

# Towards successful schooling: The role of courts and schools in protecting conflicting individual educator and learner rights

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## 1 Introduction

Conflict frequently arises between the individual rights of individuals. In resolving such conflicts, the relevant rights have to be balanced<sup>1</sup> in order to reach a just equilibrium (interpreted as parity).<sup>2</sup> At school level, different individuals have needs and interests that are not necessarily in harmony. This may lead to tension between individual rights. Such tension is overlaid in South Africa with its specific history of racial, ethnic, linguistic and religious conflict.<sup>3</sup>

Section 36 of the Constitution of the Republic of South Africa,<sup>4</sup> known as the limitation clause, is a rights-balancing mechanism that makes specific provision for the criteria to be considered when conflicting rights and interests are claimed. It is also, therefore, a mechanism for peaceful co-existence between individual claimants.<sup>5</sup> In this regard, the Constitutional Court in *SATAWU v Garvas*<sup>6</sup> emphasised the fact that a balancing process is needed when any limitation is placed on the rights of individuals, in order to ensure that such a limitation is reasonable and justifiable in an open and democratic society based on human

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<sup>1</sup>Sanders 'Collective rights' (1991) 13 *Human Rights Quarterly* 368 at 386.

<sup>2</sup>Van Dyke 'Collective entities and moral rights in liberal-democratic thought' (1982) 44(1) *Journal of Politics* 21 at 22.

<sup>3</sup>Sayed 'Democratising education in a decentralised system: South African policy and practice' (2002) 32(1) *Journal of Comparative and International Education* 35 at 43.

<sup>4</sup>1996 ('Constitution').

<sup>5</sup>Mokgoro (1998) 'Ubuntu and the law in South Africa' Paper delivered at the *First Colloquium Constitution and Law* held at Potchefstroom on 31 October 1997.

<sup>6</sup>2013 1 SA 83 (CC) paras 19, 22.

dignity, equality and freedom. Attention is drawn to the fact that exercising individual rights and freedoms does not extend to individuals who use their rights and freedoms in an unaccountable manner leading to the violation of others' rights. The Constitutional Court subsequently cautioned that if individual rights are used in such a way, the beneficiaries thereof will lose constitutional protection.<sup>7</sup>

When dealing with conflicting needs, and thus conflicting rights, the question that arises is how can they be dealt with in a way that creates a culture of respect for diversity and other people's rights and so guides the role-players' actions? Secondly, how can such conflict be resolved? In this regard, awareness is needed that some conflicts centre on the range and scope of rights and that assigning weight and significance to the ends and effects of protecting and promoting individual rights without diminishing other people's individual rights, is necessary. Childress *et al*<sup>8</sup> propose that, under such circumstances, it is best to balance the conflicting rights against one another.

At schools, conflict between individual rights can arise in multiple ways, such as a conflict between educators' rights to their profession<sup>9</sup> and learners' rights to a basic education,<sup>10</sup> when learners disturb classes and educators' right to teach; individual rights to religion<sup>11</sup> and schools' Codes of Conduct; or the rights of educators to maintain discipline<sup>12</sup> and learners' right to freedom and security of the person.<sup>13</sup>

Various studies exist which address the rights of educators and learners by placing emphasis on the learners' right to a basic education,<sup>14</sup> education in the language of choice,<sup>15</sup> and the best interests of the child.<sup>16</sup> However, only a few studies have addressed the rights of educators and how to pit them against those of learners. No literature could be found that addressed the role of both the courts

<sup>7</sup>*Id* para 45.

<sup>8</sup>Childress *et al* 'Public health ethics: Mapping the terrain' (2002) 30 *Journal of Law, Medicine & Ethics* 170 at 172.

<sup>9</sup>See (n 4) s 22.

<sup>10</sup>*Id* s 29(1).

<sup>11</sup>*Id* s 15.

<sup>12</sup>Joubert, De Waal and Rossouw 'Discipline: Impact on access to equal educational opportunities' (2004) 22(3) *Perspectives in Education* 77 at 81.

<sup>13</sup>See (n 4) s 12; O'Neil 'Corporal punishment in public schools: A call for legal reform' (2008) 8 *African Human Rights Law Journal* 60 at 68.

<sup>14</sup>Christie 'The complexity of human rights in global times: The case of the right to education in South Africa' (2010) 30(1) *International Journal of Educational Development* 3 at 6.

<sup>15</sup>Skutnabb-Kangas *Linguistic genocide in education – Or worldwide diversity and human rights?* (2013).

<sup>16</sup>Cummings, Mawdsley and De Waal 'The best interests of the child, parents' rights and educational decision-making: A comparative analysis of interpretation in the United States of America, South Africa and Australia' (2006) 11(2) *Australia and New Zealand Journal of Law and Education* 43 at 43.

and schools in defusing the tension that often arises between the rights of educators and learners. It is in view hereof that this article sets out in an exploratory manner to investigate the ability of courts and schools via recent case law and literature to protect individual rights while also curtailing the infringement thereon.

The aim of this article is to:

- reflect on the conflict between the rights of individual educators and learners;
- indicate the role of the law and courts to protect the individual rights of learners, school governing bodies and educators;
- signpost the role of schools to protect education role-players' individual rights;
- and propose recommendations as to how schools can protect individual rights towards successful schooling.
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The safety of learners and educators at schools has recently become a matter of national concern, as school-based violence is occurring more frequently. The incapacity of schools to administer discipline has aggravated school-based violence against learners and against educators who have been victimised or intimidated by their learners.<sup>17</sup> This situation has not changed much in the last seven years. Although it is acknowledged that such instances result, *inter alia*, in a deterioration of the teaching and learning environment, a sound solution has not yet been found. In this regard, the *Annual Report for 2012* of the Human Rights Commission indicates that it remains troubling that South Africa, a country with sufficient resources and one of the most progressive constitutions in the world, continues to fail to provide quality education.<sup>18</sup> Recent initiatives by provincial departments have been met with criticism, on the basis that the implementation of their proposed measures, such as metal detectors, as well as search and seizure procedures, has the potential to infringe learners' rights to dignity and privacy. They, furthermore, do not provide long-term solutions, as the source of the problem is not addressed. The contrary is also true, however, in that various constitutionally guaranteed individual rights are being infringed by the continuation of school-based violence or the tangible threat thereof.<sup>19</sup> It is in view hereof that this article aims to propose recommendations as to how courts and schools can protect individual rights in school settings.

In order to reach the aims set for this article, cognisance is taken of the fact

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<sup>17</sup>Human Rights Commission Terms of reference, rules and procedures: Public hearing on school-based violence. GN 1148 in GG 29154 of 2006-09-1.

<sup>18</sup>Human Rights Commission (2012) *Annual Report 2012* at iv.

<sup>19</sup>*Ibid.*

that, when research is done on the impact of the law and courts on, for example, the protection of individual rights in the sphere of education, the outcomes are conditional and depend on the interaction between the social conditions under investigation.<sup>20</sup> It is in view hereof that the focus is placed on the role of the law and courts as important catalysts of change, as well as on the role of schools to protect the individual rights of education role-players at South African schools. By doing so, the authors were able to assess the impact of courts and schools as it would be applicable to the contexts of social institutions in which individual rights need protection.

By including this contextual variable in the analysis, the authors were able to reflect on the reality that conflicts between individual rights do not occur in a void. It moreover assisted in understanding the workings of the law, courts and schools in practice. Cognisance was taken of the fact that legal rules are not merely considered as set in legislation, but rather evaluated for their effectiveness in achieving particular social goals.<sup>21</sup>

To avoid any misunderstanding, the most pertinent concepts are briefly explained.

## 2 Concept clarification

Most of the rights<sup>22</sup> guaranteed by the Constitution are for the benefit of every *individual* and may thus not be denied to any individual. Some rights, so-called collective rights, are restricted to a particular category of beneficiaries such as cultural rights (s 31) and the rights of detainees (s 35) in order to confine the scope thereof. This article uses the term *individual rights* to refer to the rights of which educators and learners are the individual beneficiaries. Concerning the horizontal and vertical application of the Bill of Rights, s 8(2) undoubtedly envisages situations in which horizontal relationships, that is, between individuals, call for direct application. On the other hand, vertical application refers to protecting individuals by placing obligations on the State not to infringe their rights.<sup>23</sup>

In terms of s 165 of the Constitution, the judicial authority is vested in the courts which are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. Section 166, moreover, makes it clear that courts include the Constitutional Court;

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<sup>20</sup>Smulovitz 'Law and court's impact on development and democratisation' in Cane and Kritzer (eds) *The Oxford handbook of empirical legal research* (2010) 747.

<sup>21</sup>Cownie *Legal academics: Culture and identities* (2004) 55.

<sup>22</sup>Those excluded are the political rights (s 19); citizen rights (s 20); freedom of movement rights (s 21); and the freedom to trade (s 22).

<sup>23</sup>Currie and De Waal *The Bill of Rights Handbook* (2013) 42-45.

Supreme Court of Appeal; High Courts; Magistrates' Courts; and any other court established or recognised in terms of an Act of Parliament. When referred to in this article, the concept *courts* includes the first three courts mentioned as they create precedents for the future.

In line with the democratisation of the education system, decentralising power from departmental to local, school level, the term *schools* is used to include principals, educators, parents<sup>24</sup> and learners equally. This is due to the fact that all education role-players need to take responsibility for successful teaching and learning.<sup>25</sup>

Cognisance is moreover taken of legislation such as the Schools Act,<sup>26</sup> the Employment of Educators Act<sup>27</sup> and the South African Council for Educators Act.<sup>28</sup> These Acts were promulgated to direct the complex relationships between education role-players, as well as the common law which safeguards the private domain of individual independence.<sup>29</sup>

### 3 Balancing conflicting individual rights

Legal rights, as put forward by Currie and De Waal,<sup>30</sup> present a correlative relation. If one person therefore has a right, others have the legal duty to uphold such a right. This boils down to the notion that every right must be exercised with due regard to the rights of others – a fact that, according to the Constitutional Court in *SATAWU v Garvas*,<sup>31</sup> can never be overemphasised. The interrelationship between the various individual rights and freedoms were regarded alongside by the said court as crucial to upholding democracy in South Africa.

It was further pointed out by Jafta J that fundamental rights must always be exercised with the consciousness of any foreseeable harm that may befall others as a consequence of exercising such rights. Individuals must therefore always

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<sup>24</sup>In this article the term 'parent /s' or 'parental' refers to the definition as it is stated in s 1 of the South African Schools Act 84 of 1996 ('Schools Act'):

'(a) biological or adoptive parent or legal guardian;  
(b) person legally entitled to custody; or  
(c) person who undertakes to fulfil obligations of the person referred to in (a) and (b) towards learner education at school, ...'

<sup>25</sup>See (n 24) at Preamble; Zuma State of the Nation Address: Joint Sitting of Parliament. Cape Town, 3 June 2009.

<sup>26</sup>See (n 24).

<sup>27</sup>76 of 1998.

<sup>28</sup>31 of 2000 ('SACE Act'), which also contains the Code of Professional Ethics ('Code of Ethics').

<sup>29</sup>Van Wyk *et al Rights and constitutionalism: The new South African legal order* (1994) 210, 452-453.

<sup>30</sup>See (n 23) 35.

<sup>31</sup>2013 1 SA 83 (CC) para 65.

reflect on and reconcile themselves with the risk of a violation of the rights of others.<sup>32</sup> Reference was moreover made to the fact that the enjoyment of fundamental rights may be limited only in a manner allowed by the Constitution as the Constitution itself recognises that none of these rights is absolute and provides the criteria for their limitation in s 36 thereof.<sup>33</sup> Section 36 provides for the rights in the Bill of Rights to be limited only in terms of the law of general application to the extent that the limitation itself is reasonable and justifiable. Implicit in this injunction is the fact that for a limitation to arise, it must be clear from the terms of the law that it limits a guaranteed right and to what extent this is so. It is only if such law, when properly construed, clearly restricts the exercise of a right in the Bill of Rights that it can be said to constitute a limitation of the right in question.<sup>34</sup> Before this kind of limitation can survive constitutional scrutiny, the courts must ensure that limitations satisfy all the requirements set out in s 36.

#### 4 The role of courts in protecting individual educator and learner rights

Courts will only interfere in school disputes when they are justiciable. This occurs, according to the High Court,<sup>35</sup> when the convictions of society demand that a dispute must be settled in a court of law. The Appeal Court<sup>36</sup> made it clear that a dispute is only justiciable when it presents an existing or live disagreement and is capable of being adequately settled by judicial determination rather than on other grounds. Courts must therefore avoid giving advisory opinions on abstract propositions of law, that is, when issues have become debatable or are of a purely academic nature.<sup>37</sup>

With regard to the justiciability of socio-economic rights, of which education is but one, Liebenberg<sup>38</sup> points out that the particular significance of the Bill of Rights is that it creates the possibility for everyday individuals to contest the exercise of public and private power that infringe human rights. In this manner the individuals who challenge these exercises of power would support the constitutional vision of social transformation. This is exactly what the High Court did in *Centre for Child Law v Minister of Basic Education*.<sup>39</sup> The case concerned the right of children to a basic education, which is enshrined, without qualification,

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<sup>32</sup>*Id* para 68.

<sup>33</sup>*Id* para 121.

<sup>34</sup>*Id* para 121.

<sup>35</sup>*Siyepu v Premier, Eastern Cape* 2013 2 SA 425 (ECB) para 54.

<sup>36</sup>*Qoboshiyane NO v Avusa Publishin Eastern Cape (Pty) Ltd* 2013 3 SA 315 (SCA) para 6.

<sup>37</sup>See (n 15) 25.

<sup>38</sup>Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 34.

<sup>39</sup>2013 3 SA 183 (ECG) para 1.

in s 29(1)(a) of the Constitution. Giving effect to this right was, according to the High Court, a crisis of enormous and disturbing proportions in the Eastern Cape Province. Based on the threat to learners' right to a basic education, the High Court accordingly rendered the dispute justiciable and therefore a dispute for the courts to settle. The right of learners to a basic education was also found to be violated and thus in need of protection by Kollapen J in the case *Section 27 v Minister of Education*.<sup>40</sup> It was declared that the responsible government departments' failure to timeously provide textbooks – an essential component of teaching and learning – to schools in Limpopo amounted to an infringement of the constitutional rights of learners to a basic education, to equality and human dignity. With regard to the departments' defence of *bona fides*, the High Court found that the conduct or omission on their side need not have been *mala fides* to constitute a violation of the right in question and that the steps taken by them to remedy the situation were not reasonable, given the urgency of the matter.

The Constitution itself clarifies this in s 38 which states that: '[w]hen an infringement of or threat to any right entrenched in this Chapter is alleged, any person shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights'.

#### 4.1 Courts and individual learner rights

To give effect to s 38, courts have, on various occasions protected the individual rights of learners. Recent cases include *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal*<sup>41</sup> in which the Constitutional Court found that the provincial education department's one-sided reduction of subsidies payable to independent schools infringed the right of learners to a basic education. It was emphasized that the right to education is an entitlement of learners whether they attend private or public schools.<sup>42</sup> Since the subsidies assisted the realisation of the right to a basic education – a right without internal limitations unlike other socio-economic rights – the relationship between the Department and independent schools was not merely one based on the contract concluded by them. The Constitutional Court found that missing the due date for paying a percentage of the independent schools' subsidy constituted 'a legal obligation unilaterally enforceable' on behalf of those who anticipated benefitting from the payment.<sup>43</sup> Emphasis was also placed on the negative obligation the State generally bears to respect existing learner rights to a basic education.

The right to a basic education was also distinguished from other socio-

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<sup>40</sup>2013 2 SA 40 (GNP) paras 25-26 32 & 39-40 at 46H-47B 48B-D & 49F-50B.

<sup>41</sup>2013 ZACC 10 para 45.

<sup>42</sup>*Id* para 47.

<sup>43</sup>*Id* para 48.

economic rights in the case *Governing Body of the Juma Masjid Primary School v Essay NO*<sup>44</sup> in so far as it was emphasised that this right must be understood as being an unqualified right. Its realisation is not, as in the case of the right to further education, subject to an internal limitation requiring that the right be progressively realised within available resources subject to reasonable legislative measures.

In the case *Centre for Child Law v Minister of Basic Education*,<sup>45</sup> the High Court referred to s 100 of the Constitution to indicate the possibility for the national government to intercede where a provincial administration has failed to meet its obligations. The failure of the Minister of Education to appoint non-teaching staff at Mary Waters High School and Cape Recife High School was, accordingly, regarded as an infringement of the rights of the learners attending these schools to a basic education. This was brought about by the fact that teaching staff members had to perform administrative tasks, thus deviating from their core responsibility, namely to teach learners; leading to the schools not functioning properly. The High Court, moreover, pointed out that such a failure could amount to an infringement of other fundamental rights, such as the rights to security (s 12), human dignity (s 10) and children's rights (s 28).

The paramount importance of protecting the rights belonging to children specifically (s 28) was also accentuated in *Shange v MEC for Education, KwaZulu-Natal*.<sup>46</sup> The learner, after reaching the age of majority, claimed for damages sustained at the age of 15. The educator used corporal punishment on another learner when the educator's belt struck him and injured his eye. The damage consequently occurred from an alleged assault upon him by the educator.<sup>47</sup>

The right of learners to equality (s 9) was protected in *In Re Heydenrich Testamentary Trust*<sup>48</sup> as the High Court found that the withholding of scholarships, bursaries or any other form of support from learners on grounds of gender and race constituted unfair discrimination. The Supreme Court of Appeal similarly found in *The Head, Department of Education, Free State Province v Welkom High School*<sup>49</sup> that denying a pregnant learner the right to attend school, amounted to unfair discrimination. The provision of inadequate State subsidies to special care facilities was also at issue in *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*.<sup>50</sup> It was found that this

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<sup>44</sup>2011 8 BCLR 761 (CC) para 37.

<sup>45</sup>2013 3 SA 183 (ECG) para 14.

<sup>46</sup>2012 2 SA 519 (KZD).

<sup>47</sup>*Id* para [1] & [7] paras 316B & 318C.

<sup>48</sup>2012 4 SA 103 (WCC).

<sup>49</sup>2012 6 SA 525 (SCA).

<sup>50</sup>2011 5 SA 87 (WCC) paras 26, 29 & 31-42, paras 100C-101A, 102G-103B and 103E-107C.



omission composed an unjust infringement of learners' rights to a basic education, equality, human dignity and protection from neglect and degradation. The infringement of the latter rights was brought about by the fact that these were learners with severe and profound intellectual disabilities that made them even more vulnerable than other learners. Fewer subsidies were allocated to centres housing these learners according to governmental policy and practice, which entailed failure to take reasonable measures to make provision for their educational needs.

Courts have also, thus far, been successful in addressing disputes in which the rights at school level were scrutinised.

## 4.2 Courts and schools

In the case of *Governing Body, Tafelberg School v Head, Western Cape Education Department*,<sup>51</sup> the High Court had to make a decision concerning the interference of the provincial Department of Education (DoE) with the obligation of the school governing body to maintain school discipline. The relationship between the two partners is outlined in the Schools Act: the position of the head of an education department is defined in s 1, and the position of the school governing body of a public school is contemplated in s 16(1), which falls within the area of the provincial DoE.

In terms of item 23(2)(b) of Schedule 6 to the Constitution, the High Court found that the interests and right to procedurally fair administrative action of the school governing body were infringed by the DoE. The governing body found a learner guilty of serious misconduct for the theft of a computer hard drive belonging to the school and made a recommendation to the provincial DoE that the learner be expelled from the school.<sup>52</sup> The latter, however, ordered the school governing body to re-admit the learner. When called to decide the matter, the High Court pointed out that a reasonable balance had to be maintained between the need to protect the individual from decisions unfairly arrived at by the public authority and the contrary desirability of avoiding undue judicial interference in their administration.

Since the decision by the provincial DoE had a materially adverse and direct effect on the school governing body's statutorily protected obligation to maintain proper discipline at their school – of fundamental importance to those in authority at schools<sup>53</sup> – and since the procedures followed by the Department had been unfair and inconsistent with the principles of natural justice, the decision of the

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<sup>51</sup>2000 1 SA 1209 (C) paras 1215G-1216B/C.

<sup>52</sup>See (n 24) ss 9(1) and 9(2); regulations promulgated under s 9(3) 31 October 1997 in PN 372/1997 (Western Cape).

<sup>53</sup>See (n 24) s 8.

Department was set aside.

Similar decisions were made in the cases *Governing Body, Rivonia Primary School v MEC for Education, Gauteng Province*<sup>54</sup> and *Queenstown Girls High v MEC, Department of Education, Eastern Cape*.<sup>55</sup> The Supreme Court of Appeal in the *Rivonia* case indicated that it is the right of school governing bodies to determine the admission policies for their respective schools in terms of sections 5(5) and 5(9) of the Schools Act.<sup>56</sup> Therefore, a provincial authority may not summarily override any decision made by it in this regard.<sup>57</sup> The High Court in the *Queenstown* case concurred that precipitous interference was inexcusable, adding that setting admission policies for schools is an administrative action that had to be protected from undue interference.

The same stance was taken by courts with regard to compiling other school policies. The school policy of Welkom High School that allowed pregnant learners to leave the school for a period of time was the main issue in the *Head, Department of Education, Free State v Welkom High School*.<sup>58</sup> The Supreme Court of Appeal indicated that a governing body's decision to adopt policies stood, and could produce legal consequences until set aside by a court of law. It was also held that the adoption of a Code of Conduct for a school (embracing its pregnancy policy) fell in the domain of the school governing body as part of their functions to govern public schools.<sup>59</sup> As a result, it was held that the head of the provincial DoE had no authority to instruct the school to allow a pregnant learner to attend school and that his conduct accordingly breached the principle of legality. The validity of the policy should rather have been placed in dispute.

Another example is the Constitutional Court's decision in *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo*.<sup>60</sup> It was once again held that the constitutional principle of legality was breached by the DoE in endeavouring to force the school in question to change their school's language policy.

All the case law referred to above protected the rights of school governing bodies (who also represent educators and learners and their individual rights) against infringement by the relevant provincial DoE. It was, however, necessary to protect the rights of school governing body members from parents in the matter of *Tshona v Principal, Victoria Girls High School*.<sup>61</sup> The parents of a learner

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<sup>54</sup>2013 1 SA 632 (SCA) paras 37 & 54 paras 640G-641C & 645H-646A; see (n 62) below for the Constitutional Court ruling on the *Rivonia*-case.

<sup>55</sup>2009 5 SA 183 (CK) para 17 para 191E.

<sup>56</sup>The Constitutional Court's judgment on the *Rivonia*-case is referred to below; see (n 62).

<sup>57</sup>As will be pointed out below, the Constitutional Court disagreed on the latter; see (n 68).

<sup>58</sup>2012 6 SA 525 (SCA) paras 12-14, 16 & 23 paras at 530-531A, 531F/G-532B, & 534G-535B..

<sup>59</sup>*Id* paras 21 & 22 paras 533G-534F.

<sup>60</sup>2010 2 SA 415 (CC) paras 89; 93-94; paras 445I-446A and 446H-447C.

<sup>61</sup>2007 5 SA 66 (E) para 73F-G.

expelled from the school's hostel insulted the integrity of the principal and by implication all school governing body members. Since expelling a learner from a school hostel did not include expulsion from the school, the High Court held that the learner's right to a basic education was never infringed by the school governing body members.

In the *Rivonia* case, the Constitutional Court granted the Gauteng DoE leave to appeal<sup>62</sup> against the judgment and order of the Supreme Court of Appeal, based on 'the interests of justice' and the appeal's 'reasonable prospects of success'. While pointing out the significance of school governing bodies being afforded the role of including a determination of capacity in their school's admission policy,<sup>63</sup> the Constitutional Court added that a *broader role* for school governing bodies concerning the implementation of admission policies and determining capacity was lacking.<sup>64</sup> Moreover, the effect of the essential textual qualifier in s 5(5) of the Schools Act<sup>65</sup> that subjects a school governing body's power to other Schools Act provisions and to appropriate provincial law points to the possibility of provincial government intervention if such intervention is provided for. Quoting from a previous relevant Constitutional Court case,<sup>66</sup> this Court also directed attention to the necessity of understanding the powers of school governing bodies 'within the broader constitutional scheme to make education progressively available and accessible'.<sup>67</sup>

In *Rivonia*, the Constitutional Court<sup>68</sup> pointed out that, while the direct role of provincial governments in the implementation of learners' admissions to schools is recognised in subsections 5(7) to 5(9) of the Schools Act,<sup>69</sup> the principal's responsibility to act under the authority of the Head of Department (HoD) concerning the implementation of the admission policy at school level follows from sections 16(3) and 16A(2)(a)(vi).<sup>70</sup> It thus followed that individual decisions at school level could only be taken *provisionally*, with s 5(9) of the Schools Act<sup>71</sup> providing what the Constitutional Court referred to as 'a safety valve' by allowing the provincial Member of the Executive Committee not only to contemplate admission refusals, but also to overturn admission decisions that were taken at

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<sup>62</sup> *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School* CCT 135/12 [2013] ZACC 34 para 32.

<sup>63</sup> *Id* para 40; see (n 24) s 5A(3).

<sup>64</sup> *Id* para 40..

<sup>65</sup> See (n 24).

<sup>66</sup> See (n 60) para 61.

<sup>67</sup> See (n 62) para 41.

<sup>68</sup> *Id* para 42-43.

<sup>69</sup> See (n 24).

<sup>70</sup> *Ibid*.

<sup>71</sup> See (n 24).

school level.<sup>72</sup> It was the Constitutional Court's ruling that the Supreme Court of Appeal had erred in concluding that the Schools Act allowed only the Rivonia Primary's school governing body to take school admission decisions and that the Gauteng HoD could not overrule their admission policy.<sup>73</sup>

### 4.3 Courts and the individual rights of educators

Courts have also interfered in giving effect to the individual rights of educators. Recently, the ground-breaking case of *Le Roux v Dey*<sup>74</sup> was heard in which the three learner applicants were granted leave to appeal against the judgments of a High Court and the Supreme Court of Appeal that found they had defamed the respondent, one of five vice-principals at the school, Dr Dey, and awarded damages to him. The learners' application for leave was worded in view of specific constitutionally enshrined fundamental rights and values, and questioned the determination of the liability of children for hurt feelings or for defamation. The applicants challenged the accuracy of the Supreme Court of Appeals' judgment of costs and R45 000 damages to the respondent, finding that the learners had wrongfully and deliberately published defamatory material relating to the respondent.<sup>75</sup>

In the learner applicants' argument during the High Court and Supreme Court of Appeal cases, it was submitted that, among others, their right to freedom of expression was specifically relevant. Two *amici curiae* submissions, the Freedom of Expression Institute (FEI) and the Restorative Justice Centre (RJC), were admitted to join the applicants in trying to highlight the constitutional dimensions of the case.<sup>76</sup> Using what the Constitutional Court appreciatively termed *thorough and useful arguments*, the FEI emphasised children's rights to freedom of expression, with specific reference to satirical expression; the RJC expanded on the significance of *engagement* as an instrument of resolving a dispute such as this.<sup>77</sup>

This dispute involved three male learners who were 15½-17 years old at the time. The youngest learner fashioned a computer image of their principal and one of their vice-principals, Dey, as two naked male bodybuilders in a sexually evocative position, by super-imposing their faces onto the originals. An audio-

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<sup>72</sup>See (n 62) para 44.

<sup>73</sup>*Id* para 57; see (n 54).

<sup>74</sup>2011 3 SA 274 (CC); see also Neethling and Potgieter 'Defamation of school teachers by learners' (2011) 32 *Obiter* 721 at 730 where the case discussion highlights confirmation that learners are neither exempt from slander actions by their educators nor unlimited when planning and executing jokes/pranks on their educators.

<sup>75</sup>*Id* para 11.

<sup>76</sup>*Id* para 28.

<sup>77</sup>*Id* para 29.

visual programme, South Park, which showed a boy's head electronically transposed onto a gay bodybuilder, inspired the learner's creativity and his intention was to create the image as 'an enjoyable spectacle'.<sup>78</sup> Typical of learners, two others abetted by spreading copies around.<sup>79</sup> It is to be noted that the first learner, Le Roux, sent the image by cell phone only to his closest friend, Gildenhuys, and pleaded unsuccessfully for it not to be forwarded or published. After coming clean about the transgressions, the learners were punished by (1) being barred from leadership positions; (2) not being allowed to wear honorary colours for the remainder of the year; and (3) having to submit to five successive Fridays' detention of three hours each.<sup>80</sup> As an example of protecting an individual educators' right and at the request of Dr Dey,<sup>81</sup> who had become the symbol of authority and discipline at school,<sup>82</sup> the three were charged criminally and these charges were resolved by their having to follow a diversion programme under the Criminal Procedure Act 51 of 1977, which comprised community service by cleaning zoo cages.<sup>83</sup>

Citing *S v Mamabolo*,<sup>84</sup> the Constitutional Court accredited the standing of the right to freedom of expression as 'no less important [here] than ... in the [US]'.<sup>85</sup> Remembering children's best interests specifically, the Appeal Court used an objective test to consider whether a sensible viewer would evaluate the intended joke by learners as belittling their vice-principal, Dey.<sup>86</sup> The court aimed at establishing meaning by holding the sensible viewer as a legal construct of an individual.<sup>87</sup>

Supporting the notion of protecting individual educator rights, in a statement on behalf of the educator Dey, a principal of a renowned high school testified that school discipline is not only a forerunner of learners showing respect to their educators, but is also vital for the effective functioning of any school. In addition, 'there [was] a growing tendency... to challenge the status and authority of teachers' concomitant with an associated 'breakdown' of school discipline.<sup>88</sup> Answering the question whether the message the picture sent would most likely undercut the regard with which others held Dey,<sup>89</sup> the Constitutional Court found

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<sup>78</sup> *Id* para 13.

<sup>79</sup> *Id* para 12-15.

<sup>80</sup> *Id* para 18.

<sup>81</sup> Of note is that the principal did not form part of the criminal charges against the learners.

<sup>82</sup> *Id* para 99.

<sup>83</sup> *Id* para 19.

<sup>84</sup> *S v Mamabolo (E TV and others intervening)* 2001 3 SA 409 (CC) para 37.

<sup>85</sup> *Id* para 47.

<sup>86</sup> *Id* para 89-106.

<sup>87</sup> *Id* para 90.

<sup>88</sup> *Id* para 128.

<sup>89</sup> *Id* para 106-107.

the average person as indeed regarding the picture as derogatory of Dey. The judgment indicates that the drive behind 'the association created by the picture' was to smear and reduce Dey's image of authority and discipline by demeaning and subjecting him to mockery in the learners' eyes'.<sup>90</sup>

Having testified on Dey's behalf during the Supreme Court of Appeal trial, part of the FEI's evidence was cited by the Constitutional Court, specifying that the picture undermined dominant 'figures of authority' at school by turning the morals that they embodied 'rudely ... on their heads'.<sup>91</sup> A schoolgirl witness for the applicants concluded that although the picture could be seen to be a youngster's hoax, the effect was shameful and belittling and she would not like her parents to be depicted thus.<sup>92</sup>

Aiming to protect individual educator rights, the Constitutional Court argued that a sensible viewer would agree that educators are regularly 'the butt of [learners'] jokes'. While these jokes should not be taken too seriously,<sup>93</sup> 'there is a line that may not be crossed': to the same degree that educators are permitted security of their self-esteem and standing, they are also permitted the safeguarding of their physical integrity.<sup>94</sup> Despite the fact that the line in the instance of defamation may not be clear, it is still there and it is traversed when jokes are cutting. It ultimately came down to a value judgment.<sup>95</sup> The boys 'knew... they were messing with Dr Dey's image and carried on regardless of the consequences'.<sup>96</sup> It is noteworthy that the three learners did not, given their various levels of intellectual and emotional development and any concomitant ability to tell right from wrong, seek to have this possible mitigating factor weighed against their accountability for their actions.<sup>97</sup> Furthermore, the trial court's judgment indicated that, according to the boys' own evidence, they (1) knew what they were doing was wrongful; (2) admitted that they would not have used the faces of their pastor or parents, for example, in the same manner; and (3) one of them wanted to stop the wider publishing of the picture.<sup>98</sup>

In support of protecting individual educator rights, the Constitutional Court confirmed the computer image was derogatory towards the plaintiff and held the three learners accountable in the following manner: R25 000 compensation payable to Dey; an unconditional apology to Dey; and payment of Dey's High

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<sup>90</sup> *Id* para 107.

<sup>91</sup> *Id* para 108.

<sup>92</sup> *Id* para 116.

<sup>93</sup> *Id* para 117-118.

<sup>94</sup> *Id* para 118.

<sup>95</sup> *Id* para 119.

<sup>96</sup> *Id* para 133.

<sup>97</sup> *Id* para 134.

<sup>98</sup> *Id* para 135.

Court costs. In *Jacobs v Chairman, Governing Body, Rhodes High School*,<sup>99</sup> a case concerning the safety of educators at the hands of learners, the High Court pointed out the principal's duty to ensure the safety and security of educators.<sup>100</sup> During school hours, the educator was beaten by a male learner with a hammer in the classroom and in the presence of other learners. The educator received medical treatment for injuries sustained to her head (three blows to the head), a fractured bone from her wrist to her elbow, two fractured bones in her wrist (in trying to defend herself) and a swollen knee. As a result, she had to spend three days in hospital.<sup>101</sup>

The unfortunate attack left the once energetic, committed and ambitious educator emotionally and psychologically wounded to such an extent that she could no longer continue her teaching career.<sup>102</sup> From the evidence presented to the court it was evident that the incident was a grave setback to the efforts of the school 'to heal the divisions of the past and improve the quality of life of the learners'.<sup>103</sup> The High Court moreover found that the attack infringed upon the educator's fundamental right to human dignity (s 10), life (s 11) as well as on her right to freedom and security of the person (s 12).<sup>104</sup>

The High Court, conversely, also had to take the circumstances that led to the attack into consideration. The said educator had noticed a death certificate pertaining to herself, fabricated by the learner, in his journal. The learner, under protest, was subsequently taken by another educator to the principal who wrested the journal from the learner. After viewing the content thereof, the principal made the learner sit outside his office while the secretary called both the police and the learner's mother. The learner, however, disobeyed his instruction and went back to class where he assaulted the educator. The question that came to the fore pertaining to the conduct of the principal was whether the principal's omission led to his not attending to his duty to act reasonably under such circumstances.

In finding answers to this question, the court scrutinised policy considerations as they play an important role in determining the legal convictions of the community.<sup>105</sup> It was stated that, since the beginning of the constitutional democracy in South Africa, the legal convictions of the community must be determined as reflected in the Constitution, policy documents of the DoE and the

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<sup>99</sup>2011 1 SA 160 (WCC).

<sup>100</sup>*Id* para 21-23; see also Neethling and Potgieter 'Deliktuele aanspreeklikheid in skoolverband' (2011) 44(1) *De Jure* 161 at 168 where in a case discussion of this judgment the authors point out that educators who act *in loco parentis* at school need to be measured according to a *reasonable educator* and not a *reasonable parent test*.

<sup>101</sup>*Id* para 7.

<sup>102</sup>*Id* paras 4 and 89.

<sup>103</sup>*Id* para 1.

<sup>104</sup>*Id* para 19

<sup>105</sup>*Id* para 15.

Codes of Conduct of schools of which all were found to provide for the safety and security of educators and learners alike.<sup>106</sup> The court, importantly, pointed out that public authorities and public functionaries have a positive constitutional duty to act in such a manner as to protect the constitutional rights embedded in the Constitution. This is due to the fact that government and State actors must be accountable for their conduct.

With reference to the accountability of principals towards protecting individual educators' rights at their schools, the *Jacobs* case turned to other court precedents. One of these precedents was that of *Carmichele v Minister of Safety and Security*,<sup>107</sup> and the *Jacobs* court stated that it had to ascertain whether the principal had a legal duty to safeguard his educators. This was done by examining (1) relevant constitutional and statutory provisions that indicate protecting individual educator rights; (2) policy documents of the DoE and policy issues which impact on such a legal duty towards protecting individual educator rights; (3) the accountability of the defendants as State functionaries exercising public power concerning the protection of individual rights; (4) the special relationship that existed between the various role-players in protecting individual rights; and (5) the reasonableness or otherwise of imposing liability on the school principal concerning protecting individual educators' rights.<sup>108</sup>

It was found that the principal, as functionary of the State that has obligations regarding the protection of individual rights, was primarily responsible and accountable for the implementation of the constitutional rights of educators at his school. This principal thus had a legal duty to ensure that his educators could do their work while being free from all forms of violence. The court furthermore noted that the relationship between the educator and the principal (as well as the DoE – s 60 of the Schools Act) was special and suitably close to give rise to a legal duty on the part of the principal to act positively to ensure the safety of the educator. It therefore was a factor to be considered in determining the reasonableness or otherwise of an omission to prevent violence from happening to an educator. The principal *in casu* took control and accepted responsibility for the learner and saw the death threats made to the educator. He nevertheless did not take reasonable steps to protect the educator and was subsequently found to have breached his legal duty in a negligent manner. Finding for the educator, the High Court awarded her the amount of R1 114 685.53, costs and ancillary relief.<sup>109</sup>

Having been granted leave for appeal based on the fact that the principal contested being accountable for the educator's individual rights, the principal went

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<sup>106</sup>*Id* para 22.

<sup>107</sup>*Centre for Applied Legal Studies Intervening* 2001 4 SA 938 (CC).

<sup>108</sup>*Id* paras 23-24.

<sup>109</sup>See (n 99) paras 103-105.



to court two years later and *Long and the Member of the Executive Committee for Education, Western Cape versus Jacobs*<sup>110</sup> was heard in the Supreme Court of Appeal. Primarily four issues needed to be determined:<sup>111</sup>

- Did the trial court err in finding that, among others, the principal owed the educator the legal duty of '[acting] positively to ensure [her] safety and security'?
- Did the trial court err in finding that the principal's conduct on the day of the learner's attack was negligent and therefore causally linked to the educator's harm?
- In the event that the Appeal Court would find the appellants delictually liable to the respondent, did the trial court err in determining all parties' own degrees of fault after having found the respondent contributory negligent?
- Did the trial court err and misdirect itself when gauging the quantum of the respondent's damages in such a way that it warranted Appeal Court interference?
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While denying negligent conduct in any alleged respect of individual educator rights, especially, the principal and others expanded their evidence in an effort to prove fault partly on the side of the educator respondent by indicating, among others, the educator's (1) general failure to exercise reasonable care when managing the educator-learner relationship with the learner who had attacked her, thus placing her own individual right to protection at risk; (2) ignorance in not recognising that she had to pay better attention to the learner and his journal with respect to her individual right to protection; (3) failure immediately to notify anyone in authority, including the principal and the South African Police Service, about the contents of the learner's journal; and (4) not exercising reasonable care in handling the matter in the first place, showing a disregard of her own and others' individual rights.<sup>112</sup>

In considering the appellants' legal duty (which includes the principal's duty) to act positively towards individual educator rights, and acknowledging that appellants are charged 'to ensure that a safe learning and teaching environment prevailed' at the school, the Appeal Court pointed out that it 'did not necessarily give rise to a legal duty to act for purposes of delictual liability'. However, the present matter convinced the Appeal Court that social norms required the imposition of liability for negligence concerning the individual educator's rights.

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<sup>110</sup>(145/11) [2012] ZASCA para 58.

<sup>111</sup>*Id* para 5.

<sup>112</sup>*Id* para 7.

The appeal was dismissed with costs and the Appeal Court based its finding chiefly on two counts. The relevance of the first finding concerning the protection of individual educator rights lies in that the principal had the obligation towards the educator to take 'the elementary precaution of keeping [the learner safely] where he could see him' until police got there – which he clearly did not take.

With reference to the role of courts in protecting educator and learner rights, an unexpected warning was sounded by the Appeal Court about how the trial court conducted their hearing. The concern was based on two aspects that are relevant to this article: (1) the trial took too long in that cross-examination of the respondent took nine days and immaterial evidence was allowed; and (2) the principal was charged to divulge evidence that ought to have been kept private.<sup>113</sup>

The discussion now turns to the role of schools to protect the individual rights of education role-players at South African schools.

## 5 The role of schools in protecting individual educator and learner rights

Education rights are in essence rights to positive action, as they can only be guaranteed positively by collective action, by people assuming the charge of supporting education.<sup>114</sup> It is for this reason that all education role-players should work closely together with the State in protecting these rights. To the same degree that government is perceived as failing society, so too civil society fails the State when it does not embrace the skills and channels that are available to making accountability matter.<sup>115</sup> Thus, when wrong things happen, society will mostly bear the blame for not having knowledgeable, involved, attentive and responsive citizens.

Courts alone cannot solve problems at the practical level. To find sound solutions for schools, the unique education problems South African schools specifically encounter, need to be addressed at local school level.<sup>116</sup> Since the law addresses multifaceted, rather than discrete, problems and attempts not to explain the individual components of, for example, an education phenomenon, but to develop a holistic understanding of their overall complexity, problems pertaining to the tension between individual rights often need to be resolved at school

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<sup>113</sup>*Id* para 40.

<sup>114</sup>See (n 23) 636.

<sup>115</sup>De Villiers 'Making accountability matter as a member of society' (2012) *The Institute for Accountability in Southern Africa* available at: [http://www.ifaisa.org/Making\\_accountability\\_matter.html](http://www.ifaisa.org/Making_accountability_matter.html) (accessed 2013-06-06).

<sup>116</sup>De Wet and Wolhuter 'A transitiological study of some South African educational issues' (2009) 29(3) *SAJE* 359 at 364-365.

level.<sup>117</sup>

In this regard, the Constitutional Court in *SATAWU v Garvas*<sup>118</sup> indicated the meaningful contribution that could be made by ordinary people to realising the constitutional objective of advancing fundamental, individual rights and freedoms. In school environments this, according to Mokonyane,<sup>119</sup> entails a *collective* accountability that learners, educators and parent communities have towards safeguarding excellence in teaching and learning. The Constitution, under the section on founding values, specifies accountability as being safeguarded by a multi-party system of democratic governance;<sup>120</sup> accountability is implied where fulfilling constitutional obligations is imposed;<sup>121</sup> and being subject to accountability<sup>122</sup> is set out as equivalent to being entitled to fundamental rights as features of citizenship.<sup>123</sup> Yet, the correspondence between rights and accountabilities is often discounted, often resulting in blowing up the former and snubbing the latter.

The Ministry of Education<sup>124</sup> identified the single most important determinant for the success of schools as a collective accountability between learners, parents, educators and managers taking precedence. In education, accountability would imply establishing responsibility 'according to Codes of Conduct and ... [by] meeting ... formal expectations' so that learners too can support education and accept responsibility for their behaviour towards successful schooling. A challenge in education, pointed out before,<sup>125</sup> is that of educators always being attentive to relevant legal parameters when making decisions<sup>126</sup> and/or disciplining learners.<sup>127</sup> This remains an ongoing challenge and is reminiscent of the Constitution's protection of human rights<sup>128</sup> and its stipulation that no one is above the law.<sup>129</sup>

Arguably, the most prominent role of schools in protecting individual educator

<sup>117</sup>Chynoweth 'Practice-informed research: An alternative paradigm for scholastic enquiry in the built environment' (2013) 31(5) *Property Management* 435 at 438.

<sup>118</sup>2013 1 SA 83 (CC) para 61.

<sup>119</sup>Address delivered to announce 2012 Gauteng Province Matric Results 3 January 2013.

<sup>120</sup>See (n 4) s 1(d).

<sup>121</sup>*Id* s 2.

<sup>122</sup>*Id* s 3(2)(b).

<sup>123</sup>*Id* s 3(2)(a).

<sup>124</sup>Department of Education *Manifesto on values, education and democracy* (2001) 17-18.

<sup>125</sup>De Waal 'Legal accountability for public school discipline – Fact or fiction?' (2011) 31(2) *SAJE* 175 at 176.

<sup>126</sup>Thomas, Cambron-McCabe and McCarthy *Public school law – Teachers and students' rights* 6<sup>th</sup> ed (2009) xiii, 224-225.

<sup>127</sup>Yell and Rozalski 'The impact of legislation and litigation on discipline and student behaviour in the classroom' (2008) 52(3) *Preventing school failure* 7 at 10.

<sup>128</sup>See (n 4) s1(a).

<sup>129</sup>*Id* s1(c).

and learner rights would be that of making both parties accept their personal accountability,<sup>130</sup> in this case, concerning successful schooling through teaching and learning specifically. In several instances, learners' individual rights go hand-in-hand with those of their parents. While being aware of the authority of the Schools Act and other education-relevant Acts as being secondary to that of the Constitution,<sup>131</sup> this article focuses on two of these Acts to indicate the role of schools in protecting individual educator and learner rights.

First of all, the Schools Act and subordinate guidelines, policies and regulations where applicable are discussed. These official documents are perceived as 'the functionary arms of the legal octopus, the Schools Act' since they are generally acknowledged, hypothetically speaking, as being convenient forms of control and having comprehensive influence.<sup>132</sup> Secondly, the SACE Act and its Code for Professional Ethics<sup>133</sup> are discussed as various aspects of accountability are addressed.

### 5.1 *The Schools Act and policy, guideline and regulation indicators*

The Preamble<sup>134</sup> calls not only for upholding the rights of all educators, learners and parents, but also encourages their recognition of their relevant accountability in partnership with the State. While accountability for the compulsory school attendance of learners is allocated to parents with penalties indicated,<sup>135</sup> in this regard the accountability of learners of compulsory school-going age is implied<sup>136</sup> and learner accountability is supported by holding 'any other person' than a parent – thus also a learner – accountable if he/she prevents compulsory school-going aged learners from attending school.<sup>137</sup>

Under the heading *Admission to public schools*, parent and learner accountability are found in s 5(9) which gives both parties leave to appeal against a decision to refuse learner admission to a public school. Learner and parental accountability concerning teaching and learning are confirmed in s 8: emphasizing the purpose of a school's Code of Conduct as creating a focused and disciplined setting that is committed to refining and sustaining the quality of the learning process,<sup>138</sup> the accountability of learners, educators and parents are

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<sup>130</sup>See (n 125) 176.

<sup>131</sup>*Ibid.*

<sup>132</sup>*Ibid.*

<sup>133</sup>South African Council for Educators Act 31 of 2000. See also (n 28).

<sup>134</sup>See (n 24).

<sup>135</sup>*Id* ss 3(1) & 6(a).

<sup>136</sup>*Id* s 3(1).

<sup>137</sup>*Id* s 6(b).

<sup>138</sup>*Id* s 8(2).

addressed in s 8(1) which indicates the necessity of all three parties taking part in the school governing bodies consultation process while developing such a learner code, aimed at successful schooling.

At a different and more responsible level, s 8(4) reminds learners and parents that the Schools Act does not contain any section or sub-section that would pardon learners from observing their school's Code of Conduct. Moreover, the accountability of the school and its school governing body is indicated in the sub-sections that point out the requisite of not only including provisions concerning due process to safeguard the interests of all parties who form part of disciplinary proceedings, but also providing support processes aimed at counselling learners taking part in such proceedings.<sup>139</sup> Additionally, a section calls on parents to accompany learners to disciplinary proceedings,<sup>140</sup> clearly aimed at successful schooling.

While sections 8A(1)-(3) and 8A(8) of the Schools Act call on learners to behave accountably, at the same time the sections imply parental accountability concerning their children's behaviour. These sections warn learners not to bring unauthorised dangerous objects or drugs to school and not to use illegal drugs. The penalties would include being subjected to fair and reasonable suspicion group searches of their persons and/or property; and being subjected to random group urine or non-invasive tests. Parents are therefore indirectly implored to take charge of the children in their care.<sup>141</sup>

The accountability of schools in this regard is, among others, firstly pointed out in the National Policy on Drug Abuse by Learners in Public and Independent Schools and Further Education and Training Institutions.<sup>142</sup> A point of interest here is that this Policy on Drug Abuse was developed primarily to aid not only learners who abuse drugs, but also the bigger portion of the learner-school staff population who are, while not taking part in drugs actively,<sup>143</sup> subjected to other learners' illegal drug practices.<sup>144</sup> In the second instance, the accountability of schools is also pointed out in the Devices to be used and Procedures to be followed for Drug Testing.<sup>145</sup> Strangely enough, item 1 of Annexure A refers to upholding learners' interests concerning their *right to education*, instead of referring correctly to their constitutional *right to a basic education* as stipulated in

<sup>139</sup> *Id* ss 8(5)(a) & 8(5)(b).

<sup>140</sup> *Id* s 8(6).

<sup>141</sup> For comparative purposes, see Potgieter 'Preliminary thoughts on whether vicarious liability should be extended to the parent-child relationship' (2011) 32(1) *Obiter* 189 at 200 where the author indicates an increasing tendency to view parents as having to get 'more actively involved in controlling and taking responsibility' for their children's behaviour 'in and outside' the school setting.

<sup>142</sup> GN 3427 in GG 24172 of 2002-12-13 ('Policy on Drug Abuse').

<sup>143</sup> *Id* item 11.1.

<sup>144</sup> *Id* item 6.

<sup>145</sup> GN 1140 in GG 31417 of 2008-09-19 ('Devices for Drug-testing').

s 29(1)(a) of the Constitution.<sup>146</sup>

The purpose of the Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners<sup>147</sup> is to guide schools in order to produce consensus in learner Codes of Conduct that include consulting educators, learners and parents.<sup>148</sup> School governing bodies are directed towards aiming for a 'disciplined ... purposeful ... order[ed]' school setting in their school's Code of Conduct.<sup>149</sup> Moreover, such a code must not only 'inform ... learners of the way in which to conduct themselves', but such a code must also endorse the school's public accountabilities and must advance leadership.<sup>150</sup> A successful Code of Conduct should lay down a standard of moral behaviour that aspires to guide learners' future behaviour in civic society where they need to become commendable, accountable citizens who have accomplished 'self-discipline and exemplary behaviour'.<sup>151</sup> With the Code of Conduct Guidelines indicating learners' learning by experience and observation, it is implied that educators especially need to set truthful examples of conduct accountable for the sake of successful schooling.<sup>152</sup>

In the first place, references to learner accountability occur in a number of occasions<sup>153</sup> and the occasions vary from equipping themselves to manifest as 'worthy and responsible citizens', to being dedicated to 'self-development ... education and learning' while developing their academic-sport-cultural potential.<sup>154</sup> Secondly, learner accountability is implied as Codes of Conduct must identify the roles of learners in advancing 'a proper learning environment' by being in class and not unsettling their educators and/or other learners.<sup>155</sup> Implied accountability is additionally found in the list of wrongdoings that can result in suspension,<sup>156</sup> as the list can be regarded as signposting expected positive learner behaviour<sup>157</sup> in that it takes account of not showing behaviour that impinges on others' rights, invasive conduct, debauched conduct, insolence and/or verbal abuse.<sup>158</sup>

Finally, the ideal situation, according to the Guidelines for Codes, is to achieve an educator-learner relationship that is founded not only on 'reciprocal

<sup>146</sup>See (n 125) 179.

<sup>147</sup>GN 776 in GG 18900 of 1998-05-15 ('Code of Conduct Guidelines').

<sup>148</sup>*Id* item 1.5.

<sup>149</sup>*Id* items 1.1, 1.2, 1.4, 1.6, 7.1.

<sup>150</sup>*Id* item 1.4; see (n 125) 180.

<sup>151</sup>See (n 147) items 1.4, 1.6 & 1.9.

<sup>152</sup>*Id* item 1.6.

<sup>153</sup>*Id* items 1.4, 1.6, 2.2, 4.7.4, 5.1(b), 5.2, 5.3, 5.4 & 5.5; see (n 125) 180.

<sup>154</sup>See (n 125) 180.

<sup>155</sup>See (n 147) items 1.10 & 4.7.5.

<sup>156</sup>*Id* item 11.

<sup>157</sup>See (n 125) 180.

<sup>158</sup>See (n 147) items 11(a), (e) & (j).

respect and trust',<sup>159</sup> but also on both partners' appreciating the weighty roles of collaboration and intervention.<sup>160</sup> Such a relationship would point to the prospect of 'a contact link being established between educators and learners so that disagreements could be settled amicably'.<sup>161</sup> As pointed out before, learners and educators are then held partly accountable for settling disputes.<sup>162</sup>

## 5.2 *The South African Council for Educators Act*

In the Code of Professional Ethics,<sup>163</sup> under the sub-heading *General*,<sup>164</sup> educator accountability towards determining the quality of education in South Africa is noted as being mirrored by educators' attitude, commitment, self-control, principles, training and behaviour. Furthermore, upholding and advancing fundamental rights,<sup>165</sup> fulfilling their professional obligations by acting accountably<sup>166</sup> and acting in such a manner that their conduct causes no dishonour to the teaching profession<sup>167</sup> are also mentioned.

In the second place, educator accountability is addressed under the sub-heading *Conduct – the educator and the learner*.<sup>168</sup> Educators who conduct themselves in an ethically correct manner are, among others, described as (1) respecting the views, dignity and fundamental rights of learners; (2) taking 'reasonable steps' to safeguard learners' safety; and (3) not being negligent or lethargic when conducting professional duties. Thirdly, educator accountability is reflected in the sub-heading *Conduct – the educator and the parent* where accountability for promoting pleasant relationships with parents is indicated.<sup>169</sup> In the fourth place, the sub-heading *Conduct – the educator and the community* points to educators conducting themselves so as not to show contempt for the community's norms, customs and values. Fifthly, under the sub-heading *Conduct – the educator and his or her colleagues*, to safeguard the smooth running of schools, educator accountability includes not damaging colleagues' authority and standing<sup>170</sup> and respecting the different responsibilities allocated to colleagues.<sup>171</sup>

Under the sub-heading *Conduct – the educator and the learner*, item 3.3

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<sup>159</sup>*Id* item 5.6.

<sup>160</sup>*Id* item 4.4.1.

<sup>161</sup>*Id* items 5.8 & 9; see (n 110) para 180.

<sup>162</sup>See (n 125) 180.

<sup>163</sup>See (n 28).

<sup>164</sup>*Id* item 2.2.

<sup>165</sup>*Id* item 2.3.

<sup>166</sup>*Id* item 2.4.

<sup>167</sup>*Id* item 2.5.

<sup>168</sup>*Id* item 3.1.

<sup>169</sup>*Id* item 4.1.

<sup>170</sup>*Id* item 6.1.

<sup>171</sup>*Id* item 6.2.

implies learners being held accountable for progressively cultivating a set of values 'consistent with the fundamental rights contained in the Constitution'. Backing learner participation that characterizes accountability, item 3.14 directs educators to be aware of a partnership with learners in education in appropriate instances.

## 6 Conclusion and recommendations

It is quite clear from the various sections above that, to fulfil their role in protecting individual rights towards successful schooling, schools need to conduct their business according to the regulatory legislation and subordinate indicators. Courts, on the other hand, will interfere once disputes become justiciable and will then protect individual rights by way of a weighing process. It has become evident that a court will not hesitate to protect the rights of learners, schools and educators alike when their rights are infringed.

Albeit finding that courts and schools can indeed resolve conflicts and protect individual rights in ways that prevent the vindication of one individual right without diminishing the individual rights of others, the correlative relations between individual rights were highlighted. The duty of the bearers of rights to uphold the rights of others was accentuated by pointing out that every right must be exercised with due regard for the rights of others. This entails that individuals must always exercise their rights with the realisation of any foreseeable harm that may befall others as a consequence of exercising their rights.

In this regard, the importance of schools creating a culture of respect for diversity and others' rights and educating learners to be accountable for their actions was highlighted in the various sections above. Following these efforts, the final aim of the article was to propose recommendations as to how schools can protect individual rights with a view to successful schooling and, therefore, the following recommendations are put forward:

- Schools must conduct their business according to the regulatory legislation and subordinate indicators – an example would be the disputes that arise annually on the subject of school admission and school refusals. Such disputes could point to principals and their school governing bodies not heeding the vital importance of abiding by the set out guidelines which aim to protect learners' rights to a basic education.
- School governing bodies and their principals need to heed the judgments and orders of the courts – courts could support successful schooling by getting it right the first time when policy matters are not yet clearly defined, especially regarding the broader roles of role-players concerning implementing policies and determining capacity in order to protect individual rights.



- *Educators and learners must join forces and accept their collective accountability towards teaching and learning* – individual rights must be protected by all the bearers of rights and through concomitant duties by way of cooperative action.
- *The school society must become actively involved in promoting the assiduous exercise of individual rights* – education rights can only be assured positively through collective action of society working towards promoting education, especially concerning the right to a basic education.
- *School governing bodies must develop learner Codes of Conduct meticulously to lay down a standard of moral behaviour that guides learners' behaviour in civil society* – such codes must be adhered to strictly, not only to establish harmony among all education role-players, but also, and even more importantly, in order for learners to become accountable citizens who exhibit 'self-discipline and exemplary behaviour'.
- *Principals and their educators must lead by accountable example* – as role models, they must fulfil their tasks diligently and acknowledge learners as partners where relevant. In this way individual educator and learner rights will be protected more visibly.
- *Representative Councils of Learners (RCLs) must be supported in accepting partial accountability for learner conduct at their schools* – being democratically elected to leadership positions at school level, these learner councils need to lead by example in working towards protecting individual educator and learner rights. If such RCLs do not shape up, the councils ought to be disbanded and/or suspended.
- *Learners must own up to being accountable for their own education* – among others, successful schooling depends on learners not unsettling schools, educators and other learners. A line must be drawn in order to protect not only individual learner rights, but also individual educator rights.
- *Educators and learners must aim to resolve disagreements together* – the educator-learner relationship needs to be built on mutual trust and respect. In this way both education partners could appreciate their weighty roles of collaboration and intervention as they aim at protecting each other's individual rights in search of successful schooling.

As soon as educators and learners start sharing the power to create successful schooling, especially by protecting each other's rights, courts will not be overburdened unnecessarily, but will be used optimally. Since one cannot unring a bell, schools, educators and learners must heed the warnings sounded by the court cases mentioned and discussed and guard against opening themselves up to the creation of Catch-22 situations.