

Note from the special editor for the CELP contributions

*Susan Coetzee**

The Centre for Education Law and Policy (CELP) is grateful for the opportunity to have a section in *SA Public Law* set aside for articles dealing with Education Law. Considering the rate at which the highest courts in South Africa, for example, the Supreme Court of Appeal and the Constitutional Court, are called upon to decide on educational matters, it is clear that not only education stakeholders such as the National Department of Basic Education, provincial departments of basic education, principals, governing bodies and educators, but also the courts struggle to benchmark the interpretation of Education Law against the Constitution.¹ With this in mind, CELP invited articles from experts in Constitutional Law and Education Law on the theme: *Benchmarking South African Education Law against the Constitution*.

Six articles were selected. Professor Rika Joubert, the Director of CELP, set the scene with an article titled 'Incorporating international standards into national education law in South Africa: The accountability of the state'. She refers to section 39(1)(b) of the Constitution, in terms of which, state accountability should be interpreted to comply with international norms and standards relating to the right to education. She argues the need for increased state accountability to protect the right to education.

However, it seems that finding the state (in this case, the Minister of Basic

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¹See, for example: *Head of Department: Mpumalanga Department of Education and Minister for Education v Hoërskool Ermelo* 2009 ZACC 32; *MEC for Education in Gauteng Province v Governing Body of Rivonia Primary School* 2012 ZASCA 194; *Fish Hoek Primary School v G W* (642/2008) 2009 ZASCA 144; 2010 2 SA 141 (SCA); 2010 4 BCLR 331 (SCA); 2010 2 All SA 124 (SCA) (26 November 2009); *Le Roux v Dey* (CCT 45/10) 2011 ZACC 4; 2011 3 SA 274 (CC); 2011 6 BCLR 577 (CC); BCLR 446 (CC) (8 March 2011); *Governing Body of the Juma Masjid Primary School v Essay NNO (Centre for Child Law and Socio-Economic Rights Institute of South Africa as Amici Curiae)* 2011 8 BCLR 761 (CC); *Head of Department, Department of Education, Free State Province v Welkom High School*; *Head of Department, Department of Education, Free State Province v Harmony High School* (CCT 103/12) 2013 ZACC.

Education or any of the provincial departments of basic education) wanting with regard to providing an education in compliance with international norms and standards and holding it accountable will not necessarily result in the vindication of the right to education as guaranteed in section 29 of the Constitution. The article 'Contempt and execution in vindicating the right to education', deals with the problem of vindicating the constitutional right to education when the state fails to comply with court orders. Mr Ganesh, a volunteer at the Legal Resources Centre (Grahamstown Office), with reference to the 2013 post-provisioning litigation carried out by the Legal Resources Centre (LRC) in *Eastern Cape (Centre for Child Law) v Minister of Basic Education* 2012 4 SA 35 (ECG), considers the available measures of contempt and execution pursuant to the State Liability Act 20 of 1957. He argues the importance of vindication because when the departments of basic education fail to comply with court orders they not only inevitably support the belief that socio-economic rights are not justiciable, but also prevent equal education for all learners. He mentions in his article that the matter will be heard again on 20 March 2014. The court proceedings of 20 March were concluded with the Eastern Cape Department of Basic Education agreeing to a settlement in terms of which vacant posts will be permanently filled by 1 July 2014 and those schools that paid salaries during 2013 and which should have been paid by the Department will be reimbursed. The Department further consented to an opt-in call action which resulted in the first certified class action in South Africa. This will allow schools that were not part of the legal action to submit their claims for reimbursement. This settlement is a win for the constitutional right to education.²

This quest to achieve equal, quality education for all learners is the focus of Professor Marius Smit's article 'Ambivalent adjudication of admission and access to schools – striking a reasonable balance between equality, quality and legality'. He investigates the dilemma of how to achieve equal education without destroying the effectiveness of existing functional public schools; allowing public schools to adopt restrictive admission policies or education departments to impose unlawfully on schools' autonomy. He concludes that, in South Africa, the main quest in education is not only how to ensure equal access to schools, but how to ensure quality education. One of the problems hampering quality education and successful schooling is the struggle to balance conflicting individual educator and

²See: Legal Resource Centre Press Release: Payment of teachers: Settlement reached available at: <http://lrc.org.za/press-releases/3071-press-release-payment-of-teachers-settlement-reached> (accessed 2014-03-26); Press release by Department of Education — Payment of teachers available at: <http://lrc.org.za/press-releases/3070-press-release-by-department-of-education-payment-of-teachers> (accessed 2014-03-26); Legal Resource Centre Press Release: Press release: Payment and appointment of teachers: Opt-in class action lawsuit goes to Court available at: <http://lrc.org.za/press-releases/3067-press-release-payment-and-appointment-of-teachers-opt-in-class-action-lawsuit-goes-to-court> (accessed 2014-03-26).

learner rights.

In the article 'Towards successful schooling: The role of courts and schools in protecting conflicting individual educator and learner rights', Professor Elda De Waal and Dr Erika Serfontein of North-West University examine the role that courts and schools can play in striking an equilibrium between conflicting individual rights. Emphasising the reciprocal nature of rights (that is, every right has a corresponding duty), the authors stress the importance of accountability and a culture of respect for diversity and for the rights of others. However, the question that comes to the fore is whether a true balance between individual educator and learner rights is possible in the light of section 28(2) requiring that 'A child's best interests are of paramount importance in every matter concerning the child'.³

In the article 'The "best interests of a child" standard in education – an overview of South African case law', Professor Susan Coetzee and Ms Riana Mienie from the University of South Africa (Unisa) outline the legal framework for the 'best interests of a child' standard, investigate the content that should be given to the standard and then review the courts' interpretation of the standard in relation to school education. They formulate eight guidelines in an attempt to 'promote uniformity of principle, consistency of treatment and individualisation of outcome'.⁴ As leaders in school administration (management and governance) principals are responsible to lead educators and school governing bodies to observe and promote the learners' best interests.

The article 'Defining "reasonable" in the school setting: The legal standards for school principals, administrators, and educators in South Africa and the United States' by Professor Phillip Daniel from Ohio State University and Scott Greytak an Attorney at Law investigate how American and South African courts interpret 'the reasonable administrator/principal' standard. They argue that the courts in both countries determine the 'reasonable principal' standard of duty of care on a case by case basis which makes it difficult to identify practical guidelines for principals in this regard. They contend that the *in loco parentis* doctrine forms the basis of the educator's duty of care and the higher standard of reasonableness expected of principals in both countries.

These articles illustrate how important it is for the National Department of Basic Education, provincial departments of basic education, principals, governing bodies, educators and courts alike to benchmark their interpretation of Education Law against the Constitution. This is the only way in which South Africa can successfully comply with international standards for the fulfilment of the right to education, and that will, *inter alia* translate into the provision not only of equal access to, but of quality, education. Where organs of state fail to comply with

³Constitution of the Republic of South Africa, 1996.

⁴*S v M (Centre for Child Law as Amicus Curiae)* 2007 2 SACR 539 (CC) para 36.

these standards, the courts must take the best interests of all affected children into account when deciding the matter and ensure that their orders are adhered to so that the right to education can be vindicated.

CELP was invited again to submit a selection of articles for the section on Education Law in the second 2015 issue of *SA Public Law*. Authors are invited to submit articles to Professor Susan Coetzee (coetzsa1@unisa.ac.za) on the following theme: *Solving disciplinary problems at South African schools within the ambit of the Bill of Rights*. Priority will be given to articles with good theoretical grounding and fresh ideas. Questions – highlighting problems/issues relating to school discipline – authors could consider include:

- Do learners' rights prevent effective discipline?
- How does the learner's right to education affect the disciplinary measures of suspension and expulsion available to schools?
- How should educators establish a disciplined, inclusive classroom?
- How could educators address cyber-related misconduct within the ambit of the Bill of Rights?
- Should learner pregnancy be seen as a form of misconduct or a protected right?
- How do learners' rights affect the scope of educators' disciplinary powers?
- What affect do learners' rights have on the relationship between parents and educators in relation to discipline?

The closing date for submission of Education Law articles:

17 April 2015.

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