

## Legal accountability for public school discipline — fact or fiction?

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*Educators, learners and parents/caregivers should be held accountable for instilling learner discipline through clear guidelines and limitations to achieve security at public schools. Two previously identified education challenges are sustaining well-disciplined education systems and ensuring that educators are attentive to legal parameters in making decisions and dealing with discipline. This article adds a third challenge: convincing educators, learners and parents/caregivers of their accountability concerning creating/maintaining safe learning environments. Five subordinate legislation documents relevant to legal accountability are scrutinized, as well as relevant case law. The article follows a documentary comparative perspective using a secondary analysis method: appraising legal guidelines and asking questions to draw conclusions and make pragmatic action-oriented suggestions.*

*Education is the most powerful weapon which you can use to change the world*  
Nelson Mandela

### Introduction

Based on section 24 of the Constitution of the Republic of South Africa, 1996 (1996; hereafter Constitution) pointing out the fundamental right to *an environment... not harmful to (one's) ... well-being*, learners must be educated under safe conditions. Several authors take it one step further, pointing out that orderly and dedicated teaching conditions are indispensable facets of successful schools (Vaughan, 1975:1; Rossouw, 2003: 415; Steyn *et al.*, 2003:xi; Oosthuizen, 2004:2; Yell & Rozalski, 2008:7). This is reminiscent of Dlamini's proclamation (in De Waal, 2007:229) that teaching involves the right to *run* schools, fuelling the controversy that surrounds managing learner discipline as a factor that influences security at public schools (De Waal, 2007:229).

The author's own experience at public schools in the Sedibeng-West D8 area has elicited strongly worded arguments from educators who talk about what the law says one can/cannot do, and others who commend the application of discipline, but both suppressing the instilling thereof in maintaining school discipline.

Discipline is instilled by providing clear guidelines and limitations through consistent behaviour and performance. This is leadership from the lowest level upwards (Mitchell, pers. comm., 2010). Yet the vital question remains: How does one exert leadership when no one appears to be held accountable for the outcomes?

When discipline is instilled, it develops a sense of personal responsibility that leads to inculcating a sense of order in learners' daily lives. Once learners have taken personal responsibility, they seek to ensure that other learners do likewise: instilled discipline thus works contagiously towards a law-abiding citizenry (Mitchell, pers. comm., 2010). However, the weakness at South African public schools is that the level of learner discipline that is *seen* to be instilled is unacceptably low. Moreover, it appears as if the majority of the people of South

Africa — including the learners — are fooled by a so-called *leaders'* display of apparent power as they see it reported in the newspapers/ on television and experience it in their townships, making them unaware of educators being leaders in themselves since they act as role models on behalf of parents/caregivers and society in general.

### Three identified education challenges

Firstly, Yell and Rozalski (2008:7) have identified the most significant education challenge as *sustaining* secure, organized and well-disciplined education environments that are favourable for learners to become well-educated. Education partners therefore need to draw up efficient disciplinary systems, balancing the requisites of sustaining an organized, secure school by thwarting problematic learner behaviour (Yell & Rozalski, 2008:7) and protecting learners' right to a basic education (1996:sec. 29(1)(a)).

A second challenge is the aspect of educators being attentive to the legal parameters when they need to make decisions (Thomas, Cambron-McCabe & McCarthy, 2009:xiii) or discipline a learner (Yell & Rozalski, 2008:7).

The third challenge identified by this article is informing public school educators/school authorities, learners and their parents/caregivers of the extent to which they could be held accountable for maintaining safe learning environments. This requires parental/care-giver involvement pointed out decades ago by Glasser (1975:45).

The ultimate challenge therefore lies in making the education partners accept their personal accountability concerning creating/maintaining safe schools.

### Problem statement, objectives and concept clarification

The point of any law is to reflect society as it wants to be viewed. Currently South Africa has a compilation of things people believe they deserve, not what they need (Mitchell, pers. comm., 2010).

This statement raises concern: Are the various public school education-related regulations just cleverly worded documents or are the education partners familiar with the contents?

Three Ministers of Education have proclaimed a variety of guidelines, regulations and policies aimed at putting practical support strategies in place especially at public school level. Such documentation may well imply a heightened success rate at managing school discipline and safety in theory, but the questions arise to what extent:

- public school learners can be held accountable to adapt their behaviour within the parameters set down by school authorities;
- public school educators and authorities can be held accountable to create parameters wide enough to accommodate learners' need to grow; and
- parents/caregivers can be held accountable concerning the behaviour of the young people in their care.

Recognising the authority of the Schools Act (84/1996) and the National Education Policy Act (27/1996; hereafter Policy Act) as second-most to that of the Constitution (1996), the focus remains on relevant subordinate legislation: guidelines, regulations and policies.

In this regard, these documents are considered the functionary arms of the legal octopus, the Schools Act (84/1996), in that they offer direction to, notably, public schools, and are accepted as having potentially far-reaching influence and manageable forms of control.

## Objectives

The aims of this article are

- to explore five subordinate legislation documents, assessing to what extent school education partners could be held legally accountable for maintaining safe learning environments; and
- to examine relevant case law, determining precedents laid down concerning school authorities/learners' accountability towards maintaining safe learning environments.

## Concept clarification

### *Discipline*

Discipline implies the existence of productive, remedial, rights-based educative practices, while *punishment* is seen as retaliatory, disparaging and unproductive practices (DoE, 2000:9). Within the school milieu the word *discipline* comprises education, paced learning, leadership and organization (Mabeba & Prinsloo, 2003:32). Moreover, parents/caregivers need to be held accountable for the discipline at home and for learners' taking part in school activities (RSA, 1998:item 6.1, 6.1(a) & 5.5).

In this paper, *discipline* refers to rights-based practices that aim at safe public school education.

### *Instill*

Public school level discipline should not merely be *applied*: it should be instilled. According to the dictionary (Onions, 2001:1018), *instill* points to introducing something little by little or *infuse[ing] [something] gradually*.

### *Accountability*

The Constitution (1996) juxtaposes accountability with *responsiveness* and *openness* as three values that need to be guaranteed by the multi-party system of the South African democracy. Moreover, Davel (2000:426) mentions *encouraging... child[ren] to be accountable for the harm caused by [them] and public administration* — including public schooling as an organ of state (1996:sec.1995(2)(b)) — is obliged to be accountable (1996:sec.195(1)(f)).

As part of the Values in Education Initiative, the Ministry of Education published its Manifesto on Values, Education and Democracy (DoE, 2001), describing accountability as making responsibility an established custom *according to Codes of Conduct and... formal expectations* (DoE, 2001:17).

In this paper, *accountability* refers to the extent to which each education partner is held responsible for specific aspects of maintaining safe learning environments, conducive to successful teaching and learning.

## Conceptual framework

The conceptual framework of this study is based on the premise of Coloroso (in Sadker & Zittleman, 2010:388) that making *internal discipline* the focal point of managing classrooms would support learners in acknowledging accountability for their actions.

The article follows a documentary design, as supported by Green and Browne (2005:38), since the author used accessible documentary resources as her data and had an investigative attitude while cross-examining the selected texts (Rapley, 2007:111). Moreover, the focus was

not only on *what is written and how a particular concept is expanded, but also on what is implied and/or not written* (Rapley, 2007:111).

At the same time the article follows a comparative perspective in that, as pointed out by McMillan (2008:189), such a perspective allows the researcher to acquire insight and evaluate the investigated information by comparing and weighing data.

Such a documentary comparative study was undertaken by conducting what McMillan and Schumacher (2006:44) refer to as a policy analysis, using a *secondary analysis method*: appraising existing legal guidelines and asking diverse questions in order to draw conclusions and make pragmatic action-oriented suggestions available.

### **Exploring subordinate legislation ré accountability or the lack thereof**

This section focuses on the relevant sections in the five identified subordinate legislation documents in order to address the challenge of making educators, learners and parents/caregivers aware of their personal accountability concerning creating/maintaining safe and orderly schools.

#### **National Policy on the Management of Drug Abuse by Learners in Public and Independent Schools and Further Education and Training Institutions (RSA, 2002a; hereafter Policy on Drug Abuse)**

The core driving force behind the Policy on Drug Abuse is aiding both the learners who abuse drugs and the best part of the learner-school staff population who are not actively involved in drugs (RSA, 2008:item 11.1), but who could be influenced by others' drug practices (RSA, 2002a:item 6).

The constitutional warning sounded by the phrase *not to be discriminated against unfairly* (1996:sec.9(2)-(4)) resounds in the section stipulating that no fundamental right could keep a learner, guilty of unlawful conduct, immune from disciplinary action (2002a:item 10) and in the section indicating the option of following the required legislated disciplinary procedure — considering the possibility of suspension and/or expulsion — in cases where a learner refuses assistance or where guilt of drug trafficking has been established (RSA, 2002a:item 31).

The policy intends aiding those in need of it (RSA, 2002a:item 6), calling for a *structured intervention* to include the learner/parents/caregivers, with the aim of reaching agreement. This is described as *a controlled crisis where ... user[s are] confronted with the desperate reality of [their] situation and offered treatment*. This is echoed in Devices for Drug-testing (RSA, 2008:item 10.3) which calls for learners' realizing the consequences of their illegal drug use. Moreover, the ultimate aim of the Policy on Drug Abuse is not for education institutions to take punitive action as a first step (RSA, 2002a:item 8; echoed in the Schools Act, 84/1996:sec.8A (14) and in Devices for Drug-testing, 2008:item 10.4) or to denounce such learners (RSA, 2002a:item 9), but to devise understandable policies that emphasize *a restorative supportive orientation* (RSA, 2002a:item 12 & 15).

The latter calls for informing the education partners clearly in a *culturally appropriate and inclusive* manner (RSA, 2002a:item 15) while building secure and compassionate school environments that recognize the significance of human dignity and observe *innocence* (RSA, 2002a:item 15(a)). The latter causes concern if it implies all inclusive blamelessness/incorruptibility, given that the policy was apparently devised as applicable to anyone receiving education, regardless of age and level of maturity. Perhaps rather using the term *inexperience*

would increase the credibility of the applicability of the policy.

Sadly, no explanation is offered for the phrase *culturally appropriate and inclusive*, leaving it up to the discretion of each school/education institution. The difficulty in defining the phrase is pointed out by Du Preez and Roux (2010:13) as trying to establish an attitude that is neither universally nor narrowly defined.

While the policy has as its backbone the objective of thwarting drug activities, dealing with drug incidents and taking care of those who have fallen prey to drugs, section 19 stipulates drug-testing as *an invasion of privacy* that could violate learners' constitutional rights and is therefore *not ... the [preferred] ... intervention*.

Fortunately a previous article (De Waal, 2007) made an appeal for random drug-testing and it is gratifying to witness that the following document which came into effect in 2008, sets out the drug-testing devices and procedures that have been identified to counteract illegal use of drugs especially at school level.

### Devices to be Used and Procedures to be Followed for Drug Testing (RSA, 2008; hereafter Devices for Drug-testing)

Section 1 of Annexure A of the document recognizes the supremacy of the Constitution in that it describes conducting random search and seizure, described in Annexure B (RSA, 2008:item 1) as aimed at discovering drug abuse and supporting drug-dependent learners, and drug-testing as *obviously infringing* on specifically the affected person's right to human dignity (1996:sec.10), right to privacy (1996:sec.14) and right to property (1996:sec.25). Putting these disciplinary measures into practice therefore calls for the appropriate consideration of, among others, the above-mentioned fundamental rights.

Yet section 1 (RSA, 2008:Annexure A) also reminds everyone of the Schools Act being *a law of general application*, as it is relevant to all schools and it upholds learners' interests concerning their right to education, noticeably not their constitutional right to a basic education (1996:sec.29(1)(a)), in a drug-free and dangerous object-free setting. The previous Minister of Education identified and published the Devices for Drug-testing with the guiding principle of search and seizure being founded on *common sense*, carried out and contained by the educator-learner's *in loco parentis* boundaries (RSA, 2008:Annexure B, item 1).

Although section 19 of the Policy on Drug Abuse (RSA, 2002a) rules out conducting random drug-testing, the Schools Act (84/1996) was amended (Education Laws Amendment Act 31 of 2007) to qualify the term *random* as permissible if it could be linked to ascertaining *reasonable suspicion* of, among others, illicit drugs (RSA, 2002a:item 8A(2) & (8)).

Moreover, random searches appear to be limited to *groups of learners*, group referring to more than one learner, and not individuals (RSA, 2008: Appendix B:item 2.1.2 & 6.4), although the phrase *never concentrate on individuals* could be interpreted to imply that individual random testing would be allowed as long as the *focus* is not on that category of learner. In the case of secondary testing, however, the guiding principle for conducting search and seizure on an individual is that of a precise connection between unlawful actions and the individual (RSA, 2008:item 13.3.1).

### Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners (RSA, 1998; hereafter Guidelines for Codes)

Aimed at creating *a consensus document* that needs to involve everyone, from the parents/care-

givers to the non-teaching staff members at public schools (RSA, 1998:item 1.5), School Governing Bodies are advised to have the aspects of a *disciplined ... purposeful ... order[ed] ... safe* school setting (RSA, 1998:item 1.1, 1.2, 1.4, 1.6, 4.6, 7.1) foremost in their minds as they endorse schools' *civic responsibilities* of increasing leadership (RSA, 1998:item 1.4). A successful Code of Conduct should lay down a *standard of moral behaviour* that aspires to guide learners' *future conduct and safety in civil society* where they need to become *worthy... responsible citizens* who have attained *self-discipline and exemplary* behaviour (RSA, 1998: item 1.4, 1.6 & 1.9).

Learner responsibility, from preparing to become accountable citizens to being dedicated to *self-development... education and learning* while extending their academic-sport-cultural possibilities, is mentioned in several instances (RSA, 1998:item 1.4, 1.6, 2.2, 4.7.4, 5.1(b), 5.1(f), 5.2, 5.3, 5.4 & 5.5).

Implied learner responsibilities are mentioned in the sense that the Code of Conduct needs to indicate the role, even of learners in developing a *proper learning environment*, by looking after school property and being present in classes without bothering educators or fellow learners (RSA, 1998:item 1.10, 4.6, 4.7.5). In the last instance, implied responsibility is spotted in the section that offers a list of transgressions that could lead to suspension, indicating expected positive learner behaviour.

The Guidelines for Codes proposes an educator-learner relationship that is based on *mutual trust and respect* (RSA, 1998:item 5.6), that is built on both parties understanding the significant roles of intervention and collaboration (RSA, 1998:item 4.4.1) and that indicates the possibility of a contact link being established between educators and learners so that disagreements could be settled amicably (RSA, 1998:item 5.8 & 9). In this case, educators and learners are held partially accountable for resolving disputes.

A clear warning is sounded that *learners ... are not in charge of schools*; they are depicted as collaborators in creating learning sites that are favourable for successful teaching and learning (RSA, 1998:item 7.4). To this effect, specific references are made to developing learner self-discipline (RSA, 1998:item 1.6 & 7.1), placing the responsibility on learners to be available in this regard also.

Educator accountability comes specifically into play where it is pointed out that educators need to be dedicated and committed to education and acknowledge their co-accountability with the other education partners (RSA, 1998:item 2.2). Moreover, educators need to pay due attention to treating their learners fairly while at the same time understanding the significance of intervention and co-operation at school level (RSA, 1998:item 4.4.1). Educator accountability is also addressed in the discipline section (RSA, 1998:item 7), describing the required fairness of all procedures (RSA, 1998:item 7.3, 7.4, 7.5 & 7.6). Managing gang activities is mentioned two sections later, merely indicating that schools need systems that focus on conciliation (RSA, 1998:item 9). This indicates that gang activity is not yet rife at schools or sound guidelines are unavailable.

Implied educator accountability can be found in the references that range from setting a commendable example at public schools and upholding a *high standard of professional ethics*, since learners *learn by observation and experience*, to assisting learners in developing their individual potential by also taking care of them during all school-related events (RSA, 1998: item 1.1, 1.4, 1.6, 3.7, 4.4.1, 4.2, 4.7.4, 4.7.5 & 5.6).

Educator rights become paramount in several references that are made concerning, among

others, maintaining the ethical ideals, standards and doctrines at schools that must be specified in their school's Code of Conduct, reminiscent of the *civic responsibilities* (RSA, 1998:item 1.4) that a public school must advance; being reminded of their protected fundamental rights; and acting legally in the place of the parent/care-giver (RSA, 1998:item 1.5, 1.9, 1.10, 3.2, 3.3, 3.7 & 4.1).

Parental/care-giver accountability is spelled out in various sections that range from being involved partners in the learners' education by acknowledging their co-accountability and maintaining the ethical ideals, standards and doctrines that are set out in their school's Code of Conduct, to being held liable for damages that learners cause deliberately (RSA, 1998:item 1.5, 1.7, 1.9, 1.10, 2.2, 4.1, 5.3, 5.4, 6.2 & 10.1(e)). More importantly is the section that awards parents/caregivers the final accountability for learner conduct, clearly stipulating their accountability by obliging learners to abide by the school rules, by recognizing partial culpability in the case of unacceptable learner behaviour, and by paying attention to the learning process, mainly in supporting them in finishing their homework (RSA, 1998:item 6.1 & 5.2).

Implied parental/care-giver accountability is embedded in the references that stretch from being responsible to ensure that learners attend obligatory schooling (echoing the Schools Act, 84/1996:sec.3(1) & (6)(a) and classes without bothering others, to supporting learner participation in education-sport-cultural activities and assisting them in setbacks (RSA, 1998:item 4.7.2, 4.5.1 & 4.5.2, 4.7.5, 5.1(d)-(f), 5.2 & 5.5). Reminiscent of the warning that *learners ... are not in charge of schools* (RSA, 1998:item 7.4), parents/caregivers are cautioned to perform their function responsibly, specifically since they are *ultimate[ly]* held *responsible* for and obliged to ensure the positive behaviour of learners in their care (RSA, 1998:item 6.1, 7.4 & 11).

Parental rights are mentioned directly in the references that are made to forming part of any decision-making and consultation process that would affect learners, thus giving effect to *due process* expecting remedial disciplinary measures and not punishment as first option (RSA, 1998:item 6.3, 7.7, 10, 12.2 & 13.2). This is reminiscent of the constitutional and Schools Act stipulations of following *just administrative action* (1996:sec.33), *due process* (84/1996:sec.8 (5)(a)) or *legitimate educational* procedures (84/1996:sec.8A).

### Regulations for Safety Measures at Public Schools (RSA, 2001; hereafter Safety Measures)

The security of learners needs to be protected, not only on the school premises, but also during school activities that take place at other venues (RSA, 2001:reg.1 & 8A(2)), calling on educators to oversee and organize them in all such instances, which echoes the educator-learner's *in loco parentis* boundaries referred to in Devices for Drug-testing (RSA, 2008:Annexure B, item 1), and in Regulations to Prohibit Initiation Practices in Schools (RSA, 2002b:reg.5.3; hereafter Prohibiting Initiation). The document on Safety Measures (RSA, 2001) appears to safeguard public school security by referring to schools as *drug ... and dangerous object free* sectors (RSA, 2001:reg.4(1) & 4(4)(a)-(d)).

*Reasonable suspicion* of hazardous items or unlawful drugs being on the school grounds is the prerequisite for a police search, which is the preferred option since it is named before that of a search by principals or their entrusted representative (RSA, 2001:reg.4(3)(a)). Calling on police officials points to the gravity with which the Council of Education Ministers views the safety dilemma at public schools, echoed in section 9(3) which stipulates *visible policing* as

a requirement at school sporting and cultural activities. Such a search would then be lawful and would apply to every person present on the school grounds, with the possibility of having the identified item or drug confiscated (RSA, 2001:reg.4(3)(c)).

Although clear guidelines that may oversee anyone's entrance onto the school grounds follow in regulations 5(2)(a)-(f), the question that poses itself is whether principals are currently acting according to the measures — which could include asking for identification, conducting a search, using an electronic appliance or calling for sniffer dogs — to protect their school grounds. On the one hand, the decision to follow these precautionary measures is apparently left to principals' discretion, explained as *consider[ing]... alternatives, deliberat[ing], judg[ing] and... [deciding]* in Cambron-McCabe et al. (2009:29), and on the other hand, one could argue that such measures would appear to be time-consuming and tedious.

Based on the author's own experience during school visits in the Sedibeng-West area, the former argument could be seen to indicate unfair decision-making since school principals in general hold the view that they would be accused of being judgemental. This aspect is reminiscent of the Devices for Drug-testing's guiding principle of search and seizure being founded on *common sense* (RSA, 2008:Annexure B, item 1). Perhaps the USA's general legal rule that public school officials are protected in matters such as discretionary policy-making decisions and enactment of regulations (Cambron-McCabe et al., 2009:29 & 299) deserves closer scrutiny.

The latter argument, which refers to safety measures as being time-consuming and tedious, negates the original aim of the Safety Measures and therefore deserves close scrutiny in order to convince principals of the urgency of maintaining secure public schools, no matter how much time it takes.

The word *may* must be replaced with a stronger concept that would implore principals to take precautionary measures for the sake of secure school grounds. In this regard, ambiguity exists where the Safety Measures (RSA, 2001:reg.9(5)) point out that schools are obliged to draw up *action plans* for putting these measures into operation. Apparently the mere existence of such plans would satisfy the education authorities that public schools will become safe sectors (RSA, 2001:reg.9(9)).

It is not clear to what extent the Council of Education Ministers and the Minister of Education could be held liable for supporting public schools in devising effective safety measures at the school gate, since merely the obligation to develop precautionary guidelines is mentioned (RSA, 2001:reg.9(8)). However, close reading of the document indicates the duty of principals to secure their school grounds, therefore indicating not only their legal accountability, defined as being able to validate one's actions (Joubert & Prinsloo, 2009:148), but also their *personal liability* (Botha, Smit & Oosthuizen, 2009:185).

Quoting various authors, Botha et al. (2009:187) offer three aspects that could explain educators', thus including principals', legal duty:

- Educators' influential situation (reminiscent of the authority that the provincial and subordinate legislation affords educators in carrying out their duties).
- The unique educator-learner relationship (reminiscent of the *in loco parentis* boundaries referred to specifically in Devices for Drug-testing, 2008:item 1).
- Managing dangerous items (reminiscent of the various guiding documents available at school level).

Based on the general South African starting point that people take responsibility for their



personal costs, it is noteworthy that *negligence*, defined as *a breach of... legal duty to protect others from unreasonable risks of harm* (Cambron-McCabe *et al.*, 2009:19), counts as one of the discerning exceptions when considering whether a South African principal could be accountable for damages that learners suffered at school due to security shortcomings. Cases where public school principals choose not to follow precautionary measures concerning safety, which then lead to negative incidents, could therefore result in finding them legally accountable. However, founded on the *vicarious liability* rule that school principals perform delegated functions, the Department of Education would be held accountable (Botha *et al.*, 2009:202; Joubert & Prinsloo, 2009:149). Moreover, the liability of the State with reference to school activities that are held by public schools is stipulated in section 60 of the Schools Act (84/1996).

The question posed here is whether legal accountability should not clearly be seen to be in place top-down, rather than the currently implied bottom-up.

### Prohibiting Initiation (RSA, 2002b)

The main intention of these regulations is to safeguard especially new learners' safety and well-being at schools, by protecting them from loss, hurt and/or injury.

Early on the reader is reminded (RSA, 2002b:reg.3) that learners need to be encouraged to acknowledge their accountability towards the *organization [and] governance* of their schools *in partnership with the State* (echoing the Schools Act, 84/1996:Preamble). Moreover, learners are referred to not only as responsible for studying and expanding their personal complete potential, but also for permitting others to achieve their complete potential devoid of any interferences (RSA, 2002b:reg.5.3). The latter sounds a warning to learners not to become guilty of transgressions in this regard.

Implied learner responsibility is indicated firstly in the section that supports *a process of [positive] induction* at schools that aims at instilling learner discipline, motivation and respect (RSA, 2002b:reg.3.5.4), pointing to learners' positive cooperation during their introduction to the new setting. Secondly, learners are implied as being co-responsible for upholding a secure setting that will be beneficial to education (RSA, 2002b:reg.3.5.1). Finally, the implored learner-learner and educator-learner *relationship of mutual trust and respect* (RSA, 2002b:reg.4.2) implies the need for learners to accept responsibility for their conduct.

Specifically taking cognizance of learners' right to non-discrimination and equality, privacy, respect and dignity, non-violence, freedom and security, and protection from maltreatment, neglect, abuse or degradation (RSA, 2002b:reg.3.1-3.4), the document places an obligation on schools to uphold discipline in order to ensure uninterrupted educative learning (reg.3.5.2, 6.2 & 6.3).

In the last instance, this document offers support to educators by reminding them of the co-extensive rights and responsibilities that they share with parents/caregivers to care for, to manage and to control the learners fairly while they form part of school events (RSA, 2002b:reg.5.3; 6.2; 6.3 & 6.5).

### Examining relevant South African case law

A strange discrepancy is found in the recorded background facts of the original case *Wynkwart NO v Minister of Education and Another* 2002 (6) SA 564 (C) (*Wynkwart*) and its appeal case *Minister of Education and Another v Wynkwart* NO 2004 (3) SA 577 (C) (*Wynkwart Appeal*). While *Wynkwart* refers to the plaintiff's son as an eight-year-old learner, *Wynkwart Appeal* has

recorded his age as nine years and seven months old. The significance of this discrepancy lies in the varying degrees of legally expected educator accountability concerning learners' safety at public schools according to their levels of development.

Based on the hierarchy of courts, this article will be informed by the facts of *Wynkwart Appeal* since it is accepted that the facts of an appeal case would be scrutinized even more closely.

In the original *Wynkwart* case, the plaintiff who had filed suit acted on behalf of his Grade 3 nine-year-old son who had injured himself in 1990 as he tried to leave the school premises shortly after having been dismissed from class. Common practice allowed the junior learners, those in Grade 1–3, to be excused from classes before the seniors and to exit through gate 5 under educator supervision. However, on that day young Wynkwart chose the gate that was closer to his home as his exit route, although it was unused and therefore locked. He had to climb over the gate, fell onto his head and sustained serious injuries, leaving him quadriplegic. With the events having occurred a decade ago and arguing that the young Wynkwart's injuries were caused by the negligent actions of the defendants, the court was led by his injuries leaving him *permanently disabled and quadriplegic* (*Wynkwart*, 572 at §24). The trial court ruled in favour of the applicant with costs, based on the argument that the school should have foreseen such an incident and that educators are expected to take more special care of younger learners who are prone to act unwisely. Moreover, educators trained in child development should understand children's reckless behaviour. According to this court, telling learners during assemblies that they should not climb over gates or fences did not allow educators to abandon their legal duty of care (*Wynkwart*, 572 at §23).

No reference was made to the influence of the learner's age on educator accountability for learner safety, which could be due to the court having been misinformed of his learner's age. The case law referred to in this instance comprised claims of two applicants on behalf of their seven-year-old son (*Jones v Lawrence* [1969] 3 All ER 276, quoted in *Wynkwart*, 568 at §14) and eight-year-old daughter (*Knouws v Administrateur, Kaap* 1981 (1) SA 544 (C) (*Knouws*), quoted in *Wynkwart*, 570 at §21). These courts ruled in favour of both minors, mainly because they were seven to eight years old.

No reference was made either to whether the school had placed an unknown hazard in the learner's way on the day of the incident. Close reading of the court-led evidence indicates that it was common knowledge that gate 6 was permanently closed as an exit route, indicating that it was not a newly created danger.

The High Court granted leave for appeal and overturned the trial court verdict in *Wynkwart Appeal*. Considering the 900 primary school learners who were managed by 32 educators, the fact that gate 6 was permanently locked, due to previously *perceived danger* to any learner who would cross the busy road, and evidence pointing to educator supervision together with scholar patrols being available daily at gate 5, the High Court guided the legal argument away from the trial court's contention of accountability concerning taking special care of children to being held accountable for taking reasonable steps towards avoiding accidents:

*[T]he true inquiry was not as to foreseeability (trial court's contention), but as to what constituted reasonable steps for the appellants to have taken in the circumstances, and whether ... if taken, (they) would probably have averted the harm (Wynkwart Appeal, 580C-D).*

The High Court also questioned the trial court's decision to rely on the learner's testimony rather than on that of the educator (*Wynkwart*, 569 at §16) since no reasons were offered to

substantiate the preference (*Wynkwart Appeal*, 581B-C). Moreover, firstly the educator's version of the events were confirmed by other educators' testimony; secondly the young Wynkwart had suffered serious trauma on that day and only gave evidence 11 years later; and thirdly the appellants' testimony was *that of senior teachers of many years standing* (*Wynkwart Appeal*, 581G). This is reminiscent of learners being held accountable for their own behaviour and accepting the consequences in some instances.

Another relevant legal pronouncement is that of *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) (*Van Duivenboden*). The relevancy originates from this case firstly affirming that the State — represented by people performing functions on its behalf — has a positive constitutional duty to act in order to protect fundamental rights (*Van Duivenboden*, 446B-C). Secondly the judge pointed out that the very existence of that duty implies accountability (*Van Duivenboden*, 446C). This judge held that to determine whether reasonable precautionary steps have been taken, would require scrutinizing the circumstances of the case, making sure that unjustified burdens are not placed on public authorities. The ruling found the public authority, police officers, liable for not having reasonably foreseen the possible harm that one B could cause while being allowed to own firearms even though his *fitness to possess firearms* was under suspicion. In the words of the judge, [*The police officers' negligence was a cause of the respondent being shot in the ankle and shoulders* (*Van Duivenboden*, 437H)]. This would support the ruling in the *Wynkwart Appeal* that the accountability of public school educators to exercise supervision is related to the hazards that learners are exposed to. Based on the fact that learners were frequently cautioned against going up over the fences and gates of 1.8 m high and were specifically reminded that only three of the six gates should be used, the High Court found that reasonable precautionary steps had been taken in that even the fences and gates were evidence of safety measures at the school (*Wynkwart Appeal*, 583E).

Furthermore, in *Wynkwart Appeal*, the High Court reasoned as follow:

*[W]here pupils were not kept under ... constant supervision of teachers... was not in itself a breach of duty of care... The degree of supervision required depended on... risks to which... pupils were exposed (Wynkwart Appeal, 582H/I-J)... To guard against a single pupil slipping away, climbing over a gate... and suffering injuries would [require] that each pupil... [be] kept under continuous supervision. It would not be reasonable to expect the appellants to have taken such steps in this instance (583H-I/J).*

Two other legal pronouncements that set relevant precedents were also quoted in the *Wynkwart Appeal*.

The court in *Rusere v The Jesuit Fathers* 1970 (4) SA 537 (R) (*Rusere*) had to consider a claim concerning an eight-year-old learner who lost the sight of one eye after being involved in a game of Cowboys and Crooks using imitation bows and arrows. The hostel boys had completed playing a soccer match and were playing unattended with grass shoots just before dinner, when someone's 50 cm grass shoot hit young Rusere's right eye at a short distance. *Rusere* complained that the educators had not complied with their accountability concerning promoting learner safety and had contributed towards the accident.

Basing his argument mainly on educators' accountability to *keep children of this age under constant supervision ... [as linked to the hazards learners had to face] ... in their particular surroundings* (*Rusere*, 539), the Court found that if these boys had been kept under constant supervision, it would have been *too timorous an approach* concerning the normal frequency of hazards that could occur in everyday children's fun (*Rusere*, 540). Quoting

*Camkin v Bishop* (1941) 2 All E.R. 713 (*Camkin*), the *Rusere* Court was led by the following paragraph:

*If every master [takes] precautions to see that there is never ragging or horse-play..., his school would... be too awful a place to contemplate* (*Camkin*, 716).

In the judge's own words, *To subject [learners] to the [oppressive] and molly-coddling [knowledge] of round-the-clock [supervision of every] waking activit[y] would [not be fair on them].*

The *Rusere* Court's grounds for finding the defendants not negligent were the following:

- Hostel staff and learner council members were on hand if needed (*Rusere*, 539H).
- Learners were made aware of the dangers involved when *throwing* or *catapulting* projectiles and were *forbidden* to own *potentially harmful* items (*Rusere*, 540A).
- Learners did not play that game as a rule (*Rusere*, 541D-E).
- Hostel staff members acted as reasonable persons would have in comparable circumstances (*Rusere*, 541H).

In sum, the *ratio decidendi* of *Rusere* is contained in the following legal principle:

*In the absence of any particular circumstances giving rise to a measure of risk beyond that which is normal in the daily routine of life, it is not the law that a schoolmaster must keep his pupils under supervision for every moment of their school lives* (*Rusere*, 537).

A reminder therefore that, according to legal precedent, the degree to which educators are held accountable for their learners' safety is proportionate to their ages and the hazards they are exposed to.

In *Knouwds*, the court was asked to address the claim of a parent on behalf of her daughter, an eight-year-old, who had been playing on the school grounds when she fell over the school's running lawnmower, hurt her finger in its fan belt and had the finger amputated. The Court found the worker, who operated the open fan belt machine, the custodian, who had not prevented the learners from playing there although the principal had requested him to, and the principal, who had not taken the necessary precautionary steps under the circumstances, negligent for not having supervised the lawnmower that was in use where learners were running around and of using the machinery unnecessarily during school hours. In this case, contrary to the facts of *Rusere* and *Wynkwart Appeal*, educators were reminded of learners' impulsive nature that was specifically obvious during play time and of their accountability towards ensuring learner safety in this regard: cutting the grass during play time placed an unnecessary hazard with risk of injury in the way of the learners. This points to educator accountability held in higher regard when creating new hazards or being obliged to perform supervision. (*Knouwds*, 554H).

Informed mainly by the legal precedents of the above-mentioned cases and contemplating the presented facts, *Wynkwart Appeal* found the school and its educators not negligent in their capacities as accountable for the young Wynkwart disobeying school rules and becoming quadriplegic.

## Conclusions

That there is a disastrous lack of discipline at our public schools, fuelling corruption, violence and a serious lack of performance, is not fictitious by any measure. Harrowing local news constantly highlights the absence among South African educators of accepting legal accountability for what goes wrong.

Yet the latter is imperative.

Education partners need knowledge of the legal parameters within which to make decisions, as well as of the extent of their accountability for creating/maintaining safe and successful learning environments. To this end, five subordinate legislative documents are presented for insight into legal accountability and relevant case law reveals precedents laid down concerning the accountability of public school authorities and learners.

Such are the facts that underlie the desperate need of legal accountability for public school discipline.

### **Pragmatic action-oriented suggestions**

As promised in the discussion on the conceptual framework of this article, the author appraised existing legal guidelines and asked diverse questions in order to make the following practical suggestions available:

- 1.1 Principals must be seen to take personal responsibility for creating and maintaining a safe environment and protecting their learners' security at all school activities (supported especially by Safety Measures).
- 1.2 Principals must support the learner-learner/educator-learner relationship that comprises mutual trust and respect by making the inculcation of learner discipline, motivation and respect a specific obligation of both learners and educators (supported by Devices for Drug-testing; moreover, as educator the principal needs to lead by example in acknowledging accountability).
- 2.1 Educators should be guided by school district offices in upholding a high standard of professional ethics (supported especially by Guidelines for Codes).
- 2.2 Educators should take personal accountability for creating and maintaining a caring environment where learners are treated fairly (supported especially by Guidelines for Codes).
- 3.1 Parents/caregivers should receive greater encouragement from School Governing Bodies to acknowledge their co-accountability in maintaining the ideals of the school's Code of Conduct (supported especially by Guidelines for Codes).
- 3.2 Parents/caregivers should be guided regularly to uphold sound relationships with the children in their care, based on firm discipline and learners' fundamental rights (supported especially by Safety Measures, Devices for Drug-testing and Guidelines for Codes).
- 4.1 Learners must be made specifically aware by their educators and parents/caregivers of their co-responsibility concerning upholding a secure education setting (supported by Safety measures, Guidelines for Codes and their own Code of Conduct at school).
- 4.2 Learners must be taught by their schools about accepting accountability for their own behaviour (supported by Guidelines for Codes).
- 4.3 Learner Representative Councils (LRCs) must be trained by their educator sponsors to play an incisive role in influencing positive behaviour among learners (implied by the Schools Act and deduced from the Guidelines for Codes).

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