

CHAPTER 6

SUMMATION, FINDINGS AND RECOMMENDATIONS

6.1 INTRODUCTION

This chapter consists of a summary of the previous chapters, followed by specific findings that have become clear from the research. Finally recommendations are made, aimed at ensuring an accountable, responsive and open educator-learner relationship in South African public schools.

6.2 SUMMATION

In chapter 1 the problem which has instigated the research was expounded. Moreover, the objectives of the research were determined, the research method was demarcated, and the chapter divisions were finalised. The research method consisted of:

- a literature study based on primary and secondary legal and educational sources;
- a comparative school law perspective regarding the most important aspects of South African, English and Welsh, Canadian and Japanese education.

Chapter 2 focused on the legal position of the learner within the South African school system. This position was firstly demarcated in the South African legal system, with the emphasis on *subjectivity* and *age* as important determinants of his status in private law. The focus then shifted to the South African school system. The legal obligations and rights of the learner were discussed in terms of the Schools Act. Attention was thirdly drawn to the fundamental rights of the learner, as enshrined in the SA Constitution, in the context of the administration of justice. The emphasis fell on the status of the minor in public law, the nature of his fundamental rights and his right to exercise the latter. It became evident that the learner's *best interests are of paramount importance* in all matters that concern him. A brief comparative legal perspective of South Africa, Germany, and the United States of America completed the chapter.

Chapter 3 enunciated the legal determinants of the South African educator-learner relationship. In the first place the legal requirements of valid administrative acts were discussed. The discussion centred around the following aspects:

- the principle of legality;
- prerequisites concerning the author of the administrative act;
- prerequisites concerning form and procedure;
- the objective of the act;
- legal consequences of administrative acts; and
- the prerequisite of *bona fides*.

In the second place common law concepts relevant to the educator-learner relationship were highlighted. These concepts are *quasi-judicial competence*, the *rules of natural justice*, *vicarious liability*, the *ultra vires* doctrine and the *in loco parentis* doctrine.

Chapter 4 examined the South African educator's duty of care. This was done by looking at the juridical foundation of the educator's duty of care and then by examining the expectations required by law of the reasonable educator. Thirdly the content and scope of the educator's duty of care were pointed out. In the last place the educator's legal liability for non-compliance with the duty of care was scrutinized.

In chapter 5 a comparative school law perspective of the educator-learner relationship in England and Wales, Canada and Japan was presented. An attempt was made to come to a new understanding by scrutinizing similarities and differences in South Africa, England and Wales, Canada and Japan regarding the following aspects;

- the sources of school law;
- the duties and responsibilities of educators;
- rights of learners;
- discipline; and
- liability for negligence of malpractice.

6.3 FINDINGS

Specific findings have become clear from the research. They are presented in terms of the original research objectives.

6.3.1 Findings based on research objective 1: To determine the legal position of the learner within the South African school system

The following notable findings regarding an educational-juridical perspective of the educator-learner relationship within the South African public school system have been made:

- Educators must be fully conversant with the individual competencies, subjective rights and legal obligations bestowed on learners, parents, themselves and the State (*cf.* 2.1). This is probably the only way in which they can vindicate their own fundamental rights and fulfil their duties.
- The legal status of the learner, as circumscribed in private law, must be taken into account when a secure educational environment is created (*cf.* 2.2.2). As a natural person the learner is vested with legal subjectivity, which implies that he has not only the capacity to act, but also the capacity to litigate, as well as legal capacity (*cf.* 2.2.2.1).
- A learner's age has an impact on both his capacity to act and his capacity to litigate (*cf.* 2.2.2.2). These limited capacities should be seen as legal protection because of the learner's lack of experience, and not as a legal penalty (*cf.* 2.2.2.2). The recognition of the learner's lack of experience sounds a warning to educators to safeguard the welfare of their learners.
- Certain other private law prescriptions have relevance to the educator-learner relationship in the sense that they determine voluntary legal relationships which are of individual and private concern to the parties involved (*cf.* 2.2.2). An example would be the contract the parent enters into with the school board for the tuition of the learner.
- In addition to private law, formal law has relevance to the educator-learner relationship because it contains the prescribed procedures which have to be followed in educational administrative actions (*cf.* 2.3.1 and 3.2.3 and 3.3). On the

other hand, the relevance of public law can be seen from the fact that school law forms part of the South African public law system, and specifically resorts under administrative law (*cf.* 2.3.1).

- As a sub-section of administrative law, school law is affected by both private law and public law in the sense that the former regulates, *inter alia*, the legal relationship between the parent and the learner. The latter contains certain criminal law provisions such as statutory or common law misdemeanours (*cf.* 2.3.1.1).
- It is evident that the SA Constitution is the supreme law of the country, which implies not only that all laws, including school law, are subordinate to it, but also that such laws are tested in terms of this legal document (*cf.* 2.3.1.2). The other source of school law is the common law as it emerges in case law (*cf.* 2.3.1.2).
- The Schools Act guarantees parents and learners the following specific rights:
 - ♦ protection from unfair discrimination on any grounds whatsoever (*cf.* 2.3.2.1 and 2.4.1.2);
 - ♦ basic education and equal access to education institutions (*cf.* 2.3.2.1 and 2.4.1.2);
 - ♦ the right of parents or guardians with respect to the education of their children; and
 - ♦ the rights of learners with respect to their own education (*cf.* 2.3.2.1 and 2.4.1.2).
- The South African learner is obliged to submit to authority, discipline and punishment (*cf.* 2.3.2.1.1 and 3.3.5 and 4.5.3.4). He has the duty to subordinate himself to the school's code of conduct. Moreover, he has the obligation to comply with compulsory schooling and participate in extra-mural activities (*cf.* 2.3.2.1.1 and 2.4.1.2). The learner thus shares in the education responsibility, and the educator is obliged to take action if the learner fails to obey him (*cf.* 2.3.2.1.1).
- Concerning his legal rights, the Schools Act permits education in the official language or languages of the *learner's* own choice, where it is *reasonably practicable* (*cf.* 2.3.2.1.1).

- Both the SA Constitution and the Schools Act provide for the learner's right to procedurally fair administrative action (*cf.* 2.3.2.1.1 and 2.4.1.2 and 3.2 and 3.3). The latter comprises the *audi alteram partem* and objectivity principles (*cf.* 2.3.2.1 and 3.3.2.2.1 and 3.3.2.2.2). Although the learner also has the right to be part of the governing body of his school(*cf.* 2.3.2.1), he enjoys protection based on his status as a minor in private law (*cf.* 2.2.2.1 and 2.2.2.2) and 2.3.2.1).
- The Schools Act is lacking in the sense that serious misconduct which would justify expulsion has not been defined; specific disciplinary procedures which have to be followed have not been specified (*cf.* 2.3.2.1). Another deficiency of the Schools Act is that the right of appeal is awarded the learner or his parent only against the learner's expulsion, and not against his suspension (*cf.* 2.3.2.1). Contrary to this ignorance regarding the learner's right to appeal against his suspension, the SA Constitution enshrines the fundamental right to just administrative action and stipulates that *a child's best interests are of paramount importance* in every matter that concerns him (*cf.* 2.4.1.2).
- The *best interests* of the learner must enjoy paramount importance in all matters that concern him.
- Some discrepancy exists between the age limit in the SA Constitution, which specifies that persons younger than 18 years are regarded as children, and the SA Schools Act, which fails to define the term *minor* (*cf.* 2.3.2.1). If the legal parameters of 7-21 years of age are accepted as the definition (*cf.* 2.3.2.1), then three years of the learner's life as a *minor* are not protected by the special additional protection afforded children in section 28 (the so-called children's clause) of the SA Constitution (*cf.* 2.4.1.2). This would imply that the *best interests* of the learner are not *of paramount importance* during these three years.
- Regarding his fundamental rights, the age (*cf.* 2.2.2.2) and level of maturity of the learner could lead to the limitation of his independent right to exercise these rights (*cf.* 2.4.3). These aspects are reminiscent of the *Grundrechtsmündigkeit* and *sufficiently mature* principles of Germany and the United States of America (*cf.* 2.4.3.1). Educators must therefore take note that being vested with fundamental

rights does not necessarily imply that the learner has the independent right to exercise them.

- It appears that the justiciable rights entrenched in the Bill of Fundamental Rights, making the State responsible for the safe refuge, feeding and education of the learner, lead to practical problems.
- The educator must take cognizance of the fact that vertical and horizontal application applies to section 28 of the SA Constitution which protects the rights of children (*cf.* 2.4.2.1). Both State (public) and private relationships are affected by this duality.

6.3.2 Findings based on research objective 2: To identify the legal determinants of the educator-learner relationship

The following are the most important findings regarding the legal determinants of the educator-learner relationship:

- Administrative acts which are performed at school must comply with the general prescriptives of the law, which are legal empowerment (*cf.* 3.2.2), lawfully constituted authority (*cf.* 3.2.2.1 and 4.5.3.3), compliance with circumstantial and procedural prerequisites (*cf.* 3.2.3.1), reasonableness (*cf.* 3.2.6 and 4.3.1), fairness (*cf.* 3.3.2) and liability equal to that of private persons in the case of action taken without legal authority (*cf.* 3.3.4). The *bona fides* of the author of an administrative act cannot change an invalid act into a valid act (*cf.* 3.2.6). The court will only interfere in administrative decisions if there is evidence, *inter alia*, of *ultra vires*, prejudice or *mala fides* (*cf.* 3.2.2.2 and 3.3.4 and 3.2.4 and 3.2.6).
- The quasi-judicial competence of an administrative body, such as the governing body of a school, refers to its capacity to investigate a possible breach of conduct, hold trials, come to conclusions, make official decisions and exercise its discretion (*cf.* 3.3.1). All of these need to be done in accordance with the adjudicative process (*cf.* 2.3.2.1.1 and 2.4.1.2).
- Natural justice concerns itself with the fact that a person who is affected by an administrative act, such as the learner, is entitled to a fair, unprejudiced hearing (*cf.* 2.3.2.1 and 3.3.2.1). Yet the application of natural justice need not be rigid, since

the circumstances of the case, the nature of the investigation and the specific infringement point to its flexibility (*cf.* 3.3.2.2.1). By upholding the principles of natural justice, the educator accepts accountability for his actions (*cf.* 4.5).

- The blameless accountability of the Department of Education in the final instance, for the unlawful act of its staff is worded in *vicarious liability* (*cf.* 3.3.3). Four aspects need to be present to establish *vicarious liability*:
 - ♦ an unlawful act;
 - ♦ the unlawful act has to be performed during the execution of the employer's duties;
 - ♦ the unlawful act has to fall within the limits of the employer's capacities; and
 - ♦ the unlawful act has to occur while an employer-employee relationship exists (*cf.* 3.3.3).
- Negligence can exist only if the damage caused was reasonably foreseeable and preventable (*cf.* 3.3.3.1). The test of the reasonable person is applied in order to determine what the law expects of an educator (*cf.* 3.3.3.1 and 4.3.1.1.4):
 - ♦ Would a reasonable person have acted in the same way?
 - ♦ Could the damage have been foreseen?
 - ♦ Could the damage have been prevented?
- Based on the *in loco parentis* position of the South African educator, he exercises both delegated and original authority over the learner at school (*cf.* 3.3.5 and 4.2), and carries great responsibility regarding his legal duty concerning caring supervision (*cf.* 4.3 and 5.4.1 and 5.4.2 and 5.4.3) and the accompanying right to maintain discipline (*cf.* 2.3.2.1.1 and 5.6.1 and 5.6.2 and 5.6.3).

6.3.3 Findings based on research objective 3: To examine the extent of the educator's duty of care

The major findings in this regard are:

- The educator's duty of care refers to a specific obligation towards a specific group of learners in his care (*cf.* 4.2). South African law expects of the educator to act as

proceedings against educators, and Canada also holds the learner responsible for his own tortuous actions.

6.4 RECOMMENDATIONS

The following recommendations are made towards developing educational-judicial guidelines in an effort to ensure an accountable, responsive and open educator-learner relationship in South Africa:

- The *legal implications* which the SA Constitution and the Schools Act have on education should be made intelligible and accessible to all educators. Questionnaires should be sent out periodically to determine whether the information has been interpreted and implemented correctly.
- Care should be taken that the educator become fully conversant with the capacities, subjective rights and legal obligations bestowed on the learner, his parents, himself and the State. This could be done by compiling a set of comprehensible regulations in a Compendium with regards to, *inter alia*, the legal status of the learner, the prescribed procedures contained in formal law which have to be followed in the education system, the learner's obligations concerning his own education, and the educator's obligation to take action if the learner fails to obey him.
- The educator should be trained regarding exactly what is meant by legal, reasonable and procedurally fair administrative action. This could be done by including School Law as a compulsory subject in the completion of an education degree or diploma, and by introducing School Law as part of current in-service-training qualifications.
- The deficiencies of the Schools Act should be attended to immediately by:
 - ♦ carefully defining serious misconduct;
 - ♦ clearly specifying the disciplinary proceedings which have to be followed;
 - ♦ laying down the provisions of due process;
 - ♦ affording him / his parents the right to appeal against *all decisions* affecting him negatively;

- ♦ bringing the school-going age limit in line with the indication in the SA Constitution that a minor is regarded as younger than 18 years. This calls for a decision to be made regarding the compulsory school-leaving age.
- The educator should be informed of the scope and content of the duty of care he owes the learner. This could be done effectively in the various provinces.
- Guidelines should be compiled to make educators aware of the general prescriptives of the law with reference to administrative acts. Phrases such as *bona fide* behaviour, the *ultra vires* principle, *diligens paterfamilias*, the rules of natural justice, and *vicarious liability* should be expounded in full detail.
- The learner should be made aware of his obligations concerning his own education. Most important would be his duty to comply with compulsory school attendance and reasonable rules of behaviour. He must also be made aware of the fact that his own contributory fault might be taken into consideration concerning damage resulting from wrongful and negligent conduct.
- More should be made of the obligations of the learner which are common on an international level.
- Schools should finally come to realise that the so-called "indemnification form" does not protect them legally from being held liable for damage suffered by a learner.
- Canada's minority language education rights need to be scrutinized closely, since South Africa can gain much from the viewpoint that minority languages should be protected from extinction. However, attention should be drawn to the fact that the learner should be included in the affording of such rights.
- Corporal punishment has definitely lost its place in an accountable, responsive and open educator-learner relationship. Therefore the learner can only benefit from international consensus that this form of punishment should be prohibited.

6.5 CONCLUDING REMARKS

An accountable, responsive and open educator-learner relationship is vested in the clear demarcation of the individual capacities, subjective rights and legal obligations of

the parents, the learner, the educator and the State. It is in this regard that the onus rests with the educator to stay abreast of dramatic changes in the education-legal environment.

This research identifies itself with W.H. Auden's wise words:

Unless an individual is free to obtain the fullest education with which his society can provide him, he is being injured by society.