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Balancing rights in education: applying the proportionality test

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Educators and learners know that they are entitled to the protection of their rights, but are uncertain to what degree this protection extends. Fundamental rights are not absolute and may be limited by the rights of others, by laws of general application and by the definitional parameters of rights as described in the Constitution. This article explains the process of applying the balancing of fundamental rights in terms of the proportionality test of the general limitation clause (section 36) of the Constitution. Other non-fundamental rights are also limitable in terms of the principles of South African law. Court cases in the education setting are discussed illustrating examples of conflicting rights in schools. Such situations are opportunities for educators to apply the Constitution in the classroom by teaching learners a set of values consistent with the Bill of Rights.

Balansering van regte in die onderwys: toepassing van die proportionaliteitstoets

Onderwysers en leerders weet dat hulle daarop geregtig is om hul regte te handhaaf en beskerm, maar is onseker tot watter mate hierdie handhawing geldig is. Fundamentele regte is nie absoluut nie en mag beperk word deur die regte van ander, algemeen-toepaslike wette en die omskrewe interne beperkings van elke reg. Hierdie artikel verduidelik die proses om die balansering van fundamentele regte toe te pas volgens die proportionaliteitstoets van die algemene beperkingsklousule (artikel 36) van die Grondwet. Ander nie-fundamentele regte is ook beperkbaar in terme van die beginsels van Suid-Afrikaanse reg. Sake binne die onderwyskonteks word bespreek ten einde as voorbeelde te dien vir gevalle waar regte met mekaar in botsing kom. Sulke gevalle is geleenthede vir opvoeders om konflikhantering te onderrig deur grondwetlike waardes in die klaskamers aan te wend.

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Learner discipline in schools has deteriorated markedly over the past decade and educators complain that it is the result of learners having more rights than educators. (Lessing & Dreyer 2007: 120). Most educators, learners and schools are aware that they are entitled to the protection and advantages afforded by the enshrinement of fundamental rights. However, a number of studies have confirmed that in general educators, members of school governing bodies as well as learners are very ignorant of the underlying legal principles and the content of their rights (De Wet 2002: 115-22, Breed 2003: 98, Smit 2005: 4). Educators are uncertain whether fundamental rights may be limited or what to do when rights come into conflict with each other. As a result of this ignorance, educators feel disempowered to assert their authority to maintain discipline. This lack of assertiveness unconsciously undermines the development of a culture of respect for fundamental rights in the classroom.

Schools are microcosms of society (Akkermans 1997: 241). Learners experience many of the everyday challenges and conflicts in the classrooms and school environment that will one day become part of their adult life in the society they live in. According to Akkermans (1997: 241), education therefore has two main functions namely a qualification function and a socialisation (or civilising) function. Dlamini (1994: 578) affirms that education is the primary instrument to ensure the safeguarding, protection and transference of a society's constitutional values and a community's culture. Developing a democratic culture with respect for fundamental rights is enhanced when principals and educators themselves model constitutional and democratic behaviours (Dimmock 1995: 171). So doing they overtly and explicitly display for learners, parents and others in the school community the desirable codes of behaviour and values. In order to engender a culture of respect for fundamental rights it is therefore essential that knowledge of the content of the Bill of Rights and education law should be acquired by every educator. The skills needed to apply the constitutional provisions and in particular for the balancing of rights to everyday situations should be mastered by educators in order that they may be taught in schools.

1. Objectives

The aim is to discuss the principles with regard to the balancing of rights by applying the constitutional provisions and legal principles to the education setting. The focus is on explaining the procedure for limiting fundamental rights by applying the proportionality test of section 36 of the Constitution.

2. Methodology

The following methods were used to find the applicable legal principles:

- An interpretive-theoretical method was adopted which, according to De Groot (De Wet *et al* 1981: 9), is not empirical in nature but involves the interpretation and theoretical evaluation of known findings. In this regard reported judgments of the High Court, Supreme Court of Appeal and Constitutional Court of South Africa that have a bearing on education, were researched according to rules pertaining to the interpretation of the Constitution and case law.
- This research is in essence an analysis and synthesis of the applicable legal principles and rules pertaining to the theme. As with all Western legal systems historically based on Roman law, the South African legal system is an objective self-contained system of knowledge (Samuel 2003: 32). Bearing the educational approach in mind, the following legal methodology as described by Samuel (2003: 95-119) was utilised in this study:
    - hermeneutical methods to interpret legal texts such as the South African Constitution, relevant education legislation and law reports;
    - analysis of the legal data which involves the consolidation, reduction and interpretation of the data, and
    - legal reasoning by applying descriptive, inductive, deductive and analogical modes of reasoning as well as diverse types of legal argumentation with regard to precedents and metaphor.

3. The relationship between rights and duties

Rights and duties have assumed a central role in modern law (Samuel 2003: 35). The converse of every right is a duty. For every right, such as the fundamental right to basic education (RSA 1996b: section 29) or the common law right to contractual freedom, there is an equal concomitant duty or responsibility. The common law relationship between rights and duties remains in force in accordance with section 2 of Schedule 6 of the Constitution (RSA 1996b). Although a condition for human existence is that individuals have rights to choose freely, such right to freedom and autonomy of individuals are always conditioned by each person's membership of society (Sayed 1995: 79). Central to the resolution of the dilemma between individual autonomy and the constraints which may be placed on these freedoms by society, is the assertion that being human involves interaction and intersubjective transactions between individuals (Sayed 1995: 80). Thus, neither total individual freedom nor absolute collective societal action are acceptable and practical ways of organising society. The role of the state, which includes state organs such as public schools, is to balance the protection of individual freedoms with the collective rights and interests of other members of society (Sayed 1995: 84). The boundaries of individual rights are determined by the rights of others and by the legitimate needs of society (Erasmus 2003: 629). Consequently every person has a duty to take the freedoms of others into account. The relationship between individual rights and the duties towards the collective interests of other members of society is demonstrated in Table 1.

It is also necessary to distinguish between fundamental rights and non-fundamental rights. Fundamental rights are those rights that have specifically been enshrined in terms of chapter 2 of the Constitution and, to name a few, include rights to human dignity, life, equality, privacy, freedom of expression, religious freedom, language, culture, security of person and basic education. All the other rights that exist in the South African law whether in terms of the common law or legislation are non-fundamental.

Table 1: The relationship between fundamental rights and duties

Rights	Duties
Right to equality	Duty not to discriminate unfairly on the grounds of race, gender, age, religion, language and sexual orientation
Right to human dignity	Duty to respect the dignity of others
Security of person	Duty not to treat others in a degrading way No assault, no cruel punishment, no illegal arrest
Privacy	Respect the privacy of others; protect own and the property of others, access to own records, ensure confidentiality of learner records
Religious freedom	Allow another's religious freedom
Freedom of expression	Duty to use freedom of expression responsibly No slandering or defamation of another person No hate speech, no war / violence propaganda
Freedom of association	Duty to respect another's freedom to associate or to dissociate
Right to assemble	Duty to allow peaceful demonstration
Right to basic education	Allow basic education to occur
Right to administrative justice	Duty to ensure fair and unbiased procedures; reasonable, justifiable and accountable bureaucratic decisions
Language and cultural freedoms	The duty to allow and respect the use of own languages and the enjoyment of cultures

4. Limitation of rights

All rights, albeit fundamental or non-fundamental, may be limited in accordance with the law. The courts have the judicial authority to adjudicate whether the limitations or infringements of rights are in accordance with the law. Section 7(3) of the Constitution (RSA 1996b) provides that the rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill. Fundamental rights may be limited in the following three ways: limitation in terms of the general limitation provision, section 36 of

the Constitution; limitation by the fundamental rights of others, and restriction of the scope and meaning of a fundamental right by virtue of the definitional demarcation or specific limitations of the right.

However, the process of limiting fundamental rights differs from that of non-fundamental rights, because section 36 of the Constitution prescribes particular considerations that apply to the limitation of fundamental rights. It has been said that the general limitation provision in the Bill of Rights of the Constitution is probably the most important section in the constitution (Woolman 1996: 60); not because the fundamental rights are unimportant, but because the general limitation provision applies to all cases that involve conflicting fundamental rights. Section 36 reads as follows (RSA 1996b):

> Limitation of rights
>
> 36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and purpose;
>
> (e) less restrictive means to achieve the same purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

In the matter of De Reuck *v* Director of Public Prosecutions (2003: 89B)[1] Epstein J linked the limitation of rights to the balancing process by stating:

> I reiterate that the rights contained in the Bill of Rights are not absolute. Rights have to be exercised with due regard and respect for the rights of others. Organised society can operate only on the basis of rights being exercised harmoniously with the rights of others. Of course, the rights exercised by an individual may come into conflict with the rights exercised by another and, where rights come into conflict, a balancing process is required.

1 De Reuck *v* Director of Public Prosecutions, Witwatersrand Local Division 2003 (3) SA 389 (W).

It follows thus that the fundamental rights and freedoms of any person, including learners and educators, are not absolute but may be limited by means of a balancing process. The discussion that follows will consider the legal principles.

5. Balancing process to limit fundamental rights

According to Woolman (1996: 54) the balancing of rights entails two distinct formats. Firstly, balancing of rights may refer to a situation where head-to-head comparison of rights, values or interests occurs. This means that in comparing the value or weight of one right in relation to another right, an either-or determination is made in terms of which one right outweighs the other. For instance, in adjudicating the constitutionality of the death sentence, the Constitutional Court determined in the matter of S *v* Makwanyane (1995: 55)[2] that a person's right to life will always outweigh the state's interests.

Secondly, the balancing process might refer to "the striking of a balance" (Woolman 1996: 55). In situations where rights can rightfully co-exist and it is not necessary to decide in favour of one right or the other right. In other words, the balancing of rights would require that the equilibrium is re-established by bringing equally important rights to an even keel. For instance, when a learner has committed a misconduct such as disrupting a class by boisterous behaviour, then the learner can be disciplined without having to be suspended from school. The learners right to basic education will so doing be brought into balance (equilibrium) with the school's right to maintain discipline. Neither the school nor the learner's rights are limited in their entirety, but the extent of the right of the learner is adjusted.

From the last example, it is evident that the outcome of balancing process might at times be problematic and that the reasonability of the decision will need to be justified. In what follows the legal factors determining the justifiability of such balancing decisions will be expounded.

2 S *v* Makwanyane 1995 (3) SA 391 (CC).

6. Factors to consider in the process of limiting fundamental rights

By applying the general limitation clause, all the factors listed in section 36 must be considered consecutively in order to comply with the constitutional requirements. Accordingly, before the actual balancing process in terms of the so-called proportionality test can take place, the following two preliminary enquiries must be made: Has a fundamental right been infringed? If so, has a law of general application limited the fundamental right?

6.1 Establish whether a fundamental right is infringed

The first factor to consider is to establish whether a fundamental right has in fact been infringed (De Waal *et al* 2001: 146). If the court finds that no fundamental right has been infringed, then the process of testing the constitutionality in terms of section 36 ends.

As in the case of Acting Superintendent-General of Education *v* Ngubo (1996: 369)[3] demonstrators against the quality of teacher training in the province staged a sit-in on the campus of the Natal College of Education. The demonstration became violent after demonstrators vandalised facilities and disrupted educational activities. The police eventually had to evict the students. The educational authorities applied for an interdict barring the students to prevent similar occurrences in future. The students opposed the application on the grounds that the interdict sought would violate their right to freely demonstrate. The students received little sympathy from the court that decided that the actions of the students had exceeded the scope of the right to freely demonstrate.

In the education context it is likely that a learner's right to basic education, which is a fundamental right, will always come into play. For instance, if a principal unjustifiably suspends a learner, then the learner's right to basic education has been infringed. Likewise, if a learner disrupts a class by ill disciplined behaviour, then all the other learners' rights to receive basic education are infringed. In the

3 Acting Superintendent-General of Education *v* Ngubo 1996 (3) BCLR 369 (N).

education context it inevitably follows that the fundamental right to basic education will come into play. This first enquiry will thus always be answered in the affirmative because conflicting rights at schools usually infringe the fundamental rights to basic education of the learners.

6.2 Establish whether a law of general application limits the fundamental right

Only laws of general application may limit fundamental rights. Simply put, this second precondition requires that the law limiting the fundamental right has to apply generally to all persons and not just to one person or limited group of people. According to Woolman (1996: 54) the attributes of a law of general application are that: it must apply generally to all persons; it must be non-arbitrary (the law must not be random, capricious or illogical); it must be accessible to all persons (everyone must be able to find out what the rule entails), and the law must be precise, specific and clear.

Original legislation such as parliamentary statutes, provincial and local authority legislation, common law rules and subordinate or delegated laws such as regulations all fall in the category of laws of general application, because they comply with all these attributes. However, internal administrative rules of an organisation, such as school rules or codes of conduct, personnel regulations of companies, and rules of churches or trade unions, do not qualify as laws of general application. The reason for this is that these rules apply only to the limited group, ie members of the organisations or learners and personnel of the schools, and the content of the rules are not generally accessible. An example might clarify the point; if a school rule prescribes that no cellular phones may be used during school hours, such a rule will apply only to the learners and educators attending the school. The "no cellphone-rule" will accordingly not apply to adults or persons delivering goods to the school, because the rule is an internal or administrative rule. Such administrative rules may not limit fundamental rights and accordingly it will be unconstitutional if, for instance, a school rule prohibits learners the freedom of expression.

However, this does not mean that administrative actions or decisions by schools may not limit fundamental rights at all. It should be clearly distinguished between an internal administrative rule and an administrative action executed in terms of a law of general application. The implementation or administration of a law of general application automatically leads to the limitation of fundamental rights. For instance, a policeman implementing his duty to arrest a suspected criminal, by necessity limits certain fundamental rights of such a criminal. Therefore, not only the laws of general application, but also the implementation of such laws, may limit fundamental rights. Administrative law is primarily concerned with the daily implementing (administering) of legislative policy and the exercise of delegated powers within the framework allowed by the empowering legislation. The application of school rules, actions and decisions by school principals, educators and/or school governing bodies are administrative actions falling under administrative law (Hoexter 2002: 3).

Administrative action, such as a decision by a governing body to suspend a delinquent learner, may limit the fundamental rights of the learner if the decision is taken in accordance with the provisions of the South Africa Schools Act and furthermore complies with the requirements of proportionality (reasonability and justifiability) as expounded in section 33 and the Promotion of Administrative Justice Act (RSA 2000, De Ville 1994: 368). An administrative action will be reasonable, if it exists for a good reason. Furthermore, a school's decision or action will be justifiable if the interest that is being protected is of sufficient importance. The maintenance of learner discipline in schools is vitally important and exists for the reason of ensuring effective education (Oosthuizen 2006: i). Thus, even though an administrative action does not qualify as a law of general application, it may limit a fundamental right if it is executed in terms of a law of general application. In other words, in a roundabout way, administrative action such as disciplining a learner, may also limit the fundamental rights of the learner provided that the action is reasonable and justifiable.

6.3 Proportionality test — weighing the factors

In the first constitutional case, S *v* Makwanyane (1995: 102),[4] the Court approved the principles expounded in the Canadian case of R *v* Oakes (1986: 103)[5] and explained the proportionality test as follows:

> There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question: R v Big M Drug Mart Ltd at 352. Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance.

Three questions should thus be asked to test the proportionality of the law in relation to the fundamental right limited (Woolman 1996: 67):

a) Does the objective of the law warrant the infringement? In other words, is the objective of the law legitimate?

b) Is the manner of limitation rationally connected to the objective of the law? In other words, is there a justifiable reason to limit the right by law?

c) Could less restrictive means have been used?

To answer question a) from an educational perspective, the objectives of the South African Schools Act are to provide a uniform system for the organisation, governance and funding of schools (RSA 1996a: short title) and to establish a disciplined and purposeful school environment, dedicated to the maintenance and improvement of quality learning (RSA 1996a: section 8). These objectives are legitimate and warrant the infringement of fundamental rights, because the Constitution itself enshrines the right to basic education (RSA 1996b: section 29) and thus implicitly requires of the State to provide education.

4 S *v* Makwanyane 1995 (3) SA 391 (CC).
5 R *v* Oakes 1986 (1) SCR 103 (Canada).

Woolman (1996: 67) suggests that a more logical order of analysis or sequence of asking the questions would be that question c), concerning less restrictive means, be asked before question b). In other words, before weighing the cost and benefit to the affected persons, it should first be determined whether the rule or law can be made less restrictive and still achieve the same objective. For example, can a prohibition against long hair for boys be made less restrictive by allowing neatly cut long hair and will it achieve the same objective of a disciplined school? Such questions will have to be answered with regard to specific concrete facts on a case to case basis.

Question b) entails the true balancing process because the reasonability and justifiability of the limitation is weighed against the objective of the law. In other words, question b) would require that consideration be given to the reasonableness and importance of a school rule prohibiting ill-disciplined behaviour in relation to the learner's fundamental rights. For instance, question b) enquires whether a school rule prohibiting long hair for boys is reasonable and important enough to limit a learner's right to privacy or freedom of expression. The purpose, effect and importance of school rules or the collective rights of fellow learners are placed on one side of the scales. On the other side of the scales are placed the nature and effect of infringement of the right of an individual learner to wear his/her hair as s/he likes. These values are then weighed up by taking into account the requirement for good and sufficiently important reasons that would be convincing in a democratic society based on dignity, equality and freedom. The essence of this proportionality assessment is to determine whether the "benefit to others" seems to outweigh the "cost to the right-holder" (De Waal *et al* 2001: 145). The answer to these questions cannot be given in the abstract, but depends on the particular facts of each case and must be considered casuistically. Exemplary court cases will be discussed in section 9 below.

7. The rights of educators to maintain discipline

A learner who relies on the right to basic education, implicitly accepts the responsibility to comply with the obligations that go hand in hand with such a right. The obligations attached to the right to basic education are that the learner must attend school, must enable education to take place, must learn and apply himself and must adhere to the rules of the school and classroom. In addition the duty to respect another learner's right to basic education is also implicit to each learner's own right to basic education. Thus, if learners disrupt classes by undisciplined behaviour, then they would not be complying with their duties associated to the right to basic education. This breach of legal duty on the part of the ill-disciplined learners infringes the rights of other learners to receive a basic education. The rights of the majority of disciplined learners and the legitimate needs of society to establish an educated citizenry weigh heavier than the disruptive learner's right to basic education.

Section 8(1) of the South African Schools Act (RSA 1996a) empowers only governing bodies to maintain discipline at schools. It is obviously impractical for parents to be charged with maintaining the run-of-the-mill discipline at schools. Accordingly, educators have the same rights as parents to exercise control and maintain discipline by virtue of their common law *in loco parentis* position of authority (RSA 1998: section 3.7). This delegation of legitimate authority entitles educators to maintain discipline at schools and in classrooms. Most of the decisions to limit a disruptive learner's rights by means of disciplinary methods would be taken informally during school hours. These decisions by educators (including principals) must be judiciously exercised in accordance with principles of reasonableness and fairness.

8. Fair hearing and corrective action

The process of adjudicating or deciding the relative weight to be attached to the conflicting rights can take place informally in a classroom situation or formally during a disciplinary hearing by the school governing body. The question arises whether an educator may

adjudicate the weight of learner's rights or whether this may only be done by a disciplinary committee. In other words, when may an educator balance learner's respective rights and when should the school governing body decide?

The American case of Goss *v* Lopez (1975: 725)[6] is instructive with regard to procedural rights of learners during disciplinary action by educators. In this matter about ninety learners were suspended following a destructive conduct during protests against the Vietnam war at two schools. Certain innocent learners were also suspended without a hearing. The Supreme Court of the United States (equivalent to the South African Constitutional Court) emphasised that learners were entitled to "due process" hearings before suspension from schools. However, the court distinguished between three levels of ill-discipline (Russo 2004: 804-10). At the lowest level, which includes daily infringements of school rules that learners know or should know and the punishment would not lead to suspension, then no "due process" or procedural hearing is required. This level entitles educators to maintain discipline immediately by executing corrective action without the delay of a hearing. Level two applies when the infringement is going to be permanently recorded against the learner's name and short-term suspension may result. This level requires "a modicum" or basic fair hearing in terms of which no lengthy notice period is required, but the learners are entitled to state their sides of the story before corrective action is considered. The most serious level-three infringements have expulsion or long-term suspension as a possible corrective measure. The learners are entitled to full and fair administrative hearings in terms of which written notice is given to the learners and their parents or guardians, and the hearing is held by a fair and impartial judge or committee. Although the American law differs from South African law, it is suggested that the analogous principles pertaining to the levels of ill-discipline and the procedural requirements before corrective action is taken, be usefully applied to South African schools.

6 Goss *v* Lopez 419 US 565, 95 SCt 729, 42 LEd 2d 725 (1975).

The straightforward answer to the question whether a learner is entitled to a fair hearing in terms of South African law is provided for in section 9 of the South African Schools Act. This section provides that the school governing body must administer discipline in matters that might lead to suspension or expulsion and only with regard to serious offences. Serious offences have been determined by notice in section 11 of the Guidelines for a code of conduct (RSA 1998: 8) and include conduct endangering the safety of others; possession, threat or use of dangerous weapons, drugs, liquor; fighting, assault; immoral behaviour and profanity; harmful graffiti; racism; hate speech; sexism; vandalism; theft; disrespect, verbal abuse, criminal behaviour; victimisation, bullying, intimidation; dishonesty with regard to examinations and repeated violations of school rules. It is clear from this list that many offences are regarded as serious and can lead to the suspension of learners.

The most common form of misconduct in schools is the use of improper language in the form of swearing (Oosthuizen 2006: 5) However, this does not mean that such behaviour or insults are protected by the freedom of expression or should be tolerated. Verbal insults may be prosecuted as a crime of *crimen iniuria* or by means of a civil defamation or libel action depending on the nature of the statement. A recent example from the media is the court case where three learners distributed an electronically manipulated photograph of the school principal and deputy-principal's heads superimposed on the naked bodies of other persons (Carstens 2006: 19). The principals instituted legal action against the learners claiming R600 000 for damages as a result of the defamatory nature of the insulting photographs.

9. Applying the process of balancing to examples from case law

To illustrate the process of balancing, examples from reported court cases will be considered in the following section. The process of balancing fundamental rights in accordance with the proportionality test is not difficult to understand and should ideally be applied in the school context whenever the opportunity arises.

9.1 Right to basic education *versus* right to expel learner

- Example 1: Learner is expelled from school after a disciplinary hearing

In the matter of Phillips *v* Manser (1999: 198)[7] the disciplinary committee found Phillips, a 17-year-old learner of Alexander Road High School guilty of a number of offences including serious assault of a fellow learner with a spanner, removing chloroform and inhaling it without permission, vandalising school property with graffiti, insulting educators, lying, forging a letter of absence, and fighting. The school governing body instructed Manser, the school principal, to suspend the learner and to recommend his expulsion to the Head of Department in terms of section 9(1)(b) of the South African Schools Act. Before the Head of the Education Department could decide, the learner's father launched an urgent application for a court order setting the decision of the governing body aside. Phillips contended that the disciplinary hearing had been unfair and improper, that the school did not have a code of conduct and accordingly could not validly find misconduct of rules that did not exist, that the disciplinary committee had made the recommendation instead of the school governing body as required by the Schools Act, and that the learner had a right to basic education in terms of section 29(1) of the Constitution, which right entitled the learner to attend the school.

On the question of the proceedings at the inquiry held by a disciplinary committee of the governing body, the court found that there was no partiality on the part of the principal and the court found that the hearing was in all respects proper and fair. The court held that the decision to suspend the applicant had been made by the governing body and not the disciplinary committee. This decision had been fairly made despite the fact that the governing body did not itself hold a hearing. The court found that a disciplinary committee constituted in terms of section 30 of the Schools Act could legitimately undertake a hearing and that the governing body was entitled to subsequently act on what occurred at the hearing and reach its decision in the light thereof. The applicant's argument was that in the absence of a code

7 Phillips *v* Manser 1999 (1) All SA 198 (SE).

of conduct as contemplated in section 8(1) of the Schools Act no decision to expel a learner could validly be taken. The court refused the application with costs, which had the effect that the learner's expulsion was confirmed. The court did not decide the issue whether a 17-year-old learner had a right to basic education in terms of the Schools Act that education is compulsory up to the age of 15 years only. However, the court indicated that as a result of the decision to expel the learner, Phillips no longer had the right to basic education at the school.

Although the court did not apply section 36, the general limitation provision of the Constitution, in this matter the outcome of the court's decision in effect confirms that an ill-disciplined learner's right to basic education may validly be limited if a fair disciplinary hearing had been held in terms of section 9(1) of the Schools Act. A similar result would have been reached if the court had decided to apply the proportionality test of section 36, because the limitation of the learner's fundamental right to basic education would have been balanced against the right to basic education of all the other learners at the school. As illustrated by this case, the objective to maintain discipline at a school in order to provide education outweighs the right to education of a learner that repeatedly committed serious acts of misconduct at school.

9.2 Freedom of expression *versus* right to discipline learner

- Example 2: Learner's hair in Rastafarian dreadlock style contrary to the school dress code

In Antonie *v* Governing Body, Settlers High School (2002: 738)[8] a learner was suspended by the governing body, on the grounds of serious misconduct, for wearing her hair in dreadlocks under a cap. Prior to the disciplinary action against her, the learner had requested permission from the principal on the grounds that she embraced the Rastafarian religion, but permission was refused. The suspension was set aside by the court on a technicality, ie that adhering to religious dress

8 Antonie *v* Governing Body, Settlers High School 2002 (4) SA 738 (C).

codes did not amount to serious misconduct under the disciplinary code of the school. Had the court considered the constitutionality of the suspension in terms of the two-stage approach, it is submitted that the same result as the court's decision would have been reached.

First, it is evident that the learner's rights to freedom of expression, religious freedom and dignity were infringed. Application of the school code in accordance with the rules of natural justice entitled the governing body to limit these rights, if it was reasonable and justifiable. The purpose and importance of the school rule requiring a dress code in respect of clothing and hairstyles was to enhance discipline, to promote equality by avoiding distinctive clothing between rich and poor learners, to establish group coherence and an esprit de corps, to enhance group identification and to avoid the complexities of drafting a reasonable and suitable casual dress code instead of a uniform dress code. The nature of the rules is in the form of a school code with the effect that learners wear uniforms so that they are more disciplined and that equality is promoted by avoiding distinction between rich and poor learners. This is placed on the one side of the proverbial scales of justice.

The nature and effect of the infringement of the learner's rights was that her freedom of expression, religious freedom to dress in religious attire was limited and her dignity was infringed. Could a less restrictive code accomplish the same purpose of discipline and promotion of equality? The uniform dress code could be relaxed in respect of religious attire as an exception to the rule. This is the other side of the scale.

The extent or severity of the infringement of freedom of expression, dignity and denial of religious freedom, compared to the rights of other learners to a disciplined school environment promoting equality, is a determining factor in the equation. The guidelines to a code of conduct (RSA 1998) for schools in terms of section 8(3) of the South African Schools Act (RSA 1996a) for regulating freedom of expression at schools reads as follows:

> Freedom of expression is more than freedom of speech. The freedom of expression includes the right to seek, hear, read and wear. The freedom of expression is extended to forms of outward expression as

> seen in clothing selection and hairstyles. However, learners' rights to enjoy freedom of expression are not absolute. Vulgar words, insubordination and insults are not protected speech. When the expression leads to a material and substantial disruption in school operations, activities or the rights of others, this right can be limited, as the disruption of schools is unacceptable.

In the Antonie case this guideline in respect of freedom of expression had not been adopted as a school rule or code of conduct. If it had been the case or if other schools had adopted this suggested school rule, a uniform dress code would probably be reasonable and justifiable for the additional purpose of preventing disruption to school operations. However, in the Antonie case, no evidence was placed before the court that her freedom of expression had lead to any substantial disruption of the school operations. Thus the strict limitation of her right to freedom of expression was not justified or reasonable under the specific circumstances of the case.

9.3 Equal access to education *versus* language rights

- Example 3: Afrikaans single-medium school forced by the Department of Education to change its language policy

In the matter of Governing Body of Mikro Primary School *v* Western Cape Minister of Education (2005: 19)[9] the provincial Department of Education had forced, at pains of disciplinary action, the inclusion of an English-medium course upon an Afrikaans-medium school, thus effectively changing the school language policy without regard to the rights of the school governing body. The action of the Department of Education was found by Thring J of the court *a quo* to "fly in the face of the law" because the minister's language policy guidelines of filling available schools before requiring single medium schools to change, were not followed. Furthermore, the honourable judge found that the best interest of the child-principle, which is of paramount importance according to section 28(2) of the Constitution, does not "trump" the rule of law and the prerequisite of legitimacy. In particular, the court

9 Governing Body of Mikro Primary School and others *v* Western Cape Minister of Education. 2005 (3) SA 436 (SCA).

held that it is in the long-term best interest of all children that the state must obey the law. Thring J put it as follows:

> … it is the simple principle that the state must obey the law. That is a principle which is so fundamental and so important in any civilised country that it must be only extremely rarely, if ever, that the rule of law can be 'held hostage', as Mr. Osborne puts it, to the best interests of children. Indeed, it is difficult to imagine how it could ever be in the best interests of children, in the long term, to grow up in a country where the state and its organs and functionaries have been elevated to a position where they can regard themselves as being above the law, because the rule of law has been abrogated as far as they are concerned. It could be cogently argued, I think, that a Court which, by its orders, exposed children to the risk of growing up in such a place would be doing them a greater disservice than a Court which merely ordered that they be removed from one school and placed in another, equally acceptable to their parents, and only a short distance away.

Challenging the main finding of the court *a quo*, the Western Cape Department of Education appealed and relied mainly on section 29(2) of the Constitution which provides that everyone has the right to receive education in an official language of choice at a public educational institution if practicable. Apart from asserting the rights enshrined therein, the appellants argued that the governing body's right to determine the language policy of the school was subject to the Constitution, the Act and any provincial law; and that the language policy was therefore subordinate to the constitutional right of the learners in question to be taught in English at each and every public school. The Supreme Court of Appeal rejected that interpretation. Instead, it held that section 29(2) means that everyone has a right to be educated in an official language of his or her choice at a public educational institution to be provided by the state if reasonably practicable, but not the right to be so instructed at each and every public educational institution. The court dismissed the appeal with costs.

The reasoning by the Supreme Court of Appeal in the Mikro case is correct. From this judgment it can be inferred that the best interest of a child is not a "trump card" that neutralises other rights, but rather that a balance should be struck between the conflicting rights. Applying the proportionality test to the specific facts of the Mikro case,

the purpose and importance of the school's single-medium language policy, the long-term best interest of learners to receive education in their mother tongue, the protection of the cultural rights of the majority of the Afrikaans-speaking children and the prerequisite that the state should adhere to the rule of law are placed on the one side of the scale. On the other side of the scale the English learners' right to basic education at a school and the short-term best interest to avoid the inconvenience of transferring to another school are weighed. Lastly, the factor whether the Afrikaans or English learners' rights can be limited to a lesser extent, should be determined. The fact that a school conveniently situated in close proximity could accommodate the English learners without much disruption, is the deciding factor in this equation. In this case the benefit to the Afrikaans learners to protect their language and cultural rights outweighs the cost to the English learners to move to an available English-medium school in close proximity.

Although the court did not apply the proportionality test in considering the limitation of conflicting rights *in casu*, the consistent use of the proportionality test in situations where fundamental rights are limited will have the same results and will lead to legal certainty. Legal certainty of the balancing process will in turn promote the education of fundamental rights in schools and will assist educators to apply these principles in classroom situations.

10. Striking a balance between co-existing rights

Woolman (1996: 46) reminds that the courts do not always apply the proportionality test in terms of section 36, because such a balancing process is sometimes not possible. Rights and interests cannot always be valued quantitatively, but at times need to be adjudicated qualitatively by taking characteristics such as intensity, utility and aesthetics of the rights into consideration. The Mikro case is an example of a matter where the best interest of all the children on both sides of the conflict had to be considered. In this matter the rights of the children were not evaluated in a head-to-head comparison, but a "balance was struck" by ensuring that the right to basic education of

all the learners would co-exist. The court determined that the long-term best interest of all the children would be best served if the state complied with the requirements of legality and the language rights of the Afrikaans learners were upheld.

11. Conclusion

Fundamental rights are not absolute, but are limited by the rights of others, by the definitional parameters of rights as described in the Bill of Rights, and by the general limitation clause. By applying the proportionality test to cases where fundamental rights are limited, satisfactory results of balancing conflicting rights in education can be reached.

School principals responsible for professional management, governing bodies responsible for the governance of schools and educators responsible for teaching, can apply the balancing process by establishing the proportional weight of conflicting fundamental rights in a variety of situations. At times educators will be required to make snap decisions in a classroom concerning such conflicting rights. It is understandable that such "spur of the moment" decisions will not always be as accurate as a judgment of a court, because the latter has the convenience of the lengthy legal process, copious legal argument and time to reflect and consider the issues. Nevertheless, it is recommended that educators should practise and become *au fait* with the process of balancing conflicting rights in classroom situations. This will enable educators to become assertive in maintaining discipline. Not only will the consistent demonstration of the balancing process contribute to the learners' understanding of their fundamental rights and the limitations thereof, but the learners will also be empowered with life skills to manage conflict in accordance with constitutional principles. In the long run, it will be to the distinct advantage of the South African society as a whole if a culture of respect for fundamental rights and the constitutional process of balancing rights is taught in schools as part of the socialisation function of education.

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