

# The potential remedial function of the law in the deteriorating public education system of South Africa

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## OPSOMMING

### Die Potensiële Remediërende Funksie van die Reg in die Verswakkende Openbare Skoolsisteem van Suid-Afrika

Hierdie artikel maak daarop aanspraak dat die Suid-Afrikaanse regstelsel sowel die vermoë as die verpligting het om die nodige remediërende funksie te vervul, sodat verdere agteruitgang van die openbare onderwysstelsel gestuit word. Daadwerklike optrede vanuit die regstelsel word in die vooruitsig gestel om openbare amptenare, onderwysvakbondlede en politici wat die reg verontagsaam, te dwing om die heerskappy van die reg en oppergesag van die Grondwet te erken en te respekteer.

Die artikel wys daarop dat daar dringende optrede nodig is teen vakbonde soos SADOU, wat volgens alle getuienis die reeds kwesbare onderwysstelsel verder ondermyn. Sowel die aanstigting van gewelddadige optrede tydens langdurige stakingsaksies as die beskerming van lede wat hulle deurlopend skuldig maak aan substandaard-onderdig, moet teengewerk word. Sodanige onprofessionele, onetiese optrede tas die reg van leerders op onderwys ernstig aan. Die Staat se aandeel aan mislukte onderhandelinge en die gevolglike nywerheidsaksies in die openbare sektor, insluitend die onderwys, moet egter nie misgekyk word nie.

Die eerste aanbeveling is dat belanghebbendes by die onderwys moet saamwerk om die nodige respek vir die heerskappy van die reg te vestig en af te dwing. In gevalle waar versuim onder amptenare, vakbondlede of politici om die reg te respekteer opgemerk word, moet die belanghebbendes nie skroom om hofsake teen die oortreders aanhangig te maak nie.

Die tweede aanbeveling hou verband met die potensieel kragdadige optrede van die howe, soos in *Coetzee v National Commissioner of Police* 2011 2 SA 227 (GNP) gedemonstreer is. Daar word aanbeveel dat, waar openbare amptenare hulle aan *mala fide*-optrede skuldig maak, hulle in hul persoonlike hoedanigheid aanspreeklik gehou sal word vir die volle regskoste, eerder as om dit vanuit Staatsfondse te laat vereffen. Dit sal as 'n gepaste straf dien, en ook as 'n afskrikmiddel om ander amptenare te keer om hulle aan soortgelyke wangedrag skuldig te maak.

## 1 Problem Statement

It is trite to state that education in South Africa is in dire straits. A plethora of serious risks regarding the provision of quality education is simultaneously encountered and created by the South African school system, which currently compares unfavourably against some other

African countries with a considerably smaller education budget. Motala and Dieltiens<sup>1</sup> point out that “despite substantial improvements in both policy and practice, education in SA remains poor in terms of learning outcomes”.

One of the reasons for this state of disarray in the system is the lack of effective and ethical leadership by politicians and governmental structures such as the departments of education on national and provincial level. Landman<sup>2</sup> states that a lack of ethical leadership has become common practice in the public life in SA. He points out that some top leaders are establishing a culture that puts ethical and democratic values second to their own political agendas. In comparison, Landman draws attention to the fact that former president Nelson Mandela during his term of office honestly and frequently admitted his mistakes, but nowadays some leaders refuse to do so.

This deficiency regarding ethical leadership can be distinguished from one other prominent problem, that of teacher unionism, but can also be seen as one of the contributory factors towards the problems associated with some unions.

Unionism, and specifically the actions of some teacher unions, is a cause of grave concern. During the public workers’ strikes of 2010, which included large numbers of educators, intimidation, violent behaviour and vandalism prevailed. This is an example of unethical conduct at lower levels of society, as compared to the leadership that was mentioned. Part of this approach is to intimidate and even assault non-striking colleagues, but “union and political leaders refuse to take a principled stand against this”.<sup>3</sup> Landman adds that “too many top leaders are light weights in heavy-weight positions who do not understand or do not take seriously enough the attendant responsibilities.”<sup>4</sup>

In the light of above-mentioned risks, deficiencies and the resulting general decline in the quality of education provision, solutions and remedies have to be identified to counter this tendency. The properly developed legal framework, including the Constitution of the Republic of South Africa, 1996 (the Constitution), in principle does provide the necessary support for the system, but the improper way in which these legal principles are put into operation currently leads to further deterioration. Approached from a legal perspective, the provision regarding the rule of law as entrenched in section 1(c) of the Constitution as part of its founding provisions, should be recognised as one of the cornerstones of this democracy, and should without doubt be considered

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1 Motala & Dieltiens “Educational Access in South Africa Country Research Summary” (2010) [http://www.create-rpc.org/pdf\\_documents/South\\_Africa\\_Country\\_Research\\_Summary.pdf](http://www.create-rpc.org/pdf_documents/South_Africa_Country_Research_Summary.pdf) (accessed 2011-03-02).

2 Landman “Ethical, responsible leadership is far too rare” *Beeld Sake*24 (2011-02-04) 2.

3 *Ibid.*

4 *Ibid.*

as part of the solution and remedial function of the law. The rule of law is directly linked with the supremacy of the Constitution, and both these notions may be harnessed to respond to the deterioration of the system.

In the argumentation that follows, the focus will be on selected prominent causes and the potential of legal remedies for the prevailing situation. The claim of this article, that will be substantiated in the discussions that follow, is that the legal system can provide, given certain limitations and conditions, the necessary remedy and thus mend this deterioration of the system. In this context the legal system would include the legislator, judiciary and executive.

## 2 Conceptual Framework

### 2.1 The Law, and the Functions of Law

The legal systems in most democracies adhere to the principle of separation of powers, according to which the legislative, judiciary and executive powers of the State function as separate entities. The direct influence of the one on the other is normally not tolerated. Although not written expressly into the Constitution, the South African legal system also subscribes to this principle. References in this article to the law or legal system includes all three spheres of the state's power: all three can and should contribute towards remedying the deficiencies of the education system.

One crucial question that should be answered from the outset is what the actual function of a legal system is. Can the judicial structures and the laws of a country be seen as entities that can or should remedy any deteriorating system? Further, can it be expected from a legal system to function proactively and protect a system from deviations, or should the function be merely *post hoc*, that is, in reaction to problems, challenges and violations of the law?

The answer to these questions can be sought in the roots of South African law. The South African legal system is firmly rooted in the Roman-Dutch system, which originates from the Kings era dated 753 to 509 BC.<sup>5</sup> For the purpose of this discussion, the focus is on the period when the office of the Praetor was established in 367 BC, which fell in the important period before the rule of Caesar Justinian. Several sources of the law were established in this period, all pointing at the one central function of the law – the regulation of civil life.<sup>6</sup> The customary law of the time contained a number of rules that regulated public relations in Rome. In 451 BC the *Twelve Tables* were developed as a result of the public demand to, for the first time, codify legal rules and regulations. These

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5 Van Zyl *Geskiedenis van die Romeins-Hollandse Reg* (1983) 15.

6 *Ibid.*

systematic and clear tables, engraved in bronze, were short sayings written in an authoritative idiom.<sup>7</sup>

Ever since then, as the Roman-Dutch law developed through the centuries, the law had one central function: that of regulating the relationships between people, on horizontal level, and the vertical relationship between the State and its citizens and other inhabitants. The South African common law, as it developed from the Roman-Dutch law since the establishment of the Cape Colony in 1652, still had this one primary function.

It can thus be stated that the one most prominent function of a legal system is to provide in a regulatory way the necessary structure within which both interpersonal relations and large, complex structures such as the government and its subdivisions can function effectively. In so doing, it can provide security to the citizens of the country, and also ensure that the government fulfils its obligations.

Focusing on the problems encountered in the South African public school system, as pointed out, the legal system can and should be seen as a remedy, both proactively and reactively.

## 2 2 The Remedial Effect of the Law

The term “legal remedy” can be defined as “[t]he manner in which a right is enforced or satisfied by a court when some harm or injury, recognised by society as a wrongful act, is inflicted upon an individual”.<sup>8</sup> The four basic types of judicial remedies are damages, restitution, coercive remedies and declaratory remedies.<sup>9</sup> According to the same dictionary the “law of remedies” refers to the relief to which a plaintiff is entitled after successfully establishing in a court that a substantive right has been infringed by the defendant.

For the purpose of this article the general meaning of the word “remedy” will rather be used, synonymous with terms such as “cure” or “therapy”. In terms of the central claim of the article, the legal system of the country is deemed to be capable of supplying answers to the deterioration in the education system, to a greater or lesser extent curing or remedying the weaknesses and flaws. The claim is not only that the system is capable of achieving this, but also that it is expected of the legal system to provide the answers. In the final discussion of the article a number of recommendations will be offered as to how the legal system can and should be utilised to combat the main deficiencies in the education system.

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7 *Ibid.*

8 According to *The Free Dictionary* (<http://www.legal-dictionary.thefreedictionary.com> (accessed 2011-10-10)).

9 *Ibid.*

The first element of the legal system that holds part of the answer is the rule of law and the associated principle of legality, which will be discussed next.

### 2 3 The Rule of Law and the Principle of Legality

The rule of law was first described in the early 20th century in England, when it was stated that the purpose of the rule of law was

[t]o protect basic individual rights by requiring the government to act in accordance with pre-announced, clear and general rules that are enforced by impartial courts in accordance with fair procedures.<sup>10</sup>

Hoffmann<sup>11</sup> refers to the World Justice Project which aims at a worldwide promotion of the rule of law.<sup>12</sup> Through partnerships and legal research the Rule of Law Index was compiled, and four universal principles that lie at the heart of the rule of law were formulated.<sup>13</sup> These principles have direct bearing upon the current South African education situation:

- (a) The government and its officials are accountable under the law.
- (b) The laws are clear, publicised, stable and fair, and protect fundamental rights, including the security of persons and property.
- (c) The process by which the laws are enacted, administered and enforced is accessible, fair and efficient.
- (d) Access to justice is provided by competent, independent and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

The principle of legality is currently often seen as the essence of the rule of law, and implies that decisions can only be made “by the application of known and general principles of law”.<sup>14</sup> It has also developed into a general requirement that all law and state conduct must be rationally related to a legitimate government purpose, as confirmed in *President of the Republic of South Africa v South African Rugby Football Union*.<sup>15</sup> Jowell<sup>16</sup> refers to this case, remarking that the Constitutional Court struck down an action of the then newly elected President, Nelson Mandela. Instead of launching the now familiar counter-attack on “unelected judges”, as certain politicians currently tend to do, President Mandela graciously welcomed that no person is above the law.<sup>17</sup>

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10 Currie & De Waal *The Bill of Rights Handbook* (2005) 10.

11 Hoffman “Accountability and the Rule of Law” (2009) [http://www.ifaisa.org/Accountability\\_and\\_the\\_rule\\_of\\_law.html](http://www.ifaisa.org/Accountability_and_the_rule_of_law.html) (accessed 2011-05-05).

12 *Ibid.*

13 *Ibid.*

14 Currie & De Waal 11.

15 2000 1 SA 1 (CC).

16 Jowell “How secure is the rule of law in South Africa?” (2009) [www.thetimes.co.uk/tto/law/article2213352.ece](http://www.thetimes.co.uk/tto/law/article2213352.ece) (accessed 2011-05-20).

17 *Ibid.*

Du Plessis AJ in the judgment *Coetzee v National Commissioner of Police*<sup>18</sup> sums up the disarray of the South African society in the following words:

South Africa is facing a tsunami of corruption, bribery, state intervention in all spheres of the economy, unlawful, incompetent and malicious execution by public officials of the exercise of their duties, in breach of the Constitution, and in breach of virtually every other obligation that exists. The only bulwark against this threat to the public, innocent citizens, and the poor, the frail and the needy, are the courts and the rule of law. The courts and the independence of the courts, and the willingness of the judiciary to stand up against intimidation and *mala fide* actions of state officials must be utilised in its full force.

This alarming decline in the country in general, and more specifically the education system, can be partially ascribed to the non-adherence of both public officials and politicians to the constitutionally entrenched concept of the rule of law.<sup>19</sup> This will be discussed later in more detail.

### **3 The Need for Remedial Action against Teacher Unionism**

The World Innovation Summit for Education (WISE) is an annual international seminar, initiated by a number of international organisations under the leadership of the Qatar Foundation. The focus of the 2011 conference was on innovation in education.<sup>20</sup> The respective roles of the parents, learners, school leaders and educators in this process of innovation was discussed in depth, but it was significant that amongst the 126 countries no reference was made in any debate to the role of teacher unions.<sup>21</sup> This points at the fact that unionism does not necessarily form an essential part of any education system, and that the focus in educational debates can readily be on other structures that make the system function effectively.

In South Africa teacher unions have a very prominent impact on education, unfortunately predominantly to the detriment of the already crippled school system. The most visible influence of unions is the conduct of certain unions' members during strike actions, when intimidation and harassment of fellow educators and learners are regularly alternated with violence and vandalism – unlawful conduct that tarnishes the image of the profession.

In the keynote address at the Fifth Commonwealth Teachers' Research Symposium in 2010, with the focus on teacher

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18 2011 2 SA 227 (GNP) 91.

19 *Maritzburg College v Dlamini* [2005] JOL 15075 (N).

20 Colditz *Report of CEO to FEDSAS* 2011.

21 *Ibid.*

professionalism, Jansen<sup>22</sup> commented that South Africa is probably one of few countries in the world “where the unions rather than government run the schools”. In 2011 Jansen repeated his concern about the adverse influence of unionism, and added that it is currently a fact that president Zuma would not attempt to control South African Democratic Teachers’ Union (SADTU), due to its alliance with the ruling African National Congress through the Congress of South African Trade Unions (Cosatu).<sup>23</sup> He explained that the “balance of powers” in the politics prevents any attempt of the state to improve education.<sup>24</sup>

### 3 1 The SAOU’s Approach to Education

While all teacher unions take part in strike actions, not all unions contribute to the threatening demise of quality education. Unions such as the *Suid-Afrikaanse Onderwysersunie* (South African Teachers’ Union – SAOU) and others in the Combined Trade Union-Autonomous Teachers’ Unions promote professional conduct and high quality teaching by its members.<sup>25</sup> In-service training to specific groups of educators and principals are regularly offered by the SAOU, raising their levels of expertise and ensuring professional management and teaching in the schools where these educators are based. Zille<sup>26</sup> expressed her appreciation and respect for the SAOU, and added: “This is one of few teacher unions that tries to find a balance between educators’ rights and the rights of learners.”

### 3 2 SADTU’s Approach to Education

There is a growing sentiment against the approach of the SADTU, which is ironically regarded as the single most prominent hindrance to quality education in South Africa. SADTU was established about 20 years ago and currently has 245,000 members. Buhlungu<sup>27</sup> is quoted as follows:

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22 Ochs “Enhancing Teacher Professionalism and Status” (2010) [http://www.thecommonwealth.org/files/234058/FileName/Enhancing\\_Teacher\\_Professionalism\\_and\\_Status.pdf](http://www.thecommonwealth.org/files/234058/FileName/Enhancing_Teacher_Professionalism_and_Status.pdf) (accessed 2011-09-20) 15.

23 Steyn “Beset Staat se Geboue” (2011) <http://www.volksblad.com> (accessed 2011-11-23).

24 *Ibid.*

25 On 2011-08-31, the Combined Trade Unions - Autonomous Teacher Unions (CTU-ATU) was admitted into the Education Labour Relations Council (ELRC) in the place of the Combined Trade Unions - Independent Teacher Unions (CTU-ITU). This CTU represents 123,500 teachers. NAPTOSA has the largest membership of the parties within this CTU while the other parties are SAOU, NATU, PEU, HOSPERSA and PSA (Rossouw *Labour Relations in Education - A South African Perspective* (2010) 105).

26 *Ibid.*; Zille “Die SA Onderwysstelsel: voldoen dit aan die behoeftes van die internasionale arbeidsmark?” (Speech delivered by DA Leader Helen Zille at the *Suid-Afrikaanse Onderwysersunie* Principals’ Symposium in Port Elizabeth, 2010-08-31 available at <http://da.org.za/docs/10348/SAOUCToespraakfinaal.doc.pdf> (accessed 2011-11-25) 2.

27 Seekoei “‘Union lords’, not idealists, running show at SADTU” *Mail & Guardian* (2010-09-03).

'Little union lords' are running the South African Democratic Teachers Union (SADTU), having long ago defeated the education idealists who were central to the union's formation 20 years ago. The intimidation and vandalism marking the 2010 strikes would have been foreign to 1989 education idealists. Twenty years ago teachers were rather conservative professionals, regarded as elites in their communities.

Also commenting on the effect of the 2010 public workers' strikes on quality education, James<sup>28</sup> stated: "The teachers' union SADTU has forgotten about the learners' right to education. Through their ill-disciplined and sometimes violent conduct they have forsaken their biggest responsibility: excellent teaching". He added that SADTU is an "anti-education organisation, which is hostile to the interests of learners."<sup>29</sup>

SADTU president Thobile Ntola refers to the earlier days of the union by stating that teachers initially did not want to affiliate to the trade union federation Cosatu because they considered themselves professionals.<sup>30</sup> Also noting the changed approach of SADTU, Zille reports about the exodus of SADTU's members, "who are increasingly disillusioned with the tone, style and management of their organisation."<sup>31</sup> This union nevertheless remains the single largest South African trade union, with about two thirds of the 390 000 South African educators as its members.<sup>32</sup>

### 3 3 Strikes and Picketing

In spite of the fact that some teacher unions aim at advancing the professionalism of their members, unionism is closely associated with aggressive industrial action. Looking back over the first decade of the 21<sup>st</sup> century, headlines such as the following point to looming or on-going educator strikes, and caught the attention of the public and the media: "2 000 teachers to strike today", "Teachers' strike suspended after legal threat" and "No pay cut for Cape's non-striking teachers".<sup>33</sup> In the report

28 Peyper "Peiling wys SA skolestelsel is vierde swakste ter wêreld" *Beeld* (2010-25-09) ("Poll shows that SA school system is worst in the world, bar three") (own translation)).

29 SAPA "Teaching an essential service - DA" (2010) <http://www.news24.com/SouthAfrica/News/Teaching-an-essential-service-DA-20101011> (accessed 2011-11-15).

30 Seekoei *Mail & Guardian* (2010-09-03).

31 Zille (2010-08-31).

32 Van Onselen "How Sadtu and SACE have damaged accountability in SA Education" (2012) <http://inside-politics.org/2012/06/25/how-sadtu-and-the-sace-have-damaged-accountability-in-sa-education/> (accessed 2011-11-15).

33 Mkokeli "2000 teachers to strike today" *Eastern Cape Herald* 2003-04-11 1; Masondo 2005 "Teachers' strike suspended after legal threat" *The Herald* (available at [http://www.theherald.co.za/herald/2005/02/23/news/n13\\_23022005.htm](http://www.theherald.co.za/herald/2005/02/23/news/n13_23022005.htm)) (accessed 2005-03-30); Peters "No pay cut for Cape's non-striking teachers" *Cape Argus* 2005-03-07 (available at [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=105&art\\_id=vn20050307102032456C353645](http://www.iol.co.za/index.php?set_id=1&click_id=105&art_id=vn20050307102032456C353645)) (accessed 2005-03-07).

“NAHT plans first strike in 114 year history” the possible strike of school principals was highlighted.<sup>34</sup>

A strike is defined as follows:<sup>35</sup>

‘strike’ means the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to ‘work’ in this definition includes overtime work, whether it is voluntary or compulsory.

While the right to strike is entrenched in the Constitution, the Labour Relations Act<sup>36</sup> (LRA) includes certain limitations that render strikes unprotected where the prescriptions of legislation or collective agreements were not followed.<sup>37</sup> In order to act lawfully, a number of requirements in this Act must be met and certain procedures have to be followed by those planning to take industrial action.<sup>38</sup>

### ***3 3 1 Strike Action of 2007***

After a relatively peaceful period of about two years, June 2007 saw the most extensive teacher strike activities, which ranged from a one day action to a prolonged nationwide strike of three weeks that severely damaged the educational prospects of thousands of learners. This strike action took place after months of unsuccessful negotiations, and was

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34 Bamber “NAHT plans first strike in 114 year history” (2011) <http://teachersupport.info/news/in-the-press/NAHT-plans-first-strike-in-114-year-history.php> (accessed 2011-11-20).

35 S 213 Labour Relations Act 66 of 1995 (LRA).

36 66 of 1995.

37 S 23 Constitution; s 68 LRA.

38 S 64 LRA contains the right to strike and recourse to lock-out: “(1) Every employee has the right to strike and every employer has recourse to lock-out if- (a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and- (i) a certificate stating that the dispute remains unresolved has been issued; or (ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that- (b) in the case of a proposed strike, at least 48 hours’ notice of the commencement of the strike, in writing, has been given to the employer, unless- (i) the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or (ii) the employer is a member of an employers’ organisation that is a party to the dispute, in which case, notice must have been given to that employers’ organisation; or (c) in the case of a proposed lock-out, at least 48 hours’ notice of the commencement of the lock-out, in writing, has been given to any trade union that is a party to the dispute, or, if there is no such trade union, to the employees, unless the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or (d) the case of a proposed strike or lock-out where the State is the employer, at least seven days’ notice of the commencement of the strike or lock-out has been given to the parties contemplated in paragraphs (b) and (c).”

supported by all teacher unions, including unions such as the SAOU that previously abstained from this type of industrial action. Thousands of teachers went on strike for the first time in their careers, a strike that lasted for the members of the SAOU for one day only: 1 June 2007.

It should be noted that, in contrast to public perception, the reason for this strike was not the salary dispute only. A variety of grounds for the strikes was published by the unions, of which the salary increase was most prominent, but concerns regarding educator security were also raised by the SAOU. Educators are seriously concerned about the lack of action from the State to curb those elements that regularly impact on their security, as stipulated. This is an infringement of their basic right to an environment that is harmful to their health or well-being.<sup>39</sup> Security is also properly entrenched in the Constitution, according to which all citizens' security, including that of educators, is provided for.<sup>40</sup>

The extended strike of three weeks by SADTU members ended at the beginning of the winter holidays of 2007. The salary dispute ended when the unions accepted the 7,5% increase the government finally offered.

The severely negative effect of this type of prolonged industrial action was clear in the grade 12 results at the end of 2007 – a decline in the pass rate at numerous schools that previously made good progress. The educators' constitutional right to strike had to be weighed against the learners' entrenched right to education. The educators eventually managed to raise the increase by 1,5% from the initial 6% that was offered, but the cost for the education system was high. At many schools the culture of teaching and learning was damaged, while the status of educators declined in the eyes of their learners and the public.

In an attempt to mitigate the damage, provincial education departments initiated an expensive catch-up program, which was only partly successful.<sup>41</sup> Despite good intentions, numerous learners and educators did not attend the scheduled teaching sessions on Saturdays and during the September holidays.

### **3 3 2 Strike Action of 2010**

In July and August 2010 a more severe strike than the one in 2007 by various groups of public workers followed directly after the football World Cup final. For several weeks teachers affiliated to some of the unions went on strike in a period of time when the final year students were to write their penultimate examinations. Some examinations were

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39 S 24(a) Constitution.

40 S 12 Constitution contains the right to freedom and security of the person, which reads in relevant part: "Everyone has the right to freedom and security of the person, which includes the right – (c) to be free from all forms of violence from either public or private sources."

41 Prinsloo & Beckmann "(Un)lawful union activity: the risk of liability" 2012 (paper presented at the SAELA International Conference 2012-09-10-12) Somerset West, South Africa.

postponed, and in some cases even cancelled, with teacher unions demonstrating indifference regarding the importance of these examinations for the future of the students.

Referring to the intimidation, violence and vandalism as well as other forms of unlawful conduct that was part of this strike action, the editor of one prominent newspaper commented as follows, reflecting the sentiment of a certain portion of the South-African society:

There are thousands of educators who see their work as a calling and who deserve better salaries. The members of SADTU who are lazy and who act in a criminal way during the strike, do not count as part of this group. They are supposed to help children to establish a foundation of good education before entering adult life. Instead, SADTU starts an indefinite strike weeks before the final examinations. These educators can destroy the future of the poorest students, those who deserve it the least, through their strike action.<sup>42</sup>

The timing of the strike was as dreadful as the type of unlawful activities resorted to. A parent summed it up as follows:

The angry and chanting mob forced our children out of their classes when some educators were busy teaching. If it were not for the presence of the police, we don't know what they would have done as they were angered by the unrelenting attitude of the principal, the staff and the resistance of the learners to leave school premises.<sup>43</sup>

In this case the staff members demonstrated the basic attitude of the SAOU and other members of the CTU. They all demonstrated their disappointment with the unacceptable low offer from the government, but did their best to mitigate the adverse effect on the children's education and academic progress.

The *Code of Professional Ethics* of the SA Council for Educators (SACE) specifies that all educators registered at the SACE have to:<sup>44</sup>

- (a) acknowledge the noble calling of their profession to educate and train the learners of our country;
- (b) acknowledge, uphold and promote basic human rights, as embodied in the Constitution of South Africa;
- (c) commit themselves to do all within their power, in the exercising of their professional duties, to act in accordance with the ideals of their profession.

These guidelines are intended to be the professional norm for educators and their unions, and should be read with the entrenched Constitutional notion of the best interests of the child.<sup>45</sup>

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42 Du Plessis "Zuma moet self dié stakers vasvat" *Beeld* (2010-08-17) (available at <http://www.beeld.com/Opinie/HoofArtikels/Zuma-moet-die-stakers-self-vasvat-> (accessed 2011-08-18)).

43 Vaal Reefs Technical High School SGB "2010 Report to FEDSAS NW Province" 2010.

44 S 2(1) South African Council for Educators Act 31 of 2000.

45 S 28(2) Constitution.

Specific provisions in the LRA exist that, if implemented in education, would serve the best interests of the child in the context of education. The following limitations are specified in section 65:

- (1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if –
  - (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute;
  - (b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;
  - (c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act;
  - (d) that person is engaged in –
    - (i) an essential service; or
    - (ii) a maintenance service.
- (2)(a) Despite section 65(1)(c), a person may take part in a strike or a lock-out or in any conduct in contemplation or in furtherance of a strike or lock-out if the issue in dispute is about any matter dealt with in sections 12 to 15.

Referring to strike actions in general, Oosthuizen states that "... while the educators exercised their constitutional right to express their dissatisfaction through strike action, thousands of learners were deprived of teaching".<sup>46</sup> Du Plessis sees these striking teachers as "... thugs who should have appeared today in the criminal court on charges of intimidation, assault and vandalism."<sup>47</sup> Teaching is the last place for them to be."

Mills comments in "Why Africa is poor" that the youth of Africa, which could be regarded as an immense potential source of talent and energy, is currently seen as a threat to safety in their countries.<sup>48</sup> The reason is that the majority are untrained and jobless, and it is obvious that every strike action in South Africa will increase this problem.

A further element that has a severe influence on the problems created by strike actions, is that quality education is not demonstrated nor experienced. Motala and Tikly state that "parents and children have no proper benchmark of what good basic education might entail, and thus they are more accepting of mediocre school and teacher performances and consequently are not fully aware of their predicament".<sup>49</sup>

### **3 3 3 Looming Strike Action of 2011**

In the second term of 2011 it was jointly announced by the Independent Labour Caucus (ILC) and Cosatu Unions that they have formally rejected

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46 Oosthuizen *et al Aspects of Education Law* (2009) 275.

47 Du Plessis *Beeld* (2010-08-17).

48 Du Plessis "Staking word 'n monster wat SA kan verteer" *Beeld* (2010-08-25).

49 Motala & Dieltiens "Educational Access in South Africa Country Research Summary" (2010) [http://www.create-rpc.org/pdf\\_documents/South\\_Africa\\_Country\\_Research\\_Summary.pdf](http://www.create-rpc.org/pdf_documents/South_Africa_Country_Research_Summary.pdf) (accessed 2011-03-02) 10.

the government's offer for a salary increase.<sup>50</sup> The following reasons for rejecting the offer have *inter alia* been put forward:

- (a) The projected CPI for 2011 is 4.7% and therefore the offer of 4.8% is in effect an offer of CPI + 0.1%. Therefore, totally unacceptable.
- (b) The postponement of long outstanding matters, such as the improvement of housing benefits and medical benefits is unacceptable.

The ILC and Cosatu Unions were of the opinion that these offers imply that the state as employer prefers to ignore past crises in the hope that they will disappear, the government "demonstrates their unwillingness to conclude these negotiations amicably".<sup>51</sup> Considering the arguments of the unions, a despondency has developed on the unions' side regarding the inability of the State to look after the interests of its employees. It was also mentioned that about 40% of the educators are financially blacklisted in South Africa in terms of the National Credit Act,<sup>52</sup> which is some kind of indication of the amount of the average teacher's salary.

The state might argue that it does not have the financial means to meet the demands regarding salary increases. This argument, which was obviously also followed in the 2010 salary bargaining, is diminished by the way in which a high percentage of politicians has spent state funding in recent years, including extraordinary amounts paid immediately after their elections towards super luxury vehicles and the renovation of their personal housing facilities. In addition, the general mismanagement by a number of state departments – either through corruption, overspending or underspending of the allocated funds – contributes to the relentless, ever demanding approach of unions. The auditor-general, Mr Terence Nombembe, pointed out that R4 billion was wasted irregularly and fruitlessly by government departments in the 2009-2010 tax year.<sup>53</sup>

In the light of the effect of successful or unsuccessful collective bargaining, one legal structure that should be recognised as a potential source of remediation is the Education Labour Relations Council (ELRC). This bargaining council has been established in terms of section 37(3)(b) of the LRA. Section 28 of the LRA provides for the powers and functions of bargaining councils, most notably the conclusion and enforcement of collective agreements, the prevention or solving of labour disputes and the development of proposals for submission to the National Economic Development and Labour Council NEDLAC or any other appropriate forum on policy and legislation that may affect the sector and area.<sup>54</sup>

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50 Press release by SAOU (2011) available at [http://www.saou.co.za/images/stories/libraryNuusflits/Press\\_statement-public\\_service\\_wage\\_negotiations-May\\_0620.pdf](http://www.saou.co.za/images/stories/libraryNuusflits/Press_statement-public_service_wage_negotiations-May_0620.pdf) (accessed 2011-03-02).

51 *Ibid.*

52 34 of 2005.

53 Landman *Beeld* (2011-02-04) 2.

54 S 28(1)(a), (b), (c), (h) Constitution.

Although educators normally approach the ELRC for education-specific matters, educators also fall within the Public Service Coordinating Bargaining Council (PSCBC) when matters that concern two or more public sectors are negotiated.<sup>55</sup>

One ELRC function that has the potential to remedy the adverse effects of strikes is “to determine by collective agreement the matters which may not be an issue in dispute for the purposes of a strike or a lockout at the workplace”.<sup>56</sup> If this function is effectively performed, some incidences of industrial action in education may be prevented by ruling out those matters that should rather be resolved through mechanisms that do not directly affect the teaching and learning process.

### **3 3 4 Risks for Unions During Violent Industrial Action**

Referring to the risks encountered by teacher unions, Prinsloo and Beckmann<sup>57</sup> argue as follows:

Like a reasonable person a reasonable union ought to be able to foresee the damage or harm happening to a school, a learner, a parent, the education system and the country as a whole as a result of strike action and should take all reasonable steps to avoid such action.

Since the judgment in *SATAWU v Garvas*<sup>58</sup> violent conduct of members during industrial action holds real financial risks for unions. In *SATAWU* the Constitutional Court held that a law is consistent with constitutional principles if it holds organisers of gatherings, normally union leaders, liable for riot damage caused during such industrial action, “unless they took all reasonable steps to avoid the damage and they did not reasonably foresee that damage.” In September 2012 Joubert reports that this far-reaching measure might eventually be included in law amendments currently being debated.<sup>59</sup> Cosatu is aggressively opposed to such amendment, which was first proposed by the Democratic Alliance in 2010, which might render those unions without proper control over their members bankrupt.

### **3 4 Remedial Action through Law Amendments**

Statutory provision is made to regulate industrial action, and to limit it where necessary. In section 65 of the LRA the normal right to strike is limited when essential services have to be rendered. According to section 213 of the LRA “essential service” means “a service, the interruption of which endangers the life, personal safety or health of the whole or any

55 Rossouw *Labour Relations in Education - A South African Perspective* (2010) 107.

56 S 28(1)(i) Constitution

57 Prinsloo & Beckmann “(Un)lawful union activity: the risk of liability” 2012 (paper presented at the SAELA International Conference 2012-09-10-12) Somerset West, South Africa.

58 CCT 112/11 [2012] ZACC 13.

59 Joubert “Unies boet dalk as lede aanjaag” *Beeld* (2012-09-28) 13.

part of the population.” An essential services committee, established by the Minister of Labour in consultation with the Minister for the Public Service and Administration, has as one of its functions in terms of section 70 of the LRA “to conduct investigations as to whether or not the whole or a part of any service is an essential service, and then to decide whether or not to designate the whole or a part of that service as an essential service”.

The prohibition of essential services to strike in terms of section 65 can be seen as a powerful mechanism to maintain a certain level of functionality in public services. The LRA regulates the relationships between all employers and employees in both public and private employ, including educators at public schools. If education is classified by the essential services committee as an essential service, similar to the defence force, police service, and nursing, such a step has the potential to drastically reduce the disruptive effect of teachers’ industrial action. Deacon reasons that South Africa has “sufficient laws regulating strikes and, particularly, protest action or picketing” and is not in favour of further law amendments but this suggested amendment to labour law is supported by Reynecke, the Democratic Alliance as well as Beckmann and Prinsloo.<sup>60</sup> Such an amendment implies that the existing definition of essential services might need to be expanded to also include possible damage to the psychological and academic well-being of learners, over and above threats to their physical safety and health. In so doing, the devastating influence of some teachers’ unions could be curbed. In turn, this might be the start of building (or bringing back to where it once existed) a culture of teaching and learning conducive to quality education.

#### **4 The Need for Remedial Action Against Departmental Incompetence**

Jansen is of the opinion that three quarters of public schools in South Africa can be classified as being weak.<sup>61</sup> He blames this on the government’s appalling attitude towards service provision, which is also visible in other state departments.

One legal instrument that regulates competence in service provision, especially related to decisions by public officials that adversely affect the

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60 Deacon “The implications and risks of the teacher’s right to strike” (paper presented at the SAELA International Conference 2012-09-10–12) South Africa; Reynecke “The Right to Dignity in Education” (paper presented at the SAELA International Conference 2007-00-26–28) South Africa; SAPA “Teaching an essential service” (2010) <http://www.news24.com/SouthAfrica/News/Teaching-an-essential-service-DA-20101011> (accessed 2011-03-02); Prinsloo & Beckmann “(Un)lawful union activity: the risk of liability” (paper presented at the SAELA International Conference 2012-09-10–12) South Africa.

61 Steyn (2011) <http://www.volksblad.com> (accessed 2011-11-23).

rights of citizens, is the application of the Promotion of Administrative Justice Act.<sup>62</sup> It is expected from the State to ensure fairness in the treatment of both employees of the state, such as educators in public schools, and ordinary citizens of the country. Referring to the Constitutional right to just administrative action, Currie and De Waal state that the "... entrenchment of fundamental principles of administrative law in the Constitution and Bill of Rights should be seen against the background of a long history of abuse of governmental power in South Africa".<sup>63</sup>

Another legal instrument that may have a remedial effect upon the quality of service provision by public officials, is the *Code of Conduct for the Public Service*, which forms Chapter 2 of the Public Service Regulations. This *Code* sets as its purpose to:

... act as a guideline to employees as to what is expected of them from an ethical point of view, both in their individual conduct and in their relationship with others. Compliance with the Code can be expected to enhance professionalism and help to ensure confidence in the Public Service.

To give effect to this general statement, this code sets a number of ideals for public servants' approach to their duties, amongst others that such an employee:

- (a) puts the public interest first in the execution of his or her duties;<sup>64</sup>
- (b) loyally executes the policies of the Government of the day in the performance of his or her official duties as contained in all statutory and other prescripts;<sup>65</sup>
- (c) is committed through timely service to the development and upliftment of all South Africans;<sup>66</sup>
- (d) is committed to the optimal development, motivation and utilisation of his or her staff and the promotion of sound labour and interpersonal relations;<sup>67</sup>
- (e) refrains from party political activities in the workplace;<sup>68</sup>
- (f) is punctual in the execution of his or her duties;<sup>69</sup>
- (g) executes his or her duties in a professional and competent manner.<sup>70</sup>

These ideals for the conduct and attitude of public officials, such as departmental officials in the department of education, serve as basic guidelines for the discussion that follows. While some reasons for the decline in the quality of education are also to be found within underperforming schools, such as lacking principal leadership or

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62 3 of 2000.

63 S 33 Constitution; Currie & De Waal 642.

64 S 3.1 *Code of Conduct for the Public Service (CCPS)*.

65 *Ibid.*

66 S 3.2 *CCPS*.

67 S 3.3 *CCPS*.

68 *Ibid.*

69 S 3.4 *CCPS*.

70 *Ibid.*

educator diligence, the discussion will focus on the role and efficiency of the various departments of education.

#### **4 1 Substandard Education**

An international assessment of the whole education system of 100 countries was done in 2010 by the magazine *Newsweek*.<sup>71</sup> The report pointed out that South African education came 96th as compared to 100 other countries. In comparison, Mozambique ended up in the 95th place, Tanzania (94th) and Ghana (92nd), all having a much smaller education budget. The reasons for such a poor performance should be identified, and remedies should be urgently implemented. There are numerous schools where the matric pass rate is less than 20%, and in some cases 0%. The national pass rate in 2010 was 61%, but in the province of Mpumalanga only 48% and in Limpopo 49%.

This is to a certain extent due to ineffective provincial education departments and district offices, which is in contrast to the ideals set in the code of conduct for public servants, as discussed. They regularly lack both the ability and willingness to provide professional and academic guidance, and also lack control over schools and indolent educators, adding to this unsatisfactory situation. Jansen refers to the inability or unwillingness of the education department to control quality service delivery: "... no one has the balls to fire a pathetic principal. Mediocrity is a big problem in South Africa".<sup>72</sup>

In one case where the provincial education department did act against educator misconduct – allegedly organising illegal meetings – it was reported that SADTU planned a strike and was also demanding "the removal of Modidima Manny, the head of the Eastern Cape's crisis-ridden education department".<sup>73</sup>

#### **4 2 Transformation**

It seems as if the political ideology of transformation has become more important than the interests of learners, an approach to appointments of educators and officials that prevails in both the teacher unions and the various departments of education. There are also irregularities during teacher appointments.<sup>74</sup> The appointment process is often strongly influenced by the dominating teachers' union, SADTU. As a result, individuals without the necessary experience, skills or an inclination towards working hard are appointed in positions beyond their

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71 Peyper *Beeld* (2010-25-09).

72 Steyn (2011) <http://www.volksblad.com> (accessed 2011-11-23).

73 John "SADTU backs down from strike but goes to court" *Mail & Guardian* 2011-11-22 (available at <http://mg.co.za/article/2011-11-22-sadtu-backs-down-from-strike-but-goes-to-court>) (accessed 2011-11-23).

74 *The Governing Body of the Point High School v The Head of the Western Cape Education Department Case 14188/2006* (C).

capability.<sup>75</sup> In effect the district offices have become notorious for not demonstrating the capacity or willingness to improve the quality of education. Towards the end of 2011 the situation has deteriorated to such an extent that Jansen urged parents and other stakeholders to “occupy the offices of the education department in every province”.<sup>76</sup> Du Plessis does not agree with such a *modus operandi*, but strongly agrees with Jansen on the urgency of protest action.<sup>77</sup>

Though by far in the minority, well-functioning schools, in contrast, achieve high pass rates every year. On average and on a non-provincial basis, the grouping that can be called ex-Model C schools achieve a pass rate of 96.14%. Colditz explains this as follows:<sup>78</sup> “The role-players in the school communities make the difference: leadership by principals and governing bodies, diligent and hardworking teachers, disciplined teachers and students, as well as loyal support by parents.” Somewhat ironically he adds: “This success is achieved not because of, but despite the involvement of the respective education departments.”

To further substantiate the references to the lack of competence or diligence of some education departments, two recent court cases will be analysed.

#### **4 2 1 Maritzburg College v Dlamini 2005**

One prominent problem encountered by schools in disciplinary matters that involve suspension and expulsion, is the unreasonable delay by Heads of Education Departments (HoDs), which has led to considerable prolonged uncertainty amongst educators, principals, parents and the learners involved. In *Maritzburg College v Dlamini*<sup>79</sup> the school waited on three different occasions for between a year and 21 months for the HoD of the Natal Education Department, (first respondent) to respond to their correspondence.<sup>80</sup> In this case the reaction only came after he was summoned to a High Court hearing. The judge commented as follows on the tardiness of the official: “I find it disturbing (to put it mildly) that a public official had to be galvanised into action to do his duty only when served with a court application.”<sup>81</sup>

Following *Maritzburg*, the legislator amended section 9 of the South African Schools Act<sup>82</sup> in 2006. This section on suspensions and expulsions now includes specific time frames, formulated as follows:

75 Du Plessis “Rektor som ANC reg op met dié woord” *Beeld* (2011-11-21) (available at <http://www.beeld.com/Opinie/HoofArtikels/Rektor-som-ANC-reg-op-met-die-woord-20111121>) (accessed 2011-11-22).

76 Steyn (2011) <http://www.volksblad.com> (accessed 2011-11-23).

77 Du Plessis *Beeld* (2011-11-21).

78 Personal communication with Colditz in Jan 2011.

79 [2005] JOL 15075 (N).

80 *Maritzburg College v Dlamini* [2005] JOL 15075 (N).

81 *Ibid.*

82 84 of 1996.

(1C) A governing body may, if a learner is found guilty of serious misconduct during the disciplinary proceedings contemplated in section 8 –

(a) impose the suspension of such learner for a period not longer than seven school days or any other sanction contemplated in the code of conduct of the public school; or

(b) make a recommendation to the Head of Department to expel such learner from the public school.

(1D) A Head of Department must consider the recommendation by the governing body referred to in subsection (1C)(b) and must decide whether or not to expel a learner within 14 days of receiving such recommendation.

(1E) A governing body may suspend or extend the suspension of a learner for a period not longer than 14 days pending the decision by the Head of Department whether or not to expel such learner from the public school.

If these provisions are followed properly, an unruly learner that has been found guilty by a school governing body of serious transgressions will be suspended for a maximum of 21 days after the transgression – an initial seven days, plus a maximum of 14 days, pending the decision by the HoD whether or not to expel such learner from the public school. Within that period, the HoD has 14 days to finalise his or her decision.

#### **4 2 2 *FEDSAS v The MEC, Eastern Cape Education Department***

In January 2011 the Pan Africanist Movement reacted to the “continuous decline and stagnation in matric results and general decline in the management of education” in the Eastern Cape Province.<sup>83</sup> They suggested that the education department of that province should be put under administration by the national government. This happened shortly afterwards when Minister of Basic Education, Ms Angie Motshekga, announced in March that the Eastern Cape Department of Education was put under administration in terms of section 100 of the Constitution.<sup>84</sup> All functions of that department were taken over by the National Department, a situation that prevailed for the rest of 2011. By August 2011 the National Basic Education Department has encountered, according to minister Motshekga, much resistance and a lack of cooperation regarding its intervention plans to get the Eastern Cape Department of Education back on track.<sup>85</sup>

Section 100 of the Constitution provides for national intervention in provincial administration:

100 National intervention in provincial administration

(1) When a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the national executive may intervene

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83 Mayekiso “Education system is dysfunctional – PAM” 2010-01-07 *City Press* (available at <http://www.citypress.co.za/SouthAfrica/News/Education-system-is-dysfunctional-PAM-20100107>) (accessed 2010-04-27).

84 *Ibid.*

85 SAPA “Eastern Cape education rot goes deep” (2011) <http://www.news24.com/SouthAfrica/News/Eastern-Cape-education-rot-goes-deep-20110823> (accessed 2011-08-27).

by taking any appropriate steps to ensure fulfilment of that obligation, including -

- (a) issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and
- (b) assuming responsibility for the relevant obligation in that province to the extent necessary to –
  - (i) maintain essential national standards or meet established minimum standards for the rendering of a service;
  - (ii) maintain economic unity;
  - (iii) maintain national security; or
  - (iv) prevent that province from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole.

It is not difficult to find a variety of reasons for the poor performance in the Eastern Cape, one being financial mismanagement due to both incapacity of officials and undue union involvement.<sup>86</sup> Another reason is the lack of proper administration regarding teacher provision. The deadline for post provision scales to be published by all provincial departments of education for the appointment of teachers was 30 September 2010 to enable schools to start the new school year with an approved duty sheet. This department failed to do that, and early in 2011 started – in the absence of such scales – to remove temporary teachers from their positions, severely disrupting education in many schools. The Federation of Governing Bodies of South African Schools (FEDSAS), a voluntary association of school governing bodies of public schools that supports quality education in schools, intervened on behalf of its member schools in that province. An interim court order was issued on 22 February in the Eastern Cape High Court, that compelled the Eastern Cape Department to appoint teachers in some 6000 vacant posts in schools in this province to prevent further disruption of schools, a decision that the Department unsuccessfully appealed against, with costs.<sup>87</sup> In the interim decision the court ordered the department to fill posts within five days of the order being served. In some schools there are up to twelve vacant posts, obviously disrupting all attempts towards quality education.

In a joint media release by Paul Colditz, the chief executive officer of FEDSAS, and Chris Klopper, the chief executive officer of SAOU, said:<sup>88</sup>

We are grateful that the court acted in the best interests of the learners, because it is clearly not a priority for the provincial education department. FEDSAS and the SAOU are prepared to work with the minister to ensure that the situation returns to normality. However, then the focus should be on solving problems; not simply treating symptoms.<sup>89</sup>

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86 John Mail & Guardian (2011-11-22).

87 *FEDSAS v MEC for the Department of Basic Education* case no 60/2011 (EC High Court).

88 FEDSAS & SAOU “Eastern Cape Education Department reigned in” Joint media release on 2011-03-04.

89 *Ibid.*

Financial problems such as these in the Eastern Cape should be addressed, because it deprives children of their right to quality education.

The Department of Basic Education has a history of being accused of contempt of court orders, which might be ascribed to both incompetence to carry out the orders, and an attitude of not taking the judiciary seriously.<sup>90</sup> This resistance to the rule of law was also visible on this matter regarding post provisioning, resulting in the case of PJ Olivier High School later in that year, after failure by the Department to abide by the initial court order.<sup>91</sup> The Democratic Alliance spokesperson Van Vuuren reports in January 2012 that “[t]he process of post provisioning has been completed, but sadly 8 000 vacancies have as yet not been filled”.<sup>92</sup> Van Vuuren added:

It is incumbent upon this Department of Education to exercise its responsibilities towards the core function of education which is teaching and learning, by providing a teacher for every available subject and classroom. Although there are challenges in the implementation of the post provisioning, this Department has once more horribly failed our learners.

To above-mentioned court cases a list of other cases in most provinces in South Africa can be added, where the respective departments of education lost cases on a variety of issues, such as irregularities during teacher appointments, admission of students and the language policy of the school.<sup>93</sup>

The tolerance of the National Department of Basic Education regarding the lack of competence demonstrated by officials in provincial departments, leading to expensive court cases, is tested regularly. Most of these court cases point out that basic legal principles have not been respected, irregularities in procedures prevail, undue influence has been applied, and an obsession with transformation has obscured reason.

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90 Carlisle “Education officials could face jail time” *Daily Dispatch* (2011-10-21) (available at <http://www.lrc.org.za/lrc-in-the-news/1634-2011-10-21-education-officials-could-face-jail-time> (accessed 2012-03-15)); Mabuza “School says minister, MEC in contempt of court order” *Business Day* (2011-08-19) (available at <http://www.businessday.co.za/articles/Content.aspx?id=156364> (accessed 2012-03-15)); PSA “Eastern Cape Department of Education in contempt of court” 2011 (available at [http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CFUQFjAC&url=http%3F%2Fwww.psa.co.za%2Fforce-download%3Ffile%3Dsites%2Fdefault%2Fpsa%2Ffiles%2Fmedia\\_statements%2FPSA24112011%2520ECEduc.pdf&ei=GQHCT8XbNYP1hAfx3YGSCg&usq=AFQjCNF7QiwQ6K8n0oTSAPA-yXjPvWMMAA](http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CFUQFjAC&url=http%3F%2Fwww.psa.co.za%2Fforce-download%3Ffile%3Dsites%2Fdefault%2Fpsa%2Ffiles%2Fmedia_statements%2FPSA24112011%2520ECEduc.pdf&ei=GQHCT8XbNYP1hAfx3YGSCg&usq=AFQjCNF7QiwQ6K8n0oTSAPA-yXjPvWMMAA)) (accessed 2012-03-15).

91 *PJ Olivier High School v MEC for Education, Eastern Cape* (2011-07-14) case 214/11 (EC).

92 Van Vuuren “8 000 Teacher Vacancies in EC Not Filled” (2012) <http://www.dabhisheo.org.za/2012/01/16> (accessed 2012-03-15).

93 *The Governing Body of the Point High School v the Head of the Western Cape Education Department* case 14188/2006 (C); *Governing Body, Mikro Primary School v Minister of Education, Western Cape* 2005 3 SA 504 (C); *High School Ermelo v Head of Department, Mpumalanga Department of Education* case 30627/07 (TPD).

### 4 3 Remedies through Policy Development

In the light of such a strong set of factors negatively impacting upon the quality of public education provision in the country, it should be obvious that any attempt to turn the tide will have to be performed with great efficiency and determination. Isolated, uncoordinated attempts would not be sufficient, and a political will and strong leadership is a prerequisite, both on political level and in schools and education departments. A fine blend between tolerance and impatience with the progress (or lack of progress) will have to be found.

Current policy developments may serve as remedies to the prevailing unsatisfactory state of affairs. Under the topic “A delivery-driven basic education system” in the budget speech by the Minister of Basic Education, she made a number of statements that can be seen as positive trends and, if properly implemented, can start turning the tide.<sup>94</sup>

(a) She referred to the initiative that was developed in 2010: Action Plan to 2014: Towards the Realisation of Schooling 2025. This Action Plan is the “heading arrow for improving learning outcomes.”

(b) She referred to 2010 as the year when education came face to face with a brooding teachers’ strike, but still achieved an impressive 67.8 percent pass-rate, showing that the system is improving. This was an increase of 7.2 percent on the 2009 pass-rate of 60.6. “Most importantly, we turned the tide and rolled back the downward spiral of the past years. The challenge is to maintain or improve results. 70 percent is within reach.”

Unlike some of her predecessors, she admitted boldly that education does have a number of weaknesses. Using the favourite term of “challenges”, she referred to:<sup>95</sup>

(a) Inefficiencies resulting in poor management and weak financial controls – this we see in some provinces continuing to receive qualified reports.

(b) Poor accountability in different parts of the system; poor planning, monitoring and evaluation; poorly designed institutional structures that are not aligned to the key role of the department because of poor focus on the key role of instructional responsibilities for an education department, especially at district level, thus making it difficult to deliver on the key mandate of the department; and unsettling safety levels in schools.

(c) Educator well-being, which is aggravated by the nation’s burden of disease, such as the impact of HIV and AIDS; low levels of skills, commitment and discipline, and inappropriate working conditions.

What lacked here, unfortunately, was a direct reference to the undesirable influence of SADTU and its affiliates, currently one of the major weaknesses in the education system and a prominent threat against the delivery of quality education.

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94 Department of Basic Education Budget Vote speech by Minister Angie Motshekga at the National Council of Provinces.

95 *Ibid.*

A further positive element was the direct reference to some provincial departments' under-performance:

The planning and delivery oversight unit's initial task will be to focus on improving the performance of 18 poorly performing districts in the Eastern Cape, Limpopo and Mpumalanga. These are the districts which over a period of 3 years have consistently underperformed in the National Senior Certificate exams.

In the debate that followed the budget speech, comments and criticism from the opposition regarding further deficiencies in the system was not (as often previously) summarily turned down, and the Minister indicated that she took note of such problems and will seriously look into those.

## 5 Recommendations

The most prominent reason why the legal system should remedy education in South Africa is found in the constitutional provision of the best interests of the child, which is of paramount importance in every matter concerning such a child.<sup>96</sup> In addition, the Constitution provides for the right of everyone in South Africa to a basic education.<sup>97</sup>

The claim of this article, as formulated at the outset, is that the South African legal system has the ability to provide a remedial function. To further substantiate this claim, two specific recommendations related to the most prominent problems, as identified, will now be offered.

The first recommendation relates to the principle of legality and rule of law. Consistent adherence to the rule of law by public officials and politicians can remedy certain ills of the education system. As pointed out, some provincial departments of basic education have made themselves guilty of contempt of court orders and a general disrespect of the legal system. This attitude of not taking the judiciary seriously can be effectively countered if the verdict in *Maritzburg* is consistently applied.

The judge referred to the unwillingness of the HoD to expeditiously make a decision on the expulsion. The HoD regarded it "utterly unreasonable" to expect him to make a decision within two months. The judge finally contended that:

... consideration must be given in future, in my view, where litigants are forced to come to court to compel public servants to carry out their duties where they have failed to do so, that such officials be ordered to pay the costs incurred, personally.<sup>98</sup>

It is therefore recommended that stakeholders should work together towards respect for the rule of law, and if non-adherence is observed,

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96 S 28(2) Constitution.

97 S 29(1) Constitution.

98 *Maritzburg College v Dlamini* [2005] JOL 15075 (N).

these stakeholders should consider bringing lawsuits against transgressors in their personal capacity.

The second recommendation concerns departmental incompetence, which can often be traced back to inappropriate appointment processes, as influenced by the obsession with transformation.

Following the *Maritzburg* case, the case of *Coetzee* can serve as a landmark case in curbing both incompetence and *mala fide* conduct of state officials.<sup>99</sup>

Arguing the appropriateness of *de bonis propriis* cost orders against government officials, Du Plessis AJ specifies actions by such officials “that cause unnecessary litigation and costs, that are unreasonable, reckless and dishonest”. He also quotes Plasket J in *Venbor (Pty) Ltd v Vendaland Development Company (Pty) Ltd t/a Campstore*<sup>100</sup> who indicated that officials acting in bad faith should be ordered to pay the legal costs in their personal capacity. Internationally, the Canadian appeal case *Re West Nissouri Continuation Board*<sup>101</sup> judgment is of importance. Riddel J, referred to officials found guilty of misconduct and said: “... nor can they be allowed to use public money to pay for the results of their own misconduct”.

Du Plessis AJ, in *Coetzee*, said that in his view:

[t]he time has come for courts to impose the full extent of the law upon government officials who arrogantly act in breach of the constitutional imperatives referred to above, who act with impunity, and who are not taken to task by government, mostly because of inability, unwillingness or political reasons.

The time has come to order such public officials, not only to right the wrong that has been caused, and not only to avoid the taxpayer to fund their unlawful frolics of their own, but also to act as a deterrent to public officials in future, to grant an order in terms of which all the costs of the litigation caused should be carried by those responsible.

This decision, while referring to incompetent police officials, highlights two elements that are also applicable to the education scenario: the current unwillingness by certain sections of government to discipline employees in breach of their public duties, and the necessity to ensure that officials in future do not dare to repeat these type of mistakes.

Many of the problems causing the threatening demise of the public education system, such as unethical leadership, strike actions and departmental incompetence, are clearly working against these fundamental rights of the child’s best interests, the right to education and the right to freedom and security. Stakeholders that have the vision of quality education for all South African children should take a unanimous

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99 *Coetzee v National Commissioner of Police* 2011 2 SA 227 (GNP).

100 1989 2 SA 619 (V).

101 (1970) 38 Ontario Law Reports 207.

stand against these negative influences. Educator security should be enhanced in the quest for quality education. The stranglehold should be broken through a final change in the political will to improve the system, linked with diligence on the part of school principals, teachers and hardworking school governing bodies.

The South African legal system, including the legislative, the judiciary and the executive, does (albeit in principle) provide the remedies needed to rectify the deficiencies in the education system. The prerequisites for this process to succeed, is respect for the rule of law, adherence to the principle of legality, and proper functioning of the whole legal system. The ideals for education can be reached if the adverse effects of teacher unionism as well as the incompetence of provincial departments of education are effectively and decisively dealt with.