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SAFE ENTRANCE INTO EDUCATION FOR GIFTED LEARNERS IN SOUTH AFRICA

Introduction

The valuable and much applauded directive in the South African Constitution (Constitution)[1], "A child's best interests are of paramount importance in every matter concerning the child", sounds so reassuring, as if guaranteeing, at the very least, "safe schooling" for all learners, in more than merely the physical sense. Such a hope would certainly not be unfounded, given the definition[2]: "Safe schools are a *sine qua non* for effective teaching and learning." Add to this the following explanation[3]:

> A narrow view of safety focuses only on physical harm and encompasses such serious problems as assault, armed robbery, and homicide. A broad view of safety, on the other hand, addresses psychological as well as physical safety. *Any threat to an individual's well-being*, self-inflicted or otherwise, is regarded as a safety issue.

To ensure the learner's best interests, much emphasis has recently been placed on the legal duties and liabilities of South African school governing bodies[4] as well as those of educators[5], but no emphasis has been given to the specific rights and responsibilities of parents, one of the education partners in the acknowledged triangular partnership of learner, educator and parent. And even the role parents have played in governing bodies concerning the appointment of educators is being phased out at this very moment on the insistence of the Minister of Education. This does not augur well for what is called "the impact on school climate"[6] and therefore for safe schooling.

This is ironic when one calls to mind that educators' responsibilities and duties are based on their *in loco parentis* position, with the law expecting them to act

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[1] *Constitution of the Republic of South Africa, Act 108 of 1996*.
[2] Squelch, J. 2001. Do school governing bodies have a duty to create safe schools? An education law perspective. *Perspectives in Education*, **19(**4), 137-149.
[3] Duke, DL. 2002. *Creating safe schools for all children*. Boston: Allyn and Bacon, xvi.
[4] See fn 2.
[5] De Waal, E. 2000. *The educator-learner relationship within the South African public school system: an educational-juridical perspective*. Unpublished PhD, PUCHE, Republic of South Africa.
[6] Perkins, BK. 2001. Judgement handed down by Albie Sachs in the case of Doreen Harris *versus* the Department of Education: comments. *Perspectives in Education*, **19(**4), 35-37.

like *diligens paterfamiliae*. Yet now it would seem that the educators have usurped the parents' position. No wonder that a specific author[7] calls for the great mystique surrounding educator autonomy to be unmasked.

Current focus

In part, the emphasis on governing bodies and educators may be due to the current focus on the South African Schools Act (Schools Act)[8] which highlights learners' rights as well as educators' responsibilities and duties, without adequate mention of the parents' role. This, too, is understandable, as the Constitution refers only obliquely to the parents' role in terms of parental care[9]. However, the UN Convention on the Rights of the Child is more specific concerning this issue[10]:

> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of the parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

The Declaration of the Rights of the Child[11] adds:

> The best interests of the child shall be the guiding principle of those responsible for his/her education and guidance; that responsibility lies in the first place with his/her parents.

No wonder that Currie[12] calls on the South African State to pass legislation in which the rights of children and the duties of parents and the State in relation to those rights are clearly set out. To this can be added the observation that

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[7] Ranson, S. 1994. Towards the learning society. London: Cassell, 127.
[8] *South African Schools Act, Act 84 of 1996*.
[9] Section 28(1)
[10] United Nations Convention on the Rights of the Child, New York 1989, principle 1 and 2.
[11] Proclaimed by the General Assembly Resolution 1386 (XIV) of 20 November 1959, principle 7.
[12] Currie, I. 1998. *Children*. *In* De Waal, J, Currie, I & Erasmus,G. *The bill of rights handbook.* Kenwyn: Juta, 342-348.

although the major challenges lay in the drafting of an instrument of fundamental rights until recently, they now lie in interpreting it[13]. With such improved guidelines, parents could be led to involve themselves more with the intellectual welfare of their children, instead of delegating responsibilities for this to the educators. After all, USA parents are afforded the fundamental right to direct the upbringing of their children[14], and no-one can deny the fact that the parent is the primary educator of his or her child[15]. Moreover, children need parental assistance in exercising their rights[16].

Rationale of study

Interestingly enough, this study originated from the successful role of one of the forgotten partners, Doreen Harris, setting the scene for promotion of one aspect of the child's best interests: that of safe entrance into education for gifted learners in South Africa, while, understandably, all the attention has recently been on the furtherance of schemes to educate learners from underdeveloped communities.

In order to gauge the importance of Harris's triumph in court over the Department of Education[17] this study will highlight:

- the main aspects of this landmark in education law and policy, and
- individualizing educational rights in South Africa.

In the course of this research both the original court case[18] and the appeal that followed[19] have been consulted. The Constitution, the Schools Act, the

[13] Wielemans, W. 2001. Judgement handed down by Albie Sachs in the case of Doreen Harris *versus* the Department of Education: comments. *Perspectives in Education*, **19(**4), 39-44.
[14] McCarthy, MM, Cambron-McCabe, NH and Thomas, SB. 1998. *Public school law*. 4th ed. Boston: Allyn & Bacon, 109.
[15] Kruger, AG and Van Schalkwyk, OJ. 1997. *Classroom management*. Pretoria: Van Schaik, 148; Joubert, HJ and Prinsloo, IJ. 2001. *Education law: a practical guide for educators,* 37.
[16] Robinson, JA. 1995. An overview of the provisions of the South African bill of rights with specific reference to its impact on families and children affected by the policy of apartheid. *Obiter*, **16**(1), 99-114.
[17] *Harris v The Minister of Education TPD, as yet unreported (Case 30218/2000).*
[18] *Ibid*.
[19] *Minister of Education v Harris 2001 (4) SA 1297 (CC).*

National Education Policy Act (National Policy Act)[20] and relevant case law were consulted.

Furthermore, much weight has been put on the commentaries of Wielemans[21], Bertelsmann[22] and Perkins[23], making this a juridical-educational analytical and argumentative study.

Main aspects of this landmark in education law and policy

Talya Harris was part of a group of children who had enrolled at the age of three in the King David pre-primary school. She spent three years preparing herself to enter the King David Primary School in January 2001. Her sixth birthday was due to fall on 11 January 2001, a short while before the school year would begin. When she started her pre-primary education, there were no legal impediments to her starting school in the year she turned six. Challenging the validity of the new Age Requirements for Admission to an Independent School Policy[24], Talya's parents sought an order of court, permitting her to be enrolled in grade one in the year she turned six.

Original High Court verdict

On 15 January 2001 the Transvaal High Court declared the Notice to be unconstitutional and invalid[25], and authorised King David Primary School to admit Talya to grade one. The following findings were made in a written judgement:

- The Minister's actions discriminated unfairly against Talya and similarly situated children on the grounds of age, were not justifiable, and accordingly violated the right to equality[26].

[20] *National Education Policy Act, Act 27 of 1996*.
[21] See fn 13.
[22] Bertelsmann, E. 2001. Judgment handed down by Albie Sachs in the case of Doreen Harris *versus* the Department of Education: comments. *Perspectives in education*, **19**(4), 29-33.
[23] See fn 6.
[24] The Minister of Education (the Minister) published this as *General Notice 647 of 2000* (the Notice) in *Government Gazette No. 20911 of 18 February 2000*: "A learner must be admitted to grade 1 if he or she turns seven in the course of that calendar year. A learner who is younger than this age may not be admitted to grade 1."
[25] See fn 17.
[26] Section 9 (fn 1).

- By requiring Talya and other children in her position to repeat their final year of pre-primary school or to sit at home waiting for the year to pass, the Minister's actions unjustifiably violated their best interests as being of paramount importance in every matter concerning them[27].
- The Notice was *ultra vires* the powers of the Minister. The Minister was merely authorized to determine national policy in respect of a number of issues, including the age of admission to schools, but not empowered to make law[28].
- Being in the national government, the Minister usurped a provincial executive power, in conflict with the Constitution[29]. The Minister stated in the Notice that the age requirement had to be applied in addition to what had been determined by a provincial Member of the Executive Council (MEC).
- Finally, even if the Notice were valid, it was so only to the extent that it enunciated national policy. Such policy could not provide any legal barrier to the admission of Talya to the King David Primary School in 2001.

Subsequent Constitutional Court verdict

The Minister appealed against the whole judgement[30]. During this appeal, it was found to be both unnecessary and inappropriate for the Constitutional Court to rule on the broad and complex constitutional issues raised concerning equality and the rights of the child[31]. The matter was to be decided

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[27] Section 28(2) (fn 1).
[28] Section 3(4) (fn 20).
[29] See fn 1, section 125:

> 125 (1) The executive authority of a province is vested in the Premier of the province.

The following stipulations are found in section 41:

> 41 (1) All spheres of government and all organs of state within each sphere must --
> (e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
> (f) not assume any power or function except those conferred on them in terms of the Constitution;
> (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.

[30] See fn 19.
[31] See, for example, *Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC)*at par. 199 and *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2002 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC)* at par. 21.

on an examination of the scope of the Minister's powers under the National Policy Act[32].

In analysing the legal effect of the Notice, the following facts were found to be relevant[33]:

- The objective of the Notice under the National Policy Act was to achieve uniformity between public and independent schools by extending the turning-seven rule to independent schools as well.
- King David Primary School is an independent educational institution maintained at its own expense and registered with the State in terms of the Constitution[34]. The school was satisfied that Talya was ready to enter grade one in the year she turned six.
- The challenge brought in the Transvaal High Court on Talya's behalf was largely, though not exclusively, based on a demand for exemption from, rather than a scrapping of, the turning-seven rule[35]. The contention was that the discrimination was unfair and against the best interests of the child because the requirement allowed for no exemptions for children who did not reach seven during the year, even if they were manifestly ready for school.

The Minister's main reaction to this challenge:

- Scholars below the age of seven tend to clog the educational system as a result of high failure and repetition rates and this carries financial implications for the government. For that reason there is a need for a general rule that scholars must turn seven in the year in which they enter grade one.

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[32] See fn 20.

[33] See fn 19, par.5 and 6.

[34] See fn 1, section 29 (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that –
(a) do not discriminate on the basis of race;
(b) are registered with the state; and
(c) maintain standards that are not inferior to standards of comparable public educational institutions.

[35] See fn 19, par.6.

- There are no educationally sound criteria to determine school readiness. For that reason it was not possible to provide for exceptions from the general rule.
- The age requirement of seven years is based on sound educational principles.

The initial focus on exemptions resulted in affidavits dealing extensively with the validity of school-readiness tests in a multicultural society. The main disagreement between the respective experts was whether reliable and objective tests could at present be employed in South Africa. Yet relatively little factual information was provided to enable the Constitutional Court to contextualise the broader and more complex constitutional issues raised.

Judgement handed down in the Minister's appeal included the following:

- In the light of the division of powers contemplated in the Constitution and the relation between the Schools Act and the National Policy Act, the Minister's powers are limited to making a policy determination and he has no power to issue an edict enforceable against schools and learners. Yet the manifest purpose of the Notice was to do just that.
- The Notice purports to impose legally binding obligations upon independent schools and MEC's and is *ultra vires* the powers granted the Minister by section 3(4)(i) of the National Policy Act[36]. The Minister accordingly infringed the constitutional principle of legality[37]. The appeal was dismissed with costs that included the costs of two councils.

Effect of the judgement handed down on the South African education system

The Harris-decisions have far-reaching effects on the education system and thus required a review of admission policies in public and independent schools. In an interim arrangement, the direct result of the judgement delivered in *Harris v The Minister of Education (TPD)* and *Minister of*

[36] Section 3(4) (fn 20).
[37] See *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC).*

Education v Harris (CC)[38], the Minister announced an amendment to the policy on admission to public schools[39]. Exemptions from the general rule that a child must turn seven during the year of admission to school will be considered by Heads of Department. This deviation may only occur if reasonable grounds exist to show that such a learner, based on educational principles, is school ready for grade one. Furthermore, it has to be in the best interest of such a learner to be admitted as an underaged learner. The parent of the learner must show that the refusal to be admitted to school will have a detrimental effect on the learner's development.

The question now arises whether the outcome of the Harris case has succeeded in individualizing educational rights in South Africa. This aspect therefore warrants careful consideration.

Individualizing educational rights in South Africa

In commenting on the juridical process known as the Harris case, Wielemans (a foreign expert in educational sciences) poses four questions, two of which are[40]:

- To what extent is the right to education individualised in South Africa?
- Does the principle of equality of educational opportunities[41] allow for the right to unequal treatment?

These questions lead to a more scientific question applicable to Talya Harris, namely: do children who are recognised as "early-ripe" on the basis of scientific investigation have the right to an accommodated form of education?

The acceptance of the importance of human sciences has brought about a growing awareness that certain children should receive special forms of education, lest their rights be considerably damaged[42]. The principle of the equality of opportunities therefore supposes that these children have the right to unequal treatment. That is why many countries, *inter alia* on the basis of

[38] See fn 17 and fn 19.
[39] *Government Notice 1356 (Government Gazette 22928) of 11 December 2001*, par. 4(A) of the Schools Act (fn 8).
[40] See fn 13.
[41] Section 9, fn 1.
[42] See fn 21, 42.

this scientifically supported insight, provide an accommodated form of education to children with disabilities such as light mental handicaps, physical deficiencies, visual or auditive impairment[43]. A smaller number of countries, such as Belgium and the Netherlands organize special education for early-ripe and/or gifted children. Wielemans[44] is of the opinion that, in all these forms of so-called "special" schools in such countries, compulsory education mostly begins at 6 or 7 years, but that parents can appeal to recognised psychopedagogical centres to assess the early-ripeness of their child. Judge Coetzee[45] disagreed with this age statement: there was no evidence to support the allegation that the age requirement of seven was based on sound educational principles. On available evidence it appears that the age of seven or above applies in less than a third of countries world-wide. More than two thirds of countries have five or six years as their school entry age. This could therefore not be used as an argument to uphold the age policy in South Africa[46].

The possibility of assessing early-ripeness was originally denied by the Minister of Education when he argued that there were no reliable tests which have been developed for a multicultural and multilinguistic society to determine when a child is ready for school[47]. Bertelsmann[48] maintains, however, that it should be comparatively easy to devise such tests for all South African children, in any case.

Subsequent to the judgement delivered in the High Court and the Constitutional Court on the Harris case, learners may now be admitted at a lower age if certain requirements are met, as mentioned above.

This surely recognises the principle of equality of educational opportunities in South Africa implying the right of unequal treatment for a well-determined category of children, admitting that their rights can be seriously damaged if they are denied the right to unequal treatment.

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[43] *Ibid.*
[44] *Ibid*.
[45] See fn 17.
[46] *Ibid*.
[47] *Ibid*.
[48] See fn 22, 32.

The original fear that early-ripeness or giftedness cannot be scientifically assessed has been allayed by recent scientific investigations which claim the capability to do so, as well as to reach a scientific consensus on the question whether the characteristics of a certain child should lead to a justified exception to prevailing educational rules. It would therefore have been unacceptable if the court had turned a deaf ear to the progress in human and social sciences[49]. Fortunately it did not.

However, Wielemans[50] does concede that other considerations, such as an unpredictable increase of the national education budget, could have led to a refusal to accept exceptions to the general law while waiting for "better times". Had this occurred, safe entrance for gifted learners would have been seriously impaired. There can be no doubt that the best interests of the child fortunately prevailed.

In all fairness it must not be forgotten that much good has already been achieved at the *other* end of the scale:

South Africa ratified the UN Convention on the Rights of the Child in 1995. This placed strong emphasis on an individual approach to children's issues. Since then, the individual needs of learners above the age norm for a relevant grade or those who have to repeat one or more years at school have been taken into special consideration. Bertelsmann[51] says this policy cannot be faulted since it applies the principle of the individualisation of learners' needs and aspirations.

One of the arguments used by the Minister of Education in the appeal case to forestall the admittance of underaged children to grade one, was the high failure-rate in that grade[52]. As this could possibly inhibit parents from using the exemption clause to have their early-ripe children admitted, a quick look at early childhood education is advisable.

The issue of early childhood education

[49] *Ibid*, 44.
[50] *Ibid*.
[51] *Ibid*, 43.

While the importance of early childhood education is discussed at great length internationally, three aspects are of specific relevance to the consideration of new policy in South Africa[53]:

- New information on brain research.
- Long-term benefits to society.
- The impact on school climate and achievement during learners' primary and secondary years.

These aspects cannot be dealt with in this study. Suffice it to point out that early childhood programmes in the USA, Europe, Asia and Australia that are designed to stimulate children for school readiness, build on the well-founded research of noted psychologists such as Piaget and Maslow. Based on the results of the National Head Programme in the USA, it is maintained that experiences prior to the age of seven have a remarkable influence on the cognitive, emotional and social development of individuals[54].

The Perry pre-school study[55] found that, at the age of three and four, children's participation in a high-quality active learning pre-school programme created the basic framework for success as an adult.

At the same time an ecological perspective regarding the age at which children attend school in South Africa suggests that national economic and social interests are impacted by this policy[56]. There is ample reason to believe that early childhood education can promote the moral climate in a considerable measure. According to Perkins[57] there is an undeniable governmental interest in sustaining an educated citizenry that will engender morality and foster virtue in government. This naturally extends to the provision of an early childhood education experience in South Africa.

Conclusion

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[52] See fn 19.
[53] See fn 6, 35.
[54] *Ibid*.
[55] As discussed in Schweinhart, LJ & Weikart, DP. 1993. *The high/scope Perry pre-school study through age 27*. Ypsilanti, MI: High/Scope Press.
[56] See fn 6, 36.
[57] *Ibid*.

Wielemans's questions have been dealt with and answered to a certain degree:

- The Harris case has put South Africa on the road to individualising the right to education for early-ripe or gifted learners, in spite of the fact that the Minister of Education did not amend his policy before 11 December 2001 after judgement was passed in the appeal case on 5 October 2001.
- There can be no doubt that the principle of equality of educational opportunities definitely allows for the right to unequal treatment. Although all aspects of early childhood education could not be dealt with in this study, it can be concluded that early-ripe children have the right to an accommodated form of education.

Safe entrance into education for gifted learners in South Africa has been assured.