

## Part 5

### Law and Education

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#### Professional Discretion of School Principals: A South African Education Law Perspective

##### **Abstract**

Principals are confronted with an exceptional degree of difficult decisions. One of the key challenges that school principals are facing in many parts of the world today is how to maintain a balance between professional discretion and accountability with the legislative and policy framework in which they must perform their duties. Every judgement call made by a principal will inevitably be questioned. However, without discretionary powers it would be impossible to be a principal. This paper therefore explores the application of professional discretion by school principals by focusing on different components of professional discretion, principals' need for autonomy, discretionary power of principals, principles governing the application of professional discretion, and the factors that influence or limit discretion.

Keywords: professional discretion, accountability, contextual intelligence, principals' autonomy, discretionary power, discretionary principles

##### **Introduction**

It is argued by Boote (2006, p. 462) that principals have sufficient professional discretion for certain tasks when they have the ability to make professional judgement and the competence to act on those judgements. Boote (2006, p. 462) further argues that such judgements should be appropriate to a specific context. However, school principals are also situated against the accountability framework they function within (Du Plessis, 2019, p. 98). According to Nieuwenhuis (2007, p. 104), accountability imposes a duty or responsibility on a person, the principal, to behave according to norms and expectations set for his or her actions. In other words, each principal needs to be able to account in a specific context for his or her actions in relation to the standard and expectations set for those actions.

Contextual intelligence refers to a principal's ability to identify contextual factors in a given situation and adjust his or her discretion to influence or act in a situation for the best interests of a learner. This includes the combined knowledge of technical skills and practical know-how (Marishane, 2016, p. 164). According to

Marishane (2016, p. 164), principals who have contextual intelligence could apply professional discretion more appropriately.

### **The conundrum**

Every judgement call made by a principal will inevitably be questioned (Du Plessis, 2019, p. 112). The justification for challenging a principal's decisions may be attributed to principals increasingly being held accountable. Therefore, it is essential to exercise appropriate professional discretion on a daily basis whilst leading and managing a school with contextual intelligence (Du Plessis, 2019, p. 159). Without discretionary powers it would be impossible to be a principal. However, it is important for principals to weigh every decision they make very carefully in order to comply with what is expected (Du Plessis, 2019, p. 112).

Newham (2000, p. 45) and Thorn (2015, p. 3) argue that educators in Australia and America are neither sufficiently trained nor equipped to apply laws and policies in an educational context, nor do they have easy access to legal advice and relevant support structures, which in turn, limits their professional discretion. Thorn (2015, p. 3) emphasised that although most school principals and managers have had some training in school law, they lack the understanding and ability to use this knowledge to develop policies and exercise adequate professional direction. In the South African context, Du Plessis (2019, p. 97) and De Waal et al. (2001, p. 51) concur that principals are not adequately prepared nor trained for the demands of being a principal and do not necessarily know how to perform their variety of roles as set out in the Policy on the South African Standard for Principalship.

### **What does the literature say?**

Exercising discretion or judgement in decision-making is seen as an indispensable part of a school principal's professional duties (Heilmann, 2006, p. 2). Public school principals will continue to be influenced by legislation as they are positioned against a framework of accountability in which they operate (Wallender & Molander, 2014, p. 1). Consequently, for school principals to be efficient in their decision-making they have to continuously evolve and improve their knowledge in terms of education law (Boote, 2006, p. 463). Thorn (2015, p. 3) reiterates that although most school principals and managers have had some training in education law, they lack the understanding and ability to use this knowledge to develop policies and exercise adequate professional direction.

#### *Components of professional discretion*

The understanding and conceptualisation of the notion of professional discretion is vital for all principals as it equips them to make the best possible decisions in the best interests of their learners (Boote, 2006, p. 461). According to Wallender and Molander (2014, p. 1), professional discretion comprises of two focus areas. Firstly, professional discretion refers to a principal as a practicing professional with some form of formal education and who is employed by either the government or private sector. Secondly, it describes discretion as the ability of a principal to make appropriate decisions regarding the learners in their care (Wallender & Molander, 2014, p. 1).

Therefore, professional discretion refers to the ability and obligation of a principal to determine what actions are appropriate, and the capacity to take certain actions. Jeffries (2013, p. 76) explains that professional discretion enables principals to “flexibly adapt their practices to the diverse circumstances they face each day”.

Discretion exists where rules and regulations do not have a clear indication of how to proceed in dire situations (Heilmann, 2006, p. 9). In this regard Du Plessis (2019, p. 112) recognises that without professional discretion, it would practically be impossible to be a principal. However, trying to manage discretion, which should have no control by definition, is a daunting task (Heilmann, 2006, p. 35). A comprehension of discretion is therefore imperative for a principal’s decision-making, particularly where experience, existing laws and policies are inadequate or unsuitable to be applied in a specific context.

### *Professional discretion and principals’ need for autonomy*

According to Pearson and Moomaw (2005, p. 37), “granting autonomy and empowering teachers is an appropriate place to begin in solving problems of today’s schools”. There are two definitions of autonomy when looking at discretionary space as well as discretionary reasoning, namely, judgemental capacity versus opportunities for judgement (Wallender & Molander, 2014, p. 3). Wallender and Molander (2014, p. 3) found that “autonomy becomes stronger the larger the discretionary space, and *vice versa*”. Wallender and Molander (2014, p. 3) further emphasise that, due to the discretionary space of professionals who act by virtue of professional authority and power granted to them in their profession, there is a need for accountability. In simpler words, autonomy refers to the educator’s freedom and ability to make good judgements (Wallender & Molander, 2014, p. 3).

Du Plessis (2019, p. 98) explains that the space for professional discretion allows a principal some freedom to act or judge independently and that it sometimes even stretches beyond the scope of one’s legal power. Du Plessis (2019, p. 98) further argues that creating a space for professional discretion “will allow for more creativity and autonomy by principals as compared to strict impersonal compliance to elaborate rules and regulations”. The regulatory environment characteristically includes matters involving public values that apply to all government institutions, such as non-discrimination, and matters involving fundamental values unique to education (Jeffries, 2013, p. 51). Hence, the regulatory environment of South African school principals is linked to democratic values of human dignity, equality and freedom as set out by the Constitution. Therefore, the State and the school must respect, promote, protect human rights and base their discretion on the fundamental rights as included in Chapter 2 of the Bill of Rights (RSA, 1996).

The regulatory environment influences discretionary space, and it also includes a limited set of practises for which there is negligible disagreement about the effectiveness of particular practice as well as decision-making (Jeffries, 2013, p. 51). Molander et al. (2012, p. 217) maintain that the extensive use of professional discretion in educational practice can challenge the rule of law (equal treatment, just administrative action, predictability and legality) as well as the implementation of policies. In conjunction with Molander et al. (2012, p. 217), Jeffries (2013, p. 51) argues that there are principals who are simply incapable of using adequate professional discretion. It is therefore important that a principal must not abuse his

or her discretionary power in bad faith (De Waal, 2000, pp. 44-45). Ingersoll (2003, p. 5) believes that principal empowerment is arguably the solution to problems in public schools and these problems can be addressed by decentralizing schools and increasing discretionary power and autonomy to principals and educators. The proviso would be that principals have the necessary competencies to exercise their discretion appropriately.

### *Discretionary power of principals*

In South Africa, the High Court supports discretionary powers of principals in dealing with disciplinary issues and the promotion or retention of learners (Clarke, 2008, p. 4). Clarke (2008, p. 4) reiterates that where matters are left to the discretion of a principal, and where his or her discretion has been *bona fide*, then the court will not interfere with the result. However, De Waal et al. (2001, p. 156) argue that:

*[the] bona fides of the author of an administrative act cannot change an invalid act into a valid one: corporal punishment can, for example, never be condoned.*

According to Molander et al. (2012, p. 221):

*the entrustment of discretionary powers is essentially connected to the demand for justification and to the expectation that those who are granted such powers have the will and the ability to justify their judgments, decisions and actions.*

Du Plessis (2019, p. 159) explains not only do principals have discretionary power, but that they are often compelled to exercise this power, particularly in a context where the safety of learners or educators is at risk. If a principal has discretionary power, he or she is under obligation to justify his or her decisions, judgement and action with reasons that others can understand, accept or reject and he or she can be sanctioned if such decisions were not rational (Molander et al., 2012, p. 221). Molander et al. (2012, p. 221) further explain that accountability measures are strategies for making principals with discretionary power accountable.

Molander et al. (2012, p. 221) emphasise that there are two ways of making the use of discretionary power more accountable; first by reflecting on structural measures that affect discretionary space and secondly by epistemic measures that challenge discretionary reasoning. Du Plessis (2019, p. 159) argues that discretionary powers of principals are limited and contribute to the challenging nature of making effective decisions. Notwithstanding the above, discretionary power is a fundamental component when making decisions; hence it would be impossible to be a principal without this power.

### *Principles governing the application of professional discretion*

Martin (1995, p. 241) explains that there are four important principles that govern the application of professional discretion by school principals. Firstly, principals' decisions must be according to the dictates of the law. Secondly, principals must not fail to exercise or otherwise avoid discretion granted to them. Thirdly, the discretionary powers must not be abused or used excessively. In this regard De Waal (2000, pp. 44-45) stresses that it is critical that principals do not act in bad faith or misuse their discretionary power. Lastly, discretion must not be used for purposes other than those dictated by law.

Molander et al. (2012, p. 217) argue that for principals to be effective in their decision-making they have to construct their discretion around three central

principles of the rule of law. Firstly, principals should make sure that the enforcement of their decision-making is predictable. However, discretion is a source of variation, and extensive practice of professional discretion can create unpredictability. Secondly, a principal's actions must be within the framework of the law. It is thus imperative to note that the extensive use of discretion can influence personal reasoning. However, principals should take cognisance of Section 9 of the Children's Act 38 of 2005 which specifically maintains that "in all matters concerning the care, protection and well-being of a child, the standard that a child's best interest is of paramount importance must be applied". Furthermore, principals must give due consideration to this principle when making any decision (acting *ultra vires* must be justifiable) affecting a child or which may lead to some aspect of neglect (Du Plessis, 2019, p. 102). Lastly, principals should apply their discretion equally (Molander et al., 2012, pp. 217-218). Therefore, it is clear that tension exists between professional discretion and the principles of the rule of law.

### *Factors that influence discretion*

Principals are confronted by competing demands of external and internal forces in their decision-making. Internal forces may include a principal's knowledge, experience and personal-belief. Heilmann (2006, pp. 3, 7) argues that principals base their decisions on several factors, such as case facts, personal values, contextual factors and school and divisional policies. Although, the level of discretion could be limited by external factors, there is space for a principal to go beyond these factors if they choose to do so (Heilmann, 2006, p. 120). However, according to Molander et al. (2012, p. 218), it is difficult to predict discretion because outcomes of discretionary reasoning can differ due to internal and external forces. Molander et al. (2012, p. 218) argue that the same case can be judged differently at different times, different situations and by different persons, even if it is an unchanged case and the case has been handled in a thorough, conscientious and reasonable manner.

In many cases, a principal's values encourage them to make the best possible decisions. However, values can also influence their judgment negatively and not be in the best interests of learners. In addition, some principals find it challenging to exercise adequate professional discretion due to a lack of competencies, a lack of self-control and a lack of independence (Boote, 2006, pp. 465-466). Competencies are necessary to apply appropriate professional discretion, although competencies alone are not sufficient enough to develop professional discretion (Boote, 2006, p. 466).

External factors, such as laws and policies, may restrict the space of autonomy of a school principal in the South African context. Principals regularly find themselves in a position where their judgements or decisions may require them to contradict the law and their discretion should then be guided by Section 36 of the Constitution. This section governs factors that should be considered when limiting a right, such as the democratic values of human dignity, equality and freedom. As indicated in Section 36, consideration should be given to

*the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose, the availability of less restrictive means to achieve the purpose (RSA, 1996).*

Constitutional rights and freedoms are not absolute; they have boundaries set by other rights and by important social concern such as public order, safety and democratic values. However, as explained by Prinsloo (2015, p. 47), if a limitation to a right can be justified in accordance with the criteria in Section 36 of the Constitution, it will be constitutionally valid. All these factors must be taken into consideration by principals when deciding what is in the best interests of learners. In the end, these forces affect the decision-making process and could turn into everyday working habits.

Marishane (2016, p. 164) argues that the context in which schools and the school leadership interact is ever changing. A school's context is shaped by many internal and external factors which influence the principal's behaviour and discretionary power and to which the principal must adapt. Marishane (2016, p. 164) explains that among the contextual factors which influence learners' learning and achievement are the school's climatic conditions, school safety and the school's teaching and organisational structure. External factors may also include technological advancement, socio-economic conditions and accountability systems. It is clear that principals find themselves in varied contexts and therefore, it is important that principals develop contextual intelligence in order to exercise adequate professional discretion to matters relating to legislation (Du Plessis, 2019, p. 102).

### Concluding remarks

Existing literature suggests that although most school principals and managers have had some exposure to education law, they lack the understanding and ability to implement this knowledge, formulate policy and exercise appropriate professional discretion in the educational environment. Without the necessary legal knowledge, it would be almost impossible for principals to be contextually intelligent. Numerous authors have made contributions with regard to principals' obligations and the fact that they are confronted with situations in which they are expected to apply their legislative and intuitive judgement. However, it appears that there are principals who are simply incapable of using adequate professional discretion, due to a lack of understanding thereof.

### References

- Boote, D. N. (2006): Teacher's Professional Discretion and the Curricula. *Teachers and Teaching: Theory and Practice*, 12(4), 461-478.
- Clarke, A. (2008): *School Management and Leadership*.  
[https://juta.co.za/media/filestore/2013/02/3\\_2008.pdf](https://juta.co.za/media/filestore/2013/02/3_2008.pdf) (Accessed 30 March 2020).
- De Waal, E. (2000): The Educator-Learner Relationship within the South African Public School System: An Educational-Juridical Perspective. Unpublished PhD thesis, Potchefstroom University for Christian Higher Education.
- De Waal, E., Theron, T. & Robinson, R. (2001): An educational law analysis of "the learner's best interests". *Perspectives in Education*, 19(4), 151-162.
- Du Plessis, A. (2019): School governance and management decentralisation and school autonomy in the South African education system. Unpublished PhD thesis, North-West University.

- Heilmann, M. R. (2006): Principals' Perspectives on Discretion and Decision-Making. Unpublished MEd thesis, University of Manitoba.
- Ingersoll, R. M. (2003): *Who controls teachers' work?: Power and Accountability in America's Schools*. Harvard: Harvard University Press.
- Jeffries, S. D. (2013): Mandated Mediocrity: Modernizing Education Law by Reducing Mandates and Increasing Professional Discretion. *Cornell Journal of Law and Public Policy*, 23(45), 46-84.
- Marishane, M. R. (2016): Leadership and context connectivity: Merging two forces for sustainable school improvement. In: *Education Provision for Everyone: Comparing Perspectives from Around the World*: BCES Conference Books, Vol. 14, 163-169.
- Martin, Y. (1995): Controls of administrative discretion in public schooling in British Columbia: 1872-1994. *Education and Law Journal*, 6(1), 233-255.
- Molander, A., Grimen, H. & Eriksen, E. O. (2012): Professional Discretion and Accountability in the Welfare State. *Journal of Applied Philosophy*, 29(3), 214-230.
- Newnham, H. (2000): When is a teacher or school liable in negligence? *Australian Journal of Teacher Education*, 25(1), 45-51.
- Nieuwenhuis, J. (2007): *Growing human rights and values in education*. Pretoria: Van Schaik.
- Pearson, L. C. & Moomaw, W. (2005): The relationship between teacher autonomy and stress, work satisfaction, empowerment, and professionalism. *Educational Research Quarterly*, 29(1), 37-53.
- Prinsloo, S. (2015): Human Rights in Education. In: R. Joubert, P. Du Plessis, V. P. Mahlangu & I. J. Prinsloo (Eds.) *The Law of Education in South Africa* (pp. 35-77). Pretoria: Van Schaik.
- Republic of South Africa (RSA) (1996): *Constitution of the Republic of South Africa Act 108 of 1996*. Pretoria: Government Printer.
- Thorn, K. B. (2015): Tort liability for school personnel. Unpublished PhD thesis, University of Alabama.
- Wallender, L. & Molander, A. (2014): Disentangling Professional Discretion: A Conceptual and Methodological Approach. *Professions and Professionalism*, 4(3), 1-19.

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