BALANCING THE EDUCATOR’S RIGHTS TO FAIR LABOUR PRACTICES AND TO STRIKE WITH THE RIGHT TO EDUCATION

by

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TOPIC
BALANCING THE EDUCATOR’S RIGHT TO STRIKE AND FAIR LABOUR PRACTICES AND THE CHILD’S RIGHT TO EDUCATION

The crisis in public education is one of the greatest barriers to achieving a better life for all in South Africa. It entrenches inequality and impairs the dignity of millions who enter adult life without the tools needed to fully express themselves or contribute meaningfully to society. This treatise investigates the potential for law (including courts and tribunals) to intervene and act as a lever for the protection and advancement of the rights of the child including the right to basic education.¹

The preamble of the Constitution of the Republic of South Africa² states:

We, the people of South Africa,
Recognise the injustices of our past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and
Believe that South Africa belongs to all who live in it, united in our diversity.
We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to –

• Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

• Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

• Improve the quality of life of all citizens and free the potential of each person; and

• Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

This treatise investigates the potential for law (including courts and tribunals) to intervene and act as a lever for the protection and advancement of the rights of the child including the right to basic education. The dissertation critically explores the debate on the educator’s right to strike and fair labour practices and the child’s right to education, by assessing the rights and liberties, which accrue to educators and the child (learners) in terms of existing law.

The South African Constitution has made specific provision for the protection of the rights of children and the rights of educators and these rights are fundamental to the development of a society in transition. The vexed question that arises is whether these rights can co-exist in a society that has inherited a legacy of discrimination and inequality. The consequences of this legacy have resulted in the rights of educators competing with those of learners. The normalisation of the balance of these opposite rights is the challenge that lies ahead and this process will require intervention of all stakeholders rather than purely legislative intervention.

This dissertation recommends a consensus-based approach, which is the most appropriate solution to balance the rights of educators with this of the child’s right to education, as opposed to a declaration of the education sector as an essential service. It further proposes the establishment of a more structured and organised forum / institution and its sole purpose would be to deal with the individual or collective rights of educators that compete with the rights of learners.
CHAPTER 1
INTRODUCTION

South Africa has, arguably one of the most progressive constitutions in the world, incorporating within it a Bill of Rights extensive in its provisions and bold in terms of the vision it seeks to advance. However, the litmus test of the Constitution cannot lie in the adequacy of its text but in the effect that it has on the rights of children and citizens that it seeks to protect. While we have achieved great success in relation to human rights in the first 16 years of our democracy, we also face considerable challenges. One of the foremost of such challenges is how “to free the potential of each person”, as a prerequisite to position people more favourably to contribute to the environment of their own human rights and that of others. The right to basic education is a critical right in the achievement of this objective.3

While great strides have been made in the past 16 years to equalise the education system, this process has not always produced equality or equity in outcomes for the learners who pass through our school gates. It is thus an opportune time to take stock of the achievements and identify the obstacles that hinder the realisation of the right to basic education.4

The perception, that the right to basic education is hindered by the right to strike, gained momentum after the 2010 public servants strike. The wanton destruction to property, violence, intimidation and neglect of the learners that accompanied the strike characterized the 2010 public service strike, in which educators (teachers) were the backbone. This raised the wrath and ire of the South African public. This strike was regarded as having had a worse impact on public education than the 2007 public service strike. This negative effect resurrected the debate on the competing rights of educators to strike and children’s right to education respectively. In

4 Ibid.
aggravation there appeared to be a general consensus that public education in South Africa is in crisis and amongst other factors, the conduct and poor performance of some educators contributed to the crisis. This raging debate was accompanied by threats of declaring teaching an essential service, restructuring collective bargaining for educators, to limiting the right to strike in some form – with aspirations of trying to balance the constitutional (labour) rights of educators with the child’s constitutional right to education.

The public in South Africa from politicians to ordinary citizens and increasingly even some educators themselves believe that the scale should be tilted in favour of the interest of the child as opposed to the right of the educator. The justification for this proposition arises from section 28(2) of the Constitution which enshrines the principles of “best interest of the child” and “paramountcy of the child”. This means that the rights of the child should weigh more heavily than the rights of educators.5

The courts, including the Constitutional Court (CC) itself, used principles of “best interests of the child” and “paramountcy”, of section 28(2), to justify limitations of rights of others, including teachers, when such rights competed with the rights of the child. The proponents of this view advocate a prohibition on the right of teachers to strike.

Can we find a balance between these competing rights or will the right of the child to education always trump over the rights of teachers, when such rights are in competition? Will a total prohibition on the right of educators to strike pass muster in the constitutional court, or will it be regarded as an unfair limitation on the right to strike?

My treatise attempts to ventilate these questions by exploring the following:

- The role of educators in the crisis of service delivery and performance of public education in South Africa;

5 S 28(2) of the Constitution.
• The nature of the educators profession and its legal framework in South Africa;

• The child and the law in South Africa;

• Balancing the educators’ right to “fair labour practices” (promotion and appointment) with the child’s right to education;

• Balancing the educator’s right to a fair hearing with the right of a child victim or witness;

• Balancing the educators’ right to “fair labour practices” with the child’s right to education – Deemed dismissals of educators by operation of the law (section 14 of the Employment of Educators Act); and

• Balancing the educators' right to strike with the child’s right to education.

My treatise is intended to critically explore this debate by assessing the rights and liberties which accrue to educators and the child (learners) in terms of existing law by evaluating it against the practical reality of the enforcement of these competing Constitutional rights. I will provide an analysis and finding and offer suggestions on a way forward.

6 Employment of Educators Act 76 of 1998.
CHAPTER 2
THE RIGHT TO EDUCATION IN SOUTH AFRICA

The Constitution states:

“29. Education
1. Everyone has the right
   a. to a basic education, including adult basic education; ...”\(^7\)

The value and importance of education the world over is aptly summed up by the former Secretary-General of the United Nations, Kofi Anan when he said:

“Education is the single most vital element in combating poverty, empowering women, protecting children from hazardous and exploitative labour and sexual exploitation, promoting human rights and democracy, protecting the environment and influencing population growth. Education is a path towards international peace and security ...”\(^8\)

The importance of a thriving education system was again made in the South African Human Rights Commission (SAHRC) Report which stated that the right to basic education is a central facilitative right in our constitutional democracy. It is aimed at providing opportunities and gateways for ensuring the promotion and protection of all other human rights. Approximately 12 million learners and 350 000 teachers attend 27 000 schools across the country on a daily basis. The right to basic education is a central facilitative right in our constitutional democracy. It is aimed at providing opportunities and gateways for ensuring the promotion and protection of all other human rights.\(^9\)

A broad overview of international human rights and discourse indicates that basic education should be compulsory and free. In order to unpack the content of the right

\(^7\) S 29(1).
a useful framework refers to the right demonstrating the following four inter-related features: Education should be available, accessible, acceptable and adaptable (the 4As). However, these (4As) are subject to the provision that the right to basic education must be delivered within the context of each country. Thus, the content of the right to basic education is not static nor is it the same for all countries. This calls for a contextual approach when seeking to understand and define the content of the right in South Africa. To date, there has been no CC decision that addresses the meaning of the right to basic education. It thus remains to be tested what interpretation of this right would be given by our CC. The right is also not defined in any legislation. The Constitution provides that when interpreting rights, we may look to international law for guidance.

What must not be ignored is that the South African Constitution frames the right differently from many other constitutions in that the right is not subject to progressive realisation. Therefore, a legal test to determine whether the South African government is complying with its constitutional obligations is not subject to the constitutional test of determining progressive realisation. The test would thus have to be different from the one set out in the seminal Grootboom Constitutional Court judgment, which deals with economic and social rights within the context of progressive realisation.

The text of the 1996 Constitution does not subject the right to the internal limitation of progressive realisation as it does for the other economic and social rights (e.g. housing, healthcare, food, water and social security). The 1996 Constitution thus does not subject the right to an internal qualifier that the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right. Much of the international discourse on the right to basic education is written from the perspective that the right is subject to progressive realisation. This must be borne in the mind when considering the international discourse within the South African context.10

The Constitution states:

“36. Limitation of rights

1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

   a. the nature of the right;
   b. the importance of the purpose of the limitation;
   c. the nature and extent of the limitation;
   d. the relation between the limitation and its purpose; and
   e. less restrictive means to achieve the purpose.

2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

Section 36 of the Constitution allows for the right to be limited by a law of general application to the extent that the law is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom and taking into account all relevant factors. The limitations clause could certainly impact on specific aspects of the content of the right to basic education. It could be foreseen that justifiable limitations could be placed for example, on matters concerning language, culture and religion where these rights need to be balanced against the rights of the child; the Best Interests of the Child principle; and, the right to education. However, such limitations have to satisfy the provisions of section 36.

2.1 INTERNATIONAL LAW

Section 39(1)(b) of the Constitution can be considered as the most valuable point of departure when discussing the role and influence of international law and consequently the right to basic education. Section 39(1)(b) of the Constitution compels a court, tribunal or forum, when interpreting the Bill of Rights, to consider international law. Section 233 of the Constitution provides that:

11 S 36.
“... when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is consistent with international law”.  

According to the Constitutional Court decision in *S v Makanyane and Another*, non-binding international law, as well as binding international law, must be considered.

The right to social security is recognized as a human right by a variety of international instruments. See, for example, the Universal Declaration of Human Rights and the International Covenant on Economic Social and Cultural Rights (ICESCR), as well as the UN Economic and Social Council *General Comment*. The courts have used International law in deciding many constitutional and other cases. For example, In the *Grootboom* case the Constitutional Court took extensive notice of the provisions of the ICESCR and the approach towards the interpretation of the Covenant provisions adopted by the relevant supervising organ. However, the court did not agree that the South African Constitution imposes a duty as required by the Covenant, according to the supervisory body, of guaranteeing at least the minimum core content of the applicable right (i.e. the right to access to adequate housing, in this case). However, the court accepted that the State’s obligations emanating from its international obligations contained in the Convention on the Rights of the Child. General Assembly Resolution 44/25 of 20 November 1989 – signed and ratified by South Africa in 1993 and 1995 respectively), require of the state to take steps to ensure that children’s rights are observed. “In the first instance, the state does so by ensuring that there are legal obligations to compel parents to fulfill their responsibilities in relation to their children.”

12 S 233.
13 *S v Makanyane and Another* 1995 3 SA 391 (CC).
16 United Nations Economic and Social Council *General Comment No 19 (The right to social security (art 9)) (E/C. 12/GC/19)* (2008).
We can reasonably infer the same legal obligations to compel teachers to fulfill their responsibilities in relation to children in their care. It is trite that teachers are *in loco parentis* where school children are concerned.

### 2.2 OBLIGATIONS OF THE STATE

The United Nations General Comment Number 19\(^\text{17}\) also provides guidance on the core content at an international level of the right to basic education. In terms of international law, the State should respect, protect and fulfill economic and social rights. These duties extend to the right to basic education.

The obligation to respect requires the State to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to protect imposes a duty on the State to take measures that prevent third parties from interfering with the enjoyment of the right. The obligation to fulfill requires the State to take positive measures that enable and assist learners to the full enjoyment of the right.

The state has the constitutional duty to respect, protect, promote and fulfill the rights entrenched in the Bill of Rights (section 7(2) Constitution).

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CHAPTER 3

THE CRISIS OF DELIVERY AND PERFORMANCE OF PUBLIC EDUCATION IN SOUTH AFRICA: ARE WE GETTING THE RESULTS?

In this chapter the importance of the right to education and the crisis in public education in South Africa are explored. Only those issues that are relevant to this treatise, such as labour practices of educators and its negative impact on the performance of the child, are considered.

3.1 INTRODUCTION

The Department of Education in “Trends in Education Macro Indicators – Summary Report” Issue 1 of 2009 indicates that several international studies have targeted specific grades at both the primary and secondary school phase. South Africa’s achievement in these areas has been poor. South Africa achieved just under the average Southern and Eastern Africa Consortium for Monitoring Educational Quality (SACMEQ) score in both Reading and Mathematics and ranked eighth in Reading and ninth in Mathematics in 2000. South Africa achieved the lowest score in Mathematics in the 1999 Monitoring Learning Achievement (MLA) assessment of Grade 4 learners, as well as in both the Third International Mathematics and Science Study (TIMMS) studies.

The 2006 Progress in International Reading Literacy Study (PIRLS) study was the first in which South Africa participated. In South Africa, the assessment was carried out for Grades 4 and 5 learners (although the assessment was aimed at a Grade 4 level) in more than 400 schools in all of the 11 official languages. Learners were assessed in the language of tuition in which they had been taught in Grades 1 to 3. Consistent with previous assessments, South Africa’s score was the lowest of the group of countries involved.\(^\text{18}\)

\(^{18}\) The Department of Education “Trends in Education Macro Indicators: Summary Report” Issue 1 of 2009 32-34.
Of the 528 525 candidates who wrote matric in 2006, only 351 503, or 66.6% passed. This figure disguises a massive variation. For example, eight schools in Eastern Cape and three schools in Limpopo produced no matric passed at all. Altogether, a total of 139 schools around the country produced pass rates of fewer than 20%. The MEC for education in Gauteng, with the apparent support of national education minister Naledi Pandor, threatened to close down 200 dysfunctional schools and axe their principals, after these schools produced uniformly disastrous matric results. These threats were withdrawn after the implications, of having thousands of children with no school to go to, became clear. But it is clear that we need to take some bold steps to confront the problem of non-functional schools.\(^\text{19}\)

Despite Education budget trebling from 1995 to 1997, the Organisation for Economic Cooperation and Development (OECD) review confirms that we are not getting the results expected from this level of investment. This is confirmed by various international studies, which indicate that learners in South Africa are performing poorly in comparative studies. These studies, referred to above, focus on both numeracy and literacy and South Africa’s learners scored lowest in both studies. The OECD called for more in-depth analysis to be done to determine the factors affecting learner achievement. These studies confirmed the crisis in public education.

Some public schools have become “places of special danger” that afford no quality educational performance.

Sixteen years after policies were introduced to ensure education for all, the acceptance of unacceptable results cannot continue. A situation has developed in the South African education system where excellence goes virtually unnoticed and mediocrity dominates, and certain negative patterns have become entrenched as a result. There is, for example, strong resistance to performance evaluation for teachers. Very little action is taken against non-performing teachers. There is a continuing failure on the part of many schools to fulfill the basic curriculum requirements. A professional body of teachers must be subject to a system of

\(^{19}\) Democratic Alliance *Saving Dysfunctional Schools* (2007) 2.
individual performance review. Many schools are so dysfunctional that a self-conducted performance evaluation cannot possibly produce a result that is a true reflection of the reality.

In response, the President of the country, the Hon. JG Zuma, in his maiden state of the nation address on 3 June 2009 called for critical “non-negotiables” aimed to ensure quality education:

“Education will be a key priority for the next five years. We reiterate our non-negotiables. Teachers should be in class, on time, teaching, with no neglect of duty and no abuse of pupils! The children should be in class, on time, learning, be respectful of their teachers and each other, and do their homework. Other sectors, including officials and parents, are also expected to play their respective roles in reaching this goal.”

All stakeholders, departments of education, parents, educators, pupils, business, ELRC, SACE and others have launched the Quality Learning and Teaching Campaign (QLTC) – to ensure that the non-negotiables are realised, focusing on the development of a culture of learning, teaching and discipline in all schools.

3.2 SOCIAL CONTRACT FOR EDUCATION PROPOSED BY NAPTOSA, SADTU AND SAOU

The educator trade unions issued a media statement on Monday 11 January 2010 at the Midrand Protea Hotel. These three unions with a national presence in all nine provinces of South Africa and representing more than 312,000 educators, affirmed their unequivocal commitment to the Quality Learning and Teaching Campaign (QLTC), and reassured the public that 2010 will see a practical expression of that commitment. Alas this did not materialise as they participated in a lengthy public service strike in the second half of the year, jeopardising the child’s preparations for exams. Additionally, they committed themselves to dedicated professionalism and the development of a true culture of learning, teaching and discipline in public schools, both on the part of their members, and on the part of the learners.

“A quality education system wherein all role players comply with their respective duties and responsibilities distinguishes winning nations, and the unions wish for South Africa to be a winning nation based on the principles enshrined in our Constitution. ... The unions therefore express their willingness to enter into a social contract with the social partners in education. The aim would be to establish all schools in SA as centres of excellence, or at the very least demand that schools must draft a realistic plan of action to improve the quality of education.”

3.3 COMMITMENT BY EDUCATORS

It is recognised that educators play a pivotal role in any education system, and therefore on behalf of their members the unions committed themselves to the following, i.e. that

1. absenteeism among educators will be addressed and it will be required of all educators to complete attendance registers;

2. unacceptable and unprofessional conduct by educators will not be tolerated, and that their members cannot accept that the unions will protect guilty educators in an unquestionable manner;

3. educators will strive to be positive role models to learners;

4. educators will prepare for classes in a manner that can be expected of dedicated professional educators;

5. educators will comply with their administrative responsibilities to ensure that schools and learners are not disadvantaged; and

6. educators will attend relevant in-service training courses regarding the curriculum and school management to ensure that they are able to teach and manage in the most effective manner.

21 NAPTOSA, SADTU, SAOU Social Contract for Education 2010
(accessed on 17 November 2010).

22 Ibid.
Deputy President Kgalema Motlanthe stated that the “challenges in the education sector in our country are well-documented” and that “one of the tasks of improving the quality of our education remains the need to improve the capacity of educators who are entrusted with the academic and cognitive development of learners”.  

A quality education system is non-negotiable and therefore quality at all levels must be attained to ensure that South Africa can take its rightful place in the world. This would mean serious consideration must be given to balancing the rights and obligations of educators with the Constitutional rights of the child to basic education.

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CHAPTER 4

THE NATURE OF THE TEACHING PROFESSION AND ITS LEGAL FRAMEWORK IN SOUTH AFRICA

4.1 TEACHERS AS PROFESSIONALS

A public teacher is a professional who is a member of a vocation founded upon specialised educational training.

In South Africa, the public teacher serves the citizens, the child in particular, who rely on the state to honour its Constitutional (section 29) duty to provide the child with basic education.

The word professional traditionally means a person who has obtained a degree or specialised qualification in a professional field. The term commonly describes highly educated, mostly salaried workers, who enjoy considerable work autonomy, a comfortable salary, and are commonly engaged in creative and intellectually challenging work. Less technically, it may also refer to a person having impressive competence in a particular activity or sector. Because of the personal and confidential nature of many professional services and thus the necessity to place a great deal of trust in them, most professionals are held up to strict ethical and moral (peer determined) regulations.

Teachers as professionals have the following characteristics:

1. Has expert and specialized knowledge in one or more subjects or subject areas.

2. Has excellent manual/practical and literary skills in relation to their area of specialisation.
3. Produces high quality work in (examples): creations, products, services, presentations, primary/other research, administrative or other work related endeavors.

4. Bound by and is committed to high standard of SACE code of professional ethics, behaviour and work activities while carrying out their profession (as an employee, associate/colleague, etc.).

5. Ows a higher duty to a child, often a privilege of confidentiality, as well as a duty not to abandon the child just because he or she may not be able to pay or remunerate the professional. Often the teachers as professionals are required to put the interest of the child ahead of their own interests.

6. Have reasonable work morale and is self-motivated. Demonstrate interest and desire to do a job well; whilst holding positive attitude towards the profession as important elements in attaining a high level of professionalism.

7. Maintains and develops appropriate treatment of relationships with the child, colleagues, officials, parents and other direct stakeholders. Special respect should be demonstrated to special people and interns. An example must be set to perpetuate the attitude of one's vocation without doing it harm.

8. Wears appropriate Professional Attire – including but not limited to, dress slacks, long-sleeve button down shirt, tie, dress shoes, etc.

4.2 TEACHERS ARE IN LOCO PARENTIS OF THE CHILD IN SCHOOLS

It is a Latin term that means “in the place of a parent”. It is the legal doctrine under which an individual assumes parental rights, duties, and obligations without going through the formalities of legal adoption. In loco parentis is a legal doctrine describing a relationship similar to that of a parent to a child. By far the most common usage of in loco parentis relates to teachers and students. For hundreds of
years, the English common-law concept shaped the rights and responsibilities of public school teachers.24

4.3 THE DUTY TO CARE

The legal doctrine “in loco parentis” has legal significance when it comes to looking after other people’s children – either on a casual or educational basis. When the child enters the school gates, parents/guardians are in effect assuming and agreeing to allow the teachers and other staff at the school to act “in loco parentis.”25

Justice Clarence Thomas wrote a concurring opinion indicating that public schools act with delegated authority pursuant to the doctrine of in loco parentis.26

Educators, who are in loco parentis, have a legal duty to protect and care for the learners in their charge. Educators have the rights and responsibilities of in loco parentis under South African law. Indeed in a country where the physical, emotional and sexual abuse of our children is an ongoing and wide-spread problem, in loco parentis is increasingly important.27

4.4 THE IN LOCO PARENTIS ROLE

Section 28 of the South African Constitution’s Bill of Rights defines a child as being under the age of 18, and specifies that a child’s best interests are of paramount importance in every matter concerning the child.

24 Legal Dictionary Teachers are in loco parentis of the child in schools http://legal-dictionary.thefreedictionary.com/In+loco+parentis (accessed on 18 November 2010).
26 In loco parentis http://www.quaqua.org/inlocoparentis.html (accessed on 18 November 2010).
For educators their duties extend to ensuring the educational and general welfare of learners that are in their care. This includes making sure their physical and mental health and safety is protected at all times.

If an educator does not adequately perform their duties under in loco parentis, the parent would have to prove either negligence or an intention to wilfully harm the child. Negligence suggests that the educator did not intend to harm the child but may have not have taken the same amount of care as a good parent. The test that is used is whether another “reasonable person” would have done the same in the same circumstances. If not, the educator can be found to be negligent, leading to further legal steps and even dismissal by the Department of Education.28

4.5 INTERNATIONAL DEBATE ON TEACHERS AS WORKERS OR PROFESSIONALS

Before elaborating on changes brought about by the 1996 Constitution, it is necessary to briefly make mention of changes in Education which had occurred worldwide during the period 1990-1995. These changes had coincided with South Africa’s own quest for socio-political and legislative reform and had significantly impacted and influenced the process of education law reform in South Africa.

There are currently two views on the status of educators. The first holds that they are professionals bestowed with the responsibility of educating the nation. They had to therefore, conduct themselves in an “upright”, “dignified”, and “professional” manner, all imperatives of their chosen profession. The second view categorises educators as workers.

Historically, the World Council for the Organised Teaching Profession (WCOTP) and (International Free Teacher Trade Union (IFFTU), were international teacher bodies divided on the ideological debate of “professionalism” versus “workerism”.

28 Ibid.
Those who aspired to the notion of professionalism had obviously accepted the limitation on employment rights for educators without any trepidation and banded together under the umbrella body of WCOTP.

The other school of thought was that educators were workers first and merely professional by virtue of their chosen vocation.

The merger of WCOTP and IFFTU to form Education International (EI) was premised on the understanding that the concepts “professionalism” and “workerism” were not mutually exclusive but rather complimented each other. Put simply there was a general acceptance that educators had to be seen as “professional workers”.

It made sense therefore, for our new legislative order to recognize this fundamental shift in global thinking and to take cognisance of it when redrafting our labour laws.

4.6 DEVELOPMENT OF THE LEGAL FRAMEWORK OF EDUCATORS’ RIGHTS AND OBLIGATIONS

As was expected, the period post our historic elections, has been characterized by significant and profound legislative reform in keeping with constitutional imperatives, primarily those set out in Chapter 2 – Bill of Rights of the 1996 Constitution. The advent of the Labour Relations Act 66 of 1995 (LRA) and a host of other progressive labour legislation marked the dawn of a new legal framework to regulate employer/employee relationships in South Africa.

Arguably, the Education sector was one which had undergone a complete overhaul from the old to the new order. Prior to 1993 educators were covered by various, apartheid (racially) based, and separate education legislation. With the advent and dawn of the new democracy various pieces of legislation attempted to create a single educator force entrenched in professionalism. As a consequence the Education Labour Relations Act (“ELRA”) of 1993 came into being.
4.7 EDUCATION LABOUR RELATIONS ACT (ELRA)\textsuperscript{29}

This Act for the first time gave educators, labour rights and mechanisms for collective bargaining and dispute resolution and institutionalized industrial action. It created the Education Labour Relations Council to be a bargaining council exclusively for educators as class of professional employees in the public service. Subsequently, the ELRA was repealed. Educators are now considered employees as contemplated within the meaning of “employee” in terms of section 213 of the LRA.

4.8 EMPLOYMENT OF EDUCATORS ACT (EEA)\textsuperscript{30}

This Act replaced the previous Educators’ Employment Act.\textsuperscript{31}

- Section 4 deals with salaries and other conditions of service of educators.

- Sections 6 to 9 set out the manner in which promotions and appointments in public education are made in public schools. This is of importance for my exploration in this treatise in chapter 6.

- Sections 10 to 15 deal with the termination of the services of educators. Of importance to this treatise is what is commonly called “deemed dismissals” of sections 14(1) and (2, as dealt with in chapter 8).

- Sections 16 to 26 deal with incapacity and misconduct of educators. Of importance to this treatise is section 17(1) which states that an educator must be dismissed if he or she is found guilty of:

  \begin{itemize}
  \item \text{(b)} committing an act of sexual assault on a learner, student or other employee;
  \item \text{(c)} having a sexual relationship with a learner of the school where he or she is employed;
  \end{itemize}

\textsuperscript{29} Employment of Educators Act 76 of 1998.
\textsuperscript{30} Ibid.
\textsuperscript{31} Educators Employment Act 138 of 1994.
(d) seriously assaulting, with the intention to cause grievous bodily harm to, a learner, student or other employee.”

4.9 SOUTH AFRICAN COUNCIL OF EDUCATORS’ ACT (SACE)

Educators can only be employed in education if they are registered with SACE and are bound by its Code of Professional Ethics of Educators, which states:

“Educators who are registered or provisionally registered with the South African Council for Educators …

- acknowledge the noble calling of their profession to educate and train the learners of our country;
- acknowledge that the attitude, dedication, self-discipline, ideals, training and conduct of the teaching profession determine the quality of education in this country;
- acknowledge, uphold and promote basic human rights, as embodied in the Constitution of South Africa;
- commit themselves therefore, to do all within their power, in the exercising of their professional duties, to act in accordance with the ideals of their profession, as expressed in this code;
- should act in a proper and becoming way so that their behaviour does not bring the teaching profession into disrepute.”

Conduct: The educator and the learner, an educator ...

- Respects the dignity, beliefs and constitutional rights of learners and in particular children, which includes the right to privacy and confidentiality;
- acknowledges the uniqueness, individuality, and specific needs of each learner, guiding and encouraging each to realise his or her potentialities;
- strives to enable learners to develop a set of values consistent with the fundamental rights contained in the Constitution of South Africa;
- exercises authority with compassion;
- avoids any form of humiliation, and refrains from any form of abuse, physical or psychological;

32 S 17 Employment of Educators Act.
• refrains from improper physical contact with learners;
• promotes gender equality;
• refrains from any form of sexual harassment (physical or otherwise) of learners;
• refrains from any form of sexual relationship with learners at a school;
• uses appropriate language and behaviour in his or her interaction with learners, and acts in such a way as to elicit respect from the learners;
• does not abuse the position he or she holds for financial, political or personal gain.”

The educator and his / her colleagues:

“An educator …
• refrains from undermining the status and authority of his or her colleagues;
• promotes gender equality and refrains from sexual harassment (physical or otherwise) of his or her colleague;
• uses appropriate language and behaviour in his or her interactions with colleagues.”

4.10 CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA AND THE LRA

The Constitution, in section 23, Chapter 2 – Bill of Rights: Labour Relations, states:34

“(1) Everyone has the right to fair labour practices.

(2) Every worker has the right –
   (a) to form and join a trade union;
   (b) to participate in the activities and programmes of a trade union; and
   (c) to strike …

(3) Every employer has the right –
   (a) to form and join an employers’ organisation; and
   (b) to participate in the activities and programmes of an employers’ organisation.

(4) Every trade union and every employers’ organisation has the right –
   (a) to determine its own administration, programmes and activities;
   (b) to be organised; and
   (c) To form and join a federation.

34 S 23 of the Constitution of the Republic of South Africa.
Every trade union, employers’ organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

A national legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right to this Chapter, the limitation must comply with section 36(1)."

4.11 EDUCATORS’ RIGHT TO STRIKE

Included in the rights conferred on trade unions and their members by section 23(2) is the right of every worker to strike.35

The LRA defines a strike as:

“the partial or complete concerted refusal to work, or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purposes of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to work in this definition includes over time work, whether it is voluntary or compulsory”. 36

The 1996 Constitution provides protection for strikes going beyond collective bargaining such as strikes promoting or defending the socio-economic interests of workers and political strikes. “Protest action” (more popularly referred to as “stay-aways”), with the purpose of promoting or defending the socio-economic interests of workers, is regulated by section 77 of the LRA. The Act does not protect all forms of protest action. The Act requires that one should look to the purpose of the protest action in determining whether or not it is to be afforded legislative protection. If the purpose is purely political, it will not be protected. If the purpose is to advance a socio-economic aim, it will be protected. The dividing line, it is submitted, is a problematic one. The gauge will have to be a consideration as to the overt political motivation for the action – the more politically overt the action, the less the chance of the action being protected. Given that employers are seldom, if ever, in a position to resolve disputes of an essentially political nature, and that trade unions have other

36 S 23(2) Education Labour Relations Act.
means by which they might attempt to influence the political debate, this limitation on
the right to strike will probably survive constitutional challenge.  

4.12 THE LIMITATIONS ON THE RIGHT TO STRIKE

The right to strike is well recognized in international instruments and is also
enshrined in a number of modern constitutions.  In South Africa, the LRA provides
the framework in which the right to strike is to be exercised.  Section 64(1) of the
LRA, although recognizing the constitutional right to strike, subjects the right to strike
to a number of limitations.  Indeed the various limitations all serve to promote the
overt purpose of the Act – orderly collective bargaining.  These limitations might be
categorized as both procedural and substantive.  The procedural limitations are self
evident – a strike is protected only if the procedures required by the LRA are
followed.  The first limitation is that strikes are prohibited in respect of disputes on
issues that are the subject of a peace clause contained in a collective agreement as
are strikes in respect of a dispute that is regulated by a collective agreement.
Secondly, employees may not engage in strike action if they are bound by an
agreement that requires the issue in dispute to be referred to arbitration.  Thirdly,
strike action which might have the effect of endangering life, health or safety is
prohibited.  

4.13 ESSENTIAL AND MAINTENANCE SERVICES

Therefore persons employed in “essential services” or a “maintenance service” are
prohibited from engaging in strike action.  Maintenance services are defined as
services, the interruption of which may have the effect of material physical
destruction to any working area, plant or machinery.

In the LRA, Essential Services, provide for categories of employees who are
prohibited from embarking on industrial action by reason of providing an essential
service.

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37 Currie & De Waal 513.
38 Currie & De Waal 514.
Educators are not designated as providing an essential service, and as such do not fall within this category.

4.14 THE RIGHT TO ENGAGE IN COLLECTIVE BARGAINING

The 1996 Constitution provides workers with the right to form and join trade unions and to participate in the activities and programmes of those trade unions is enshrined in section 23(2) of the 1996 Constitution.

The organisational and associational rights contained in sections 23(2)-(4) form the bedrock of a labour relations system characterized by voluntarist collective bargaining.

The constitutional protection that section 23 gives to these organizational rights, shields trade unions and employer organizations from legislative and executive interference in their affairs, and, in turn, inhibits victimization of and interference in trade unions by employers.

Section 23(5) of the Bill of Rights confers on every trade union, employer’s organization and employer the right to engage in collective bargaining. It is important to note the wording of this section and its implications for the reach of the right. The wording in the Interim Constitution was “Workers and employers shall have the right to organise and to bargain collectively”. Significantly the wording changed in section 23(5) of the 1996 Constitution to provide a “right to engage in collective bargaining”. The 1996 provision also permits national legislation to regulate collective bargaining.39

The LRA does not impose a duty to bargain collectively; however, by extending and bolstering the right to strike, the legislature has effectively empowered unions to have recourse to the strike as an integral aspect of the collective bargaining process. The right to engage in collective bargaining is cast as a right in section 23(5) of the

39 Currie & De Waal 515.
Constitution, and the LRA provides the organizational framework in terms of which that right is to be exercised. Section 23 guarantees a carefully balanced package of rights, freedoms and duties related to labour relations. This package includes the right to strike. The right to strike is a powerful tool in the hands of workers to persuade their employer to bargain collectively.\textsuperscript{40}

This LRA has repealed the ELRA and in section 37 deemed the ELRC to be the bargaining council for educators and employers in the public sector.

Educators are now viewed as any other category of employees and consequently fall within the domain of the LRA, over and above educators being regulated by host of education, sector – specific legislation, for example, the Employment of Educators Act, no 76 of 1998, the South African Schools Act and the National Education Policy Act, to name a few.

It is the Labour Relations Act, which regulates employer/employee relationship across the spectrum of the South African workforce in terms of providing a legal framework of the broader imperatives that govern any employment relationship.

Section 213, the LRA defines an employee as:

\textit{“(a) any person excluding an independent contractor who works for another person of for the State and who is entitled to receive any remuneration: …”}\textsuperscript{41}

Clearly, educators are employees of the State within the meaning conveyed in the definition of an employee and thereby are entitled to a constitutionally entrenched right to strike.

**4.15 THE RIGHT TO FAIR LABOUR PRACTICES**

The LRA defines an unfair labour practice, in section 186(2), as follows:

\textsuperscript{40} \textit{Ibid.}
\textsuperscript{41} S 213 of the Labour Relations Act.
“Any unfair act or omission that arises between an employer and an employee involving –

(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;

(b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;

(c) a failure or refusal by an employer to reinstate or re-employee a former employee in terms of any agreement; and

(d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act NO. 26 of 2000), on account of the employee having made a protected disclosure defined I that Act.”

The LRA gives effect to the constitutional right to fair labour practices. Section 23(1) of the Constitution state that everyone has the right to fair labour practices. The Constitutional Court in *Nehawu v University of Cape Town & others* found that this right is incapable of precise definition. Fairness would depend on the circumstances of a particular case and essentially involves a value judgement. It was, therefore, neither necessary nor desirable to define the concept. Rather, it must be given content by the legislature and thereafter left to gather meaning, in the first instance, from decisions of the specialist tribunal. Nevertheless, it was held, the Constitutional Court had an important supervisory role to play in ensuring that legislation giving effect to the constitutional right was properly interpreted.

A fair reason for dismissal related to capacity essentially involves the employer’s legitimate loss of confidence in the ability of the employee to perform in accordance with the contract of employment. The LRA does not define “capacity”. This is equivalent to capability or the ‘power or ability to do something.’

42 S 186(2) of the Labour Relations Act.
43 *Nehawu v University of Cape Town and Others* [2002] 4 4 BLLR 311 (LAC).
45 Darcy et al 412.
Educators as professionals are akin to senior employees. In the case of *Somyo v Ross Poultry Breeders* Somyo, the employee was dismissed for unreliability and irresponsibility with regards to his duties. The LAC held that the normal requirements for a dismissal for poor work performance may not apply in the case of a manager or senior employee whose knowledge and experience qualify for himself whether he is meeting the standards set by the employer or where the degree of professional skill required is so high, and the potential consequence of the smallest departure from that high standard are so serious, that one failure to perform in accordance with those high standards is enough to justify dismissal.

In the case of *Taylor v Alidair*, it is stated that “the degree of professional skill which must be required is so high, and the potential consequences of the smallest departure from that high standard are so serious, that one failure to perform in accordance with those standards is enough to justify dismissal”.

**4.16 CONCLUSION**

It is therefore evident that when acting in a professional capacity one is to know their duties in the scope in which they are working, and the importance of fulfilling these as required. In essence this necessitates that educators are professionally trained, they do not need to be taught, as they are already qualified in a teaching capacity. It is therefore explicable that a certain level of professionalism and performance is expected. This in turn indicates that the onus is on the employee firstly to know what is required of them, and secondly to fulfil such functions to meet a particular standard.

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46 *Somyo v Ross Poultry Breeders (Pty) Ltd* 1997 9-97 (LAC).
48 *Taylor v Alidar Ltd* 1978 IRLR 82.
In this chapter, the focus will be on the rights of the child to basic education and laws enacted in South Africa to afford them with protection. This will be weighed against the teachers’ right to strike and fair labour practice. In doing so focus will be on section 28 and 29 of the Constitution. Section 28 contains the majority of the fundamental rights conferred upon a child and section 29 provides that everyone has the right to education. The United Nations Covenant also affords children with the right to free education. The rights provided for by section 28 of the Constitution will also be discussed in great detail in order to develop an understanding of the rights of a child accorded to the child. The question that needs to be considered is whether the best interest of a child principle will be of any significance when determining whether an educator committed an unfair labour practice.

5.1 CONSTITUTION OF SOUTH AFRICA

Section 28 of the Constitution provides:

“28. (1) Every child has the right –
(a) to a name and a nationality from birth;
(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
(c) to basic nutrition, shelter, basic health care services and social services;
(d) to be protected from maltreatment, neglect, abuse or degradation;
(e) to be protected from exploitative labour practices;
(f) not to be required or permitted to perform work or provide services that –
   (i) are inappropriate for a person of that child’s age; or
(ii) place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development.

(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under ss 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –

(i) kept separately from detained persons over the age of 18 years; and

(ii) treated in a manner, and kept in conditions, that take account of the child’s age.

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child. If substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child’s best interests are of paramount importance in every matter concerning the child.\textsuperscript{49}

In this section “child” means a person under the age of 18 years.

Children are recognised by our Constitution as one of the categories of people that should enjoy extra protection. Section 29(1) further provides that everyone has the right to basic education including the right to further education. Sections 28 and 29 complies with the principles contained in the Declaration of the Rights of the Child of 1959.

5.2 DECLARATION OF THE RIGHTS OF THE CHILD OF 1959\textsuperscript{50}

Article 13 of the Covenant also recognises the right of everyone to free education for both the secondary and higher levels. primary education should be compulsory and available and free to all, secondary education should be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education, and higher education shall be made

\textsuperscript{49} S 28 of the Constitution of the Republic of South Africa.

\textsuperscript{50} International Declaration of the Rights of a Child 1959.
equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.

In terms of the Covenant, State parties should develop school systems and they should encourage or provide scholarships for disadvantaged groups. Parties are required to make education free at all levels, either immediately or progressively.

The Committee on Economic, Social and Cultural Rights interpret the Covenant as also requiring states to respect the academic freedom of staff and students, as this is vital for the educational process. It also considers corporal punishment in schools to be inconsistent with the Covenant's underlying principle of the dignity of the individual.

Article 14 of the Covenant requires those parties which have not yet established a system of free compulsory primary education, to rapidly adopt a detailed plan of action for its introduction “within a reasonable number of years”.

The protection of children’s rights has become a worldwide phenomenon and our 1996 Constitution merely echoes this global view insofar as it concerns the protection, rights, interests and liberties of children.

5.3 THE INTERNATIONAL COVENANT ON ECONOMICS, SOCIAL AND CULTURAL RIGHTS (ICESCR)\(^\text{51}\)

It expressly entrenches the right of children to receive free and quality education.

5.3.1 THE RIGHT TO FREE EDUCATION

Article 13 of the Covenant recognises the right of everyone to free education (free for the primary level and “the progressive introduction of free education” for the secondary and higher levels). This is to be directed towards “the full development of the human personality and the sense of its dignity”, and enable all persons to

\(^{51}\) International Covenant on Economics, Social and Cultural Rights 1959.
participate effectively in society. Education is seen both as a human right and as “an indispensable means of realizing other human rights”, and so this is one of the longest and most important articles of the Covenant.

Article 13.2 lists a number of specific steps parties are required to pursue to realise the right of education. These include the provision of free, universal and compulsory education, “generally available and accessible” secondary education in various forms (including technical and vocational training), and equally accessible higher education. All of these must be available to all without discrimination. Parties must also develop a school system (though it may be public, private, or mixed), encourage or provide scholarships for disadvantaged groups. Parties are required to make education free at all levels, either immediately or progressively; “[p]rimary education shall be compulsory and available free to all”; secondary education “shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education”; and “[h]igher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education”.

Articles 13.3 and 13.4 require parties to respect the educational freedom of parents by allowing them to choose and establish private educational institutions for their children, also referred to as Freedom of Education.

The Committee on Economic, Social and Cultural Rights interpret the Covenant as also requiring states to respect the academic freedom of staff and students, as this is vital for the educational process. It also considers corporal punishment in schools to be inconsistent with the Covenant’s underlying principle of the dignity of the individual.

Article 14 of the Covenant requires those parties which have not yet established a system of free compulsory primary education, to rapidly adopt a detailed plan of action for its introduction “within a reasonable number of years”.
5.4 CHILDREN’S CONVENTION ON THE RIGHTS OF THE CHILD\textsuperscript{52}

The phrase is also used by the Children’s Convention as well as the OAU Charter on the Rights of the Child. Useful content is given to the best interest requirement by the relatively detailed provisions of Article 3 of the Children’s Convention.

1. In all actions concerning children, whether undertaken by public or private social welfare institution, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

At international law, the child’s best interests standard is protected by several instruments including the Hague Convention on the Civil Aspects of International Child Abduction 1980 which seeks to protect the child’s best interests by ensuring that custody and access disputes are adjudicated by the court of the child’s habitual residence. South Africa is a signatory of the Convention. In 1996 parliament passed the Hague Convention on the Civil Aspects of International Child Abduction Act\textsuperscript{53} which incorporated the Convention into municipal law.


\textsuperscript{53} Civil Aspects of International Child Abduction Act 72 of 1996 \url{www.unicef.org/crc/} (accessed on 29 November 2010).
5.5 THE RIGHT NOT TO BE SUBJECTED TO NEGLECT, ABUSE OR DEGREADATION

Section 28(1)(d) of the Constitution seeks to protect children against abuse. The protection of the child’s right not to be subjected to neglect, abuse or degradation is a municipal reinforcement of article 19(1) of the Convention on the Rights of the Child.

There have been some legislative attempts at dealing with the physical and sexual abuse of children. For instance s 50 of the Child Care Act makes it an offence to ill-treat a child or to allow it to be ill-treated, or to abandon that child. The Sexual Offences Act\textsuperscript{54} criminalises sexual intercourse with minors. In addition section 50A of the Child Care Act has been inserted so as to criminalise the sexual exploitation of children.

Section 42 has been amended by the Child Care Amendment Act\textsuperscript{55} to include teachers or “any person employed by or managing a children’s home, place or care or shelter”. Section 42 places an obligation on educators to report the abuse or suspected abuse of the child.

5.6 THE RIGHT TO BE PROTECTED FROM EXPLOITATIVE LABOUR PRACTICES

These subsections provide protection for children from harmful labour practices, but do not place a ban or an age restriction on the employment of children.

In the light of this reality, the requirement that the education and the health of the child should not be adversely affected by the child’s employment is a valuable one. This confirms the expectation that the child is must be in school with no neglect of learning and education. A significant number of children working on farms will be protected by this section, for example those not attending school because they are required to work.

\textsuperscript{54} The Sexual Offences Act 23 of 1957.
\textsuperscript{55} The Child Care Amendment Act 94 of 1996.
5.7 A CHILD’S BEST INTERESTS ARE OF PARAMOUNT IMPORTANCE IN EVERY MATTER CONCERNING THE CHILD

This is in addition to the protection they are given by the remainder of the Bill of Rights.

A few cases will be referred to where the best interest of the child principle was taken into account in order to determine whether an unfair labour practice was committed by the State in appointing an educator to certain position or not. The effect of section 36 of the Constitution was considered in chapter 7 of this treatise and will also be considered in the remaining chapters.

In *Settlers High School v HOD Education LP* the competing rights of the child in section 28(2) on the one hand was considered *vis-a-vis* the right to equality, (more specifically the right to redress imbalances of the past) with best interest of the child on the other hand. The Department appointed an African female in order to redress the imbalances of the past even though the governing body recommended a white male as its preferred candidate. On review the High Court accepted that the right to equality and the need to redress imbalances of the past, are fundamental values in our Constitution, but held that the Constitution also entrenches rights to proper education and provides in section 28(2) that a child’s best interest are of paramount importance in every matter concerning the child. The court further held that as important as the rights of educators are, and in particular those belonging to previously disadvantaged communities, the paramountcy of children’s rights and interests must not be overlooked. The Court therefore set aside the decision of the Education Department to appoint the African female. It held that where it is common cause that the white male is clearly the candidate able to perform the function of principal, the interviewing committee did not err in the observance of their duty to accord paramountcy to the best interest of the school’s learners.

56 *Settlers Agricultural High School and Another v Head of Department and Others* 2002.
In *Harts Water High v HOD Education NC*\(^{57}\) a similar issue was considered by the court. The High Court set aside the Education Departments decision not to appoint the stronger white male candidate preferred by the school governing body but to appoint a weaker candidate in order to redress the imbalances of the past. The court held in this case that the best interest of the child principle cannot be a rigid rule and should depend on the circumstances of each case. Therefore the best interest of the child principle could be limited by section 36 of the Constitution. We should note that the no right is absolute and can be limited if it is in the interest of justice. Therefore no right can be applied in such a rigid manner that leads to the violation of all other rights guaranteed by the Constitution.

Lastly, in *Phenithi v Minister Of Education & Others*,\(^{58}\) the Supreme Court of Appeal had to consider the constitutionality of section 14(1) of the Employment of Educators Act, it agreed with the Education Department that the limitation by this section of the educators’ right to procedurally fair labour practices was a reasonable and justifiable limitation when balancing the right to fair labour practices in section 23(1) against the right contained in section 28(2) which provides that the child’s best interest are of paramount importance in every matter concerning the child. This is dealt with extensively in chapters 6 and 8 of this treatise.

### 5.8 WHO SHOULD ENSURE THAT EDUCATION IS COMPULSORY?

The high drop-out rates from school is concerning. It is, however, debatable on whom the obligation lies and how the obligation should be shared between parents and state actors to ensure that children attend school. Whereas in the past the obligation fell squarely on parents, there is an international shift towards placing the obligation more on the State to encourage attendance.

This means that the State must take measures to encourage regular school attendance.

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57 *Harts Water High and Another v Head of Department Education NC* 2006 1138H -1139F.
Article 28(1) (e) of the Convention on the Rights of the Child provides that the state shall:

“(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.” 59

The South Africans School Act (SASA) places the responsibility of ensuring attendance at school on the parent, who can be found guilty of an offence if the learner fails to attend school.

5.9 CONCLUSION

Taking into account all the principles referred to above, it is evident that the best interest of a child principle will enjoy more protection than any other right. In this chapter we had to balance (consider) the laws which affords children with a variety of rights against the rights of an educator to fair labour practices and come to the conclusion that children’s right will be taken into account when determining an educator’s right to fair labour practice. Both parents and educators should treat children with respect and dignity. The Courts have, however, been appointed as the upper guardian to ensure that the rights of the child are not violated.

CHAPTER 6

BALANCING THE EDUCATORS’ RIGHT TO “FAIR LABOUR PRACTICES” (PROMOTION AND APPOINTMENT) WITH THE CHILD’S RIGHT TO EDUCATION

The Constitution, enacted in 1996, is the highest law in South Africa. Its adoption caused far reaching changes to the South African legal system, not the least of which was to subordinate all legislation to its provision and to restrain the legislature from unreasonably encroaching on the individuals rights entrenched in the Bill of Rights.60

Section 23(1) of the Bill of Rights provides that everyone has the right to fair labour practices whereas section 28(2) of the Bill of Rights provides that a child’s best interests are of paramount importance in every matter concerning the child. The question then is how one resolves a conflict between these two competing fundamental constitutional rights.

Section 36(1) of the Constitution provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

(a) the nature of the right,
(b) the importance of the purpose of the limitation,
(c) the nature and extent of the limitation,
(d) the relation between the limitation and its purpose, and
(e) less restrictive means to achieve the purpose.61

Based on this limitation clause, the Constitutional Court has since its earliest decisions embraced balancing as a method of reconciling rights claims. In S v

61 S 36 of the Constitution of the Republic of South Africa.
Makwanyane and Another\textsuperscript{62} the Constitutional Court held that the structure of rights analysis in a Bill of Rights with a general limitation section, involves the weighing up of competing values, and ultimately an assessment based on proportionality, which in turn calls for the balancing of different interests:

"The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of section 33(1). The fact that different rights have different implications for democracy, and in the case of our Constitution, for ‘an open and democratic society based on freedom and equality’, means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of section 33(1), and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, ‘the role of the Court is not to second-guess the wisdom of policy choices made by legislators’.”

It has been held that there is no hierarchy of rights in the Constitution. The fact however remains that one of the relevant factors that a court must consider in weighing up competing rights is the importance of the right to an open and democratic society based on freedom and equality. It can also not be ignored that the Constitution itself states that a child’s best interests are of paramount importance in every matter concerning the child.

When the Supreme Court of Appeal in Phenithi v Minister of Education & Others\textsuperscript{63} had to consider the constitutionality of section 14(1) of the Employment of Educators Act, it agreed with the education department that the limitation by this section of the educator’s right to procedurally fair labour practices was a reasonable and justifiable limitation when balancing right to fair labour practices in section 23(1) against the

\textsuperscript{62} 1995 6 BCLR 665 (CC).
\textsuperscript{63} [2006] 9 BLLR 821 (SCA).
right contained in section 28(2) providing that the child’s best interests are of paramount importance in every matter concerning the child.

6.1 WHO IS “SUITABLY QUALIFIED” FOR PROMOTIONS AND/OR APPOINTMENT IN TERMS OF THE EEA?

In terms of the Employment Equity Act 55 of 1998 (EEA 55), candidates from designated groups will have to meet two criteria before being considered for appointment or promotion under the employment equity plan. The first is membership of the designated group; the second, proof that they are “suitably qualified”. A “suitably qualified” person is defined in section 20(3) of the EEA 55 as a person who may be qualified for a job as a result of any one of, or any combination of, that person’s.

- formal qualifications;
- prior learning;
- relevant experience; or
- capacity to acquire, within a reasonable time, the ability to do the job.

The definition of “suitably qualified” therefore shows that membership of a “designated group” is not only a tie-breaking factor when two candidates are equally qualified (as is the case in the European Union, as determined by the European Court of Justice), but is a consideration that may even outweigh other qualifications, provided the person in question has, in the view of the employer, the potential to “grow” into the job within what is seen to be a reasonable period of time.

Dupper argues that “despite the broad and seemingly open-ended definition of ‘suitably qualified’, employers should nevertheless employ the idea of a ‘threshold of performance’ that candidates for a certain position must attain. A plan whereby it is enough simply to be a member of a group with some qualification may lead to a level of performance below this threshold … would be irrational”.

64 Employment Equity Act 55 of 1998.
65 Ibid.
Indications are that failure to take a “threshold of performance” into consideration may have occurred with some regularity in the public service in general including public education. The transformation of the public service from one that was overwhelmingly white and male in 1994 to one that is today broadly reflective of national racial demographics is nothing short of remarkable, and has far surpassed the pace of transformation in the private sector. However, many have argued that the accelerated drive to transform the public service often led to the appointment of people who did not have the qualifications, experience, commitment or culture of service needed to be productive and loyal public servants. In short, it led in certain instances to the appointment of people who were not “suitably qualified”. It has led to a skills exodus and, most importantly, has impeded the state’s ability to spend revenue and deliver effective services, something that impacts most adversely on the poorest and most marginalized of the citizenry of the RSA.

As a general rule, courts will be reluctant to interfere with the manner in which employers define “suitably qualified”. However, when these criteria amount to “insurmountable obstacles” for members of the disfavored group, they have not survived judicial scrutiny, e.g. Du Preez v Minister of Justice.66

In Settlers High School v HOD Education Department the competing rights of the child in section 28(2) on the one hand was considered vis-a-vis the right to equality, (more specifically the right to redress imbalances of the past) with best interest of the child on the other hand. The Department appointed an African female in order to redress the imbalances of the past even though the governing body recommended a white male as its preferred candidate. On review the High Court accepted that the right to equality and the need to redress imbalances of the past, are fundamental values in our Constitution, but held that the Constitution also entrenches rights to proper education and provides in section 28(2) that a child’s best interest are of paramount importance in every matter concerning the child. The court further held that as important as the rights of educators are, and in particular those belonging to previously disadvantaged communities, the paramountcy of children’s rights and interests must not be overlooked. The Court therefore set aside the decision of the

66 2006 ZAECHC 17.
Education Department to appoint the African female. It held that where it is common
cause that the white male is clearly the candidate able to perform the function of
principal, the interviewing committee did not err in the observance of their duty to
accord paramountcy to the best interest of the school’s learners.

In *Harts Water High School v HOD Education* 67 the same issue that was considered
in the Settlers Agricultural High School was considered again. Once again the High
Court interfered with the education department’s decision not to appoint the stronger
white male candidate preferred by the school governing body but to appoint a weaker
candidate in order to redress imbalances of the past. The Court held:

“In my view, the circumstances of a particular institution should dictate the weight to be
attached to a particular value, also taking into account the interests of the learners
which are paramount in all matters affecting the rights of children. The same would
apply to the question whether the provisions of section 7(1)(b) dictate that a candidate
from a previously disadvantaged community ought to be preferred in cases where the
evaluation of such candidate and a competitor from a previously privileged group leads
to a comparative parity in the assessment of their suitability for the post. This cannot
be a rigid rule and should depend on the circumstances of each case. A number of
factors, some of which may be historical, would play a role. Such approach may in
some instances go against the spirit and the values contained in the constitution.”

In *Point High School*, 68 the Supreme Court of Appeal also intervened and set aside
the decision of an education department not to appoint the stronger candidate in
order to redress imbalances of the past when the difference in scores between the
competing candidates during interviews was significant. The court criticised the
employer for “sacrificing the interests of the School on the altar of employment
equity”.

There is therefore a clear tendency in our courts to interfere and set aside decisions
of education departments in appointment disputes, where weaker candidates were
appointed by education departments. Even where weaker candidates were
appointed in the name of equity to redress imbalances of the past, the courts
interfered when the difference in scored of respective candidates was significant.

67 2006 1138H-1139F.
68 *Western Cape Head of Department and others v Point High Governing body and Others* 2008 5
SA 18 (SCA).
In South Africa the need to balance equality with efficiency considerations finds expression in the Constitution. The Constitution states that the public service must be both “broadly representative” and “efficient”, and the police service must discharge its responsibilities “effectively”. To be sure, these two objectives (promotion of equality and efficiency) need not necessarily be in conflict.

However, this does not mean that there would necessarily always be a conflict between the rights of educators in appointment disputes and the right of the child to quality education. For example, in as much as a child needs quality education he also needs to be exposed to transformation, provided that the right of the child to quality education is not substantially affected in that a significantly weaker candidate is appointed. In this regard reference could be made to the case of *Stoman v Minister of Safety & Security* where the constitutional right to an efficient public service was considered against the right to equality and transformation in the police force. The Court said that these two rights are not necessarily competing and held:

“As far as efficiency is concerned, I am respectfully of the view that the requirement of representativity is often linked to the ideal of efficiency. A police service, for example, could hardly be efficient if its composition is not at all representative of the population or community it is supposed to serve. This view may depend on how one perceives efficiency, of course. A ruthless and Draconian police force may be ‘efficient’ in the sense that it rules with an iron fist and ensures some stability and safety over the short term; but it could hardly be efficient in the long run if it does not enjoy the trust, cooperation and the support of the community because the members of the force, including those in commanding positions, are all perceived to be representative of a different group which may be regarded as strangers or even with hostility or suspicion. In other words the ideal of representativity, or the ideal of the achievement of full equality, cannot necessarily be separated from the ideal of efficiency.”

Efficiency considerations in the private sector are largely self-enforcing; with financial incentives compelling employers to define “merit” in a manner that advances their own interests. Private employers will therefore, as a matter of self-interest, sail quite close to merit principles despite the relatively open-ended definition of “suitably qualified” contained in the EEA. However, because this mechanism is less salient in the public service, legislation has to step in to fill the void.

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70  *ibid.*
6.2 CONCLUSION

It is evident that our courts and tribunals have demonstrated that they are willing to intervene in promotion and appointment disputes to balance the educator’s right to fair labour practices with the child’s right to education. The Constitutional principles of efficiency in the public service; best interests of the child and paramountcy have guided these interventions and decisions.
7.1 INTRODUCTION: THERE IS TOO MUCH VIOLENCE AND ABUSE IN OUR SCHOOLS

South Africa experiences unacceptably high levels of violent crime. This crime spills over into the schools and playgrounds. During the HRC Public Hearing, a learner painted a picture of teachers indulging in sexual relations with each other during school time and on school property. Of great concern were the accounts of teachers abusing their positions of authority and coercing sex from girl learners. An example was given of a learner coming late and having to exchange sex with a teacher in order to be allowed onto the school premises that had been locked. A second example was of teachers exchanging food for sex from poor girl learners. The learner went further to state that in her view the school does not protect the learners and the teachers receive warnings or are merely told not to do it again.

“To put it starkly, getting young people to school is important but doesn’t make sense if the young women who get there are then raped.”

A Human Rights Watch Report confirms that, educators subject girl learners across the country to sexual abuse and harassment in our schools on a daily basis. The effect of this violence impacts on the right to a basic education as it results in poor performance by the learner due to an inability to concentrate, losing interest in school or dropping out. The Report confirms that in many instances the violence is concealed.

The prevalence of sexual offences against minors has increased over the past years, having a devastating effect on the victim, both psychological and physical. As a result, drafters of both the Constitution and other legislation made a considerable
effort in providing protection to these victims. More specifically, in recent days, are the importance echoed in courts and legislation on the rights of the child in offences of this nature.  

A definition of children’s rights has been totally lacking in arbitration and has been referred to in the past as “[a] slogan in search of a definition”.  

7.2 THE CHILD COMPLAINANT AND THE LEGAL SYSTEM

Children are vulnerable and the younger they are, more so. This is especially true when the child is a complainant or a witness in any legal process, whether a criminal trial or an arbitration.

Not only have our courts expressly recognised this fact as empirically established, is also supported by a veritable welter of scientific research and study. A constitutional injunction is powerless to protect a child from being victimised and traumatised by criminal activity. All the more should it be incumbent upon the criminal law and criminal procedure and upon the courts (arbitrators), their functionaries and practitioners who regulate its procedure and apply its principles to “protect children from abuse and (to) maximise opportunities for them to lead productive and happy lives (and to) create positive conditions for repair to take place”.

At the very least the legal system, which includes arbitrators, should administer justice in such a fashion that children who are caught up in its workings are protected from further trauma and are treated with proper respect for their dignity and their unique status as vulnerable young human beings.

The sentiments of the learned Bertelsmann J is shared, when he expressed the view that there is much to be desired if one looks at the sad state of affairs and what is currently happening in our courts (and also in arbitration hearings), and that in many

71 SAHRC Report on right to basic education 22-23.
73 S v Mokoena (2008) 5 SA 578.
instances neither the courts nor their supporting institutions succeed in giving due recognition to the paramount importance of children’s interests.

The idea of children’s rights is a complex issue that involves philosophic, moral, juristic and social considerations. In addition, consideration should be given to whether the rights afforded to children should be the same as that extended to adults, and whether these rights should be adjusted to accommodate the special needs of the child, thereby making it unique to children.

It is a historical fact that our entire legal system was designed by adults for adults, including courts and court procedures (may I also add arbitrations). Court proceedings are accompanied by *inter alia* formalistic language that would come across as stilted, artificial, magniloquent and bombastic.

The need to cater for children as witnesses and complainants in the legal system, was only realized long after lawyers became so entrapped in these rituals and forensic language that many of them found it difficult to converse in normal plain language.

It is then also a fact that most, if not all, adults find it difficult and sometimes impossible to converse with children, forced by the traumatic circumstances to enter their world. This adds to the alienation children experience in the unusual surroundings of the court room or arbitration hearing. Children are by their very nature ill-equipped to deal with confrontational and adversarial settings in which adults dictate the subject-matter, the nature and the style of the conversation.

In this regard, reference is made to the cross-examiner, not only using confrontational language, but also using terminology that might make perfect sense to the presiding officer, but more often than not, makes none whatsoever to the child. The cross-examiner aims at communicating certain messages to the presiding officer, but in doing so, falls back upon legalese that is second nature to all lawyers,

74 Human “n Teoretiese Raamwerk vir die Implementering van Kinderregte in Suid-Afrika” (2004) TSAR 78.
and trained individuals in that field, but is in this context truly conspirational against
the laity represented by the minor (see S v Mokoena).

“The resultant alienation of the child in this process is unfair and not in the interests of
justice”. 75

In K v The Regional Court Magistrate 76 Melunsky J found that the ordinary
procedures of the criminal justice system are inadequate to meet the needs and
requirements of the child witness:

“(T)he incidence of crimes involving young persons as victims, particularly crimes
involving sexual abuse and assault, has risen significantly in recent years. In cases of
sexual assault and rape the fear of investigation and trial seriously impeded the
combating of these crimes, that child witnesses experience significant difficulties in
dealing with the adversarial environment of a court room, that a young person may
experience difficulty in fully comprehending the language of legal proceedings and the
role of the various participants, and that the adversarial procedure involves
confrontation and extensive cross-examination. There is also an affidavit from Karen
Muller who is presently engaged in research into the question of the ability of young
persons to give evidence in an accusatorial environment. She explains and illustrates
that the communication ability of the child and the context in which the questions are
asked may distort the meaning attached to the child’s language. She says that in
cases of criminal prosecutions for sexual offences the language problem becomes
more acute because “it is overlaid by a range of emotional stresses and fears which
flow from the traumatic events about which the child is called to testify.”

“In the first instance, the victim is required to relate in open court the graphic detail the
abusive acts perpetrated upon them (sic). This occurs in the presence of the alleged
perpetrator. Thereafter the victim of the abuse is subjected to intensive, and at times
protracted and aggressive, cross-examination by the accused or his legal
representative. This further serves to emphasise the isolation and vulnerability of the
witness in the circumstances.

Secondly victimisation may, consequently be as traumatic and as damaging to the
emotional and psychological well-being as the original victimisation was.”

It does however not end there the problem is exacerbated when the child and the
cross-examiner do not share the same mother tongue. It is undoubtedly in the
interest of justice, that the presiding officer should follow the evidence of the child
witness properly. A failure to do so cannot be attributed to anything associated with

75 S v Mokoena (2008) 5 SA 578.
76 (1996) 1 SACR 434 (E).
the child, as the child has no choice in the manner of his / her communication. “The fault must, by definition, be that of the court and the lawyers (S v Mokoena).”

7.3 THE CHILD WITNESS IN SOUTH AFRICAN LAW

According to section 28(3), the Constitution of the Republic of SA 1996 defines a child as:

“A person under the age of 18 years”

Section 28 deals with the rights of the child and also differentiates between rights that accrue especially to children and the fundamental rights that exist for the benefit of every person, including children, with the exception of the right to vote which is especially reserved for adult citizens. The rights specially reserved for children are set out in section 28(1) of the Constitution:

Kruger emphasizes other fundamental rights of children as contained in the Bill of Rights, and not repeated in section 28, which are particularly important to children.

These fundamental rights were identified as the right to equality, the right to dignity, the right to bodily and psychological integrity, and the rights to individual autonomy encapsulated in the right to privacy. The critical provision that sets the child’s right apart from any other fundamental provision is unequivocally echoed in section 28(2) of the Constitution:

“The child’s best interests are of paramount importance in every matter involving the child.”

Our Constitution places a high priority on the rights of children. Section 7(2) of the Bill of Rights further places an obligation on the State (in this instance teachers) to respect, protect, promote and fulfil the rights in this Bill.

77 S 28(3) of the Constitution.
The Constitution thereby imports and gives contents to the Republic’s ratification and adoption of the principal international instruments protecting the interests of the child. Section 28(2), was inspired by international as well as regional instruments on the protection of children.

In particular the:

- United Nations Convention on the Rights of the Child;\(^79\) and the
- African Charter on the Rights and Welfare of the Child.\(^80\)

Both these instruments proclaim that the best interests of the child must be the primary consideration in all actions concerning the child.

### 7.4 THE RIGHTS OF THE APPLICANT

Similarly to the rights of an accused in the criminal justice system, an applicant in the ELRC has the right to a fair trial (hearing) and this includes amongst others, the right to be present during the arbitration, and the right to adduce and challenge evidence. These rights may entail an insistence on confrontation and cross-examination, although none of these rights are absolute.

In addition to the rights afforded to the applicant, section 28(1) of the Constitution relates specifically to the rights accorded to children, and provides amongst others, that every child has the right to be protected from maltreatment, neglect, abuse or degradation.

The concept of a fair hearing (trial) as per section 25(3) or hearing as per section 138(1) of the Labour Relations Act No. 66 of 1995 implies the fundamental elements of confrontation and cross-examination. Traditionally, and even before the introduction of the 1996 Constitution, the basic principle of the South African criminal


procedure, was for accusations to be made face-to-face. According to the South African Law Commission, 1989, the accused (applicant) is entitled “to demand that accusations against him be made face-to-face with him”. This very same principle is contained in Section 158 of the Criminal Procedure Act.\(^81\) Although these rights have been afforded to the accused in a criminal trial, in terms of statutory law, common law and the Constitution, the right is nevertheless not absolute. There are certain statutory provisions which specifically exclude confrontation, such as when the accused conducted himself in a manner which makes continuance of proceedings in his presence impracticable, or when evidence is given via closed-circuit television.

The Criminal Procedures Act,\(^82\) provides for the discretion of a presiding officer to allow for the appointment of an intermediary. On application, the presiding officer may allow for an intermediary, if of the view that the child will be exposed to undue mental stress or suffering, if required to testify in the presence of the accused (in case of an arbitration, the applicant).

Section 170A(1) of the Criminal Procedures Act, provides for the discretion of a presiding officer to allow for the appointment of an intermediary. On application, the presiding officer may allow for an intermediary, if he/she is of the view that the child will be exposed to undue mental stress or suffering, or if required to testify in the presence of the accused (in case of arbitrations, the applicant).

Section 170A(3)\(^83\) provides that if the court (arbitrator) appoints an intermediary, the court (also applicable to arbitrators) may allow the witness to give evidence in a room other than in the court room (where the arbitration is held).

\(^81\) S 158 of the Criminal Procedures Act 1977.
\(^82\) S 170A(1) of the Criminal Procedures Act.
\(^83\) Criminal Procedure Act.
7.5 USE OF INTERMEDIARIES - IS THE RIGHT OF THE APPLICANT (EDUCATOR) IMPEDED OR LIMITED IN SOME WAY WHEN THE RIGHTS OF THE CHILD ARE ADHERED TO?

Every applicant (educator) is entitled to cross-examine all witnesses who give evidence against him, and any refusal to allow such, would amount to an irregularity. Although the applicant has the right, as previously alluded to, the right is not absolute. The presiding officer retains the discretion to disallow questioning which is irrelevant, unduly repetitive, oppressive or otherwise improper.

The fact that the presiding officer decided to allow evidence to be given through an intermediary and or camera, does not in itself limit the right of the applicant to a fair hearing.

Insofar as an intermediary is concerned, proper training is essential in order to execute the mandate of the presiding officer, being to convey the general purport of any question to the relevant witness in a manner which is understandable to the child. Although the intermediary is mandated to remove all hostility and aggression from the question, the meaning must remain intact.

The applicant will have the right to object that his question was not asked, and may put it to the witness again in such instance. The intermediary may not change the meaning, nor may he comment on whether a child will be able to grasp a particular question or not. In effect, he is no more than an interpreter.

The function of the intermediary is therefore twofold: One, to protect the child against hostile cross-questions, and two, to assist the child in understanding the questions posed to him/her. The intermediary also does not have the authority to comment on a question. This implies that the representatives from both parties must also be properly trained in the manner in which to ask questions to a child witness.

Children by their very nature are more effective in their evidence, if they are allowed to convey their version in sequence from beginning to end. They become confused when questions jump from one occasion to another and back again. This can
obviously be one of the techniques employed by the cross-examiner, and in such instance the intermediary may not comment or intervene.

The intermediary, is not an expert witness, nor is he seen as representing the child in the process and therefore, may not insist that the child is given a break. The important role played by a properly trained intermediary is to serve as a filter between difficult questions and the child. When for instance, the question is too long or involved, the intermediary may ask that the question be put again as she herself does not understand what is required of the child.

The first criticism in relation to the use of intermediaries relates to the lack of proper training that is prescribed for intermediaries. Karen Muller explains in her book “Introducing the Child Witness”, that because of this lack of training, intermediaries have difficulty in performing the duties assigned to them. This concern was also raised during an interview with intermediaries.

It was therefore the view of Muller that a uniform qualification be introduced for intermediaries and that this becomes a pre-requisite for anyone who wants to act as an intermediary. It was further suggested that the list published in the Government Gazette be repealed as the qualifications presupposed in the list exclude anyone else who may also be competent to perform these duties.

Further it is suggested that the intermediary should be seen more as an expert than a mere interpreter. He, so it is submitted, should be given the power to offer an opinion as to whether a question can be understood by the child and also be allowed to represent the child’s interests so as to ensure that the child is given adequate breaks and is taken care of. However, this will only be effective, when the representatives and the presiding officers are all trained in how to conduct an interview with a child.

Currently there is confusion as to what exactly is expected of an intermediary. For one, is the intermediary allowed to meet the child before the actual hearing, since this may create the impression that the child has been prepared for the hearing. The problem however if that would not be the case, is what difference would it then make.
if the child in any event has to speak to a stranger? In this regard, Muller suggested that rules of practice be formulated to be followed by intermediaries.

In *Klink v Regional Court Magistrate*<sup>84</sup> the issue that had to be decided was whether cross-examine by means of an intermediary was inconsistent with the right to a fair trial because it violated the right of an accused person to challenge or cross-examine a child witness.

Muller and Hollely (*supra*) in reflecting on this judgement, refers to section 170A where the right to cross-examination was not excluded. In fact, so it was argued, section 170A(2)(a) expressly states that cross-examination must take place via an intermediary.<sup>85</sup> The emphasis in this application was in fact that the use of an intermediary unduly fettered the right to cross-examine through an intermediary since the intermediary has the power to convey the general purport of the question unless otherwise directed by the court.

The court in this instance accepted that cross-examination was a powerful tool which often played an important part in the decision of the presiding officer. However, the court emphasized that the object of cross-examination was two-fold, namely to elicit information, favourable to the party conducting the cross-examination, and also to cast doubt. The presiding officer is entitled to intervene to prevent bullying or intimidating cross-examination or when the question is calculated at confusing the witness. Therefore concluded, that, the right to a fair hearing would be dependent on the circumstances of each particular case.

The right which the applicant (educator) has to a fair hearing must be balanced with the protection of a child’s interests. Muller pointed out that, in examining the latter, the presiding officer should accept that research has shown that the prevalence of crimes against children has increased in recent years. Other factors that should also be taken into account are the fear of investigation and having to testify during these proceedings have also seriously impeded on the combating of these crimes. Child

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84 1996 3 BCLR 402.
85 Criminal Procedure Act.
witnesses experience significant difficulties in dealing with these proceedings especially with the confrontation and the cross-examination. In addition it has been shown that children find it especially difficult to deal with understanding the language of legal proceedings and the role of the personnel involved. As a result of all of the afore-mentioned, the child is exposed to secondary victimization, where he is expected to relate in graphic detail the abusive acts perpetrated upon him. All of the afore-mentioned, in the presence of the alleged transgressor, is often intensified by protracted and aggressive cross-examination.

The legislature is accordingly aimed at settling these imbalances and secondary victimization. In answering the question whether these provisions impede on a fair hearing of the applicant, the court highlighted the fact that these sections (amongst others section 170A) did not preclude an applicant from representing himself, or preventing him from asking cross-examination questions. In this regard, the court noted at 4111:

“This does not appear to me to be a limitation of the right to cross-examine. The intermediary acts, in a sense, as an interpreter: and interpreters are widely used in all of the trial courts in the country.”

The court accepted that not only the content of the question, but also the “intonations of voice and nuances of expression” were important in cross-examination. It was therefore possible, so the court reasoned, that the forcefulness and effect of cross-examination could be blunted when an intermediary was used, but this did not mean that the applicant would be denied the right to a fair hearing since the court (arbitrator) also had to take into account the interests of the child witness.

The court held

“... that the use of an intermediary did not affect the fundamental fairness of the judicial process, since the witness could be questioned on all aspects of his evidence while at the same time the intermediary could play a role in balancing the interests of the accused with those of the child witnesses by allowing the latter to be integrated into the criminal justice system without disturbing the fundamental fairness of the process.”

86  Klink v Regional Court Magistrate NO and Others 1996 3 BCLR 402.
87  Ibid.
It was argued that applicants (accused) would not be given a fair hearing, since the use of an intermediary unreasonably restricted the applicant's (accused) right to cross-examine. Since intermediaries are allowed to "filter" the questions, the planned line of cross-examination could be completely frustrated and derailed.

The court held that there were sound reasons why the intermediary was entitled to convey the general purport of the question to the child witness since it allowed the child to participate in the system. The danger of the child not understanding or appreciating the content of the question must be balanced with the right of the applicant in the interest of justice.

The use of intermediaries could assist the hearing (court) in its function to establish the truth without depriving the applicant (accused) of his right to cross-examine. In addition, so it was noted, the role of the intermediary is limited. A further control is the presence of the presiding officer who monitors the process and who can see whether the intermediary carries out this function properly without the applicant (accused) being prejudiced in any way.

Section 170A provides for the presiding officer to intervene and insist that the intermediary should convey the actual question and not just the general purport. Although the possibility of unfairness could not be eliminated fully, the court noted that it was the duty of the presiding officer to guard against it. Caution should nevertheless be exercised to ensure that the fundamental purpose of cross-examination is not frustrated.

The applicant must be afforded the opportunity to ask questions to any person who testifies against him. The final and controlling factor should always be the right to a fair trial.
7.6 MANDATORY SANCTION OF DISMISSAL IN EEA 76 OF 1998

SECTION 17 DISCIPLINARY HEARINGS: IS THE RIGHT OF THE EDUCATOR IMPEDED OR LIMITED IN SOME WAY WHEN THE RIGHTS OF THE CHILD ARE ADHERED TO?

There has been no specific challenge that has been recorded in our courts to the constitutionality of section 17(1) which prescribes that the educator must be dismissed if found guilty of any listed offence in the section. We believe that in applying the principles of best interest of the child and paramountcy the limitation on the educators’ right to fair labour practices is a reasonable one and distinguishes this from other hearings. The legislature has correctly, and in the public interest, confirmed that the mandatory sanction of dismissal is not harsh under the circumstances and must be applied.

7.7 CONCLUSION

The role of presiding officers, in balancing the right of an applicant (educator) to a fair hearing and the best interests of children in hearings of this nature, is of cardinal importance. Whether an applicant (educator) would be afforded a fair hearing, depends on the specific circumstances of each case and not specifically by allowing an intermediary during the process or testimony in camera.

It is plain that arbitrators have a responsibility to protect vulnerable witnesses, including children, from unnecessary stress and trauma. They can accommodate child witnesses in the arbitration without compromising judicial neutrality and without undermining the rights of the employee. Arbitrators should take an active management role in accommodating child witnesses to reduce trauma and increase the accuracy and completeness of their testimony and at the same time ensure that applicants (educators) are afforded an opportunity to cross-examine any person who testifies against him.

The State through the Department of Education acts not as an employer but as a custodian and defender of the rights and interest of the child as directed by

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88 Employment of Educators Act 76 of 1998.
international law and our Constitution and therefore any disciplinary hearing it conducts against an educator for alleged violations of the right of a child must be conducted in a manner that the child’s rights are not violated. These hearings must be conducted in a manner in which the child’s trauma in minimized and to this extent the mechanisms that are compelled in criminal hearings must be applicable to the disciplinary hearings i.e. the use of intermediaries, the use of special hearing rooms with facilities for the child to give in-camera evidence. Likewise SACE and the ELRC in conducting their hearings are equally obliged to offer the child the same rights and protections.

I can report that discussions are at an advanced stage for a single “pre-dismissal hearing” to be conducted the outcome of which discharges the obligations of the Department of Education, SACE and the ELRC and may be reviewable in the Labour Court. In terms of section 17, if the Educator is found guilty the presiding officer/arbitrator has no discretion other than to apply the sanction of dismissal. That decision will empower SACE to speedily deregister the educator.
CHAPTER 8

BALANCING THE EDUCATORS’ RIGHT TO “FAIR LABOUR PRACTICES” WITH THE CHILD’S RIGHT TO EDUCATION – DEEMED DISMISSALS BY OPERATION OF THE LAW – SECTION 14 OF THE EMPLOYMENT OF EDUCATORS ACT

8.1 INTRODUCTION

This chapter examines the educators’ right to “fair labour practices” with the child’s right to education – deemed dismissals by operation of the law – the provisions of section 14(1)(a) and 14(2) of the Employment of Educators Act\(^89\) which basically stipulate that an employee who is absent for more than 14 consecutive days without permission shall be deemed to have been discharged for misconduct. The discharged employee may apply for reinstatement, but he or she must show good cause why the employer should reinstate. This chapter analyzes the provisions of the section, the case law on the constitutionality of this limitation of the educators’ to fair labour practice in relation to the protection and advancement of the child’s right to basic education.

8.2 CONTEXT

Research studies in teaching in public schools in South Africa reveals that absenteeism amongst teachers was at a national average of 10% per day in 2005\(^90\) and in 2010 increased to 12% per day.\(^91\) Given the nature of teaching profession this equates to more than 40 000 teachers abandoning roughly about 10 classes per teacher with the average class of 35 pupils. This literally equates to approximately

\(^{89}\) 76 of 1998.
400 000 classes and 1, 4 million children without their duly appointed teachers to honour their constitutional right to education and their right not to be neglected.

8.3 LEGAL FRAMEWORK

The legislature deals with the issue of leave without authorisation in section 14 of the Employment Educators Act, is headed “Certain educators deemed to be discharged” and states:

“(1) An educator who is absent from work for a period exceeding 14 consecutive days without the permission of the employer;

(a) is absent from work for a period exceeding 14 consecutive days without the permission of the employer;

(b) while the educator is absent from work without permission of the employer, assumes employment in another position;

(c) while suspended from duty, resigns or without permission of the employer and assumes duty in another position; or

(d) while disciplinary steps taken against the educator have not yet been disposed of, resigns or without permission of the employer assumes employment in another position,

Shall unless the employer directs otherwise, be deemed to have been discharged from service, on account of misconduct, in circumstances where –

(i) paragraph (a) or (b) is applicable, with effect from the day following immediately after the last day on which the educator was present at work or,

(ii) paragraph (c) or (d) is applicable, with effect from the day on which the educator resigns or assumes employment in another position, as the case may be.

(2) If an educator who is deemed to have been discharged under paragraph (a) or (b) of subsection (1) at any time reports for duty, the employer may, on good cause shown and notwithstanding anything to the contrary contained in this Act, approve the re-instatement of the educator in the educator’s former post on such conditions relating to the period of the educator’s absence from duty or otherwise as the employer may determine.”

With regard to dismissal, the LRA in section 185 states that “every employee has the right not to be unfairly dismissed” and, in section 188, that “a dismissal is unfair if

92 S 185 of the Labour Relations Act.
the employer fails to prove that the reason for the dismissal is a fair reason and that the dismissal was effected in accordance with fair procedure. A guiding Code of Good Practice: Dismissal for Misconduct was also drafted to guide employers and anyone determining the fairness of a dismissal relating to misconduct.

In terms of section 191, the CCMA or a Bargaining Council accredited to perform the same dispute resolution functions as the CCMA has jurisdiction to arbitrate disputes about the fairness of dismissals for misconduct. In terms of section 141(1), if a party to a dispute would otherwise be entitled to refer the dispute to the Labour Court for adjudication, the party may refer the dispute for arbitration under the auspices of the CCMA or relevant Bargaining Council if the other party consents to the jurisdiction of these forums. However, the Labour Court has exclusive jurisdiction over certain disputes.

Tamara Cohen argued that the deemed dismissal provisions contained in section 17(5) of the Public Service Act and section 14(1)(a) of the Employment of Educators Act, not only flies in the face of the basic principles of natural justice and the ethos of the LRA, but also infringes the constitutional right to fair labour practices, unless such limitation can be shown to satisfy the constitutional limitation clause. She argued, further, that these statutory provisions are draconian and should be relied upon with caution and only where an employer has no other fairer alternative. According to Cohen the purpose of these statutory provisions is to enable public service employers to discharge deserting employees that cannot be located. She further argued that employees that can be located should be dealt with in terms of the employer's disciplinary codes and procedures and that only in the event of the

93 S 188 of the Labour Relations Act.
94 S 191 of the Labour Relations Act.
95 S 141(1).
97 Ibid.
98 Ibid.
disciplinary code having no application should resort be had to these “draconian” measures provided for. Her sentiments were however not shared by our Courts.\textsuperscript{99}

\section*{8.4 THE DEVELOPMENT OF THE CASE LAW AROUND SECTION 14(1)}

The Constitutional Court and the Supreme Court of Appeal has held that a dismissal of a public service employee [which would include educators] does not constitute administrative action and therefore, all dismissal disputes must be brought under the LRA and referred for adjudication to the relevant bodies created by the LRA, namely the CCMA, Bargaining Councils and/or the Labour Court. Moreover, an application to review a decision or administrative act taken by the state in its capacity as an employer and in respect of an employment issue must be brought under the LRA and in the Labour Court.

In dismissal disputes [ordinarily, or by consent, referred to the Bargaining Councils and the CCMA], the CCMA and Bargaining Councils will only have jurisdiction over the dispute if a dismissal took place. Section 186(1)(a) provides that dismissal means that the employer has terminated a contract of employment with or without notice. This provision has been interpreted to mean that a dismissal takes place when the contract of employment is terminated \textit{at the instance of the employer}. The Labour Court in \textit{SA Post Office v Mampeule}\textsuperscript{100} held that:

\begin{quote}
“Any act by the employer which results, directly or indirectly, in the termination of the employee’s contract of employment constitutes a dismissal within the meaning of section 186(1)(a).”\textsuperscript{101}
\end{quote}

In an early challenge to the provisions of section 14 in \textit{Yanta and Other v Minister of Education Kwazulu Natal and Another},\textsuperscript{102} the High Court confirmed that no act on the part of the employer is necessary to bring the contract of employment to an end, it comes to an end automatically after the 14 day period of absence without permission of the employer.

\textsuperscript{99} Ibid.
\textsuperscript{100} [2009] 8 BLLR 792 (LC).
\textsuperscript{101} Ibid.
\textsuperscript{102} 1992 3 SA 54 (NPD).
In *Minister van Onderwys en Kulture en Andere v Louw*, the Appellate Division confirmed the approach in *Yanta*, in that the coming into operation of the deeming provision is not dependent upon any decision, but merely a notification of a result which occurred by operation of law:

“There is no room for reliance on the *audi alteram partem* rule which in its classic formulation is applicable when administrative – and discretionary – discretion may detrimentally affect the rights, privileges or liberty of a person. Whereas in *casu*, the employee is informed in a letter of discharge that he has been discharged ..., it is not the consequence of a discretionary decision, but merely the notification of a result which occurred by operation of law.”

Louw confirms that the discharge comes into being by operation of law and not through administrative action that can be subjected to review. This case states further that if there is a dispute wherein the official claims that he had the necessary permission to be absent, and that is disputed, this is a factual dispute that can be subjected to adjudication by a court of law.

The Constitutional Court had occasion to consider the constitutionality of section 14(1)(a) of the Employment of Educators Act in the matter of *Phenithi v Minister of Education and Others*. After an ELRC panelist made a ruling that Ms Phenithi was discharged by operation of law in terms of section 14(1)(a) and that accordingly the ELRC lacks jurisdiction to determine a dismissal dispute, Ms Phenithi approached the Constitutional Court for a declaration that section 14(1)(a) is unconstitutional. The Constitutional Court however refused to consider the constitutionality of section 14(1)(a) and held that direct access to the Constitutional Court is only permissible in exceptional circumstances. The court dismissed the application and ruled that Phenithi must first approach the High Court for relief.

Phenithi then approached the High Court in Bloemfontein for relief, once again arguing that the provision was unconstitutional. The judgment of the High Court is

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103 1995 (4) SA 383 (AA).
104 2003 11 BCLR 1217 (CC).
reported as *Phenithi v Minister of Education*.\(^\text{105}\) The High Court held that as section 14 gives the employer discretion whether or not to hold a hearing, the statute does not blatantly ignore the right of the employee to be heard and neither does it flagrantly disregard the rights of the employee to fair labour practice and to justifiable administrative action. The Court emphasized that in determining whether the provision is unconstitutional, “it must be remembered that … competing considerations, namely that of the learner and that of the educator, must of necessity play an important role in the employer’s mind when exercising the discretion”. The High Court therefore held that the provision was not unconstitutional.

In *Phenithi v Minister of Education*, the Supreme Court of Appeal (SCA) finally had an opportunity to consider the section 14. Ms Phenithi’s complaint is captured as “I was not given an opportunity to state my case and the termination was apparently by operation of law without any hearing”. The High Court dismissed her application but she was given leave to appeal to the Supreme Court of Appeal.\(^\text{106}\) The Appeal Court was seized with two questions: The first being whether the discharge from duty constituted administrative action and, if so whether it was fair, and the second question being the constitutionality of section 14(1)(a) of the Employment of Educators Act. The court went through *Louw* and found that:

“The there was no suggestion that *Louw* was wrongly decided. There being no ‘decision’ or ‘administrative act’ capable of review and setting aside, the second part of the first prayer in *casu*, viz. ‘the decision to be declared an unfair labour practice’ falls away.”\(^\text{107}\)

The court quoted with approval the judgment in *Louw*, which with section 72 of the Education Affairs Act (House of Assembly) 70 of 1988:

“The deeming provision (of section 72(1)) comes into operation if a person in the position of the respondent (i) without the consent of the ‘Head of Education’ (ii) is absent from service for more than 30 consecutive days. Whether these requirements have been satisfied is objectively determinable. Should the person allege, for example, that he had the necessary consent and that allegation is disputed, the factual dispute is justiciable by a court of law. There is no question of review of an administrative decision. Indeed, the coming into operation of the deeming provision is not dependent

\(^{105}\) (2005) 26 ILJ (FS).

\(^{106}\) *Ibid.*

upon any decision. There is thus no room for reliance on the audi rule, which in its classic formulation, is applicable when an administrative – and discretionary – decision may detrimentally affect the rights, privileges or liberty of a person.108

The challenge of unconstitutionality in Phenithi109 was brought on two grounds: The first being that the provision violates the fundamental right to fair labour practice in terms of section 23(1) of the Constitution in that the provision allows the employer to act without considering the substantive and procedural aspects of the case before termination.

The second ground was that the provision violates the fundamental right to administrative action that is lawful, reasonable and procedurally fair in terms of section 33 of the Constitution. On the issue of the act materially and adversely affecting the educator’s rights, the court found that could not be questioned, but the fact that it does not compel the employer to give an educator a hearing before its provisions come into operation, does not necessarily make it unconstitutional.

The section does not totally exclude a hearing – the educator is not precluded from placing before the employer material facts that may make the employer “direct otherwise” – the court, however expressed uncertainty whether the “direct otherwise” is only before the expiry of the 14 day period, but however it was not asked to decide this issue. The court also pointed out that section 14(2) afforded the educator an opportunity to be heard and to be reinstated provided he/she is able to show good cause why the employer should reinstate him or her. The fact that there is provision for a hearing does not mean that the subsection is in conflict with the Constitution.

On the issue of whether section 14(1) is in conflict of section 188 of the LRA which states there must be must be a fair reason for the dismissal and it must be effected in terms of a fair procedure [basically a pre-dismissal hearing], the court accepted that the “unexcused, unexplained” absence for more than 14 consecutive days would constitute fair reason. Turning to the argument that the deeming provisions of section 14(1)(a) limit an educator’s right to procedurally fair labour practice, the court

108 Ibid.
109 Ibid.
accepted that this statutory provision is necessary in education because the consequences of an educator’s absence without leave are that:

- the learners are left without an educator;
- the department cannot appoint a substitute immediately;
- disruptions are caused by rearranging and reshuffling educators and learners;
- the Department is remunerating an educator while she/ he is not fulfilling his or her obligations;
- the Principal is in a dilemma as to what to do in the educator’s absence;
- having an educator in the classroom is an important aspect of giving substance to a child’s right to education; and
- education has the responsibility of balancing the rights of children with the competing rights of others, such as educators.

The court accepted the explanation of the Department of Education that since section 28(2) of the Constitution states that the child’s rights are of paramount importance, the intention of section 14 is to limit the potential harm the learners could suffer, whilst still allowing for a period of 14 days before the right of the educator is affected by operation of law. The court thereafter with regard to the above factors concluded that the limitation, if it be one, is not unreasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

8.5 CONCLUSION

The court accepted that having an educator in the classroom is an important aspect of giving substance to a child’s right to education and that education has the unique responsibility of balancing the rights of children with the competing rights of others,
such as educators. It pointed out that section 28(2) of the Constitution states that a child’s best interests are of paramount importance in every matter concerning the child and that the intention behind the section is to limit the potential harm that learners could suffer because of the absence of an educator without leave, while still allowing for a period of 14 days before the right of the educator is affected by operation of law. In the circumstances, the Court was of the view that the limitation, if it be one, on the educator’s right to fair labour practices by section 14(1)(a), is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as envisaged by section 36(1) of the Constitution. The court accordingly concluded that section 14(2) does not offend against the Constitution.
9.1 ILO PERSPECTIVE ON THE CLASSIFICATION OF ESSENTIAL SERVICES

Respect for freedom of association around the world is a fundamental and unavoidable requirement for the International Labour Organization because of its most essential structural characteristic, namely tripartism, and the important responsibilities based on the Constitution and ILO instruments that employers’ and workers’ organisations are called upon to exercise within the ILO itself as well as within the different member States.\(^\text{110}\)

As freedom of association is one of the principles safeguarding peace and social justice, it is entirely understandable, on the one hand, that the ILO has adopted a series of Conventions, Recommendations and resolutions which form the most important international source on this subject, and, on the other hand, that in addition to the general supervisory machinery, in particular the Committee of Experts on the Application of Conventions and Recommendations, a special procedure has been created for the effective protection of trade union rights; this special procedure was entrusted to the fact-finding and Conciliation Commission on Freedom of Association and the Committee on Freedom of Association.\(^\text{111}\)

The Committee on Freedom of Association has nevertheless given its opinion in a general manner on the essential or non-essential nature of a series of specific services. Thus, the Committee has considered to be essential services in the strict sense, where the right to strike may be subject to major restrictions or even prohibitions, to be: the hospital sector; electricity services; water supply services; the telephone service; air traffic control. The Committee on Freedom of Association


\(^{111}\) Ibid.
maintained that the possible long-term serious consequences for the national economy of a strike did not justify its prohibition (ILO, 1984b, 234th Report, para. 190).112

9.2 COMPENSATORY GUARANTEES FOR WORKERS DEPRIVED OF THE RIGHT TO STRIKE

When a country’s legislation deprives public servants (including educators) who exercise authority in the name of the State or workers in essential services of the right to strike, the Committee has stated that the workers who thus lose an essential means of defending their interests should be afforded appropriate guarantees to compensate for this restriction (ILO, 1996d, para. 546). In this connection, the Committee has stated that a prohibition to strike in such circumstances should be “accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented” (ibid., para. 547). It also states that a non essential service may become essential if a strike lasts beyond a certain time or extends beyond a certain scope, thus endangering the life, personal safety or health of the whole or part of the population. This is exactly the effect of strike in the education sector.113

The learners of our country are being made the cannon fodder of education disputes. We are aware that a situation may arise where educators will be placed in a position where government will abuse their powers and consequently be prejudiced. To avoid this from happening a system should be put in place where teachers are compensated accordingly and laws will have to be promulgated to prevent educators from being abused.

112 Ibid.
113 Gernigon, Odero, Guido 23.
9.3 ILO RULING ON EDUCATORS’ RIGHT TO STRIKE

It is against this backdrop that one has to critically debate the ruling of the ILO in terms of a blanket protection of rights of educators to the extent they endorse the fundamental right of educators to strike seemingly at the expense of the rights of a child to uninterrupted education.

On perusal of this ruling by the ILO, it is submitted, with respect, that the ILO had not taken cognisance of the competing and ever increasing call world-wide, for the rights and interest of children to triumph over any other right. (To the extent any other right is called into question – as in this topic, Rights of teachers to strike and rights of children to education.)

One cannot ignore that side by side this decision of the ILO on protecting the right and liberties of educators to strike, that there is a United Nations Charter/Covenant on the Rights of the Child, which has pronounced by way of a formal declaration, that the rights of children must be protected and seen as paramount. The ILO convention does not give consideration to this right when it was important to do so. After all the primary reason and existence of educators are there to cater for needs of children including the right to education.

9.4 CAN THERE BE A BALANCE BETWEEN THE COMPETING RIGHTS OF EDUCATORS TO STRIKE AND RIGHT OF LEARNERS TO EDUCATION?

It is a truism that Education forms the cornerstone for prosperity of any nation. The role of our children in pursuit of growth of a nation cannot be underplayed and best

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114 ILO: Governing Body Report of the Committee on Freedom of Association: Case No. 2405 2006 111-117, Education International (EI) obo The Canadian teachers Federation (CTF) and The British Columbia Teachers Federation v Government of Canada: The complainant organization alleged that the Government, in order to re-impose an arbitration decision that had been overturned by the British Columbia Supreme Court, has adopted unilaterally and without any consultation with social partners, retroactive legislation, that modifies or eliminates numerous provisions from freely negotiated collective agreements in the educator sector. These actions deprive teachers of lawful means to promote and defend their occupational interest, and undermine the right of the complainant organizations to act as bargaining agent for their members.
described using an age old cliché that “we cannot always shape the future for our youth but we can shape our youth for the future”.

As a nation, we find ourselves having to transform our country to compete with a rapidly improving socio-economic, technological world-order in as much as having to address the disparities created by the system of Bantustan education. These considerations in themselves, pose major challenges to our Government.

Given the treacherous past characterised by racial and social inequalities, it is not hard to understand why our supreme Constitution promotes and entrenches the rights of learners over other considerations.

Section 23(1) of the Constitution provides that everyone has the right to fair labour practices and section 23(2)(c) provides that every worker has the right to strike. The stark reality is, unfortunately, one confronted and characterized by major challenges, with particular reference to the Crisis in Education in our country, one of note being the anomalous situation of competing rights of the educator to strike and the learner to receive quality education based on the efficiency principle of the Constitution.

On the other hand, and as earlier alluded to, the South African workforce had its own share of spoils as a result of the apartheid legacy and in its own right needed major transformation in the form of rights and liberties which accrue to workers worldwide in keeping with international labour standards and conventions.

It is almost exclusively disputes of interests which call on the need to exert collective force in order to get an employer to accede to demands of employees. This notion is premised on a universally held belief that there is and always will exist, huge economic disparities between an employer and an employee and the only way an employee could size up (on an interest dispute) to the might of an employers economic clout and muscle, is by the use collective force in the form of withholding labour.

The problem at hand is that both, the rights of educators and the rights of learners are accorded due recognition in the Constitution. Those who are strong proponents
of ensuring that learners education are not compromised argue that, at best, the
rights of children must be seen as paramount, and, at worst, that no right is
unfettered and that the right to resort to industrial action must be subject of a section
36 scrutiny, and for that reason triumphs over the right of a teacher to engage in
industrial action.

Through development of constitutional jurisprudence, it is clear that the rights of
children are paramount and should be given such credence when considered against
other competing constitutional rights.

Consider the fact that although other provisions in the Bill of Rights advocate that
“everyone” is entitled to certain rights and liberties and to quote but one such
example, section 27 health care, food, water and social security, yet the Constitution
does NOT solely rely on the protection of children, who are most vulnerable and in
need of these basic amenities, by leaving the protection of children’s rights to this
section at the mercy of the use of the word “everyone”. The Constitution goes
beyond this and expressly caters for protection of children’s right in a section of its
own, viz. section 28 Rights of Children. To make this point, consider 28(1)(c) “... Basic nutrition, health care services ...” when and only if strictly interpreted, seems
superfluous in the face of section 27 precisely catering for these needs.115

The Constitution offers protection of children through various means and structures
starting from there being a positive duty and obligation on the State to protect the
rights and offer care for children.

In terms of the law, the High Court is considered the upper Guardian of all children.
This means that should the Courts determine (and have in many landmark cases)
that children’s well being were exposed to risk and danger, the court could order the
removal of children to places of safety. It can be safely concluded that such is the
premiums that the law places on the interest and well-being of children to the extent
that parents even play a subordinate role to the role of the courts / in law in this
instance.

115 Constitution.
At school, educators are deemed to be *in loco parentis*. Educators are bestowed with this legal obligation to ensure that they fit the shoes of parents whilst children remain in their care and more importantly like the state, as employees of the state have a positive duty to ensure the right of the child to basic education is not compromised.

The law provides for the creation and functioning of the South African Council of Educators\(^{116}\) to act as custodians over a profession, which caters for the provision of education to learners. It is a reasonable conclusion that SACE as a statutory body, when acting against any educator for having brought the profession into disrepute, is thereby acting first and foremost, in the best interest of children.

One argument is supported by the development of constitutional jurisprudence that all rights contained in the Bill of Rights are important but that no one right should be given more credence over any other. It would appear that Currie and De Waal support the view that there is no hierarchy of rights in our Constitution.\(^{117}\)

To the extent that the rights of teachers as employees are protected in terms of section 23, it becomes necessary to interpret this against provisions of section 28, read overall against the backdrop of the preamble of the Constitution; which embodies the spirit, purpose and objects of the Bill of Rights. Sections 28(1)(d) & (e) states that every child has the right to:

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(d) to be protected from maltreatment, neglect, abuse or degradation.; and
(e) to be protected from *exploitative labour practices.* (emphasis added)
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One interpretation of “protected from labour practices” could mean that children must not be subjected to exploitative labour practices, for example meaning to cover the employment of underage children to perform work and of employing children to conduct work that is undesirable and of underpaying them. If it is held that this was


the sole intention of the Constitution in this provision, then I chose not to pursue this argument any further and I end it here.

Section 28(e) must be read in its totality before this conclusion can be arrived at. It is interesting that section 28(f) “not required to perform work or services ... inappropriate” seems to expressly provide and deal with that issue. If I am correct with my interpretation then section 28(1)(e) must be said to be open to other forms of interpretation. I take the view that the use of “protected from exploitative labour practices” could be taken to mean that children should be protected against exploitative labour practices of others for example, whenever teachers embark on industrial action.

If this interpretation is correct then, it can be said that sections 23 and 28 must be read together and lend further support to the rights of children taking priority over other competing rights. Alternatively, section 28(1)(e) would lend support to the extent any limitation is placed on the right of teachers to embark on industrial action to the extent it is held that their actions in doing so, stands to violate the right of children to education.

9.5 CONCLUSION: POSSIBLE APPROACHES TO BALANCING THE RIGHT OF EDUCATORS TO STRIKE AND THE RIGHTS OF THE CHILD TO EDUCATION

The following questions arise from the need to balance the educator’s right to strike with the child’s need to education. Firstly, whether teaching should be declared an essential service secondly, whether an educator’s right to strike should be limited thirdly, whether schools teaching children with special educational needs should be declared an essential service, because of their special needs. Fourthly, whether a special statutory forum should be created in order to consider and resolve matters of mutual interest arising from the education sector.
Our courts have ably balanced the rights of the teacher against the rights of the child.

In April 2007 Deputy Chief Justice Moseneke gave a wide-ranging interview, in which he made the following candid remarks:

“...I’m surprised that we haven’t had one case on rights of access to education in this court in 13 years. If one were to come before this court I am sure the court would apply its mind and come up with a judgement that is consistent with the Constitution … Nobody has come to me and said, ‘My son is studying under a tree, there’s no chalk there, there’s no black board, the teachers don’t come to school every day’. Nobody’s come here to say that.”

The profoundity of these words lies in their bewilderment and their banality. They state the obvious and yet they speak to an urgent issue.

Currie and De Waal state that, important as they are, the children rights do not have a special status in the Bill of Rights. In *De Reuck v Director of Public Prosecutions* held that a child best interest is the single most important factor to be considered when balancing or weighing rights concerning children. All competing rights must defer to the rights of children unless unjustifiable. This holding was overruled by the Constitutional Court in *De Reuck v Director of Public Prosecutions*. To say that section 28(2) of the Constitution trumps other provisions of the Bill of Rights was alien to the approach adopted by this court that constitutional rights are mutually interrelated and interdependent and form a single constitutional value system.

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119 *Bill of Rights: Handbook* 600.

120 2003 (3) SA 389 (W).

121 2004 (1) SA 406 (CC).
Unless a court sees its way to a remedy, a declaratory relief it offers will be cold to comfort South Africa’s learners and their right to basic education.

The constitution in its quest to improve quality of all citizens, has made specific provision for the protection of the rights of children on the one hand and educators on the other. These rights are fundamental to the development of a society in transition. The vexed question that arises is whether the aforesaid rights can co-exist in a society that has inherited a legacy of unfairness, injustice and inequality. The consequences of this legacy have resulted in rights of educators competing with those of learners. The delicate balance that was sought to be achieved has been subsumed by the scramble to protect the individual and collective rights of educators.

Normalisation of the balance of these competing rights is the challenge that lies ahead. It is submitted that this process will require intervention of all stakeholders rather than legislative intervention or interventions. The consensus based approach may be the most appropriate solution as opposed to a declaration of a sector as an essential service.

Historical experience places doubt on the effectiveness of the declaration of an essential service. This becomes particularly relevant in the context of it being almost impossible to reach agreement on the minimum agreement. To date there is no minimum service agreement in respect of those services that has been declared essential in the public sector. Scant regard has been given to the prohibition to the right to strike in those services that have been declared essential in the public sector. Attendant on such this disregard has been the inability of the state as employer to take appropriate action against such prohibited industrial action.

The time may have come for a more structured and organised forum / institution to be established and its sole purpose would be to deal with those rights given individually or collectively that compete with the rights of learners.
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