

# South African perspective: freedom of expression



## Unlike the USA ...

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# Unlike the USA ...

“Freedom of expression”

**not** “expressive rights”

No abundance of case law in South Africa

Incidents and speculation

Human Rights commission interventions

Legislation and possible amendments



# Legislation

## Constitution of 1996

- ✓ (1) Everyone has the right to freedom of expression, which includes-
  - ✓ (a) freedom of the press and other media;
  - ✓ (b) freedom to receive or impart information or ideas;
  - ✓ (c) freedom of artistic creativity; and
  - ✓ (d) academic freedom and freedom of scientific research.
- ✗ (2) The right in subsection (1) does not extend to-
  - ✗ (a) propaganda for war;
  - ✗ (b) incitement of imminent violence; or
  - ✗ (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

**“Everyone” has this right (including teachers therefore)**  
**The right includes receiving and imparting information and ideas**  
**The right has internal qualifiers expressed in subsection (2)**



# Limitation and interpretation

## S36 of Constitution

- ✎ Interpretation generous, purposive, expression underlying constitutional values (S v Makwanyane)
- ✎ Interpretation contextualised, values based, promoting open and democratic society based on human dignity, freedom and equality (De Waal, Currie & Erasmus)
- ✎ Interpretation generous and informed by related rights to give individuals full measure of rights and freedoms (Govender)



# Other legislation?

- 👓 South African Schools Act, No 84 of 1996
- 👓 Employment of Educators Act, No 76 of 1998  
(especially the misconduct provisions of s18)
- 👓 Code of Ethics of South African Council for Educators  
(SACE)

**No conclusive evidence of efforts to curb teachers' expressive rights, directly or indirectly**

- 👓 2007 Amendment of Schools Act – s16(1): principal of a public school represents the Head of Department in the School Governing Body

**Gentle reminder? Veiled instruction about His Master's Voice? Muffler? Constitutional scrutiny and professional voice?**



# Aborted amendment of Schools Act proposed in 2007 (insertion s21A(3-4))

- 👍 (3) The principal may assist the governing body in the performance of its functions and responsibilities, but such assistance or participation **may not be in conflict** with any –
  - 👍 (a) instructions of the head of Department;
  - 👍 (b) legislation or policy;
  - 👍 (c) obligation that he or she has towards the Head of Department, the member of the Executive Council or the [national] Minister where any one of them is, or may be, cited in any legal proceedings;
- ...
- 👍 (4) **A principal may not**, on behalf of the governing body, **give evidence against the Minister, member of the Executive Council or Head of Department in any court case** where the Minister, Member of the Executive Council or Head of Department is cited as a party to the case.



# Aborted amendment of Schools Act proposed in 2007 (insertion s21A(3-4))

This prohibition violates...

... principals' constitutional right to have access to a court,  
...and SGBs constitutional right to a fair public hearing.

It shreds the freedom of expression of principals (sic!)  
guaranteed in the Bill of Rights.

[Adv Nikki de Havilland for FW de Klerk Foundation]

**Will this re-emerge in a different guise?**

**New attack on principals' freedom of expression in future?**



# Present legislation

 Improvement of past legislation

 Previously comments on the State / Department of Education were sanctionable as misconduct

 Removed from relevant provisions



# Case law

*None post 1994???*

*Pre 1994...*



*De Waal v Ziervogel 1938 AD*



**The principal, the pastor and the principal's wife – successful defence**



*Holzgen v Woolwright*



**The principal, the student and the not so perfect doctor – unsuccessful defence**



# Incidents, cases and interventions

## *The teacher's interpretation, a forbidden word, an SGB*

1999 – Cullinan Combined School

...“SGB appointment” - attended workshop on MCE

... Based assignment on *Unto dust* – forbidden word

... About Black and White warriors

... Wanted to promote relationships among learners

! Could teach them how wrong offensive words were !

**“At the end the white family made peace with blacks and could see that even if they were black or white, on the inside they were the same”**

... Was apparently dismissed by SGB unfairly ...

... without due procedure ...



# Incidents, cases and interventions



## HRC intervention: Palestine, Israel & teacher's proxy (Layla Cassim)

*...Crawford College – article on Palestinian land issue posted on notice board*

*....Layla wrote an article that put the other side and the history teacher advised her to post it on the notice board – using her as a proxy*

*...Layla was suspended, pending a hearing which never happened...*

*...Parents approached HRC – no settlement reached*

*...HRC made finding that her rights had been violated*

***! Crawford forced = apologise + ensure such an incident did not occur again !***



# Incidents, cases and interventions

 Religion in education policy, new SGB and principal in a fast food place

- ... Newcastle High School: 992 learners (361 White, 399 Black, 189 Indian & Chinese and 43 of other races)
- ... *Used to function in terms of Christian policy supported by 83% of school community*
- ... New SGB elected – rejected policy and instructed principal to operate in terms of new policy
- ... *Refused and went to High Court in Pietermaritzburg, but lost*
- ... Retired prematurely and now works in a fast food place

**??? Was he pushed or did he jump ???**



# Incidents, cases and interventions



**The teacher author, Catholic ethos & steamy novel**

*...Teacher employed by CBC*

*HOTm@ale4U published on Lulu(Internet site) Oct 2007*

*...Teacher (a female) was suspended for having written a book containing sexual and erotic material involving a Catholic woman who had an affair with a married man*

*...School said contents of book were in breach of both the contractual relationship and Catholic ethos of the school*

*...Teacher asserted she was exercising her constitutional right to engage in creative writing in her own time and that the book was not “that steamy”*

**! No settlement through conciliation ... teacher accepted an offer of six months' salary !**



# Incidents, cases and interventions

 **The teacher author, Catholic ethos & steamy novel (cont...)**

-  ***How free are teachers in their private lives? Does what teachers say or do in their private lives impact on their work as teachers?***
-  ***Is there a difference between the protection of the fundamental rights of public and independent school teachers in this regard?***
-  ***Would the South African Council for Educators (SACE) have found Morgan guilty of a breach of the Code of Ethics for Educators if a charge had been laid with them?***
-  ***Was the teacher's right to work limited lawfully?***
-  ***Should Morgan have declined the school's offer and pursued other avenues to assert her right to freedom of***

# Conclusions

**More prominence given to case law on learners' rights to freedom of expression (even in Constitutional Court)**

**There does not seem to be certainty about possible outcome of possible lawsuits regarding teachers' right to freedom of expression**

**Teachers could perhaps try to enforce their rights more forcefully**

