

## Codes of conduct in public schools: a legal perspective

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The governing body of a public school must adopt a code of conduct for the learners of the school. This document contains disciplinary rules which are crucial to school discipline, yet its legal nature and consequences are often overlooked by schools. The adoption of a code of conduct is a specific "rule-making" function which vests in the democratically elected governing body representing the main stakeholders of the school. Particular legal requirements are set for the adoption of these legal rules because they have to be obeyed by all the learners. Similarly, the enforcement of these rules constitutes an important administrative action which must be performed with due regard for the rights and interests of the learner and the school community. The law prescribes that these actions must be conducted lawfully, reasonably, and procedurally fair.

### Introduction

Section 8 of the South African Schools Act 84 of 1996 (hereafter the Schools Act) determines that the governing body of a public school must adopt a code of conduct for the learners of the school. The code of conduct contains the disciplinary rules for learners and is therefore crucial to school discipline. Equally important is the fact that these rules must be properly implemented and enforced to ensure a disciplined education and school environment. This implies sound school governance and a governing body that is well-informed about the legal nature and consequences of a code of conduct. In short, it requires school governance that is based on a solid legal footing. Be that as it may, the stark realities of everyday school life unfortunately paint a different picture, one that is marred by countless incidents at disorganised and undisciplined schools where learners openly and unashamedly disrupt the education process while confused and ignorant governing bodies and educators seem unable to tackle learner misconduct and restore discipline at school (Conradie, 1998:77).

In order to shed more light on school discipline and the legal nature of the code of conduct, this article provides a short introduction to constitutional and other legal changes that paved the way for education change in South Africa, particularly the transformation of public schools into democratic self-governing institutions. The emphasis is on the school governing body's function to adopt and implement a code of conduct and its obligation to enforce the disciplinary rules in the case of learner misconduct. The article concludes with some of the challenges facing governors, parents, educators and learners in this regard.

### The constitutional background

The constitutional changes in South Africa necessitated transformation of the education system and culminated in the development of a new democratic education system — one that would embrace and give effect to the norms, values and principles enshrined in the Constitution of the Republic of South Africa, 1996 (hereafter Constitution). Democratic values and principles that promote open, transparent and accountable government, were incorporated into education governance which, in the school context, afforded all stakeholders (e.g. the state, educators, parents and learners) — through their elected representatives — an opportunity to participate in democratic public school governance. To realise these principles, the state (from its position as the strongest stakeholder and basic provider of education in South Africa), empowered the other stakeholders to become partners in education in South Africa, as indicated in the Preamble of the Schools Act.

To establish a democratic public-school partnership, the state has devolved some of its authority to individual institutions by means of a process of decentralisation: this means that all public schools have been granted legal personality to act as "juristic persons" (i.e. legal persons bearing rights and duties) and govern their schools autonomously without undue influence from both the national and provincial education authorities (Schools Act, ss 16(1), 20, 36 and 37). However, effective partnerships in education management and gover-

nance are built on good co-operation, mutual trust, reciprocal rights and obligations and the sharing of resources and expertise to promote and serve the best educational interests of all learners (White Paper, 1996:21-23; 40-41; Bray, 2002:514).

### The public school and its governing body

All public schools have become self-governing (autonomous) institutions and govern themselves through a functionary, the governing body. The governing body is a statutory body (created in terms of a statute — the Schools Act, s 15) and therefore derives all its powers and functions from this Act and the supreme Constitution. To take charge of the governance of the school, the Act also prescribes that the governing body must be representative of all stakeholders of the school community and properly elected (Schools Act, ss 23, 28 and 29). However, although in charge of their own school governance, it remains important that some form of overall control over public schools is retained by the state who, in its role as basic provider of education, is answerable to the South African public (the taxpayers and electorate) for public education affairs (e.g. through the provision of state subsidies to schools and the accountability of schools to the education authority in this regard).

To conclude, the governing body is regarded as the legitimate "government" of the school. Good reasons exist for setting specific prescriptions regarding its composition, election and functions generally, for example:

- it makes good democratic sense to enable all stakeholders to participate in the governance of the school through their elected representatives;
- parents have a majority membership on the governing body (Schools Act, ss 28 and 29) because they have important rights and obligations in terms of their education partnership with the state: they have the freedom to choose an education for their children (e.g. the type of school and quality education to fulfil the best educational interests of the child), but also the obligation of supporting (or contributing to) the child's education to the best of their ability (e.g. through financial and other means);
- learner representation at secondary-school level inculcates the values of democratic school (and societal) practices. Although a learner is not competent to enter independently into legal contracts (she has only limited contractual liability), she is educationally mature enough to represent the learner corps of the school and act in its best interests;
- the principal represents not only the government authority (i.e. as direct delegate of the provincial Head of Education (HOD)), but also the professional management component of which the principal is the leader in the school (Schools Act, s 16(3) and 23). In such a capacity the principal not only exercises important government control over the public school (as representative of the HOD — e.g. through regular reporting on school governance to the HOD), but also brings the expertise of a professional manager into school governance;
- educator representation on the governing body contributes pro-

professional skills and expertise and represents the educator (professional) corps of the school;

- co-opted members nominated by governors contribute skills and expertise to enhance and improve school governance.

### The role of the governing body

The governing body's functions are set out in section 20 of the Schools Act. To govern efficiently and effectively a governing body must be able not only to make rules for good governance, but also to have the capacity (and will) to implement these rules in the school situation and enforce them in cases of learner misconduct by means of specific disciplinary measures provided for in the code of conduct (Guidelines for the consideration of governing bodies in adopting a code of conduct for learners, 1998; Visser, 2000:147-150).

A governing body must always act in the name of the school and is therefore under a legal obligation to act in the best interests of the school (Schools Act, ss 15 and 16). This implies that when the governing body acts in the name of the school, it also incurs legal responsibilities on behalf of the school, but that the school, as the juristic person, will ultimately be liable for the legal consequences (e.g. damages) resulting from the governing body's conduct (Schools Act, s 60; Ferdinand Postma Hoërskool v Die Stadsraad van Potchefstroom, 1999). When a governing body acts *ultra vires* ("beyond its authority") and causes damage or prejudice to the other party, it may well incur legal liability in its private capacity (i.e. not as official representative of the school). A court may instruct the guilty governing body to remedy damages it has caused to the injured party, and its members (governors) could be held personally (and/or collectively) liable for the payment of damages or costs to the injured party (Boshoff & Morkel, 2003:2A-17).

### The legal nature of a code of conduct

Discipline is indispensable for effective teaching and learning in a school, but is not defined in the Schools Act or the Minister's guidelines, referred to above (Rogers, 1998:11; Squelch, 2000:2; Van der Bank, 2000:302). A code of conduct promotes proper and good behaviour and sets standards for positive discipline. However, it also deals with negative discipline (e.g. unacceptable behaviour and conflict) and provides measures to deal with such incidents. Disciplinary measures are therefore devised to promote and maintain a well-disciplined school environment and, simultaneously, prohibit and punish unacceptable conduct through measures that also encourage the culprits to improve their behaviour (Van der Bank, 2000:310-315).

### A code of conduct must be drafted within the legal framework (parameters) established for it

A code of conduct is a legal document and must be drafted within the broader parameters provided by the supreme Constitution. For example, the objectives of the guidelines (referred to above) include to give effect to the constitutional values, democratic principles and a human rights culture in the school situation (Guidelines, 1998:1.3, 2.3). The Constitution stipulates that both Parliament (in the national government sphere) and the nine provincial legislatures share law-making functions relating to education. For this discussion it means that national education legislation adopted by Parliament (i.e. the South African Schools Act) prescribes overall rules and standards for all schools while the provinces adopt, implement and enforce legislation for all public schools in their respective provinces. School education is therefore primarily a provincial matter. Within the provincial government, school education is further decentralised in order to spread powers and functions as widely as possible, thereby enabling individual institutions (i.e. public schools) to govern their own affairs. The Schools Act therefore empowers all public school governing bodies to adopt a code of conduct for their schools, whilst guidance is given by the Minister (national department) to assist governing bodies in this regard, as indicated.

Nevertheless, some form of overall state control over schools

remains because through this channel of control, individual institutions are held accountable to the HOD for their actions or failure to function properly. Schools therefore have "limited" rule-making functions which they exercise through their governing bodies within their own schools, but also corresponding obligations to report to the provincial authority (HOD) on governance matters, particularly learner discipline.

### Drafting and adopting a code of conduct is an administrative "rule-making" act

A school's code of conduct functions similarly to the law in broader society: the law consists of a body of norms, values and rules which society has accepted as its law; people (i.e. persons as bearers of rights and obligations) must obey the law and when the law is disobeyed, legal measures must be enforced to restore legal equilibrium. The code of conduct likewise operates to promote, maintain and enforce learner discipline in the school, and restore order and equilibrium in the learner community.

### Rule-making action creates general relationships

Legal rules are found in legislation (both original and subordinate), case law (court judgments), the common law, and in other rule-making documents such as codes of conduct. Legal rules apply generally to all persons (e.g. tax laws apply to all society, child laws to all children and the code of conduct to all learners in the school). When these rules become applicable to specific cases and certain identifiable persons become involved (e.g. when I get fined for disobeying tax laws, or learner A is disciplined for overstepping the school rules), individual legal relationships are being established (Burns, 1998:89-90). The individual legal relationship therefore emanates from the general rules and is termed a "proper" administrative action, as discussed later.

### The governing body of the school must adopt a code of conduct for learners

In adopting a code of conduct for learners, the governing body must act within its powers and in the best interests of the school and all the learners.

### The rule against the delegation of rule-making powers

To delegate is to entrust a task, responsibility or power to somebody else who then becomes the agent of the original holder (Burns, 1998:143; Beukes, 2002-2003:88). Delegation is common practice in all administrations: senior or superior persons/organs delegate down the ranks to less senior and junior officials or bodies, mainly to divide and spread the workload. In this way the person to whom the task is delegated becomes responsible and answerable to the superior person who is the original holder of the delegated power. However, due to the fact that the task is performed on behalf of the superior person, the final responsibility remains with that person and he or she will ultimately be held legally liable in a court of law for the performance (or non-performance) of the task by the junior officer.

The delegation of a law-making (rule-making) function, is a difficult matter. Sufficeit to say, it is generally accepted that a rule-making task should not be sub-delegated. Reasons for this include that a law-making body usually represents different interests (in society, and in the school) and special knowledge and expertise is therefore expected of this body in making rules that must be complied with in society, and in the school. It is therefore fair to say that the special composition of the governing body, its representative nature, collective expertise and knowledge makes it the ideal body to be entrusted with rule-making for the learners of the school. What often happens, though, is that a specific committee is designated to draft the document or parts of it; nevertheless, the legal responsibility for adopting the code of conduct remains with the governing body. If, and when, a reason exists for rule-making powers to be further delegated, the empowering legislation must provide for such a sub-delegation in express terms. In this case the Schools Act does not make provision for sub-delegation to another person/body.

Finally, specific requirements also apply when rule-making actions are amended or repealed. Generally speaking, such actions may only be repealed or amended by the body that adopted the rules in the first place (Burns, 1998:97-98). The code of conduct, therefore, cannot be changed or repealed by another person or body: in fact, the same rule-making process must be followed by the governing body in amending or repealing (and adopting a new) code of conduct.

#### The governing body must consult with the learners, parents and educators of the school before adopting a code of conduct

The drafting procedure and final adoption of a code of conduct constitute a process in which all the stakeholders have to be consulted. This participatory process is reflective in nature and a prime example of democracy in action: a democratic, transparent and responsible process, as illustrated by the Constitution in sections 16, 32, 33, 34, and 195, to name but a few. There is consultation with learners, parents and educators although the governing body is not compelled to accept their advice. However, it will obviously adopt a code of conduct that is acceptable to the stakeholders and in the best interests of the school and all its learners (Visser, 2000:146-147). It is the governing body (as the representative of all the stakeholders) that finally adopts the code of conduct — not one of its members (e.g. the principal) or some of them (e.g. educator or parent representatives).

#### The code of conduct is a public (school) document and must be accessible to all stakeholders

Legal rules must be accessible, clear and unambiguous. Persons who have to obey the rules must understand what is expected of them. For example, the Schools Act provides that all learners must obey the rules and that nothing in the rules exempts a learner from the obligation to comply with the code of conduct of the school (Schools Act, s 8(4)). A copy of the code of conduct must be sent to the education authorities, and parents and educators must receive copies; it must be published in the school magazine, pinned on the notice boards and its contents discussed and explained to the learners. This practice also supports the constitutional requirements of transparency and openness.

#### Appeal

Uncertainties and disagreements raised on the content of the code of conduct and the process of adoption, should be discussed and ironed out among stakeholders before the code is formally adopted. However, when aggrieved stakeholders claim that the code has not been adopted properly because of some irregularities (e.g. where learners have not been consulted during the drafting process, where the content of the code is inconsistent with the prescribed legal parameters set by the empowering legislation and guidelines, unlawful delegation to the principal has occurred, or where the code of conduct is vague and ambiguous on forms of misconduct), the channels provided for dispute resolution within the education administration (e.g. departments) must be followed to determine whether the code has been adopted in a legally correct manner.

On appeal to the higher reviewing body/person (e.g. the HOD or Minister) the drafting and adoption process is reviewed and if the investigation proves that irregularities had occurred during the process, a decision is made to amend, or repeal, the code of conduct, depending on the seriousness of the flaw. If a complainant claims that the decision by the higher reviewing body is invalid, the case may be referred to the High Court for judicial review of this rule-making administrative action, as determined by the Promotion of Administrative Justice Act 3 of 2000.

#### Conclusion

The code of conduct promotes a disciplined and purposeful school environment, and is dedicated to the improvement and maintenance of quality school education. As a legal document, it must comply with certain legal requirements because possible legal consequences for learners may ensue. If adopted correctly, the code of conduct pro-

motes and reflects good school governance and trust among governance partners. It also fosters open and transparent governance and responsible decision-making by a governing body which is answerable (accountable) for its activities to the school community and the education authorities. After all, as an organ of state, the public school is bound by the Constitution (s 195) and must through its governing body encourage public participation in governance and policy-making, be open, transparent and accountable in governing the school. When irregularities have occurred during the process, appeal to a higher authority exists and, eventually, to the courts for judicial review of the case.

### Implementing and enforcing the code of conduct

#### Introduction

The application and enforcement of a code of conduct in individual cases (e.g. the alleged misconduct of learner A or B) is called a "proper" administrative action. This administrative action creates an individual legal relationship between the school (i.e. education authority) and learner A or B who has overstepped the disciplinary rules (e.g. A is accused in terms of the code of conduct of stealing school property and punishment of suspension may be imposed by the disciplinary committee when A is found guilty of misconduct). This type of action is most common in the school because it deals with the day-to-day maintenance and enforcement of school discipline. Specific legal requirements apply to this action, for example:

- It creates an individual, public-law relationship of authority — an unequal relationship (i.e. the educator versus the learner, or the school versus the learner). The law (found here in education legislation) empowers the person in authority to act with authority (e.g. the HOD, principal or educator may reprimand and punish learners who have broken the rules);
- The person under authority (i.e. the learner, A or B) is in a subservient position and may be compelled (forced) to act in a specific manner. This means that the school (its governing body), the principal or educator may stop unacceptable behaviour (e.g. stealing) and compel A to attend a disciplinary hearing. If found guilty by the governing body, A must obey the decision to suspend him from school;
- The rights and interests of the person in the subservient position are at stake. The possibility exists that B's (or A's) rights may be negatively affected: for example, suspension affects the right to attend school and receive an education, and for this reason the person in authority must always act in the broader public (education) interest and not abuse his position of authority. An objective assessment of the situation must be made and the decision to suspend must serve the best interests of the learner and the school. This implies that the rights and interests of the learner may (or must) be limited to serve the larger interests of the school as a whole: this process of weighing up rights and interests on both sides aims to restore the legal balance. For example, when A is found guilty of theft by the disciplinary committee and punished with suspension, her right to attend school and receive her education has been limited or restricted by the suspension that will keep her away from school for one week. But this is done in the interests of the school and other learners who are similarly entitled to receive their education in a safe, uninterrupted school environment.

B and A — like all the other learners of the school — are subject to the code of conduct for learners, principally because the code of conduct has been adopted lawfully by the governing body. Nevertheless, a proper administrative action which involves the enforcement of authority and the risk of infringement of rights and interests (both of the accused learner and school interests generally) has to be conducted in a legally sound manner because the Constitution, education legislation and the code of conduct demand that from the administrators (or governors) in authority (see also the right to just administrative action (s 33) and access to information (s 32) in the Bill of Rights; access to

information in the Schools Act (s 9(3); and relevant provisions in the code of conduct).

Acting lawfully in implementing and enforcing disciplinary measures would ensure that the risk of abuse or misuse of authoritative powers is eliminated and that the best interests of the learner are protected (albeit in the broader school context) (Currie & Klaaren, 2001: 489). Another good reason for the careful scrutiny of this action relates to the relationship of trust between the governing body and the school: the school community, parents, authorities and interested people want to be assured of school governance that is open and transparent, and a governing body that is accountable for the actions entrusted to it by the law. In other words, school governance must be kept on a legally sound footing (Beukes, 2002-2003:83-84; 125-126; Beukes, 2003: 290).

#### Legal requirements for a proper administrative action

What requirements are set by the law for a valid administrative action — an action which is rooted in the public-law relationship?

First of all, the Constitution guarantees administrative justice as a fundamental right (s 33): it requires that all administrative actions (including rule-making administrative actions, discussed earlier) must be performed lawfully, reasonably and procedurally fair. Secondly, in the process of limiting and balancing rights on both sides, the limitation must serve the purpose of promoting the values of human dignity, equality and other fundamental freedoms (Antonie v Governing Body, Settlers High School, 2002). To find out what all these legal requirements mean in the disciplinary case under discussion, a few practical hints on what to bear in mind during such an investigation (or hearing) are given.

#### Administrative action must be performed lawfully

The person/body in authority (e.g. the administrator in the authoritative public-law relationship) must devote her full attention (apply her mind) to all the legal requirements for the performance of a valid administrative action. Only then is the action lawfully exercised. In this case, not only the legal rules of the code of conduct, but also relevant provincial and national legislation and the supreme Constitution must be consulted to find all the rules that would be applicable to this administrative action. Court cases dealing, for example, with administrative justice may also be relevant to the particular investigation and, similarly, common law rules which have assisted, for example, in the development of the "due process" rule (e.g. *audi alteram partem* rule — to hear the other side) which is crucial to all disciplinary hearings, as discussed below.

Lawfulness clearly not only refers to one aspect of the administrative action (e.g. to fair procedures only) but requires lawful action for the whole of the action — covering all aspects from beginning to end, such as:

- the capacity of the administrator (*viz.* the governing body) to preside during the hearing and take a decision);
- prohibition of delegation of authority (*viz.* the governing body has the discretion to make a decision); it has a choice in determining what punishment to mete out;
- the administrator acts within its legal authority (*viz.* the governing body must act *intra vires* — not *ultra vires* — when hearing a discipline case);
- the time-frame for action (*viz.* the hearing and decision-making take place within a reasonable time).

Finally, lawfulness is often referred to as the all-encompassing (or umbrella) requirement for administrative actions because, at the end of the day, the question to be answered remains: Did the administrator pay proper attention to all the requirements for a lawful administrative action?

#### Administrative action must be procedurally fair

Underlying this requirement is the need to ensure that in exercising public powers (authority), decisions by the administrator are taken in

a fair manner, and the individual who is subject to such authority is treated fairly and justly. Fair procedures during disciplinary hearings serve the purpose of facilitating accurate and informed decision-making; it also ensures that decisions are made in the public interest and that important procedural values are followed, such as, the common law values of natural justice. The rules of natural justice (i.e. justice between persons — meaning, justice must be done and must be seen to be done) have developed and crystallised into two rules: *audi alteram partem* (to hear the other side) and *nemo iudex in sua propria causa* (no one may or should be a judge in his or her own cause — the rule against bias, partiality or prejudice). These rules now form part of the right to just administrative action in section 33 of the Bill of Rights.

#### (1) The *audi alteram partem* rule

This rule has over the years been developed by our courts and includes the following:

- the individual (learner) must be given an opportunity to be heard on the matter (i.e. an opportunity to defend his case)
- the learner must be informed of considerations which count against him to defend himself properly
- reasons must be given by the administrator for any decision taken

#### (2) The rule against bias or prejudice (*nemo iudex in sua propria causa*)

This rule means that the decision-maker (administrator) must be, and must be reasonably perceived to be, impartial. This is known as the rule against bias. Basic questions may be asked to determine whether the administrator is biased: for example, who is the committee hearing the case, who is the presiding chair, does the committee or chair have any personal or pecuniary interest in the case? It is not enough to show there was in fact no bias or partiality in the process: the criterion is that no reasonable person would have had a perception or suspicion of bias, or, a reasonable person would have expected such a person to recuse himself from the hearing. Finally, the case must not be prejudged, meaning, for example, that the principal cannot tell the committee before the hearing has commenced to suspend the learner.

#### Administrative action must be reasonable

All administrative actions must have a reasonable effect. This means that the decision taken (i.e. the decision to suspend or expel, and its consequences) must be reasonable under the circumstances. One of the important questions here is whether this action is justifiable.

The decision taken by the administrator (e.g. disciplinary committee or chairperson) usually involves a discretion: to determine on the basis of the facts of the case (e.g. an interpretation of the legal rules and the defence presented by the accused) whether suspension or expulsion is the appropriate decision. Discretionary powers cannot be exercised outside the boundaries of what would be justifiable and reasonable, taking into account the facts and circumstances of the case. It therefore involves a balancing and counterbalancing of facts and circumstances to determine what is reasonable and justifiable, and what an appropriate or suitable decision would be in the case. In order to achieve this, the following steps are crucial:

- (1) At the end of the hearing, after proper attention has been given to all the relevant legal sources (i.e. places where legal rules on learner misconduct are found) and fair procedures were followed (e.g. appropriate time allowed to the accused to defend herself), the administrator must consider the limitation clause (s 36). The limitation clause directs the decision-maker on how and to what extent the rights and interests of the accused may be limited in order to restore legal balance. It therefore offers a lawful procedure on when and how to limit rights. If this procedure is not followed, the limitation may be regarded as an unlawful infringement of the learner's right to be at school and receive an education. Factors to be considered include:
  - the nature of the right involved;

- the importance of the purpose of the limitation;
- the nature and extent of the limitation;
- the relation between the limitation and its purpose;
- whether there are less restrictive means to achieve the purpose (Malherbe, 2001:65; Bray, 2000:29-34).

The objective of the administrator in limiting the rights of learner A or B should be to achieve a decision that is reasonable and justifiable in an open and democratic society which is based on fundamental values such as human dignity, equality and freedom.

(2) The administrator's decision must be reasonable. The question is: What is a reasonable decision and does it have reasonable effects or consequences for the learner?

- A decision is regarded as reasonable (or justifiable) in relation to the offence that has been committed. In short, the punishment must fit the offence. A decision that is reasonable is taken objectively and is based on the correct facts and circumstances. For this reason adequate written reasons have to be given to the learner so that she can determine on what facts and arguments the decision has been based (e.g. the reasons must show a correlation between the action taken and the results that follow).
- The questions to be asked include: is suspension the correct penalty for theft, or should a lighter (or heavier) punishment be given under the circumstances? Next, are the effects of the decision to suspend reasonable under the circumstances? The effects of suspension would probably include that the learner would be out of school for a week and miss a lot of work. In fact, it also means that the learner's theft problem should be addressed to treat the root of the problem, and not just keeping the learner out of school without any remedial action (see also the Schools Act which provides for alternative placement of the learner in s 9(5)).

(3) The furnishing of reasons where rights and interests have been infringed

Although provision is made during the hearing for the furnishing of reasons (above), it is specifically stated that written reasons must be given to the learner when her rights and interests have been infringed (see also the Constitution, s 33(2); Promotion of Administrative Justice Act, s 5). Providing reasons under such circumstances is crucially important because not only does it strengthen the requirement of reasonableness in the sense that only reasons that are rational (i.e. not arbitrary) and appropriate (i.e. suitable or proportionate to the offence committed) can lead to a reasonable decision but, furthermore, written reasons are indispensable in preparing a proper defence when the case is taken on appeal.

At the end of the hearing when all the requirements for a lawful administrative action have been complied with, the administrator will be confident, and have proper evidence, that it (he/she) has consulted all the relevant laws on learner misconduct and punishment, including the supreme Constitution; that proper and fair procedures have been followed during the hearing; and that the decision to suspend the learner and its effects are reasonable and justified under the circumstances.

### Appeal

If learner A (or B, or the parent) is not satisfied with the correctness of the decision to suspend, or feel that the procedure followed during the hearing was unfair, he may appeal to a higher authority in the departmental structures (i.e. usually the HOD and, after that, the Member of the Executive (MEC)) (Schools Act, s 9(4)). In such instances a full reconsideration (or review) of the case is undertaken by the higher authority. The whole hearing process is started afresh and new and more evidence is permitted. The higher official therefore reviews the whole case in total, and may even repeal the decision taken by the first authority and give another decision in its place. It may also change some aspects of the decision or concur (agree) with the previous deci-

sion. The decision taken by the higher authority (and eventually the Minister) must also meet all the requirements of a lawful, reasonable and procedurally fair administrative action, as discussed.

The general rule exists that internal (administrative) remedies must be exhausted before the aggrieved person approaches the High Court for judicial review (internal remedies are cheaper, expedient, and dealt with by the experts in education; court procedures, on the other hand, are expensive, involve long delays, etc). However in certain cases (e.g. *mala fides* of the administrator) it is not necessary to exhaust internal remedies. When all the internal channels of appeal for administrative control have been used, and the learner still feels that he has not been treated fairly or that the decision to suspend him was unreasonable, he may appeal to the High Court for judicial review of the case — access to the court is, after all, a human right (Bray, 2000: 91-94). Judicial review by the high courts is another form of control (judicial control) of administrative action and is usually a final, authoritative judicial decision which is now regulated in terms of section 6 the Promotion of Administrative Justice Act (Beukes, 2003-2003:153-155).

### Conclusion and challenges

The governing body of a public school is established to govern the school in an autonomous (self-governing) manner, in line with the spirit and objectives of democracy, partnership and trust in education. Its functions are set out in the empowering legislation, suggesting that it has to make full use of these demarcated functions and, similarly, that it cannot go beyond the boundaries of its functional domain. As a functionary of the public school it should always act in the name of the school and with the best interests of the school and all its learners at heart.

A code of conduct must be adopted by the governing body of the school. This document deals with learner discipline, both positive and negative, and prescribes disciplinary measures for learner misconduct. In essence, it governs learner behaviour and interrelationships at school, and must sensitise learners towards a human rights culture, inculcating respect and tolerance for the human rights of all persons and emphasising the reciprocal obligations (duties) that are inherent to all rights. It therefore enhances respect for the education rights of all learners and promotes good conduct and tolerance of diversity, both with regard to individuality and cultural preferences (*Antonie v Governing Body, Settlers High School, 2002:740 ev*).

Adopting a code of conduct for learners is one of the most important functions performed by the governing body. This legal document empowers the governing body to regulate school discipline and promote a disciplined and purposeful environment for quality teaching and learning. It must be drafted and adopted in the correct manner, setting out the disciplinary rules applicable to all learners and formulating measures for punishment in cases of misconduct (Visser, 2000: 150-151). This means that disciplinary warnings and other measures of punishment, including the more serious forms of misconduct such as suspension and expulsion, have to be addressed in the code of conduct. From this basis, cases of misconduct have to be reported, investigated and resolved internally and within the education departments, with the high courts being the last resort for judicial control of all administrative actions.

The act of adopting a code of conduct is regarded as a rule-making action. It creates general (abstract) legal relationships because it applies to all learners of the school impersonally and unspecifically. Although specific requirements have to be complied with during the process of consultation with the stakeholders, the adoption of this rule-making action vests in the governing body - acting as the representative of all the stakeholders. A rule-making action should not be delegated to another person or body and the governing body remains legally responsible for the adoption of the code of conduct. However, it is the school, as juristic person, who will be held legally liable and face the consequences if the code of conduct is declared an invalid document by a court of law.

The implementation and enforcement of the code of conduct is a very important school governance matter. In law it is regarded as a proper administrative action which creates individual legal relationships in concrete situations. Due to the fact that it may result in the infringement of rights and obligations of individual learners, this action usually involves an investigation into the alleged misconduct, the hearing of the case and the punishment of the learner when he is found guilty of misconduct (e.g. a written warning, suspension or expulsion). The administrator (i.e. the person or body in authority performing the action) must therefore pay full attention to all the requirements set for the lawful exercise of this action: all the relevant legal sources have to be consulted; fair procedures must be followed during the hearing of the charges (e.g. giving the learner the opportunity to properly defend himself, and refraining from bias and partiality); and the decision that is taken (which usually involves the exercise of a discretion) must be appropriate and not incur unreasonable results for the learner. The right to administrative justice (which includes the common-law principles of natural justice) is an individual human right which cannot be denied or taken away, but may be limited in the proper manner when the administrator is considering an appropriate decision (and penalty) for misconduct.

Within the new democratic education system, schools function as self-governing institutions within the broader constitutional and legal framework. This framework is founded upon democratic values and principles and promotes governance that is open, transparent and accountable. Within the school context, the school and its governing body work together in a relationship of trust to promote quality education for all the learners and serve the best interests of the school. Against this background school discipline must be implemented and enforced in a democratic manner: with respect for the human rights of all involved and to restore the legal equilibrium at school in cases where incidents of misconduct (e.g. theft, bullying or being in possession of a dangerous weapon) have caused disruption. Persons aggrieved by the decision of the governing body has the opportunity to appeal to a higher education authority and, finally, to the MEC or Minister. Administrative appeals require a full reconsideration and review of the case in order to ensure lawful, reasonable and procedurally fair administrative actions. Learners (and parents) who are dissatisfied with these administrative decisions may, finally, appeal to the High Court for judicial review of the case.

School governing bodies function within the ambit of their demarcated (statutory) powers. Codes of conduct that are invalid, disciplinary hearings that are procedurally unfair and decisions that are unlawful and unreasonable, create a bad image of school governance and cause mistrust within the school community — a community whose members originally elected governors in their position of leadership and trust. In the same vein, governing bodies acting outside their functional domain should expect their *ultra vires* conduct to be nullified by the courts. Assuming powers that are not legally yours signifies either ignorance of the law or outright disrespect or disregard of the law and the legal process. It also reflects unprofessional conduct and disrespect for good governance that serves the best interests of the school — particularly when schools have to pay huge costs in court cases they have lost.

Finally, in a democratic order, the education partnership is never a one-way relationship: it requires all partners (stakeholders) to cooperate in trust, share scarce resources and expertise. In this sense, government (i.e. national and provincial education departments) as a stakeholder and basic provider of education, has a major responsibility to empower weaker partners to fulfil their rightful place in this co-operative partnership. The notion of power-sharing compels government to empower (or build capacity in) public schools to fulfil their governance tasks effectively and efficiently — an obligation that should not be underestimated, but one which is reiterated in chapters

3 and 10 of the Constitution and section 19 of the Schools Act. In addressing the needs surrounding codes of conduct, regular and continuous training on the legal aspects of codes of conduct should be provided, and proper and comprehensive guidelines prepared to assist governing bodies in drafting and adopting their own codes of conduct. Critique in this regard is that the guidelines issued by the Minister (above) are vague and superficial and offer too little guidance to schools (Visser, 2000:149-150). Provincial education departments have specific obligations in this regard, as provided in section 2 and 237 of the Constitution and section 19 of the Schools Act. To neglect these duties (e.g. a failure by some provinces to issue guidelines on learner misconduct) means that the particular provincial schools cannot function properly and the omission by the relevant provincial department to draft such documents may constitute negligence.

Government has to take the lead and set the example for good, democratic leadership and governance in education. Failing this, school communities will lose faith in government leadership and its ability (or political will) to make education partnerships work.

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