

A PRESUMED EQUALITY:
A CASE STUDY OF THE RELATIONSHIP BETWEEN STATE AND
CITIZENS IN POST-APARTHEID SOUTH AFRICA

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Abstract

This article uses a dispute between a school and the state in contemporary South Africa to examine the complex nature of the relationship between that state and its citizens. It argues that the case study suggests that this relationship is best understood as a set of shifting arrangements of authority between bureaucratic institutions, political personalities, the judiciary and, most significantly, South Africa's citizens themselves. We suggest that traditional models of the state have underestimated the agency of ordinary citizens and that this case study reveals how their actions – made possible by the presumption of their equality with the state and its agents – can influence the development of a local or national political order. The article draws upon the detailed documents prepared for the court case that arose from this dispute, as well as upon more recent interviews with teachers at the school. It is influenced by the philosophy of Jacques Rancière, and attempts to interpret his arguments about the nature of politics and equality through a South African experience.

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Introduction

The subject of this article is a dispute between a Primary School in contemporary South Africa and the provincial state. This dispute originated in a local context, expanded to include the provincial bureaucracy, was brought to the High Court, and finally resolved through the intervention of a new Premier and Member of the Executive Council (MEC) for Education. An examination of this dispute reveals something of the complex nature of the relationship between the post-Apartheid state and its citizens.

Bopasetjaba Primary School had for many years shared buildings with another school in the township of Tumahole, near Parys in the northern Free State. When, in 2002, Bopasetjhaba's Governing Body approved a set of architect's plans for the construction of a new set of buildings, expectations were high that the school would at last be accommodated on its own. However, the construction of the new school was soon delayed, and then erased from the provincial government's plans altogether without any apparent explanation. In response, Bopasetjhaba's Governing Body and parents petitioned a range of authorities, including the State President, for an explanation. Soon thereafter a media article covering the school's efforts drew a stinging reaction from the provincial bureaucracy. The school's Governing Body was disbanded, its Principal suspended and then dismissed and the School itself was earmarked for closure. As a result, the school turned to the courts. Through years of protracted legal and bureaucratic struggle, Bopasetjhaba staved off closure, won back its Governing Body, reversed the dismissal of its principal and finally, in 2010, moved into temporary buildings of its own as a prelude to the construction of permanent buildings due to be completed in 2011.

An examination of this case, we suggest, chips away at the model of a strong and bureaucratised state that is associated with South Africa – often in contrast to other states across continental Africa. While recent analyses of the South African state have tended to juxtapose a model of an ideally developmental state with an informal (or criminalised) state – with the former representing what the South African state should aspire to become, and the latter representing what it might threaten to collapse into – our argument, by contrast, depicts a state defined by shifting arrangements of authority between bureaucratic institutions, political personalities, the judiciary and, most significantly, South Africa’s citizens themselves. In our approach, authority is established in local contexts, and in response to contingent events – and is best understood through detailed case studies.

We argue that this depiction can capture elements of the state that more abstract discussions do not. More importantly, it provides the imaginative space within which an alternative account can develop. Such a study demonstrates some of the ways in which ordinary citizens can act within and upon the state by asserting an agency based upon their presumption of a radical equality. This idea derives from our reading of the work of Jacques Rancière, in particular his insistence that “democratic logic... consists in blurring and displacing the borders of the political. This is what politics means: displacing the limits of the political by re-enacting the equality of each and all ...”¹ Politics, he suggests, happens when any group of people presume their equality with the institutions of power – in this case, with the bureaucratic state. This approach points, we argue, in a new direction for the study of the relationship between citizens and the post-Apartheid state – one focussed not

¹ Jacques Rancière, *Dissensus: On Politics and Aesthetics*, edited and translated by Steve Corcoran (Continuum, London and New York, 2010). 54.

on the actions and powers of the state, but rather on the agency and activities of ordinary citizens.

The first section of his paper will outline the standard accounts of the contemporary South African state and its relationship to its citizens, before briefly pointing towards the grounds for our alternative approach. The following sections will then provide a detailed description of the development of the dispute, from its origins in 2001 through to its apparent resolution in 2011. The final section will return to the theoretical approach outlined earlier, and attempt to suggest new directions for future research in the area.

Recent accounts of the South African state

The institutional strength of the Apartheid state was, for many years, a truism. Although the work of Deborah Posel, and others, has done much to dismantle the apparent coherence of many of its operations,² the relative strength and coherence of the South African state has long been assumed in Africanist literature. Chabal and Daloz explicitly excluded South Africa from their study of the informalisation of the state across Africa.³ Bayart draws no examples from the country in his analysis of the development of the African state.⁴ Stephen Ellis has suggested an erosion of the South African state's ability to control violence within its territory without seriously disputing its relative and general strength.⁵

² Deborah Posel, *The making of Apartheid, 1948-1961: Conflict and Compromise* (Oxford University Press, Oxford, 1991).

³ Patrick Chabal and Jean Pascal Daloz, *Africa Works: Disorder as Political Instrument* (James Currey and Indiana University Press, Oxford and Bloomington, 1999), pp. xxi and 8.

⁴ Jean-Francois Bayart, *The State in Africa: The politics of the belly* (2nd edition, Polity, Cambridge: 2009)

⁵ Stephen Ellis, 'The New Frontiers of Crime in South Africa,' in J-F Bayart, S Ellis, and Beatrice Hibou, *The Criminalisation of the State in Africa* (James Currey and Indian University Press, Oxford, Bloomington and Indianapolis: 1999).

More recent work by South Africanist scholars has tended to avoid close engagement with the history of the state. Although partial exceptions exist, it is more usual for scholars to depict the contemporary state as being in one or another form of crisis. This crisis is most commonly linked one or more of four linked phenomena: the incidence of corruption, the influence of patronage networks, unresponsive institutional cultures, and technical failures.

Of these, the question of corruption has been the most prominent in popular commentary. Some scholars have attempted to historicise this concern: Lodge has emphasised the roots of contemporary concerns in the uneven nature of the late Apartheid state and – in particular – the weaknesses and endemic corruption of the homelands administrations.⁶ Hyslop has described the different ways in which concerns over patronage networks and corruption have been expressed since the late nineteenth century.⁷ The relationship between corruption and influence of patronage networks is also often discussed: in particular, the ability of chiefly patrons to influence the distribution of resources on the fringes of the formal state. These fringes can be wide, and can include very large numbers of people in their ambit. Beall and various co-authors have highlighted the roles of chiefs in allocating land in and around the greater Durban metropolitan area, while Tim Gibbs has shown how networks forged in elite schools in the Transkei regions of the Eastern Cape continue to play a significant role in the distribution of state resources.⁸

⁶ Tom Lodge, 'Political Corruption in South Africa,' *African Affairs* (1998), 97, 157-187.

⁷ Jonathan Hyslop, 'Political Corruption: Before and After Apartheid,' *Journal of Southern African Studies*, (31:4, 2005) pp. 773-789.

⁸ See, for example, Jo Beall with Mduduzi Ngonyama, 'Indigenous Institutions, Traditional Leaders and Elite Coalitions for Development: the case of Greater Durban, South Africa,' *Crisis States Working Papers Series* (No. 2, London: 2009); Tim Gibbs, 'From popular resistance to populist politics in the Transkei,' in William Beinart and Marcelle C. Dawson (eds), *Popular Politics and Resistance Movements in South Africa* (Witwatersrand University Press, Johannesburg, 2010).

Studies of corruption and – perhaps to a lesser extent – of patronage networks tend to presume the existence of a recognisably coherent central bureaucratic state, one which is weakened either from within by corruption or on its wide fringes by the influence of chiefly (or, at least, non-bureaucratic) patrons. They raise the spectre of a potentially increasing informality – or, in more heated analyses, criminality⁹ – that will erode the strength of the central state. They also suggest that the weakening of this state is creating opportunities for a range of non-bureaucratic elites to exert a large influence on the distribution of resources.

This approach, emphasising as it does the importance of informality in explaining the erosion of the state's capacity to control the distribution of resources, should be seen alongside another approach – one that emphasises disputes internal to the bureaucracy. The so-called 'service delivery' protests which have exploded across South Africa during the last decade have been emblematic in these accounts, being used to demonstrate how the failures of the state to deliver developmental goods can lead to the poor choosing to act outside of formal democratic structures. This analysis thus invokes an idea of a developmental state – that is, a state which takes an active role in shaping and supporting economic and social development.¹⁰ As the inspiration for this model of the state is most often derived from particular Asian examples, there is also a determination in this literature to emphasise that a developmental state need not arise in an authoritarian context and can, instead, be 'democratic.' This emphasis thus links questions of developmental capacity with those of participatory democracy (understood as the ability and willingness of citizens to participate

⁹ See, for a partial example of this, Sam Sole, 'The state of corruption and accountability,' in J. Daniel, R. Southall, and J. Lutchman (eds.), *The State of the Nation: South Africa 2004-2005* (HSRC Press, Pretoria, 2005).

¹⁰ For an overview see: Omano Edigheji (ed.), *Constructing a democratic developmental state in South Africa: potentials and challenges* (HSRC Press, Pretoria, 2010).

in formal state institutions)¹¹, intending to understand how the South African state could become developmental without compromising on its commitment to formal democracy.

The development of an inward-looking bureaucracy during the post-Apartheid period is an important theme in this literature. Atkinson emphasises that popular protest is motivated not only by technical failures of delivery but also by the perceived corruption of local officials and the 'unresponsive and undemocratic' manner of decision-making.¹² Von Holdt has identified a number of processes at work in the shaping of a post-Apartheid bureaucracy, including new processes of class formation amongst bureaucrats and, importantly, the power of institutional cultures shaped by ambivalence towards ideas of skill and authority, as well as by 'the importance of "face" ...' in the resolution of potential disputes.¹³ These analyses thus highlight the evolution of the post-Apartheid bureaucracy into a new professional class, involved primarily with struggles within their workplaces and largely disengaged from the concerns of the citizenry.

It should be noted, too, that this work often resonates with the growing literature on the work of Non-Governmental Organisations and organised Social Movements drawing attention to the needs and demands of the disenfranchised.¹⁴

These approaches – one loosely centred around a discourse on 'corruption' and informality, and the other around 'service delivery' and the effectiveness of formal state

¹¹ For an overview see: Claire Benit-Gbaffou, 'Introduction: The place of participation in South African local history,' *Transformation* (No. 66/67: 2008) pp. i-vii.

¹² D. Atkinson, 'Taking to the Streets: has developmental local government failed in South Africa?' in S. Buhlungu, J. Daniel, R. Southall, and J. Lutchman (eds.), *State of the Nation: South Africa 2007* (HSRC Press, Pretoria, 2007).

¹³ K. Von Holdt, 'Nationalism, Bureaucracy and the Developmental State: The South African Case,' *South African Review of Sociology* (Vol. 41, No, 1: 2010) pp. 4-27.

¹⁴ Prominent examples include: Richard Ballard, Adam Habib and Imraan Valodia (eds), *Voices of Protest: Social Movements in Post-Apartheid South Africa* (UKZN Press, Pietermaritzburg, 2006) and Steven L. Robins, *From revolution to rights in South Africa: social movements, NGOs and popular politics after Apartheid* (UKZN Press, Pietermaritzburg, 2008)

functions – have obvious strengths and limitations. The first effectively draws attention to structural elements of informality at the heart of the formal political process, while the second highlights the fraught processes implicit in the task of remaking the bureaucracy after Apartheid. Both, however, trade in abstract overviews of the state: although the work on chiefly patronage offers a partial exception to this, few of these studies start from detailed case studies or close surveys in a particular institution or region. This has meant that many of these works propose similarly abstract and overly neat models of the state – models which may accurately represent part of the picture, but never its entirety.

This may help explain another significant limitation of these approaches: their inability to provide any account of how the citizenry might be able to interact with, or influence, the state. These accounts are focussed either on the experiences of an elite – empowered by political position, wealth, or insider access – or the experiences of appointed bureaucrats. These represent the directors and administrators of state power; not the ordinary citizens of the country, who appear in these analyses only as the subjects of power.

In the following case study, we choose instead to emphasise the the agency of ordinary citizens – in this case, the members of the Governing Body of BopaSetjhaba school. We seek to show how they were able to continue to act in the face of strong pressure from the bureaucracy and its political leadership. We argue that their ability to act derived from their presumption of an equality between them and the representatives of the state: they did not believe that the expertise or resources of the state’s representatives entitled them to decide independently on the best ways in which to respond to the community’s needs. Rather, they sought to involve themselves as equal partners in every stage of this process.

This emphasis on the school's presumed equality with the state is inspired by the political philosophy of Jacques Rancière.¹⁵ In particular, we derive our argument from his idea that politics – as distinguished from the work of statecraft and political institutionalisation – is a matter of presuming and recognising an active form of equality. Politics, in this approach, is located in the ability of individuals and groups of individuals to articulate a claim to equality, and to force the holders of power to recognise the validity of that claim. The development of the institutions and structures of the state – that is to say, the standard foci of political studies – represent only a secondary form of politics.

This has a particular relevance for how one understands a rights-based democratic politics. Todd May has argued that a tradition of political philosophy including Nozick, Rawls, Sen and others has cast citizens as the passive recipients of rights. Rancière's politics, however, presumes that citizens are active claimants and creators of rights – that a democratic politics arises from the people's actions, rather than from structures that enshrine their formal right to involve themselves in the ongoing processes of power through elections or other mediated events. In this approach, the state – despite possessing great reserves of coercive power – cannot be the distributor of rights as it may be of services. This has obvious and significant consequences for how one conceives of the relationship between the state and its citizens – and while this relationship is not central to Rancière's thought, his approach does nonetheless suggest ways in which it may be productively reconsidered here.

¹⁵ See, in particular, J. Rancière, *Disagreement* (Minnesota University Press, Minneapolis, 1999). Todd May's *The political thought of Jacques Rancière* (Edinburgh University Press, Edinburgh, 2008) has also been very useful in clarifying Rancière's distinctive political theory. Our argument is inspired by these works, but should not be taken as a definitive interpretation of this theory.

The Case Study

The origins and development of the dispute

BopaSetjhaba Primary School is located in Tumahole, a township of Parys, situated on the northern border of the Free State province. The school was created in 1992 and was, from its first days, 'platooned' with another primary school – Lembethe Primary School – in the Old Location section of Tumahole. Each continued to exist as separate administrative entities, with their own Principals and teaching staff, parents' committees, Governing Body, and student enrolments. They did, however, share physical spaces, most commonly by making use of classrooms to teach in separate shifts. Although much of the literature on platooning seems to assume that the two schools would have approximately equal claims over the classrooms, this was not the case in Tumahole. The facilities being used by both Lembethe and BopaSetjhaba pre-dated the arrangement. BopaSetjhaba was seen – and, indeed, saw itself – as a temporary occupant. Neither school saw though they shared a neutral space; instead, BopaSetjhaba was seen to be using Lembethe's classrooms, offices, and facilities.

Given this context, it is unsurprising that BopaSetjhaba sought to establish itself on its own site. In 2001, a number of meetings were held between the Department of Education and the school's Governing Body. At these meetings, the practicalities of constructing a set of new school buildings was discussed. It was proposed that BopaSetjhaba be relocated from the Old Location to a site at the edge of the township, neighbouring the "Mandela" informal settlement. A plot of land was then set aside by the municipality for this.

The Department brought an architect's plan of the proposed buildings to these meetings. A draft budget for the construction of the buildings was also. Meanwhile, on 16

October 2001, the provincial Director of Works prepared a progress report on the “building of Bopasetjhaba Primary School” for the Director of Education Development. This report stated that the “Head of Public Works Roads and Transport” had already approved the drafting of “sketch plans and tender documentation” for the school. It stated that R600 000 “has been budgeted in this regard for this financial year” and that “the project will be advertised for tenders during the 2002/2003 financial year for the construction to commence during March 2003.” It added that “if more funds than the preliminary allocation indicates are made available, construction will commence earlier.”¹⁶

In January 2002, the Governing Body signed the proposed plan and returned it to the Department. The degree of cooperation between the Department and the school is – to this point – remarkable. It appears that the Department engaged the school in the process of planning for the new buildings, that it took the school’s concerns and ideas into account – most notably, in the siting of the buildings – and that the school, in turn, felt a significant degree of ownership of the project. However, after they had signed the proposed plan, this period of cooperation reached an abrupt end. It appears that the Department’s bureaucracy perceived this act as ending a period of consultation, and thus as ending the school’s involvement in the process. This may explain why, at a meeting with the Department’s District Physical Planner, the Department unilaterally suggested that the construction would be delayed until 2004. Then, on their own initiative, the school found a copy of the “Free State Strategic Plan of 2002 – 2005” and noted that it made no provision at all for the construction of their school. The Principal – Joseph Phutha – therefore wrote to the District

¹⁶ Trial Record and assorted Papers, currently in the authors’ possession (henceforth: Papers), Correspondence. Director: Works to Director: Education Development. 16 October 2001.

Director as well as to the Physical Planner and the Director-General. He set out the events and asked “for clarification.”¹⁷

No response was tendered. The Governing Body then wrote a further letter to the provincial MEC for Education at the time, Papi Kganare. This letter did finally solicit a response from the Department, although there was little in it to reassure either the teachers or the parents. Kganare simply stated that the plans approved by the Department of Education made provision for the construction of the school building in three stages: the first, ‘plans for the construction of the building’ would only take place in 2004/2005; the construction would begin in 2005/2006; and the building would be completed and usable in 2006 or 2007.¹⁸ This statement made no allowance for the school to query why this series of extensions to the process had taken place. Nor did it explain why – for example – the drawing up of plans was scheduled to take place in eighteen months’ time when, as far as the school was aware, it had already been completed. It was a blunt assertion of the existence of a bureaucratic process significantly different from that which had been communicated to the school earlier in the year. At this point, then, even the appearance of engagement collapsed and the local state imposed its authority on the process – leaving the school with little apparent agency.

Escalation

Nonetheless, in December 2002 and January 2003, the Governing Body petitioned against the delay. They wrote to the Office of the State President, the National Department of

¹⁷ Papers, Correspondence. Magau to Kganare. 11 October 2002

¹⁸ Papers, Correspondence. Kganare to Magau. n.d

Education, the Office of the Public Protector, and the South African Human Rights Commission. Only the last of these responded in a constructive fashion, agreeing to intervene to put the school's concerns to the Department. A brief article to this effect then appeared in the *Sowetan*.¹⁹

This article – rather than, it seems, any possible intervention by the Human Rights Commission – stirred an immediate response within the Department. On 17 January, Kganare said, during a radio interview, that it would be 'a waste of government funds' to construct the school's new buildings. It is notable that this response to the school's efforts to force a return to an earlier period of direct communication left no room for any engagement: for one, it was addressed to a broad audience, rather than to the school's representatives. And, in addition, it moved the discourse away from a dispute over the timing of the construction project to a dispute over the appropriateness of the entire project itself. The school struggled to know how to respond to this. As one of the teachers recalled later: 'when we were trying to talk to him about this thing of the school, he just went straight to the media... So we were scared thereafter to go to the MEC.'²⁰ Their attempts to engage with the Department had hit a brick wall; if the school had not before considered the state's potential intransigence they were now encountering it in a strong form – they were afraid to even attempt to reopen direct communication for fear of the response it might now provoke.

This fear was not without foundation. While the school tried to imagine a way forward, the office of the Head of Education sent a letter to the Head of Public Works instructing that the 'planning and erection' of BopaSetjhaba's new buildings be halted, 'with immediate effect.' It explained that, 'the school will be merged with Lembethe Primary

¹⁹ *Sowetan*, 15 January 2003.

²⁰ Interview with Christina Matla, Tumahole, 19 August 2010.

School where the learners are currently being accommodated.²¹ In addition, the Superintendent-General instructed the District Director to draw up a plan ‘on how to amalgamate the two schools...’ He also insisted that ‘disciplinary action must urgently be taken against the principal who has brought the department into disrepute...’²²

Then, on 10 March, the Principal of Bopa-Setjhaba, Joseph Phutha, received a letter from the “Acting District Director” titled: “Re: Meeting for closing down of school.” It announced, baldly, that “it is the intention of the department to close Bopasetjhaba.” It informed the school that it would be “visited by a team from the NFS [Northern Free State] District Office on Monday 17 March 2003 to outline the process for consultation and closure.”²³ Despite the perfunctory mention of ‘consultation’ it was immediately apparent that the decision to close the school had already been taken and was not up for discussion. In the best case, only the process of closure might be discussed with the Governing Body.

By the time the Department’s team arrived at BopaSetjhaba on 17 March, the school had recruited set of public interest lawyers, from the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand, Johannesburg. On their advice, the principal and Governing Body refused to allow the Department’s team entry until they could provide written reasons for the decision to close the school. The principal also pressed them to say whether the Department had put in place procedures to consult the school on its closure, as required by the South African Schools Act, 1996. When they failed to do so, the Department’s team left the school – giving the principal and Governing Body what they thought was some breathing room.

²¹ Papers, Correspondence. Head: Education to Head: Public Works. 7 February 2003.

²² Papers, Correspondence. Superintendent General: Education to Director: NFS. 18 February 2003.

²³ Papers, Correspondence. Acting District Director: NFS to Principal: BopaSetjhaba. 10 March 2003.

However, the Department was continuing its plan to discipline the school's principal and to close BopaSetjhaba. On 2 April, the school received a faxed 'Notice of Disciplinary Hearing' – dated 7 March, and signed on 31 March. On 7 April, a new deputation from the Department arrived at the school and informed the principal that he was now suspended. He would be able to defend himself at a disciplinary hearing on 17 April. Meanwhile, the functions of the school's Governing Body were withdrawn and its membership disbanded. The running of BopaSetjhaba would now become the responsibility of Lembethe's principal.

The speed of this process is striking: in the course of eight months the dispute had escalated from a disagreement over the date on which the school's new buildings would be constructed to a quarrel over the school's right to exist. The school's attempt to force the Department to reconsider its plan to delay the construction of its buildings by four years prompted the Department to respond aggressively. The suspension of Bopa-Setjhaba's Principal and Governing Body seemed to be intended – at least, in school's eyes – to punish their attempts to protest against the Department's action. There is an obvious sense in which the categories isolated by von Holdt – in particular, the importance of 'face' for new bureaucrats – may be used to explain this collapse in the state's relationship with the school. There is also a sense in which the school's attempt to continue to assert its ability to engage with the state was read by the bureaucrats as a form of insubordination. The Department's response to the school's assertion of equality was, at first, a bare denial of their right to continue to engage – followed, then, by a series of attempts to assert its superior authority.

The appeal to the courts

The Governing Body, however, refused to accept the Department's instructions. Instead they turned once again to their lawyers at CALS. On 13 March, an attorney at CALS wrote to

the District Director to alert him to the involvement of the Centre and to insist that the Department provide “BopaSetjaba’s Governors, staff and parents with the opportunity to make representations before any further action is taken.” In addition, the letter requested the Department provide its reasons for its sudden decision to close the school.²⁴ There was no response to this letter.

The disciplinary hearing went ahead and – despite arguing that the charges were groundless, or irrelevant – Phutha was dismissed.²⁵ Meanwhile, the school’s legal representatives sought to build a three-fold court case. The primary claim would be for reversal of the decision not to erect the new school buildings, while the secondary and tertiary claims would argue for the cancellation of the closure of BopaSetjhaba and the reversal of the suspension of its Governing Body. None of these claims depended on depicting the Department’s over-aggressive response to the school’s semi-public criticism. Instead, the school’s lawyers sought to base their argument on administrative law grounds.

This was possible as administrative law has been read broadly in the post-Apartheid era.²⁶ Under this reading, judicial oversight may be extended to any decision that affects the provision or administration of public goods or services. It is important to note, however, that even in this broad reading not every action affecting the provision or administration of

²⁴ Papers, Correspondence. CALS to Acting District Director: NFS. 13 March 2003.

²⁵ Papers, Correspondence, Free State Teachers Association. 8 May 2003; Papers, Correspondence: Superintendent General to Phutha, July 2003. Eventually, the dismissal was appealed to Arbitration. At a hearing in May 2004, the Arbitrator found that nothing in Phutha’s statements had placed the Department of Education in disrepute; nor was there anything unusual or litigable in his allowing the school’s pupils to disseminate a petition. He also noted that the initial Disciplinary Hearing had recommended that Phutha merely be given a written warning for speaking to the media. And although he refrained from finding the Department’s procedures to have been unfair – that is, to have been irretrievably prejudiced against Phutha – he did note that this discrepancy between recommendation and action “does cast some doubt on whether [the MEC] could objectively have made a determination in this matter ... it does raise an eyebrow when the recommendations are not followed.” Education Labour Relations Council, Arbitration Case No: PSES 632-03/04 FS, Sasolburg, 13 May 2004.

²⁶ Cora Hoexter, *Administrative Law in South Africa* (Juta Press, Cape Town, 2007) p.2.

public goods is automatically subject to judicial oversight. An action has to be more narrowly defined as an “administrative action” to be subject to judicial review – and thus subject to emendation from the bench. This has proven difficult to define, and there is no clear test to distinguish administrative action from legislative or executive actions. As a guideline, however, the determination of broad policy is not ordinarily administrative, while the implementation of those policy may be if it affects the rights, interests or legitimate expectations of a person or a defined group of people.²⁷ Thus a judge may not review the decision to adopt a policy, but may review the manner in which that policy is implemented.

It was therefore necessary for Bopa-Setjhaba’s legal team to assert that the decisions first to delay, then to cancel the construction of the school’s buildings – and, following from that, the decisions to close down or merge the school with Lembethe – constituted administrative action.²⁸ The founding papers set out a number of grounds on which a review could be based. First, that by creating a ‘legitimate expectation’ that the school buildings would be constructed and then by frustrating that expectation without hearings or any other form of engagement, the Department’s actions had been ‘procedurally unfair.’²⁹ This was an argument built upon section 6(2)(c) and section 3(1) of the Promotion of Administrative Justice Act of 2000, both of which suggest that substantive procedural unfairness is in itself grounds for the review of an administrative action.³⁰

In addition, the founding papers alleged that the decision to close the school was taken ‘for an ulterior purpose... in that the third respondent took it in order to defeat the criticism in the press of the failure to erect the buildings in terms of the original time

²⁷ *Permanent Secretary, Department of Welfare, Eastern Cape vs Ed-U College (PE) (Section 21) Inc.* 2001 (1) SA 1 (CC).

²⁸ Papers, founding affidavit, paragraph 34.

²⁹ Papers, founding affidavit, paragraph 35.

³⁰ Promotion of Administrative Justice Act (No. 3 of 2000)

schedules....³¹ This was supplemented by a third assertion: that the Department had taken its decision without reference to the specific circumstances of schooling in Tumahole. In particular, the papers asserted the Department had not taken into account the large number of potential students resident in the “Mandela” settlement. This was of particular relevance as the site allocated by the municipality was adjacent to the settlement.³²

Unsurprisingly, the Department contested the school’s claims. It contested the claim that the decision to “build or not to build the school premises” was administrative action. Instead, it suggested that it was “a policy, commercial, economic, or financial decision” and thus not reviewable.³³ This argument was an attempt to elide any distinction between the actions involved in making general policy and the actions involved in the implementation of that policy. Should the court accept this, then it would be unable to exercise its powers of review and would be required to dismiss the school’s application without taking into account any of the matters they had raised. This would include not only any imputation of bias made by the school, but also any of the circumstances raised in the founding papers – notably, the presence of currently unschooled children in the “Mandela” settlement.

However, if the court did not automatically dismiss the school’s case, the Department also sought to ensure that the reasoning behind its decision not to build the new school premises was clear. It laid out, in several lengthy paragraphs and an appendix of graphs, its understanding of the contextual circumstances within which that decision had been taken. These circumstances include the increase and then decline of students across the Free State over the last ten years – noting that the number of enrolled students had declined from 807 718 in 1998 to 682 150 in 2003. This trend was replicated in Tumahole: the number

³¹ Papers, founding affidavit, paragraph 35.2.

³² Papers, founding affidavit, paragraph 35.3.

³³ Papers, answering affidavit, paragraph 4.1.

of enrolled students had declined from 6 717 in 1999 to 5 822 in 2003. It suggested that part of this decline could be attributed to students from the township attending the H.F. Verwoerd Primary School in the old white town itself. Likewise, it noted that the number of students at BopaSetjhaba had declined by over 50% from 1995 to 2003; at the same time, the “learner to educator ratio in the school” had declined from 40:1 to 32:1. The Department continued to suggest that there was a sufficient number of classrooms available in the township – across all primary schools – to accommodate all currently enrolled students. This was evidenced by reference to the total number of school classrooms, the total number of scholars, the “learner/classroom” ratio and other ideals envisaged by the Department.³⁴

Notably absent from this plethora of figures and graphs was any engagement with the specific contextual concerns raised by the school. The Department’s analysis was abstract and technocratic: the total number of potential students was measured up against the total number of potential classrooms and teachers. The specificities of the township were not acknowledged; the distances to be travelled between different school sites, for example, played no role in the Department’s calculations. Its response to the question of accommodating new students from the informal settlements was to note that: “there are three primary schools closer to the sections referred to herein, which these children can attend. There are also other primary schools which these children can attend...”³⁵. This did nothing to address the Governing Body’s argument that those schools were overcrowded and, in any event, employed isiXhosa a language of instruction. The home language of most of the residents of the informal settlements was SeSotho.

³⁴ Papers, answering affidavit, paragraphs 7.1 – 7.8.

³⁵ Papers, answering affidavit, paragraph 49.1.

There are a number of points to note in this sequence of events and arguments. First – and perhaps most importantly – the school’s ability to make use of the court system restored a degree of agency to its Governing Body. If the Department’s actions had been taken on the assumption that they would crush the dispute, the school’s actions demonstrated that they were still able to resist the state’s power. The support of CALS meant that the school was able to continue to operate, despite the Department’s efforts to close it. Under pressure from the school’s legal team, the Department was forced to retreat from its suspension of the Governing Body; with the aid of legal counsel, the principal was able to contest his dismissal and – ultimately – be reinstated in his old position. Meanwhile, the simple fact of a case having been opened in the High Court meant that the Department could not act openly against the school until the case was heard; given the slow processes of the courts, this meant that the school was able to operate for a further eighteen months before the hearing.

Second, and more specifically, the involvement of CALS meant that the school was able to force the state to engage with it in a formally constrained context. The language and expertise deployed by the school’s legal advisors required the Department to respond in detail. Until their intervention, the Department had simply refused to put any explanation for its decisions into writing; after the case began, it had to articulate rational reasons for its actions. These could then be argued with by the school – with the aid and mediation of their legal team. This meant that the school could once again engage with the Department, even after the Department had attempted to throttle any possible avenue of engagement.

While it would be an overstatement to assert that the school’s recourse to the courts had levelled the playing field, it did act to constrain the administrative powers of the state.

The school could not be closed; its personnel were restored to their positions; and the state was required to provide the grounds on which the school could continue to engage with it.

The judgment and its aftermath

The judgement was handed down on 17 March 2005.³⁶ First, and most significantly, the judgment held that a decision to build or not to build the new school premises was indeed an administrative action – and thus reviewable. This finding meant that the court was able to proceed to the remainder of the argument before. It established that the Governing Body had indeed held a ‘legitimate expectation.’ This meant that it had the right to expect ‘at least that before an adverse decision is taken [it] will be given a fair hearing.’³⁷ As this hearing had not been held, the Governing Body’s rights had been compromised, and, accordingly, the decision not to construct the buildings had not been procedurally fair.

This finding did not dispose of the case. The court still had to decide whether it had the power to order the construction to resume. In the event, the court held that it did not have the necessary expertise to determine whether or not the local need for the school could be integrated in the state’s funding policy. Instead, it held that its powers were limited to ordering the Department to reopen the question of building the new premises.³⁸

However, the judgment then set out the requirements it placed on the Department. First, it should reopen the question of the school’s new premises without any prejudice. This meant that – in the court’s opinion – it was impossible to include the Head of Education or ‘any of the official of the Provincial Administration.’ This was due to ‘the highhanded

³⁶ *Governing Body of BopaSetjhaba and Others vs Premier of the Free State Province and Others*. (Unreported) High Court of South Africa – Free State Provincial Division (Case No: 2238/2003). The text of the judgment can be read online at: <http://www.saflii.org/za/cases/ZAFSHC/2005/5.html>

³⁷ Judgment, paragraph 11 – quoting *Mokoena and others vs Administrator, Transvaal* (1988 (4) SA 912).

³⁸ Judgment, paragraph 16.

conduct by at least the third respondent to illegally “withdraw” [the] first applicant and illegally “suspend” [the] seventh applicant, merely because they endeavoured to protect their rights...’ Given this, it was clear that the administration’s officials would be prejudiced.

It was therefore necessary to insist that the province’s Premier – the first respondent in the case – and the MEC for Education – the second respondent – take possession of the reopened investigation. The probability of prejudice on the part of the bureaucratic administration meant that only those elected politicians responsible for educational policy in the Free State were in a position both to make an informed decision on the issue and to enforce the implementation of that decision. A court order was then set out to ensure that this process was followed. The order imposed both a set of positive obligations and a clear negative obligation on the provincial executive and administration: they were positively obliged to reopen the question of providing Bopasetjhaba with new premises, and to involve the Premier and MEC for Education in this process. They were also obliged to exclude the administrative bureaucracy of the Department of Education from this process.

The granting of the court order did not resolve the dispute, however. Although each of these sets of obligations required a different method of implementation, both were the responsibility of the provincial executive. Neither, however, was implemented without difficulty – and the policing of the terms of the court order often fell on the shoulders of BopaSetjhaba’s teachers and Governing Body. From the first weeks after the order was handed down, the school and the state argued over the meaning and extent of the positive obligations ordered. The school, for example, held that they should be able to make oral

representations directly to the Premier and MEC; their offices, however, insisted that written submissions would be sufficient – and even suggested that the affidavits presented to the court could serve as these submissions. This was not viewed by the school as a genuine effort to engage. The effort to interpret this obligation so that both school and state were satisfied with the process took more than eighteen months – and a meeting between the school and the MEC only took place at the end of November 2006.³⁹

Meanwhile, from July 2005 – six weeks after the court order was handed down – administrators from the Department’s Northern Free State offices had been attempting to intervene in the process. The Governing Body was summoned to meetings on 19 July 2005 and, again, on 8 November 2005. At these meetings, they ‘were told that Bopasetjhaba Primary School was to be closed and that there was no question of the construction of new buildings for the school.’⁴⁰ This was a clear violation of the court order, not only because these meetings suggested that the decision to close the school had already been taken but also because these meetings were convened by the Department’s administrators.

The school’s teachers found themselves under pressure from these administrators. In informal meetings, the school was repeatedly threatened with closure and its teachers with dismissal. More formally, the Department also redeployed members of Bopasetjhaba’s staff. Among other examples, the school’s Principal was redeployed to the Department’s physical planning section – which sparked the suspicion among the remaining teachers that he would be tasked with closing his own school. Christina Matla, a Head Teacher at the

³⁹ Papers, Representations to the MEC, 28 November 2006.

⁴⁰ Papers, Correspondence. 3 August 2006

time of the court case, was moved to Tumahole's sole Xhosa-language school. This move was freighted with local tensions, and she was soon isolated as a Sotho-speaker.⁴¹

On the surface, at least, these redeployments were routine administrative matters. By this time, however, the relationship between the Department's administrators and the school's teaching staff had deteriorated to such a point that even apparently routine actions were interpreted as continuing harrassment. As long as the threat of closure remained, the deployment and appointment of BopaSetjhaba's staff was fraught with tension and mistrust.

A political resolution

The difficulties faced by BopaSetjhaba in implementing the court's order should not, however, obscure the ways in which the school was able to use the order to its advantage. Most significantly, the existence of the order enabled the school to frustrate any efforts to preempt the court ordered process. Whenever local administrators threatened the school with closure – most probably without explicit authorisation from the province's political heads – the school was able to produce the court order and insist that they did not have the authority to act openly against them. The court order was used as a shield, as a way of deflecting direct attacks and of enabling the school to continue to exist and to operate.

Early in 2009, these efforts suddenly seemed to pay off. A new set of national and provincial elections brought a new Premier and MEC for Education into office – both of whom had been born in Tumahole and had developed their political bases locally. In addition, both were associated with a Northern Free State faction within the provincial ANC – a faction which had been sidelined by the previous executive and one which, therefore,

⁴¹ Interview, Christina Matla.

was considered to be opposed to many of their policies.⁴² This shift meant that the school now had the possibility of a sympathetic hearing from the new provincial executive.

The first sign of these changes came when the new MEC for Education visited the township, early in 2009. Christina Matla had just been re-transferred back to Bopasethaba, this time as its new Principal. She, and other members of the school's Governing Body, met with the MEC on this occasion and drew his attention both to the school's situation and to the still-unfulfilled terms of the court's order. The MEC's personal assistant, it should be noted, was an old Tumahole-based activist who had been instrumental in introducing the school to the Centre for Applied Legal Studies several years earlier. The school was thus able to assume that the new MEC would now be able to appreciate the school's situation – as Matla put it, 'maybe it's because he is from Parys so when we talk about learners for Mandela he understand everything, the distance that those people were travelling...'⁴³

On 20 August 2009, the school met with the MEC for Education, the Head of his Department, and the regional District Director. At this meeting, the MEC appeared to overrule the local administrators' objections and stated that he would ensure that the new school premises would be built. A month later, 'someone came with a temporary structure plan...' The school was skeptical, but reassured by the visible action: 'we were not sure, but we were happy.' Then, towards the end of January 2010, builders began to appear and – starting on 15 February – a set of temporary classrooms and other buildings was erected on a site adjacent to the school's final location. Permanent buildings were promised for 2011.

⁴² The complexities of these politics have received little serious attention. A survey of local and national newspaper reporting of the ins and outs of factional politics in the area can be found in Chitja Twala, 'The Demon of Factionalism in an African National Congress(ANC)-led Free State Province (1994-2004): A Reality?', *Journal for Contemporary History*, Volume 30, No 1 (2005) pp. 109-131.

⁴³ Interview, Matla.

As soon as the temporary structures were built, the school moved out of Lembethe's buildings and – for the first time since its foundation in 1992 – occupied its own facilities. This move was accompanied by an increase in the number of students enrolled at the school; it thus seems that the school's original anecdotal argument in favour of the construction of new premises nearer to the "Mandela" settlement was an accurate reflection of local needs.

Conclusion

The presumption of equality

The root of these actions can be found in the school's determination to always act as if it was an equal partner with the state. The school did not act as if the state had a greater right either to determine whether the school required its new buildings, or to determine the best ways in which those new buildings might be constructed. Indeed, it acted as if there was no fundamental disparity in rights or power between it and the state that governed it.

This presupposition of equality can be – and, in this case, was – enormously destabilising to the structures of the state. The unspoken assumptions of the bureaucracy, and indeed of political office-holders, was that the school was either a subject of administrative power or a client of political patronage – but not an equal partner. The bureaucracy thus struggled to know how to respond to the school's presumption of equality.

It is worth noting that the standard frameworks within which the South African state is ordinarily seen are similarly incapable of addressing the questions raised by a citizen's active presumption of equality. The literature rooted in questions of corruption and patronage presumes the passivity of the citizenry, portraying them as recipients of largesse.

The literature rooted in the internal disputes of the bureaucracy and in questions of 'service delivery' likewise casts the citizenry in passive, or purely reactionary, roles: they are often irrelevant to the flows of power within the bureaucracy and only protest against the state's inability to deliver goods and services identified and prioritised by the state itself. They are not involved in the question of deciding what services are needed in whichever location. Even the literature on participatory democracy contains a notably limited idea of active engagement: one located in participation in elections, local councils, and state-led processes.

In this context, Rancière's ideas are highly suggestive. His emphasis on the ability of ordinary persons outside of the publicly-recognised sphere of institutional politics to reshape the political sphere by expressing themselves – either by dissenting from political norms, or simply by asserting their right to be recognised as political agents – directs our attention away from the institutions of the state and towards the agency of other actors.

This suggests to us that any attempt to describe the relationship between the state and citizens in contemporary South Africa must start from the same presumption of equality made by members of BopuSetjhaba's governing body. Instead of assuming that this relationship must always be driven by the state, in response to priorities identified by the state's bureaucracy, we must ask why it is that this equality is presumed, or not presumed, by citizens and citizen groups in specific, local circumstances – and ask, also, how this presumption of equality can influence and shape the development of a new political order.