

# Treasury Regulations and Educator Accountability For Damages Regarding Unlawful Disciplinary Measures in Public Schools

**Mariëtte Reyneke**

<https://orcid.org/0000-0002-7150-4367>

University of the Free State

reynekej@ufs.ac.za

## Abstract

Corporal punishment remains a reality in many schools. In *MEC for Education, KwaZulu-Natal v Shange* 2012 (5) SA 313 (SCA), the Supreme Court of Appeal awarded an adult claimant R4 million in damages for suffering due to the corporal punishment he had to endure as a learner at school. The high incidence of corporal punishment and its severe consequences give rise to the question: Could, and should, the fiscus be responsible for the redress of all delictual claims arising from the use of corporal punishment or other unacceptable disciplinary measures? On the one hand, the State is vicariously liable for damages resulting from the actions of educators. On the other, Treasury regulations require accounting officers to recover damages caused by State officials when they fail to comply with standing orders and instructions, such as the prohibition on corporal punishment. This notwithstanding, accounting officers have a discretion to write off monies owed to the State due to deliction by employees. To promote accountability, Treasury regulations could be strengthened to ensure more stringent application. Yet, the lack of discipline in schools is often the result of systemic problems, which raises the question whether it is justifiable that individual educators, could be held liable for damages caused by the use of such measures of punishment.

**Keywords:** educator accountability; accountability in general; school discipline; State liability; corporal punishment; disciplinary measures; Treasury regulations; delictual claims against State officials

## Introduction

Although Corporal punishment in South African schools is illegal,<sup>1</sup> its continued and large-scale use, as well as other unacceptable disciplinary measures in South African public schools are undisputed<sup>2</sup> and they infringe on several human rights.<sup>3</sup> The negative consequences of corporal punishment are well documented and include physical, psychological and emotional harm.<sup>4</sup> There are several legal mechanisms to address the unlawful use of corporal punishment and other degrading forms of discipline, although it is questionable whether they are effective.

There is a school of thought which advocates that the State should be held directly liable for delictual damages in the case of systemic failures, and that such damages should not be claimed in terms of the principle of vicarious liability.<sup>5</sup> However, the focus of this article is not the debate around direct State liability or liability arising from vicarious liability, nor is it the issues pertaining to the interpretation of this principle in a constitutional dispensation.<sup>6</sup> Rather, the focus is the application of Treasury regulations to recoup, from the educator, delictual damages paid by the State where systemic failures existed that arguably contributed to the amount of damages awarded.

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1 South African Schools Act s 84 of 1996 s 10.

2 Jethro Gina and Toy White, 'Managing Safety and Security in Rural and Township Schools: Case Studies from KwaZulu-Natal' (2014) 27(2) *Acta Criminologica: Southern African Journal of Criminology* 56–68; Vusi Mncube and Tshilidizi Netshitangani, 'Can Violence Reduce Violence in Schools? The Case of Corporal Punishment' (2014) 5(1) *Journal of Sociology and Social Anthropology* 1–9; Matshidiso Taole, 'Learners' Self-Reports of Exposure to Violence in South African Schools: A Gendered Reflection' (2016) 14(1) *African Safety Promotion Journal* 42–61; Sekitla Mashasane and Pinkie Mthembu, 'Exploring School Violence Misconceptions and Professional Development of Teachers' (2019) 16(3) *African Renaissance* 49–66.

3 Section 10 and 12 of the Constitution of the Republic of South Africa (Constitution).

4 Iqbal Ahmad, Hamdan Said and Faisal Khan, 'Effect of Corporal Punishment on Students' Motivation and Classroom Learning' (2013) 5(4) *Review of European Studies* 130–134; Jyoti Shukla and Neetu Singh, 'Implications of Corporal Punishment on Primary School Children' (2013) 15(6) *Journal of Humanities and Social Science* 57–59; Noorullah Shaikhmag, Thomas Assan and Irene Loate, 'A Psychoeducational Perspective of Discipline in Schools and the Abolishing of Corporal Punishment' (2016) 14(3) *International Journal of Educational Sciences* 275–283.

5 Susan Coetzee, 'Holding the State Directly Liable for Educator-on-Learner Sexual Abuse' (2018) 19(1) *Child Abuse Research: A South African Journal* 30–44; Leo Boonzaier, 'State Liability in South Africa: A More Direct Approach' (2013) 130(2) *SALJ* 330–368; Alistair Price, 'State Liability and Accountability' in Alistair Prince and Michael Bishop (eds), *A Transformative Justice: Essays in Honour of Pius Langa* (Juta 2015) 313–335.

6 Christopher Roederer, 'The Constitutionality Inspired Approach to Vicarious Liability in Cases of Intentional Wrongful Acts by the Police: One Small Step in Restoring the Public's Trust in the South African Police Service' (2005) 21(4) *South African Journal on Human Rights* 575–606; Johan Scott, 'Vicarious Liability for Intentional Delicts—the Constitutional Factor Clinches Liability' (2013) 2 *Journal of South African Law* 348–361; Chuks Okpaluba, 'The Constitutional Principle of Accountability: A Study of Contemporary South African Case Law' (2018) 33(1) *SAPL* 1–39.

## The Need for Accountability

In view of the current political climate and debates on the need to address lawlessness, corruption and wasteful expenditure of taxpayers' money, it is necessary to investigate the potential risks that the unabated use of corporal punishment in public schools pose for the fiscus and taxpayers. In *MEC for Education, KwaZulu-Natal v Shange*,<sup>7</sup> the Supreme Court of Appeal awarded a public school learner approximately R4 million in damages, several years after he had left school, because of an eye injury he sustained when a teacher used a belt to hit another child. Although an individual educator caused the harm in this case, the provincial department of education, being the employer of the educator, was liable for the damages awarded on the basis of the application of the vicarious-liability principle. In essence, the taxpayer had to 'foot the bill' for the illegal conduct of an educator who evaded liability. This raises serious concerns about the accountability of educators for deliberate and unlawful acts.

## Measures for Holding Educators Accountable for Corporal Punishment

In terms of relevant legislation, the use of corporal punishment could have dire employment,<sup>8</sup> criminal<sup>9</sup> and civil law consequences for—consequences that involve disciplinary action, a criminal law charge and a civil lawsuit. However, the focus will be mainly on delictual claims for physical and emotional harm caused by corporal punishment and other degrading disciplinary measures, on the vicarious liability of the State for these delicts, and on the State's right to reclaim, from the educator, any delictual damages that may be awarded to the claimant.

### Civil Law Remedies

The term 'delictual damages' denotes the compensation of victims of corporal punishment for medical expenses and for pain, suffering and humiliation endured.<sup>10</sup> The number of delictual claims against organs of State has increased over time as the public has become more aware of its right to sue the State for wrongful acts or omissions. This awareness on the part of citizens has also been strengthened by citizen-centred legislation.<sup>11</sup> The downside of the growing number of claims is that the State's budget allocation for delictual claims is on the increase, with fewer resources available for

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7 2012 (5) SA 313 (SCA).

8 Employment of Educators Act 76 of 1998 ss 11(1)(e), 17(1)(d) and 18(3); South African Council for Educators Act 31 of 2000 ss 21(2), 23(1)(c) and 23(1)(c).

9 South African Schools Act s 84 of 1996 s 10; Criminal Procedure Act 51 of 1977 s 276.

10 *MEC for Education, KwaZulu-Natal v Shange* 2012 (5) SA 313 (SCA).

11 Letitia Pienaar, 'Investigating the Reasons behind the Increase in Medical Negligence Claims' (2016) 19 PELJ 1–23; South African Law Reform Commission, *Issue Paper 33, Project 141: Medico-Legal Claims* (SALRC 2017).

proper service delivery, resulting in a vicious cycle of under-financed services that leads to even more malpractice and, consequently, more litigation.<sup>12</sup>

The consequences for service delivery could be devastating should the available funding for education be reduced because of delictual claims arising from unlawful disciplinary measures. Recouping damages from educators might therefore become a reality, a possibility already foreseen by some provinces. In a 2016 circular, the KwaZulu-Natal Department of Education warned educators as follows:

Educators and/or officials who administer corporal punishment [to] learners will be held personally liable for any related legal delictual claims against the Department.<sup>13</sup>

This explicit warning is in addition to a general circular issued in 2008 informing educators, inter alia, that monies for delictual claims can be recovered from officials.<sup>14</sup>

### Vicarious Liability and Accountability in a Constitutional Dispensation

In the past, an employer would not generally have been held liable for the delict of an employee even had the employee committed the delict intentionally. The employer escaped liability by virtue of the fact that the employee had not acted in the course and scope of his or her employment or if he or she had been on a 'frolic of his or her own.' Case law indicates that an employer was held liable when its employees were exercising the main functions of their employment, but intentionally disobeyed the instructions of the employer.<sup>15</sup>

This rather strict test for liability was relaxed in *K v Minister of Safety and Security*,<sup>16</sup> where the Constitutional Court developed the common law position and held that 'an intentional deviation from duty does not automatically mean that an employer will not be liable'. Consequently, the test in respect of vicarious liability and, in particular, State liability for the wrongs of public officials are flexible enough to accommodate

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12 *ibid.*

13 Department of Education Province of KwaZulu-Natal, 'Circular 10 of 2016. Prohibition of Corporal Punishment in KwaZulu-Natal Public Schools' Department of Education Province of KwaZulu-Natal (2016) <<http://www.kzneducation.gov.za/DocumentsPublications/Circulars/KZNCirculars.aspx>> accessed 20 June 2020.

14 Department of Education Province of KwaZulu-Natal, 'Finance Circular 3. Policy and Procedure to Deal with Claims against the State through Acts or Omissions and Recovery of Monies Due to the State' Department of Education Province of KwaZulu-Natal (2008). <<http://www.kzneducation.gov.za/LinkClick.aspx?fileticket=XqFh36J6Rm4%3d&tabid=140>> accessed 11 March 2020.

15 *Mkize v Martens* 1914 AD 382; *Estate van der Byl v Swanepoel* 1927 AD 141; *Union Government v Hawkins* AD 556; *Feldman (Pty) Ltd v Mall* 1945 AD 733; *Minister of Police v Rabie* 1986 (1) SA 117 (A); See also Anton Fagan, 'The Confusions of K' (2009) 126(1) SALJ 156–205.

16 2005 (6) SA 419 (CC).

constitutional and other norms.<sup>17</sup> Accordingly, employers are more likely to be held accountable for intentional delicts committed by their employees.<sup>18</sup>

It is evident from these cases and the test applied in *K v Minister*<sup>19</sup> that both factual and normative enquiries are needed. Where educators resort to corporal punishment, they are endeavouring to discipline learners, albeit in an unlawful manner, and the employer will therefore be held vicariously liable, with the taxpayer being responsible for the financing of these cases.

The Constitution's increased protection of the rights of individuals should be balanced by an increased compliance with constitutional prescriptions regarding the responsibilities of the administration to ensure that service delivery is optimised and that human rights are respected, protected, promoted and fulfilled. If the administration does not live up to the constitutional expectations as set out in section 195 of the Constitution, the State runs the risk of being overwhelmed by delictual claims due to negligent or wilful conduct by State officials. Therefore, education departments are obliged to ensure that the human rights of all learners are protected, that the resources available for education are used for education and not on preventable civil claims, and that educators are properly trained in alternative ways of maintaining discipline in schools. Accountability is an explicit constitutional requirement, without which the system is bound to fail. Lastly, citizens should know how much money is being spent on civil claims and how much is being recovered.<sup>20</sup>

## The State's Right of Recourse Regarding Civil Claims in Terms of Treasury Regulations

The State, as the employer of public school educators, is vicariously liable for damages in terms of the common law principles and the provisions of the State Liability Act<sup>21</sup> and the South African Schools Act<sup>22</sup> to mention a few legislative provisions as well as

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17 See Fagan (n 15) 156–205; Stephen Wagener, 'K v Minister of Safety and Security and Increasingly Blurred Line between Personal and Vicarious Liability' (2008) 125(4) SALJ 673–680; Siyabonga Sibisi, 'Vicarious Liability of Employer for Employee's Frolic: More Clarity on Detour Cases' (2016) November De Rebus 52–53; JA Lincott, 'A Critical Analysis of the Majority Judgement in F v Minister of Safety and Security 2012 1 SA 536 (CC)' (2014) 17(6) PELJ 2916–2951; Leslie Kobrin, 'Vicarious Liability: Easy to Understand, Difficult to Adjudicate' (2017) De Rebus May 28–29.

18 *Commissioner, South African Revenue Service v TFN Diamond Cutting Works (Pty) Ltd* 2005 (5) SA 113 (SCA); *Minister of Finance v Gore* 2007 (1) SA 111 (SCA); *South Africa Post Office v De Lacy* 2009 (5) SA 255 (SCA); *F v Minister of Safety and Security* 2012 (1) SA 536 (CC); *Giesecke & Devrient Southern African (Pty) Ltd v Minister of Safety and Security* 2012 (2) SA 137 (SCA); *Minister of Defence v Von Benecke* 2013 (2) SA 361 (SCA).

19 2005 (6) SA 419 (CC).

20 Constitution 1996 s 195.

21 20 of 1957.

22 84 of 1996 s 60.

Treasury Regulation 12.2.1.<sup>23</sup> This regulation provides for mechanisms to ensure that taxpayers do not bear the brunt of delictual damages for intentional delictual acts committed by State officials. It also provides that, although the State will normally not be allowed to recover damages paid to claimants on behalf of State officials, they (educators) will forfeit this protection if they:

(d) acted recklessly or intentionally;

...

(f) failed to comply with or ignored standing instructions, of which he or she was aware of or could reasonably have been aware of, which led to the loss, damage or reason for the claim, excluding damage arising from the use of a state vehicle;

...

It can be assumed that every educator knows, or should know, that the use of corporal punishment is unlawful. Furthermore, ignorance of the law is no defence against liability. Thus, the State can recover, from the educator, any amount paid to the claimant. In fact, Regulation 12.2.3 provides that the amount paid by the State *must* be recovered from the educator if the provisions of Regulation 12.2.1 are applicable.<sup>24</sup> To recover such damages, the State Attorney will not only be able to attach the moveable and immoveable property of the educator, but also their pension in terms of section 37D(1)(b)(ii) of the Pension Funds Act.<sup>25</sup>

Furthermore, since corporal punishment constitutes a crime, the following steps must be taken in terms of Regulation 12.5:<sup>26</sup> first, the matter must be reported to the accounting officer; secondly, the matter must be reported to the police; and, thirdly, the accounting officer must recover the amount in damages from the educator.

However, the accounting officer has a discretion to write off the losses or damages in terms of Regulation 11.4. The accounting officer should not write off debts without duly considering that:

(a) all reasonable steps have been taken to recover the debt and the debt is irrecoverable,  
or,

(b) he or she is convinced that –

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23 GG 27388 (15 March 2005) GN R225.

24 *ibid.*

25 24 of 1956.

26 GG 27388 (15 March 2005) GN R225.

- (i) recovery of the debt would be uneconomical;
- (ii) recovery would cause undue hardship to the debtor or his or her dependants; or
- (iii) it would be to the advantage of the state to effect a settlement of its claim or to waive the claim.<sup>27</sup>

This means that the accounting officer has a wide discretion in the matter, since he or she has to decide what undue hardship constitutes and will probably take into account the fact that the Department of Basic Education and the South African Council for Educators have already availed themselves of the labour and criminal law remedies open to them and that recouping the amount in damages from the educator would therefore cause undue hardship. The amount involved might also be excessive, which would render the educator penniless. The accounting officer should also consider the cost and time of civil litigation instituted to recover the amount concerned should the educator decide to contest the State's claim. Factors to consider when deciding to recover the relevant amount from an educator are the unfavourable media attention or negative political outcomes that may disadvantage the State.

### Justifiability of Writing off Claims Against Educators

It might seem unjust that educators can wilfully transgress the law, cause harm to learners, and then escape liability by which accounting officers could write off a debt that the State can lawfully recover. The Treasury regulations are clear and it should not be difficult for the State to prove that a claim was paid out in terms of the requirements in respect of vicarious liability, and that the conduct of the educator falls within the provisions of Regulation 12.2.1.<sup>28</sup>

However, it is worth remembering that educators are human beings, who have to teach and maintain discipline, while often under difficult circumstances, with no or very limited support in dealing with ill-disciplined learners coming from troubled social environments. In addition, support for learners with learning and behavioural problems is either insufficient or completely lacking.<sup>29</sup>

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27 *ibid.*

28 *ibid.*

29 Paul Munje and Rouaan Maarman, 'A Capability Analysis on the Implementation of the School Progression Policy and Its Impact on Learner Performance' (2016) 66 *Journal of Education* 185–206; Silke Grossen, Adelene A Grobler, Marlies Lancante, 'Repeated Retention or Dropout? Disputing Hobson's Choice in South African Township Schools' (2017) 37(2) *South African Journal of Education* 1–11; Rocio Romero, Lucie Cluver, James Hall and Janina Steinert, 'Socioeconomically Disadvantaged Adolescents and Educational Delay in Two Provinces in South Africa: Impacts of Personal, Family and School Characteristics' (2018) 22 1 *Education as Change* 1–33; Roelf Reyneke,

When educators are justly sanctioned for resorting to corporal punishment, they are alone in facing the consequences. It would only be fair to ask What parents, politicians, the unions, the Department of Basic Education and the South African Council for Educators have done to ensure that the use of such punishment is never resorted to? Being sympathetic towards educators and their difficult working conditions should not be construed as an attempt to excuse or defend unacceptable conduct or to minimise liability. The proverbial net of accountability should be spread wider than the educators, and should also include other role-players who fail to address systemic challenges.

## Educators Face Severe Systemic Challenges

Corporal punishment can never be condoned and educators need to be held accountable. However, the serious systemic challenges they face should be taken into account when determining the amount that the State should recover from an educator. The following sections deal with the challenges that are facing school discipline and the responsible stakeholders. The main normative argument is for these challenges to be factored into any decision to recoup money from the educator. Therefore, at the very least, any damages paid by the State should be apportioned to the different role-players. Should this not be the case, the accounting officer will almost always be at liberty to write off the debt, especially when claims are excessive, because educators will in general not be able to afford such amounts after losing their indemnity. This approach diminishes the possibility to create more accountability in the system, while the need to increase accountability measures are clear. Some contributing challenges are discussed below.

### Overcrowded Classrooms and the Lack of Other Physical Facilities

There is ample evidence of a correlation between class size and disciplinary problems. The larger the number of learners per class, the more difficult it becomes to maintain a disciplined environment. The availability of basic necessities such as water and sanitation, libraries, laboratories, electricity, and sportsgrounds plays an important role in school culture.<sup>30</sup> The lack of these facilities was highlighted when the authorities provided 3 500 schools with water tanks to render them COVID-19 compliant.<sup>31</sup>

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'The Role of Social Workers in Giving Effect to Children's Right to Education: A Legal Perspective' (2018) 43(2) JJS 79–108.

30 Vincit Lali, 'Overcrowding Becoming 'the Norm' in Some Western Cape Schools' *GroundUp* (22 February 2018) <<https://www.groundup.org.za/article/overcrowding-becoming-norm-some-western-cape-schools/>> accessed 22 February 2020; David Matsepe, Mugwena Maluleke and Michael Cross, 'Re-imagining Teacher's Experience with Overcrowded Classrooms in the Public Secondary Schools In South Africa' (2019) Special Issue *Journal of Gender, Information and Development in Africa* 81–93; Peter Barrett, Alberto Treves, Tigran Shmisand others, 'The Impact of School Infrastructure on Learning. A Synthesis of the Evidence' World Bank Research Report (2019).

31 Republic of South Africa, 'New Guidelines for School Grounds amid Covid-19' *South African Government News Agency* (30 April 2020) <<https://www.sanews.gov.za/south-africa/new-guidelines-school-grounds-amid-covid-19>> accessed 20 June 2020.

Poor infrastructure causes higher levels of violence, discrimination, educator absenteeism, and limited opportunities to learn. The 2017 School Monitoring Survey revealed that the percentage of absentee teachers had increased by two per cent from 2011 to 2017.<sup>32</sup> Educator absenteeism impacts on the level of supervision required to maintain a disciplined environment and ensure the safety of learners, thereby avoiding civil claims.

The government is well aware of the lack of school infrastructure and there seem to be attempts to address it. This is evident from the National Education Infrastructure Management System, which provides information on the condition of school infrastructure and the facilities available at schools. However, the annual School Infrastructure Delivery Reports indicate considerable backlogs in delivering the most basic of infrastructure to all schools.<sup>33</sup>

The aim of this article is not to belabour the extent of overcrowding in schools. However, a few examples serve to highlight the severity of the matter and the lack of appropriate responses. Despite legislative and managerial measures to address the lack of sufficient infrastructure, the National Council of Provinces reported in 2018 that Gauteng should provide an additional eighty-five primary schools and fifty-seven secondary schools to alleviate overcrowding in existing schools in the province. The 142 schools needed did not include additional schools necessary to service new residential areas or to accommodate the 114 000 additional learners who migrate from other provinces to Gauteng in search of a better education.<sup>34</sup> A similar situation exists in the Western Cape, with numerous children migrating from the Eastern Cape.<sup>35</sup>

In February 2020, the Mthatha High Court ordered the Eastern Cape Department of Education to provide sixty-five temporary classrooms for four severely overcrowded schools within ninety days of the court order. Many classes in these schools must accommodate between sixty and 100 learners per class. In some instances, the provincial department of education was notified of the dire situation in these schools as early as 2012. Several promises were made but no action followed.<sup>36</sup>

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32 Department of Basic Education, 'School Monitoring Survey 2017/2018' Department of Basic Education Research Report (2018).

33 Department of Basic Education, 'Annual Reports' Department of Basic Education (Annually) <<https://www.education.gov.za/Resources/Reports.aspx>> accessed 22 February 2020.

34 African News Agency Reporter, 'Gauteng Needs 142 New Schools to Tackle Classroom Shortage' (*IOL*, 21 September 2018) <<https://www.iol.co.za/news/south-africa/gauteng/gauteng-needs-142-new-schools-to-tackle-classroom-shortage-17181088>> accessed 22 February 2020.

35 Lali (n 30).

36 Estelle Ellis, 'Victory for Parents as Court Orders New Classrooms for Heavily Overcrowded Schools' (*Maverick Citizen*, 19 February 2020) <<https://www.dailymaverick.co.za/article/2020-02-19-victory-for-parents-as-court-orders-new-classrooms-for-heavily-overcrowded-schools/#gsc.tab=0>> accessed 22 February 2020.

Overcrowding in schools and the resulting disciplinary problems will, in all likelihood, not be resolved in the near future, which leaves learners and educators in an untenable situation—a state of affairs that is deteriorating. Spaul and Carel<sup>37</sup> report that the average Grade 4 class size has increased from forty to forty-five learners between 2011 and 2016. For the sixty per cent of the poorest learners, though, the picture is even bleaker, with an increase from forty-one to forty-eight learners per class during the same period. These circumstances are unlikely to change in the near future owing to severe budget cuts. For instance, the 2020 budget allocation for the Department of Basic Education decreased from R250,2 billion to R248,6 billion. This represents a decrease of R12 billion if inflation is factored in, a situation that does not bode well for education in general.

### **Failure by Members of the Executive Committee**

The South African Schools Act<sup>38</sup> obliges the MEC of each provincial department of education to take the necessary steps to ensure that there are enough schools in their province to accommodate all learners. MECs are required to report annually to the Minister of Basic Education on their inability to provide an adequate number of schools. Furthermore, the Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure provide that each learner, from Grade 1 to 12, should have a minimum of one square metre of classroom space, while the educator is entitled to seven square metres. The maximum learners per class should not exceed forty.<sup>39</sup>

The above-mentioned examples of severe overcrowding are the result of MECs' long-standing failure to execute their duties in terms of the South African Schools Act. A simple explanation for this would be the lack of resources. However, it is evident from the School Infrastructure 2019/2020 Mid-Year Report to the Parliamentary Monitoring Group that several provincial departments of education do not fully utilise their infrastructure budgets.<sup>40</sup> The report further highlights a lack of accountability, which is reflected in the national Department of Basic Education's view by reminding the relevant Parliamentary Committee that education is an internal provincial affair and that the Department merely exercises oversight, which renders it unable to make or overrule decisions on behalf of provinces. Nevertheless, the Department of Basic Education has conceded that, thus far, no effective consequence management is in place for holding MECs and provincial departments of education accountable for mismanagement and

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37 Nic Spaul and David Carel, "'Tito's Business Unusual' – Our FM Article on #Budget2020" (27 February 2020) <<https://nicspaul.com/2020/02/27/titos-business-unusual-our-fm-article-on-budget2020/>> accessed 27 February 2020.

38 84 of 1996 s 3.

39 GG 37081 (29 November 2013) GN R920.

40 Parliamentary Monitoring Group, 'School Infrastructure 2019/20 Mid-Year Report; with Minister' Parliamentary Monitoring Group (29 October 2019) <<https://pmg.org.za/committee-meeting/29168/>> accessed 22 February 2020.

underspending.<sup>41</sup> Thus, while the Department is distancing itself from responsibility for the problem, the onus is on the grassroots educator to handle ill-disciplined learners in overcrowded classes on a daily basis. They are the individuals who will ultimately be held accountable for any unprofessional conduct that results in claims for damages.

### **Misuse of Power and Avoidance of Responsibility by Departmental Officials**

There have been various reports in the media that highlight the lack of accountability and shifting of responsibility by politicians and departmental officials. In an Eastern Cape school, for instance, the principal faced an unsustainable situation by having to accept more than 200 Grade 11 learners in one class. The school made its concerns known to the relevant authorities as early as 2008. In response to an investigation by the media, a departmental spokesperson stated that the principal had ignored the Department's directive of a maximum of forty learners per class. Even more alarming is the authorities' statement in the media regarding the principal of this high-performing school and other principals in a similar situation:

The department takes a dim view of instances where principals ignore departmental regulations and allow too many learners in. We've taken a position that we are going to charge principals who ignore regulations ... it is completely unacceptable.<sup>42</sup>

This statement begs the question of where learners should enrol for school when the MEC has failed to ensure that there are enough schools. It seems as though principals are sometimes made scapegoats for departmental deficiencies and are caught in a catch-22 situation. On the one hand, particularly in the case of Quintile 1, 2 and 3 schools, principals are often forced by departmental officials to take in more than the maximum number of learners. On the other, principals are intimidated by departmental officials when they endeavour to expose irregularities, such as overcrowded classrooms.<sup>43</sup>

Even if it is believed for one moment that the principal referred to above, enrolled too many learners without the knowledge of the department, the only reasonable conclusion is that the standard of management and oversight exercised by departmental officials is completely insufficient. To allow a principal to transgress the express regulations for such an extended period without there being any consequences is highly problematic and says more about the lack of management and planning on the part of the Department

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41 *ibid.*

42 Matthew Savides, 'SA's Most Crowded School: 200 Pupils in One Class' *Times Live* (20 March 2016) <<https://www.timeslive.co.za/sunday-times/news/2016-03-20-sas-most-crowded-school-200-pupils-in-one-class/>> accessed 22 February 2020.

43 Annie van Zyl, 'Overpopulated Schools, Overcrowded Classrooms and Empty Promises' (*Middelburg Observer*, 1 February 2016) <<https://mobserver.co.za/42196/overpopulated-schools-overcrowded-classrooms-and-empty-promises/>> accessed 22 February 2020.

than about the non-compliance of the principal who is probably doing his best to serve the community.

### **Failure to Provide a Physically and Emotionally Safe Work Environment for Educators**

Section 8 of the Occupational Health and Safety Act<sup>44</sup> obliges provincial departments of education to ensure, as far as is reasonably practicable, a physically and emotionally safe and risk-free work environment. In broad terms, such departments are responsible for pre-empting health and safety risks that educators may be exposed to, providing information and training to ensure the health and safety of educators in compliance with the Act.

The reality of violence against educators when it comes to disciplinary matters is highlighted by the 2019 High Court ruling in *Ndala v Minister of Education and Another*.<sup>45</sup> In this case, the court held that a teacher who had been stabbed three times by a Grade 11 learner, after the learner had been reprimanded for his hairstyle, could not claim damages from the provincial department of education because the injuries constituted an occupational injury. It is with a degree of unease to be confronted with the reality that being assaulted by a learner is considered an occupational risk that educators have to face. This incident is a known risk factor confronted by teachers and provincial departments of education should take reasonable steps to assist schools to address this problem. For instance, proper counselling services could lessen violence in schools, but these services are not provided in the majority of schools.<sup>46</sup> Other measures to be considered for the safety of educators could be closed-circuit television cameras, metal detectors and guards, but these are not currently provided.

There is ample evidence that many educators experience mental health problems due to a lack of discipline and violence in schools, a heavy workload, dysfunctionality and a lack of resources, as well as pressure by the departments concerned to improve learners' results.<sup>47</sup> It would therefore seem unjust that educators be blamed and are subjected to

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44 85 of 1993.

45 Unreported case. Gauteng Division, Pretoria. Case No. 51706/2014. Judgment 7 August 2019.

46 Reyneke (n 29).

47 South African Human Rights Commission, 'Report of the Public Hearing on School-Based Violence' South African Human Rights Commission (2008) <<http://www.sahrc.org.za/home/21/files/School%20Based%20Violence%20Report.pdf>> accessed 21 June 2020; AP Kutame, M Maluleke, VO Netshandama and NJ Ramakeula, 'A Mental Health Promotion Approach: The Experiences of Teachers In Rural Dysfunctional Schools in Limpopo Province, South Africa' (2014) 1(2) African Journal for Physical, Health Education, Recreation and Dance Schools' 426–434; VM Mbulaheni, AP Kutame, M Mpofo, and VM Mbulaheni, 'Teacher Mental Health Promotion in Creating Quality Teaching Environments in Dysfunctional Secondary School' (2017) 15(4) Gender and Behaviour 10348–10361.

the provisions of the relevant Treasury regulations if, under these conditions, they resort to unlawful disciplinary measures.

### **Tacit Approval and a Lack of Remedial Action**

Many educators will admit to using corporal punishment, and it is evident that it is still part of the disciplinary culture of certain schools.<sup>48</sup> There is also evidence that some parents support the use of corporal punishment and that they often encourage educators to resort to it.<sup>49</sup> However, when a learner, or the parent/guardian of a learner, lays a criminal charge or sues the relevant department for damages, an educator may not claim that the use of corporal punishment is ingrained in the school's culture, because such a practice is unlawful.

The number of corporal punishment cases reported to the South African Council for Educators does not correspond with the projected number of learners subjected to corporal punishment. For instance, the Minister of Basic Education admitted that corporal punishment is still rife in schools, indicating that in KwaZulu-Natal, seventy-one per cent of learners reported being subjected to corporal punishment. The lowest incidences of corporal punishment are reported to be in Gauteng (thirty-four per cent) and the Western Cape (twenty percent).<sup>50</sup> In addition, the 2017 General Household Survey found that 9,8 per cent of learners who took part in the survey indicated that they had been subjected to corporal punishment. This translates to 1,3 million learners still experiencing corporal punishment in schools.<sup>51</sup>

In contrast, the 2017 Annual Report of the South African Council for Education revealed that only eighty-seven cases of verbal abuse, victimisation, harassment, defamation and intimidation had been reported, and 253 cases of corporal punishment and assault.<sup>52</sup> It can thus be deduced that there is substantial under-reporting of instances of corporal punishment—and this despite the provisions of the Children's Act<sup>53</sup> that all instances of child abuse must be reported.

Such under-reporting suggests tacit approval of the practices concerned by departmental officials, principals, school management teams, school governing bodies (SGBs), colleagues and parents. In doing so, they are complicit in the perpetuation of the

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48 Gina (n 2).

49 *ibid.*

50 African News Agency Reporter, 'Protocol on Corporal Punishment in SCHOOLS out for Comment Soon – Motshekga' (*The Citizen*, 2017) <<https://citizen.co.za/news/south-africa/1655643/protocol-on-corporal-punishment-in-schools-out-for-comment-soon-motshekga/>> accessed 21 June 2020.

51 Mariëtte Reyneke, 'Educator Accountability in South Africa: Rethink Section 10 of the South African Schools Act' (2018) 43(1) JJS 114–144.

52 South African Council for Educators, 'SACE Annual Report 2017/18' South African Council for Educators (2018) <[https://www.sace.org.za/assets/documents/uploads/sace\\_63207-2018-10-15-SACE%20-%20Annual%20Report.pdf](https://www.sace.org.za/assets/documents/uploads/sace_63207-2018-10-15-SACE%20-%20Annual%20Report.pdf)> accessed 21 June 2020.

53 38 of 2008 s 110.

infringement of learners' rights and should therefore be held accountable. Furthermore, it suggests that not enough is being done to ensure that remedial action is taken and that educators are trained in the use of effective and non-violent measures for addressing disciplinary issues.

### **Lack of Training in Alternatives to Corporal Punishment**

A considerable body of research indicates that there is a lack of training in lawful and effective measures for instilling discipline in schools.<sup>54</sup> The provincial departments of education are responsible for providing all educators with ongoing training. However, it is evident that there is no political will to eradicate the practice, as is evident from the figures provided in the annual reports of the South African Council for Education.<sup>55</sup>

### **Suitability of Treasury Regulations in Enhancing Accountability**

Given that after almost twenty-five years after its abolition, corporal punishment is still prevalent in schools today, it would seem that existing criminal and labour law remedies do not have the required deterrent effect. However, as awareness of the right to claim damages for the infliction of corporal punishment and other unlawful forms of discipline is on the rise, delictual claims will inevitably increase—and, unless Treasury regulations are implemented, the taxpayer will have to foot the bill. Moreover, if monetary damages are not recouped, quality education will be compromised by inadequate financing.

Taking into account the systemic failures contributing to the poor state of discipline in schools it would be unfair to recover all monetary damages from an educator. Treasury regulation 11.4 makes provision for a partial waiver of the claim against the educator, and this could to some extent address the contribution of systemic failures to the eventual damages paid by the State.<sup>56</sup>

This raises the question whether Treasury regulations should not in fact be strengthened so as to include the line managers of the educator as well as those responsible for certain systemic failures. Instead of doing away with vicarious liability and suing the State directly, Treasury regulations that enable the State to recoup damages from more, rather than fewer, officials might serve to enhance accountability within the system.

Currently, issues such as causality will probably give rise to problems in this regard, as will obtaining evidence to hold line managers accountable for failures. In all likelihood, line managers will, in most instances, be in a position to shift responsibility to their own line managers, thereby leading to endless litigation, which will not be cost-effective. Unless Treasury regulations are crafted in such a way that a fair number of officials can

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54 Mashasane (n 2); Taole (n 2); Mncube (n 2).

55 *ibid.*

56 GG 27388 (15 March 2005) GN R225.

be held liable for the recovery of money paid out in respect of civil claims against the State, the educator will solely be held responsible for any repayment to the State.

Holding line managers accountable might be more feasible in the light of the provisions of the Protocol to Deal with Incidences of Corporal Punishment in Schools.<sup>57</sup> The responsibilities of the different role players, namely the educator, school management, the principal, the SGB, district officials, and provincial and national departments, regarding the prevention and management of corporal punishment are spelled out in this document. This provides a foundation for holding other stakeholders accountable. In terms of the protocol, all incidences of corporal punishment must be reported to the principal unless she or he is the perpetrator. Thus, other educators cannot turn a blind eye if they are aware of a colleague administering corporal punishment. A specific process is prescribed to deal with instances of corporal punishment, which must be reported to the district and provincial offices. No informal disciplinary hearings are permitted. Both the principal and district officials are also responsible for the training of educators. At the very least, this protocol ensures that other stakeholders have explicit responsibilities. Failing to carry out these responsibilities can thus render them complicit when a claim for damages is instituted.

By way of analogy, one could argue that a precedent has already been set in *Jacobs v Chairman Governing Body, Rhodes High School, and Others* for increased accountability of a principal.<sup>58</sup> Here, the court found that the principal could have done more to prevent the injury suffered by an educator at the hands of a learner with a history of disciplinary problems. It therefore considered the principal negligent in the way in which he had exercised his duties. Thus, if a principal fails to provide training and to act decisively where instances of corporal punishment occur, a court will be able to apportion damages in accordance with the degree to which each defendant is at fault.

The Treasury regulations governing the recovery of damages paid by the State are, however, applicable only to State officials, that is, ‘a person in the employ of a department or constitutional institution’.<sup>59</sup> In the context of school discipline and overcrowded classrooms, ultimate responsibility rests with the MEC for Education at a provincial level and the Minister of Basic Education at a national level, as they are responsible for ensuring that enough schools are available.<sup>60</sup> However, such Treasury regulations are not applicable to them, since they are political appointees and not

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57 Department of Basic Education, ‘Protocol to Deal with Incidences of Corporal Punishment in Schools’ Department of Basic Education (2017) <<https://www.education.gov.za/Resources/Policies.aspx>> accessed 21 June 2020.

58 *Jacobs v Chairman Governing Body, Rhodes High School, and Others* 2011 (1) SA 160 (WCC). See, also, *Long and Another v Jacobs*. Unreported appeal of this case. Case No. 145/11 Supreme Court of Appeal judgment. Appeal dismissed. Long is the principal of Rhodes High School.

59 GG 27388 (15 March 2005) GN R225 1.1.

60 Schools Act 84 of 1996 s 3(5).

employees of the various education departments. Rather, it is the head of the provincial education department and the Director-General of the Department of Basic Education who, as the accounting officers, are responsible for education. To ensure accountability on the part of these officers (MECs) for the systemic failures would thus be purely political in nature, unless a court makes a personal cost order against them. Such a personal cost order in the context of school discipline is highly unlikely. To demonstrate the required political will implies for instance that Members of Parliament, as the elected representatives of the people and in this instance tax payers in particular, should do the honourable thing, namely to adopt legislation that will provide the necessary mechanisms to hold political appointments accountable. The exact format of such legislation falls outside the scope of this normative enquiry.

## Conclusion

The unabated use of corporal and other degrading forms of punishment has the potential to detract from attempts to ensure quality education for all if State resources are needed to settle delictual claims. However, carefully crafted Treasury regulations and the provisions of the Protocol to Deal with Incidences of Corporal Punishment in Schools<sup>61</sup> could assist in increasing accountability of stakeholders responsible for the prevention and management of corporal and other degrading forms of punishment. To recover monies paid out on civil claims arising from such punishment from the educator only, is undesirable especially if serious systemic problems are contributing factors. These are often caused by line managers and politicians not fulfilling their obligations, with the end result that taxpayers and other citizens end up suffering the consequences. More measures need to be put in place to recover damages paid out by the State to ensure that those who are ultimately responsible for the delicts are held accountable and that the fiscus is not depleted.

Although any system can fail, it is still the human factor that controls it to ensure that enough schools are built, buildings upgraded and maintained, and educators trained in alternatives to corporal punishment and also to report it when it occurs. It is, ultimately, the person who earns a salary and who has a specific job description or legislative obligation to comply with and, failure to do so, infringes on the human rights of learners.

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61 Department of Basic Education, 'Protocol to Deal with Incidences of Corporal Punishment in Schools' Department of Basic Education (2017) <<https://www.education.gov.za/Resources/Policies.aspx>> accessed 21 June 2020.

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