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Some aspects of education litigation since 1994: Of hope, concern and despair

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In this article we report on qualitative research in which we probed the opinions and views of a purposive sample of high-profile and influential role players in education about aspects of education litigation in South Africa since 1994. This year marked the transition to a democratic government in South Africa, and resulted in a new education system, which has led to a great deal of litigation, as was to be expected. Our participants were personally involved in litigation in various capacities. Their responses to our questions reflected hope, but also concern, and even despair. In their opinions almost all of the disputes were between the state and its citizens, and that the state lost virtually all cases. State officials often ignored legal advice and acted on "imagined powers", causing embarrassment to the state where they seemed insensitive to the needs of the people, and sometimes deliberately transgressed prescripts and provisions, abandoning its mandate to children and the country more broadly. There is extreme concern about the tendency of officials to ignore court orders. No lessons seem to have been learned from judgments and infractions of the same kind occur repeatedly - even if litigation seems to have consumed between 4–6% of the education budget. There was surprise that cases dealt almost exclusively with disputes about stake-holders' powers, and that few human rights and social issues have been litigated. Furthermore, individual officials that seemed to suffer no consequences from their unlawful actions and showed an apparent lack of professionalism to acquaint themselves with the legal prescripts that govern their professional work, caused concern for our respondents, as did the destructive role that unions and politicians seemed to play in education. However, litigation has nonetheless led to the clarification of some issues.

Keywords: concern; cost; despair; hope; human resource practices; human rights issues; imagined power; impact; lack of professionalism; litigation; unions

Introduction

This paper reports on research done on education litigation since 1994. This watershed year marked the transition to a new democratic order and to a constitutional democracy in South Africa. This transition was accompanied by the establishment of a new education dispensation to redress the malaises of the past, and make provision for the recognition of the human rights of all role players in education, and to uphold and protect these rights.

The new national education system focused on redressing past injustices and providing every child with quality education. As a result of apartheid, the entire education system had to be reorganised and restructured. These restructuring processes had real potential for litigation (WM1:5)[i]. A participant (DL:1) pointed out that the fact that there are "26,000 schools, more than 350,000 educators and millions of learners carries a high potential for litigation in and of itself."

However, it seems that the new education system has not succeeded in completely eradicating the legacy of apartheid, and that there are residual differences and polarisation on various grounds, such as race, funding, gender and governance. Grounds for disputes, differences, divisions and conflicts that may lead to litigation in one form or another still seem to exist.

Since 1994, a compelling need to survey and assess litigation has arisen. It has become necessary to record and retain the collective memory of important role players in education litigation from 1994 to the present, as some of these role players have already retired, or are now very close to retirement.

A thorough examination of litigation since 1994 may yield important and significant benefits for education policy and lawmakers, as well as for the users of education, including learners, parents and society at large. Such benefits might include:

- Greater clarity on problematic issues about the understanding and implementation of policy and law.
- Markers that can be "laid down" and used in the future implementation and adjudication of disputes. In the *KwaZulu-Natal Joint Liaison Committee v.* [Member of the Executive Council for Education] *MEC for Education, KwaZulu-Natal and Others* (2013) 4 SA 262 (CC) case, for instance, the court found that subsidies that had been announced had to be paid on the due dates even if cutbacks had to be made in budgets.
- A better education service for children.
- Greater impetus to the promotion of constitutional rights, values and responsibilities.
- More justiciable disputes could be resolved without having to resort to litigation.

Our research questions related to the participants' involvement in litigation, and their views on selected aspects of the dynamics of litigation in the period under review. In our paper, we will consider the dynamics of education litigation (including its role in the education system), the effects of litigation, the responses to it and the costs of litigation. In other words, we plan to provide a snapshot of education litigation over 20 years as viewed by our participants. We did not analyse cases or law critically, nor did we attempt to assess the functioning or performance of the judiciary.

Although some failings of the system were revealed, the order of the words in the title "hope, concern, despair" does not suggest a timeline of progression or regression. These words merely suggest that the participants' experiences and views of the role of litigation in education varied.

The Research carried out

Through semi-structured individual interviews, we collected information from 13 respondents who have played or continue to play vital and decisive roles in education in general and education policy and litigation in particular. We knew that we would have to approach people "in high places" who have played or play decisive and guiding roles in education, in general, and in education policy and litigation in particular. We also considered their knowledge of education and the education system in particular, their experience in various capacities in education, their tangible influence on the education system, their interest in the role of education and education law, and their interest or participation in education litigation.

We were worried that some of them would not be available to be interviewed. However, most of the people that we approached were willing to be interviewed.

We take a broad view of litigation in this paper, and use it to refer to both litigation in courts and to dispute resolution in labour issues.

We used purposive sampling methods and also made use of snowball sampling when we interviewed participants to increase our sample.

The interviews lasted between three and five hours, and were tape-recorded. All the participants were willing to scrutinise our capturing of the essence of their interviews (member checking) and we sent electronic copies of our transcriptions to all participants (after reading the texts and listening to the recordings a number of times). Some of the participants made suggestions to help us reflect their opinions more accurately, while others were satisfied with the way in which we had captured their opinions and beliefs.

Education departments and some statutory and other organisations declined to participate in the research. Some of these agencies were hard to reach and some simply did not respond to our approaches. Only two departments were represented in the sample. There were also instances where agencies nominated people to participate in the interviews, but we were never able to reach these nominated persons.

We are nevertheless satisfied with the quality and the diversity of the participants in our research. All 13 of them can be described as senior, esteemed, influential role players and leaders in the field of law and/or education, and they have all been influential with regard to the education litigation that has taken place since 1994. The participants included the senior management of education departments, role players in parents' and teachers' organisations, directors of centres of excellence, activists, academics and judicial officers. Participants could be classified as either educationists or jurists.

The participants came from five provinces and there was only one female participant. One of the criteria for inclusion in the sample was participation in litigation and, unfortunately, women do not seem to be well represented in that regard. The picture might, of course, be very different if the sample size were to be increased.

Research Questions

Our main aim was to get the participants' views of various aspects of education litigation since 1994. In order to get the information that we needed to construct the participants' views on the litigation, we posed the following questions in the semi-structured interviews conducted with participants:

1) Please tell us about your involvement in litigation in education since 1994.
2) Please tell us about your impressions of the dynamics of education litigation.
3) What are your opinions on the contribution or value of litigation to the quality of education provision in South Africa?
4) In your opinion, what has been the reaction of litigants to judgments?
5) Please comment on the cost of litigation.
6) What changes in litigation patterns do you anticipate, if any?

When necessary, we asked further probing questions.

The involvement of participants in litigation

All the participants have been involved in litigation for a significant period of time. Two participants only became involved in litigation after 1994.

The capacities in which the participants had been involved proved conclusively that they were all well qualified to provide the information that we were looking for and that they could be regarded as "information-rich" participants. The capacities in which they were involved in education litigation included the following:

- They initiated litigation.
- They participated in or led public hearings to obtain the input of the public at large on policy and law in various phases of development.
- They made inputs into and managed the litigation and legislative processes (WM1:2).
- They were litigants.
- They served as "junior counsel" to more senior legal colleagues and assisted other functionaries in the preparation of cases.
- They were members of the judiciary and adjudicated cases and/or other disputes.
- They acted as *amici curiae* (friends of the court).
- They provided funds to enable people to participate in litigation or were part of "activist groups."

The dynamics of litigation

Almost all of the participants thought that provincial education departments and/or their sub-structures "almost invariably" acted as defendants (TC:1, 2; TH:3; NB:4, 5). The national department was seldom involved according to DL:1, even if the cases in which the Minister was cited *ex officio* were taken into account. *Minister of Education v. Harris* (CCT13/01) [2001] ZACC 25; 2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC) (5 October 2001) is an example of one of the relatively small number of cases in which the Minister was directly involved and was found to have acted *ultra vires* regarding the setting of admission ages of independent schools.

In the vast majority of cases, school governing bodies (SGBs), schools, individuals or other agencies, such as non-governmental organisations (NGOs), were the plaintiffs. Employers and employees were often locked in dispute.

One participant pointed out that "the state loses virtually all the cases" (EG:7). In the paragraphs that follow, we will consider why this appears to be the case.

Some of the participants commented that the number of cases between the departments of education and the plaintiffs has raised concerns that the state seems to be in a constant state of conflict with its own citizens. "A government department should not be litigating endlessly with its own people. State departments should keep out of the courts" (NB; TC:5).

Participants' opinions on education litigation

Blame

Although most of the participants seemed to blame education departments and their officials for most of the litigation, some are reluctant to place the blame squarely on the shoulders of the departments of education. One of the participants (WM:1) pointed out that the *MEC for Education in Gauteng Province and Other v. Governing Body of Rivonia Primary School and Others* (CCT 135/12) [2013] ZACC 34; 2013 (6) SA 582 (CC); 2013 (12) BCLR 1365 (CC) (3 October 2013) case was an example of the fact that "education legislation and policy can be technical and complicated" and can contribute to misunderstandings and misinterpretations of law and policy. Because the judgment gives departments the right to place learners in close consultation with the school, the very wording of the judgment and the complicated nature of its interpretation would suggest that the dust has not settled on this issue.

Another participant (FGD:2) expressed unease about the word "blame" in this regard, and adduced that problems could be linked to the quality of the drafting of policy and law in a specific state department and elsewhere. The state attorney and legal advisers also have to certify bills before they go to Parliament. Another participant (EG:9) also touched on shortcomings of the legal drafting process and pointed out that "competences that have already been repealed are sometimes repealed again by newer versions of laws" and that "the Afrikaans and English texts of laws do not always agree."

According to one participant (WM1:5), another probable cause of lawsuits is SGB members violating constitutional principles. Issues of access, equity and redress are often at stake. The participant cited the *Matukane and others v. Laerskool Potgietersrus* (1996) 1 All SA 468 (T) case as an example of a case where SGBs seemingly tried to protect vested interests instead of pursuing their primary aim of contributing to the provision of quality education. The court found that the SGB of the school in question had unfairly discriminated against black learners who had sought admission to the school when it adduced that it had cultural and language rights, which entitled them to bar certain learners from the school.

Role of officials, unions and politicians in causing litigation

There was significant consensus among participants that officials, unions and politicians played an important role in the development and necessity of litigation through their actions.

Ignorance of the law

Participants suggested that ignorance of the law on the part of officials often leads to disputes through incorrect application of the law. Provincial and national head office staff members "often do not have educational backgrounds and have very little experience of working in the education system" (EC:2). One participant expressed a very strong opinion on the roles of politicians and administrators in lawsuits and the malaise of education:

> *They have the life of the country in their hands, but are insensitive to the needs of people and the country. Education is not permeated with excellence and committed teachers. Poor discipline, sexual offences and absenteeism, as well as racial overtones, are rife* (TA:3).

Participant EG(5) believed that "many of the problems emanate from the fact that the officials do not understand the philosophy of the rule of law in a democratic state such as South Africa". Participant TH(1) said that, during the years following 1994, departments were represented in disciplinary procedures by "inexperienced, ignorant, bloody-minded officials who cut corners."

A very serious accusation was levelled against officials by participant (FLA:2), who believes that, apart from misinterpreting the law because of their ignorance, some officials *"ignore the advice from legal advisers at both national and provincial levels. They make decisions too fast and do not seek enough legal advice nor give proper consideration*

to such advice. Sometimes they even deliberately transgress prescripts and provisions."

Imagined power

Most participants endorsed the view of Hattingh J in the *Suid-Afrikaanse Onderwysunie v. Departementshoof, Department van Onderwys, Vrystaat en 'n Ander* (2001) 3 SA 100 (O) case, where officials acted wrongfully because they incorrectly thought they had the legal power to take certain actions or make certain decisions. In the abovementioned case, the judge castigated the officials of the Free State Department of Education who *" … had designed a procedure to orchestrate dismissals, which had been, at best, a scandalous display of* imagined power*"* [emphasis added]. Beckmann and Prinsloo (2006) also discuss this phenomenon in an article in the *Journal of South African Law.*

Officials' use of "imagined power" is closely linked to administrative justice and legality, which are *"central issues in education litigation"* (EG:4). This participant stressed that *"the doctrine of legality, as confirmed in* Fedsure Life Assurance Ltd. and Others v. Greater Johannesburg Transitional Metropolitan Council and Others (CCT 7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998), *is an integral part of the constitutional dispensation."* Paragraph 58 of the judgment in this case reads as follows: "it seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that confirmed upon them by law."

This particular participant reported finding *"legions of examples where the provincial education authorities have pretended to have the right to exercise powers which they do not possess"* (EG:4). The participant believed that the fact that authorities were involved in the implementation of law might have given them a false sense of decision-making power. According to the participant, the 1998 *Bennie Groenewald Primêre Skool en Andere v. Premier van die Noord-Kaap en 'n Ander (Bennie Groenewald Primary School and Others v. Premier of the Northern Cape and Another)* [1998] 3 All SA 426 (NC) case illustrates the argument well. This case was referred to in Paragraph 15 of the judgment in *Despatch High School v. Head of the Education Department, Eastern Cape Province and Others* (1997) 4 SA 982 (C) and was triggered by a decree promulgated by the then MEC for Education of the Northern Cape, that schools should be reconstituted (amalgamated) in terms of phases like the Foundation Phase. The participant pointed out that, at that stage, the South African Schools Act (Republic of South Africa, 1996b) did not provide for the amalgamation of schools. The result of this case and another was that the South African Schools Act was amended to provide in section 12A for the amalgamation of schools in terms of a legal process (EG:4).

According to one participant (EG:4) *" … the doctrine of legality is violated on a daily basis, particularly by provinces, and the problem often begins with districts. They go beyond their powers, do not know their limitations and restrictions and also do not know their* [sic] *constitutional principles."*

It is self-evident that the exercise of imagined power could lead to illegal, unfair and unreasonable decisions and actions as contemplated in section 33 of the Constitution (Republic of South Africa, 1996a) and, consequently, to disputes, and eventually even lawsuits.

Lack of professionalism

Apart from widespread ignorance of the law among officials, respondents also pointed to a lack of professionalism, which emerges when a person who is appointed to a specific position does not take the trouble to acquaint himself or herself with the relevant law. Participants believed that many of the disputes would not reach the courts or conflict resolution mechanisms, such as the Commission for Conciliation, Mediation and Arbitration (CCMA), if officials were equipped with better conflict resolution skills and were not loath to engage in conflict resolution activities (DL, NB).

Linking officials' ignorance to a lack of professionalism, one participant (DL:2) commented as follows:

> [...] *They always expect somebody else to help, they think that matters are always simple and easy as they rely on past practices and they do not seem to be prepared to do their own learning and accept professional responsibility for their action within a constitutional framework.*

Another participant (FGD:2) linked officials' ignorance, use of imagined power and lack of professionalism in the following manner:

> *What needs to be prevented or reduced is litigation caused by the unprofessional conduct of state officials and undue or deplorable political pressure or duress exerted in certain situations, sometimes against legal advice.*

This again highlights the fact that officials sometimes act against advice. One participant (FLA:2) linked a lack of professionalism to four things:

1) Misinterpretation of the law as in the *Head of Department* [HOD]*, Department of Education, Limpopo Province v. Settlers Agricultural High School and Others* [2003] JOL 11774 (CC) case (which is discussed below).
2) Officials ignoring the advice of legal advisers in both the provincial and national spheres.
3) Decisions made too fast without seeking enough advice and giving proper consideration to it.

4) Deliberate transgressions by officials of legal prescripts.

Human resource development practices

Human resource development practices were also blamed for disputes and differences that have to be resolved. Officials who are found to have transgressed the law or have proved to be incompetent and unable to fulfil the duties expected of them are seldom helped through training, mentoring and assistance to overcome their problems. Instead, they are "redeployed" to other positions where they are also unlikely to succeed, while the problems that they caused remain unresolved. In essence, this erodes the development of accountability by officials and the system. This phenomenon is also examined by Beckmann and Prinsloo (2004).

Part of the human resource development practices that cause problems leading to litigation is the extraordinarily high turnover of staff in provincial, district, regional, circuit and other education department offices.

Undue political and union influence

Apart from the fact that officials seldom have what is called "institutional memory" as they have not been occupying their posts for very long, they also have to cope with what is viewed by a number of participants as undue political and union influence on their work. Three participants (EC, PS & TC) expressed strong views on the negative role played by unions. One of these participants (TC:2) pointed out that the politicisation and bureaucratic control of education have led to too many changes in leadership at MEC and HOD level and *"a resultant lack of continuity and direction."*

A participant (EC:1) believes that administrators, in particular, should not be unionised. In the view of another participant (PS:2) the unprofessional approach of one specific union *"protected its members against all reasonableness and constituted a stranglehold on education districts"*. Another participant (TA:3) mentioned a union by name and said that it was *"seeking a political kingdom rather than the good of education"*.

After discussing the causes of litigation, we will now discuss the results of litigation: the impact of litigation and the responses to litigation.

The impact of, and responses to litigation

Impact

One can identify positive and negative results of litigation. The positive results include the fact that litigation provides progressive clarity on issues such as governing bodies' authority, provincial education departments' authority regarding human resource management, governing bodies' responsibilities, and the finances and policies of schools. One can also say that litigation lays down certain markers, for example, about the unacceptability of the so-called "mud schools", the unlawfulness of corporal punishment at a school (as in the *Christian Education South Africa v. Minister of Education* (CCT4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 (18 August 2000) case discussed below), the involvement of the provincial education departments in the admission of learners in close consultation with the schools (the *MEC for Education in Gauteng Province and Other v. Governing Body of Rivonia Primary School and Others* (CCT 135/12) [2013] ZACC 34; 2013 (6) SA 582 (CC); 2013 (12) BCLR 1365 (CC) (3 October 2013) case discussed above dealt with this issue) and the fact that subsidies payable to independent schools on set dates cannot be withheld later (as the court found in the *KwaZulu-Natal Joint Liaison Committee v. MEC for Education, KwaZulu-Natal and Others* (2013) 4 SA 262 (CC) case) (FLA:1, 2; Prinsloo, 2013; PS:4; WC:1; WM:4).

The term "mud schools" derives from a case settled out of court between the Eastern Cape Department of Education and two agencies that represented the best interests of the child with regard to the mud schools that were found in the Eastern Cape until 2014.[ii] These schools were supposed to have been eradicated by 2008.

Litigation has improved or raised awareness of constitutional issues and defined certain values. The *Le Roux and Others v. Dey* (CCT 45/10) [2011] ZACC 4; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC); BCLR 446 (CC) (8 March 2011) case (in which the court found in favour of a deputy principal who had complained about learners who had superimposed his face and that of the principal on pictures of naked men) has provided clarity on aspects of learners' freedom of expression and the limitations thereof, while in the *A v. Governing Body, The Settlers High School and Others* (3791/00) [2002] ZAWCHC 4 (8 February 2002) case (commonly known as the *Antonie* case), the court criticised the school for not implementing its own code of conduct correctly and not allowing a girl who had converted to Rastafarianism to wear dreadlocks.

MEC for Education: KwaZulu-Natal and Others v. Pillay (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007) dealt with a girl who wanted to wear a nose stud to demonstrate her solidarity with her Indian cultural origins. In this case, the court found that the school in question had discriminated unfairly against the girl and had violated her religious and cultural rights. These cases have shed light on learners' right to freedom of expression and their cultural and religious rights, among others. It can be said that litigation has made it possible for role players to define and protect rights more easily through well-intended and strategic litigation (WC:2).

It seems that litigation is not the only solution to problems and disputes but *"litigation could be an essential part of the dynamics of education"* (DL:4). One participant (WM:4) expressed the view that litigation should have a beneficial effect on the provision of education and lead to better management and the clarification of role players' roles, rights and duties. However, if cases are handled badly, they have "a huge negative potential and may destroy schools – especially in those areas where the role players are not aware of the Constitution and laws, and where they see the school as operating in a vacuum" (WM:4). This participant also pointed out that some political role players viewed losing cases as "ideological challenges and have difficulty distinguishing between the party to which they belong and the state".

One participant (PS:4) pointed out that some cases confirmed the authority of role players, while some eroded it. Some cases led to more security and some led to less security, and a degree of alarm. Another participant (TC:4) made the point that litigation *"edifies or empowers good schools, which view the courts as institutions protecting them and keeping the Constitution alive. Successful and well-intended litigation gives hope to schools and principals."*

Yet another participant (WM1:3) summarised the effect of litigation succinctly:

> *… the object of some litigation was accomplished to the extent that people have fought for certain rights. The generations of administrators to come can note the outcomes of this litigation and modify their administrative actions accordingly.*

However, it seems that some administrators set processes in motion to have the law amended so that they can have their way (refer to the paragraph below).

Responses to cases

Sometimes, litigation seems to have no effect or an undesired effect. Court rulings and orders are often deliberately ignored and mistakes are repeated. This can be seen in *S v. Zuba* (ECJ 2004/004) [2004] ZAECHC 3 (19 February 2004), for example, which dealt with repeated failures on the part of the Eastern Cape Department of Education to give effect to a court order to provide a school for juvenile offenders in that province.

Two other cases present further examples of administrators failing to carry out court orders. In *Head of Department, Department of Education, Limpopo Province v. Settlers Agricultural High School and Others* [2003] JOL 11774 (CC), the HOD in the Limpopo Department of Education was taken to court and taken to task for not carrying out a court order to appoint a certain candidate to the principal's post. Similarly, *Section 27 and Others v. Minister of Education and Another* (24565/2012) [2012] ZAGPPHC 114; [2012] 3 All SA 579 (GNP); 2013 (2) BCLR 237 (GNP); 2013 (2) SA 40 (GNP) (17 May 2012) deals with a case in which a NGO took the Limpopo Department of Education to court for violating children's rights to a basic education, by not providing them with textbooks in time.

Participants commented that the causes of litigation appeared to stay the same, and did not appear to have diminished or changed. To one participant (EC:1), the *FEDSAS v. MEC for the Department of Basic Education Eastern Cape* (60/11) [2011] ZAECB best illustrates how education departments can "refuse bluntly to implement court orders." The Eastern Cape Education Department failed to appoint staff the court had ordered it to appoint. This litigation did not improve the staffing situation in schools. It also did not improve the situation of the teachers themselves.

The state may seem to be emerging as an opponent of school management and governance, as well as of its own employees. One can understand that the state will not be overjoyed by litigation that exposes "the failing state" and which creates the impression that the state is leaving children and parents and, as a matter of fact, the whole country in the lurch (TA:3).

One of the results of the state's reluctance to accept decisions against it is efforts to close perceived legislative gaps, and loopholes and obstructions that prevent the state from having its own way in certain matters (FLA:1; NB). This sometimes means that sound law is amended to suit the state better while making the law worse. Section 16A of the South African Schools Act seems to be an example of an amendment to the law that will obfuscate the boundaries between governance and management, and enable provincial education departments to take issue with governing bodies and their management of the school's funds (which is normally beyond the control of the state) through the principal (EG:6).

The reference to government trying to close loopholes raises the question: what happens after judgments have been handed down by the courts, be they in favour of or against the state. According to participants, most departments of education do not analyse court decisions or try to relate them to their present and future actions and decisions in order to avoid future litigation (EG; NG). However, some departments take great pains to analyse cases and plan to comply with court decisions to avoid further cases (WM:4). In the past, the legal advisers of the national Department of Education had meetings with the legal advisers of all the provincial education departments to analyse cases, point out the implications and suggest ways of responding to the decisions in manners that would not bring the departments into conflict with the law (FLA:1). A participant (DL:5) expressed the view

that it is *"a good principle that knowledge and insight emanating from case law should feed into better legislation and policy and that amendments made to legislation as a result of lawsuits should not make 'a mockery of litigation'"*.

The participants observed that litigation and the decisions handed down by courts appeared to have no influence on political role players and did not affect them or their careers negatively. They also pointed out that, where issues are not dealt with and resolved firmly, uncertainty and tension result in schools, as well as in departments of education. This is a matter of concern, as there are many clear and sound judgments that ought to lead to legal certainty in schools and in education systems.

Having discussed the causes and results of litigation, we will now consider possible changes in litigation patterns expected by participants.

Pattern changes expected

With regard to the possibility of patterns of litigation changing, participants' responses were diverse. Some participants expected no changes in litigation patterns, while others expected significant changes.

A participant (TA:4) believed that *"the amount of litigation cannot be reduced unless the reasons for litigation are removed."* This participant therefore expressed the opinion that wronged parties should *"litigate hard and early"* so that reasons for litigation can be appropriately and timeously addressed by the courts. Similarly, another participant (TC:5) argued that,

> *as long as the departments are dysfunctional and there remains no recognition of the shortcoming, there must and will be litigation. Where statutory failures occur, there must be watchdogs to protect the rights of those involved. The courts must be bastions of the constitutional democracy and of the rights and obligations of citizens.*

Another participant (DL:6) expressed the belief that patterns of litigation could change if

> *role players adopt the approach that litigation should be avoided as far as possible, but that one should litigate when it is essential, inevitable and avoidable. Everybody should be able to approach the courts, but the courts should not be flooded by cases.*

One of the participants (EG:7) foresaw more litigation on issues such as access to education, equality, quality and accountability for the provision of education. This participant also anticipated people increasingly using section 38 of the Constitution, as it gives anyone listed in this section the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.

Participant (WM:5) voiced a concern that was shared by some other participants, namely that at the moment, *"litigation is merely fiddling around the edges. Courts will also have to pronounce on where the responsibility and accountability lie in addition to providing clarity on where powers lie."* In the opinion of participant (WC:1) some issues have been exhausted through litigation and settled cases reflected an element of *"legalism in the form of an examination of the powers of one litigant versus those of another."* This participant believed that judging cases on the legality issues did not always address real issues, and indicated that sometimes *"the real issue was next door to legality."* This participant expected the courts to engage "*deeply with the issues of quality and the debate on democracy and equality, as well as the demands that are and should be made on public education."*

It seems clear then that the participants expect litigation to continue on the same issues as in the past, unless these causes of litigation are removed. There are opinions that litigation also needs to change significantly to incorporate the rigorous examination of issues other than legality.

The cost of litigation

In this regard, the participants' opinions were disparate. Some felt that there was not an inordinate amount of litigation, while others felt that there were too many lawsuits and that the education system was suffering as a result. Some were also concerned about the amount of litigation, but were still encouraged by its positive results. Two participants (EG; WM:1) estimated that they had been involved in more than 200 disputes (litigation), another indicated involvement in more than 100 (NB), while one did research on the issue and traced personal involvement in more than 1,000 instances (TC).

Those who had no issue with the number of lawsuits as such argued that, without certain litigation, some fundamental issues could not have been resolved (DL; FLA; TA; TC; WM). In this regard, the *Christian Education South Africa v. Minister of Education* (CCT4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 (18 August 2000) case that found unambiguously that corporal punishment was unlawful at a South African school and the *Schoonbee and Others v. MEC for Education, Mpumalanga and Another* (2002) 4 SA 877 (T) case that found that the principal was not the accounting officer of the school were cited as examples. The various interested parties in South African education have not become overly litigious.

There may, however, be questions regarding the relationship between "the failing bureaucracy" and the cost of litigation. The participants also pointed out that, although the costs of litigation can be prohibitive and restrict access to the courts (TA:5), there are various avenues that can be used to access the courts and that, in principle, the courts

are accessible to everyone (WC:5). One participant (WM:9) estimated that the departments of education spend between 4% and 6% of their budgets on legal costs – the costs are sometimes to be found in the budgets of human resource divisions in departments, but are seldom explicitly declared as such. If this participant's estimate of the costs is correct, it could amount to between R9.3 billion and R13.98 billion in terms of the 2014 education budget.

Those who believe that the amount of litigation in South African education is excessive, believe that most of the litigation will not be necessary if people (such as political role players, bureaucrats and governing bodies) know and comply with the prescribed legal frameworks. They also argue that one should be aware of the hidden costs and the intangible influence of litigation on the climate and atmosphere of schools, for example.

Conclusion

Respondents' Opinions

This paper set out to capture the perceptions and opinions of senior and influential role players in education litigation regarding selected aspects of the litigation that has taken place since 1994. Reference in the title to hope, concern and despair captures the three mainstreams of opinions that could be identified.

Hope

Participants gained hope from litigation in this sense that clear markers have been laid down in some cases, certain rights seem to have been strongly delineated, and litigation does not necessarily seem to be the default approach to disputes anymore.

Concern

The concern that emerged from the responses of the participants to certain questions can be linked to the behaviour and performance of certain administrators, politicians, unions, governing bodies and human resource managers. The concern extends to the perceived 'complicatedness' of the law and the lack of dispute resolution skills, as well as the lack of professionalism exhibited by certain administrators.

Participants also seemed concerned about the fact that some fundamental social issues or human rights issues have not been litigated or resolved to a significant degree. Participants' concern about their perceived lack of litigation on human rights was confined to human rights litigation on fundamental socio-economic issues such as access to education, unfair discrimination and the absence of proper infrastructure in schools (authors' emphasis). As far back as 2004, Mr. Justice Albie Sachs (then of the Constitutional Court) articulated a similar sentiment when he referred to the problematic issue of transformation in South Africa at a conference held to commemorate the *Brown v. Board of Education* case in the USA and ten years of democracy in South Africa (Sachs, 2005:10):

> Desegregation […] is relatively easy in South Africa; you scrap all the apartheid laws. But the structures of apartheid continue, the patterns of inequality continue, so while we have desegregated, and there are no laws blocking advancement, those that have continue to 'have' and those that have not continue to 'have not' (with possibly a small group of people sneaking their way out of the have-nots and being incorporated into the elite that have). This is not the vision of our Constitution. Our Constitution has a transformative vision, a vision of achieving equality […]

There has been a significant amount of litigation on human rights issues such as corporal punishment (the *CESA* case where parents attached to Christian independent schools wanted to be exempted from Section 10 of SASA because of religious reasons); freedom of expression (the *A v. Governing Body, The Settlers High School and Others* (3791/00) [2002] ZAWCHC 4 (8 February 2002); *Le Roux and Others v. Dey* (CCT 45/10) [2011] ZACC 4; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC); BCLR 446 (CC) (8 March 2011); *MEC for Education: KwaZulu-Natal and Others v. Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007)) cases; the *S v. Zuba* (ECJ 2004/004) [2004] ZAECHC 3 (19 February 2004) case about the unavailability of child reform schools in the Eastern Cape; the *FEDSAS v. MEC for the Department of Basic Education, Eastern Cape* (60/11) [2011] ZAECB case, concerning that province's failure to appoint and remunerate approximately 4,000 temporary teachers; the *Section 27 and Others v. Minister of Education and Another* (24565/2012) [2012] ZAGPPHC 114; [2012] 3 All SA 579 (GNP); 2013 (2) BCLR 237 (GNP); 2013 (2) SA 40 (GNP) (17 May 2012) case about the non-provision of handbooks in Limpopo as well as the language in education cases (*Die Laerskool Middelburg en 'n ander v. Die Departementshoof: Mpumalanga se Departement van Onderwys en andere* (2002) JOL 10351 (T); *Hoërskool Ermelo v. The Head of Department of Education: Mpumalanga* (219/08) [2009] ZASCA 22 (27 March 2009); *Minister of Education (Western Cape) v. Mikro Primary School Governing Body* (140/2005) [2005] ZASCA 66; [2005] 3 All SA 436 (SCA) (27 June 2005); *Seodin Primary School and Others v. MEC of Education Northern Cape and Others* (1) (77/04/01) [2005] ZANCHC 5; 2006 (4) BCLR 542 (NC); (24 October 2005)).

Newspapers have recently reported on an action brought by Organisasie vir Godsdienste-Onderrig en Demokrasie (OGOD) against six

primary schools and two ministers. In a press release OGOD (2014) states the following:

> Acting on behalf of learners and parents of learners at public schools in South Africa, OGOD has laid charges in the Gauteng Division of the High Court of South Africa against six public schools and two ministers.
>
> According to the organisation, the actions of the some (sic) public schools are in breach of the National Policy on Religion and Education, and/or unconstitutional (sic), for such public schools:
>
> 1.1 promote or to allow its (sic) staff to promote adherence to one or predominantly one religion during its religion school activities;
> 1.2 hold out that it promotes (sic) the interests of a religion;
> 1.3 align or associate itself (sic) with a religion;
> 1.4 require learners, either directly or indirectly, to disclose:
> 1.4.1 whether or not such learners adhere to any religion;
> 1.4.2 to which religion, if any, the learners adhere;
> 1.5 maintain any (sic) record of the religion, if any, to which learners adhere;
> 1.6 segregate or permit the segregation of learners on the basis of religious adherence.

It seems that all litigants have not yet submitted their pleadings to the court, and all that needs be noted at the time of writing is that, according to OGOD, a charge has been laid against six public schools and two [presumably education] ministers alleging that the schools are in breach of the National Policy on Religion and Education (Department of Education, 2003) and/or that certain alleged practices at the schools are unconstitutional. This possible litigation has human rights implications with regard to the right to freedom of religion, the right to conduct religious observances and the right not to be unfairly discriminated against.

Despair

Some participants experienced despair when they observed the arrogance of politicians and administrators, their exercising of "imagined powers" and their failure or reluctance to learn from their failures and mistakes. They were also extremely worried by the perceived lack of attention to the observance of human rights, the disobeying of court orders, the undue union and political influence in education and the subsequent litigation.

Our own Opinion

Our analysis of the responses of the participants seems to suggest that, although litigation should be avoided as far as possible, litigation *per se* should be regarded as a valuable instrument in the quest to realise all children's right to quality education. The benefits that have accrued from litigation are relatively easy to identify. So are the challenges and problems concerned with litigation.

We believe, like one of the participants (WM1:6), that the threat of litigation, possible incarceration of officials and even attachment of their property may force those officials who engage with litigation and their official responsibilities in a random fashion, to accept greater responsibility for their acts and decisions. We also agree with participant FGD, who contended that litigation *per se* cannot improve education as it is the work or the role of education practitioners to do that.

In our opinion, frivolous litigation that serves no useful purpose at all should be avoided. The role players concerned should focus on strategic litigation to enable the courts to provide clarity on the content, meaning, interpretation and application of legal provisions and also to hold officials of education departments and other role players accountable for their decisions and actions. Role-players who defy court orders should be dealt with firmly, and in accordance with the law.

We believe that the quality of legal drafting and litigation in education can be improved through the concerted professional and initial training and development of all role players in education litigation, provided that the quality of the training and the trainers are assured by competent authorities (DL; EC; EG; FLA; TA; WC; WM). Furthermore, the point of departure when dealing with disputes should be that it is likely that management solutions can be found for all problems (DL; NB; WM) and that disputes could be resolved through the use of sound dispute resolution skills and techniques.

Participant TC pointed out that the fact that some senior officials in education are not educator staff, but public service officials, is probably also a factor that contributes to litigation. In a PhD thesis, Smith (2013) found that education districts were hamstrung by the fact that some of the managers in districts were not educators.

In conclusion, we wish to quote points made by one of the participants (TH:6), because we believe that, read together, they provide a solid point of departure for reducing litigation and for improving litigation that is unavoidable. This participant expressed the belief that there should be education law experts in education departments and in institutions of the organised teaching profession, as well as of parents' formations. This participant argued cogently that

> *litigation is like war – readiness for war frightens possible enemies away. Money judiciously spent on litigation is not wasted. It hones brains. 'He who desires peace must be prepared for war.' Everybody concerned should be ready to defend the domains of teachers and the rights of the child and must be in a position to stop a political head of any*

> *education department or any other role player*[s] *striving to prejudice or disadvantage the child.*

In South Africa's post-apartheid democratic era, one question remains about the provision of education and litigation: have the underprivileged benefited from litigation and is the provision of education better now because of litigation? This rhetorical question can be answered in the negative on the basis of the findings in a number of cases referred to in the course of the discussion above including *FEDSAS v. MEC for the Department of Basic Education, Eastern Cape* (60/11) [2011] ZAECB, *Section 27 and Others v. Minister of Education and Another* (24565/2012) [2012] ZAGPPHC 114; [2012] 3 All SA 579 (GNP); 2013 (2) BCLR 237 (GNP); 2013 (2) SA 40 (GNP) (17 May 2012).

Furthermore, Abdoll and Barberton (2014) report on a study commissioned by the Centre for Child Law at the University of Pretoria to "assess what progress has been made in addressing the issues that brought about the litigation" [on "mud schools" in the Eastern Cape].

In their study, they made "the concerning finding that the Department [of Education of the Eastern Cape] has woefully underspent the allocated school infrastructure funding for two years running. The target for the number of schools to be built in 2011/2012 and 2012/2013 was [forty-nine]. However, only [ten] schools had been completed at the end of the first year."

Another report prepared for the Centre for Child Law by Veriava (2014) states boldly that, in regard to the abolition of corporal punishment by Section 10 of SASA "[P]ractice simply does not reflect the law's promise."[iii]

A number of references to newspaper reports on the "Our cases in the media" page of the website of the Centre for Child Law[iv] depict problems still prevalent in many schools:

- No end yet to mud schools – *Sowetan,* 22 August 2014
- Battle for desks as [Eastern Cape] MEC snubs court – *Sunday Times,* 6 July 2014
- No learning for orphans - *Timeslive,* 27 May 2014
- Parents back-slap happy teachers - *Timeslive,* 30 May 2014
- Conscourt orders Free State schools to review teen pregnancy policies - *Daily Maverick,* 11 July 2013
- Schools win big in court - *Timeslive,* 07 June 2013 (This is about the court ordering the Eastern Cape Department of Education to pay teacher salaries)
- Eastern Cape teacher shortage heads to court - *The Citizen online,* 06 March 2013
- Sexual abuse at school 'a pandemic' - *Mail and Guardian,* 16-22 November 2012

In our opinion the above paragraphs provide evidence that the provision of education especially for the underprivileged has not improved markedly. There is convincing proof of the problems that still beset the provision of education in particular to the underprivileged.

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Notes

i. We have assigned codes to the opinions of various participants in order to protect their anonymity. Where we cite a participant's specific contribution, we will provide the code that we assigned to the person in brackets and the number(s) of the page(s) of the written version and summary of the responses as we captured them after a colon. For example, (DL:1) means that we acknowledge the contribution of participant DL and that we are referring to page one of the written version of his/her responses.

ii. See http://www.centreforchildlaw.co.za/cases/our-cases, accessed on 26 March 2014.

iii. Quotations regarding these two publications have been taken from the website of the Centre for Child Law (http://www.centreforchildlaw.co.za/, accessed on 30 October 2014).

iv. Accessed on 31 October 2014.

References

Abdoll C & Barberton C 2014. *Mud to Bricks: A Review of School Infrastructure Spending and Delivery.* Report on a study commissioned by the Centre for Child Law. Pretoria: Centre for Child Law, University of Pretoria.

Beckmann J & Prinsloo J 2004. Towards an analytical framework for accountability regarding equal educational opportunities. *Perspectives in Education,* 22(3):133–146.

Beckmann J & Prinsloo J 2006. Imagined power and abuse of administrative power in education in South Africa. *Tydskrif vir die Suid-Afrikaanse Reg,* 2006(3):483–496.

Department of Education 2003. *National Policy on Religion and Education.* Pretoria: Department of Education.

Organisasie vir Godsdienste-onderrig en Demokrasie (OGOD). *Press release 20/8/2014.* Available at http://www.ogod.org.za/press-releases/ogod-litigation-press-release-aug2014.pdf. Accessed 30 October 2014.

Prinsloo J 2013. What you see is (not always) what you get. *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal and Others* 2013 (4) SA 262 (CC). Paper read at the annual conference of the South African Education Law Association, Muldersdrift, 11 September.

Republic of South Africa 1996a. *The Constitution of the Republic of South Africa, Act No. 108 of 1996.* Pretoria: Government Printers.

Republic of South Africa 1996b. *The South African Schools Act, Act No. 84 of 1996.* Pretoria: Government Printers.

Sachs A 2005. Equal Educational Opportunities and the Constitutional Court. In CJ Russo, J Beckmann & JD Jansen (eds). *Equal educational opportunities.*

Comparative Perspectives in Education Law. Pretoria: JL van Schaik.
Smith EC 2013. Understanding organisational culture in performing and poorly performing districts: A comparative study of district offices. Unpublished PhD thesis. Pretoria: University of Pretoria.
Veriava F 2014. *Promoting Effective Enforcement of the Prohibition against Corporal Punishment in South African Schools.* Report Commissioned by the Centre for Child Law. Pretoria: Centre for Child Law, University of Pretoria.

Legal Authorities

A v. Governing Body, The Settlers High School and Others (3791/00) [2002] ZAWCHC 4 (8 February 2002).
Bennie Groenewald Primêre Skool en Andere v. Premier van die Noord-Kaap en 'n Ander (Bennie Groenewald Primary School and Others v. Premier of the Northern Cape and Another) [1998] 3 All SA 426 (NC). (Referred to in *Despatch High School v. Head of the Education Department, Eastern Cape Province and Others* (242/2001) [2002] ZAECHC 28 (25 September 2002).
Christian Education South Africa v. Minister of Education (CCT4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 (18 August 2000).
Despatch High School v. Head of the Education Department, Eastern Cape Province and Others (1997) 4 SA 982 (C).
Die Laerskool Middelburg en 'n ander v. Die Departementshoof: Mpumalanga se Departement van Onderwys en andere (2002) JOL 10351 (T).
FEDSAS v. MEC for the Department of Basic Education, Eastern Cape (60/11) [2011] ZAECB.
Fedsure Life Assurance Ltd and Others v. Greater Johannesburg Transitional Metropolitan Council and Others (CCT 7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998).
Head of Department, Department of Education, Limpopo Province v. Settlers Agricultural High School and Others [2003] JOL 11774 (CC).
Hoërskool Ermelo v. The Head of Department of Education: Mpumalanga (219/08) [2009] ZASCA 22 (27 March 2009).
KwaZulu-Natal Joint Liaison Committee v. MEC for Education, KwaZulu-Natal and Others (2013) 4 SA 262 (CC).
Le Roux and Others v. Dey (CCT 45/10) [2011] ZACC 4; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC); BCLR 446 (CC) (8 March 2011).
Matukane and Others v. Laerskool Potgietersrus (1996) 1 All SA 468 (T).
MEC for Education in Gauteng Province and Other v. Governing Body of Rivonia Primary School and Others (CCT 135/12) [2013] ZACC 34; 2013 (6) SA 582 (CC); 2013 (12) BCLR 1365 (CC) (3 October 2013).
MEC for Education: KwaZulu-Natal and Others v. Pillay (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007).
Minister of Education v. Harris (CCT13/01) [2001] ZACC 25; 2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC) (5 October 2001).
Minister of Education (Western Cape) v. Mikro Primary School Governing Body (140/2005) [2005] ZASCA 66; [2005] 3 All SA 436 (SCA) (27 June 2005).
Schoonbee and Others v. MEC for Education, Mpumalanga and Another (2002) 4 SA 877 (T).
Section 27 and Others v. Minister of Education and Another (24565/2012) [2012] ZAGPPHC 114; [2012] 3 All SA 579 (GNP); 2013 (2) BCLR 237 (GNP); 2013 (2) SA 40 (GNP) (17 May 2012).
Seodin Primary School and Others v. MEC of Education Northern Cape and Others (1) (77/04/01) [2005] ZANCHC 5; 2006 (4) BCLR 542 (NC); (24 October 2005).
Suid-Afrikaanse Onderwysunie v. Departementshoof, Department van Onderwys, Vrystaat, en 'n Ander (2001) 3 SA 100 (O).
S v. Zuba (ECJ 2004/004) [2004] ZAECHC 3 (19 February 2004).