

The feasibility of localised strike action by educators in cases of learner misconduct

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Developments in South African labour legislation since the inception of the new democracy indicate serious attempts by the legislators to protect the interests of employees. The Bill of Rights has, concurrently, enshrined a variety of fundamental rights that, in principle, offer protection in the workplace. Despite this established, protective legal framework, South African schools regularly witness incidents where fundamental rights of educators are infringed. Numerous educators are currently convinced that their rights are put second to the rights of learners, even in cases of physical or psychological violence against them. Where ineffective enforcement of legislation by the state occurs, educators' security is undermined. This article explores various ways of compelling the employer to enforce existing legislation effectively against learner delinquency that may impact on the security of a specific group of educators. The basic claim of the article is that industrial action by educators in the form of localised strikes is feasible, provided that all other remedies have been exhausted. It is concluded that justice should be visibly reinstated by the state as employer, in all cases where educators' right to security are violated.

Keywords: educator rights, employment, human dignity, industrial action, security, strike action

Problem statement

Strike actions by educators are intrinsically infringements of the right of learners to education, and should always be regarded as the last resort to bring about change. The years 2007 and 2010 saw the largest and most extended strike actions in the history of the South African education system. Members of all teacher unions took part, their protest actions ranging from one day strikes, by some unions, to an extended strike of several weeks. The salary disputes were resolved when the unions accepted the salary increases that the government had finally offered. The effect of this type of prolonged industrial action in the education sector may prove to have severe consequences for the country (Cohen, 2010:2; Rossouw, 2010:16). Deacon and Cilliers (2009:124) make it clear that the sporadic strike actions in South Africa illustrate the fact that the legal system of the country should regulate employment relations and grievances effectively. Sufficient mechanisms should be put in place to manage all forms of dissatisfaction.

Organised labour in South Africa is currently characterised by major power struggles between the state and the unions. Deacon and Cilliers (2009:114) point out that a struggle for leadership in the African National Congress (ANC) and the demonstration of power by Congress of South African Trade Unions (COSATU) had a direct influence in the public workers' strikes in 2007. During the next five years, the perception was gradually established,

even amongst professional and diligent teachers, that only this type of aggressive action can persuade the employer to seriously consider the needs of its employees in this sector. The 2010 educator strike revolved mainly around salary increases and other socio-economic benefits, and a number of state departments participated. In contrast, the fiercely contested salary increase was not the only reason for the work stoppage by educators in 2007. In a public announcement the Suid-Afrikaanse Onderwysersunie (SAOU) (Roux, 2007) voiced the union's general dissatisfaction with the employer, as put forward in a list of 14 concerns and causes of the variety of frustrations educators had to cope with. These concerns and causes included the following:

- the rights of learners who transgress should not outweigh the rights of the silent (law-abiding) majority;
- violence and intimidation against educators by learners and some parents;
- disregard of educators' rights by education authorities and some governing bodies.

These concerns indicate that educators' experienced frustrations, leading to the strike action, should be understood in a wider context than merely salaries and other monetary benefits. A Human Sciences Research Council survey in 2005 (Robinson, 2009:128) found that 29% of the educators that acted as respondents indicated that they "very often" considered leaving the profession, due to a variety of reasons. Another 25% considered this "from time to time", according to this research. Jackson and Rothmann (2006:75-76) point out that stressful working conditions not conducive to effective service delivery by educators as employees are central to many of these concerns. Prominent in these concerns are incidences of learner delinquency that regularly pose a threat to teachers, both for effective teaching and on a personal level, where violence and harassment, including sexual harassment, occur in some schools.

De Wet (2010) offers a disquieting report on the prevalence and adverse effects of educator-targeted bullying (ETB). Her limited scale qualitative research reveals that some victims tend to suspend classes due to on-going abuse and harassment by learners, while others experience such a level of defencelessness that they later rely on others to intervene. In some cases the assistance that was relied upon, was not available:

...colleagues and management were detached and some suggested that the victims were responsible for their own plight. Perpetrators even 'used' their parents and principals to reprimand victims who lashed out at them after being relentlessly mocked and/or ignored. (De Wet, 2010:198.)

Other research on learner discipline (Rossouw, 2007:212-213) revealed that dissatisfaction does exist amongst educators, principals and members of school governing bodies (SGBs) regarding, for example, the way in which the provincial departments of education approach SGBs' recommendations for dealing with uncontrollable learners and those found guilty of criminal activities. The obvious detrimental effects of these severe forms of ill-discipline on educational activities at schools are known and need not be stated here.

Various recent court cases, as will be discussed later, include incidences where provincial departments of education are reluctant to support and maintain the expulsion of transgressors, as recommended by school governing bodies (SGBs). This tendency has become a matter of concern to numerous South African educators, SGBs and parents, as confirmed by Colditz (2009, pers. comm.), executive head of the Federation of South African School Governing Bodies (FEDSAS). To ensure a proper, fair procedure, principals and SGBs have to spend a significant amount of time investigating allegations of serious misconduct, involving witnesses, thoroughly documenting every aspect of the investigation, having discussions with plaintiffs

and the alleged transgressors, and liaising with legal representatives of the accused. After principals and SGBs have meticulously adhered to the principles of a procedurally fair investigation and hearing, and eventually made the recommendation for expulsion, departments of education often merely send the transgressors back to the same school. Examples of these abound, some of which will be discussed later. This lack of support on the side of the education departments effectively breaks down the delegated and received authority of the educators as well as principals, with an obvious associated decline in their professional status and security. As Smit (2011:66) rightly points out, this approach from departmental officials unjustifiably constrains the authority of SGBs.

This lack of support by the employer creates a situation that calls for justice and authority to be visibly reinstated by the state, in all cases where particular learners' conduct in schools may be understood as infringing upon educators' security rights.

Against the backdrop of the above problem statement the claim in this article is that industrial action by educators in the form of localised strikes or other forms of protest action is feasible when all other remedies have been exhausted.

Method

According to legal comparative principles, South African labour law provisions and principles regarding protected strikes were weighed against an example of a legal localised strike from the English jurisdiction (to be discussed later) in a quest to expand the current provisions regulating industrial action by South African educators.

The comparative legal method is a research strategy whereby the similarities and differences of different legal systems or jurisdictions are compared, with the purpose of gaining insight into a research theme (Kung, 2006:7). Oosthuizen (2009:12) points at one prominent advantage of this method for research in education law: it has the potential to draw from the experiences of education law in foreign countries where possible solutions have already been developed for new local developments.

While the argument in this article is not only based on an analysis of court cases, but also on South African constitutional, educational and labour legislation, the established methodology associated with the interpretation of statutes has also been employed. Embedded in the notion of legal hermeneutics — the study of the methodological principles of interpretation and explanation — this methodology ensured the correct understanding of legal principles and provisions. Seeing that the accurate interpretation of the law stands central to legal theory, hermeneutics as an art of interpreting texts was applied (<http://definitions.uslegal.com/h/hermeneutics>).

Legal-Conceptual framework

Localised strike action

The term “localised strike action” has to be carefully considered, since the Labour Relations Act 66 of 1995 (SA, 1995) (hereafter the LRA) does not contain such a concept or term. In section 213 of the LRA a strike is defined as follows:

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

Of special importance for the purposes of this article are the elements of “remedying a grievance” and “any matter of mutual interest”, which stand central to the problems associated with severe learner misconduct. A localised strike action of educators can therefore be defined as a short-term strike action by a relatively small group, such as a school staff, after exhausting all other remedies. This action is based on the utterly disruptive, dangerous, abusive or criminal conduct of an uncontrollable learner or group of learners that adversely and seriously influences the educators’ security, in principle due to the lack of protection by the employer.

Any such action will avoid as far as possible any negative effect on the other, obedient learners’ right to education. In fact, such a drastic reaction would also directly benefit the other learners, whose education and personal safety has been put at risk by the disruptive conduct of one or more peers.

Matters of mutual interest

One of the main reasons for a legitimate strike, as defined by the LRA, is that one or more matters “of mutual interest” should exist as ground for the action. In the context of this argument, seriously disruptive learner misconduct can become such a matter in two ways. In the first place, the state has to provide education, and the creation and proper maintenance of a learning environment conducive to learning is one of its central duties. The state is, in the second place, the employer of the educators at the public school. Should the teaching process therefore be disrupted or the environment made dangerous by one or more learners, it becomes a matter of mutual interest, and can serve as a ground for a strike action. The state can neither relinquish nor abdicate the obligation to protect its employees.

The educator, being the other party, is also influenced in two ways by the disruptiveness, abuse or criminality: firstly as professional who is hindered from performing his or her duties and providing education effectively, and as employee who has the right to work in a safe environment, conducive to quality performance.

Educators’ insecure work environment

South African legislation makes ample provision for dealing with victimisation and bullying behaviour against educators, but serious learner misconduct stays a prominent threatening factor against a secure environment for educators (Rossouw, 2010:81). Section 10 of the SA Constitution (SA, 1996a) provides for the protection of everyone’s human dignity. Any form of violence against an individual, whether it is physical or psychological in nature, is a transgression of this right.

Section 9, the equality clause, protects the individual against any form of unfair discrimination. One form of discrimination, according to section 6(3) of the Employment Equity Act 55 of 1998 (SA, 1998a) is harassment, where it states the following: Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).

The grounds of unfair discrimination under subsection 1 of the Employment Equity Act are: race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth, which resemble those listed in section 9 of the Constitution.

Two landmark judgments outside the education sector in 2004 highlighted the duty of employers to protect their employees against harassment. In the cases of *Ntsabo v Real Security*

CC [2004] 1 BLLR 58 (LC) in the Cape Town Labour Court, and in the Cape High Court the case of *Grobler v Naspers & another* [2004] 5 BLLR 455 (C), it was confirmed that acts of sexual harassment in the workplace constitute unfair discrimination, because they violate the equality clause of the Constitution. These are cases where complaints against the transgressors regarding sexual abuse had been raised, but in both instances the employer failed to implement protective measures.

According to the *Grobler* and *Ntsabo* judgments an employer must provide adequate protection of employees against harassment. These judgments made it clear that the employer can be held vicariously liable for the damaging consequences of harassment in the workplace reported to it by an aggrieved employee, unless the employer can prove that it took active steps to halt it.

Though not tested in the education sphere yet, the same principle will probably apply in a case where the right to equality of an educator has been violated by a learner through some form of harassment, reported to the department as employer, but not effectively attended to. Such a case will however not be argued on the ground of vicarious liability, which only applies in South Africa where the employer is liable for the damage caused, normally to a third party, by the wrongful and intentional or negligent conduct of an employee.

More provisions protecting employees are found in the Constitution. Fair labour practices, as provided for in section 23 of the Constitution (SA, 1996a), would, by implication, include ample protection by employers of their employees against any threat in the workplace. Section 12(1)(c) provides for the security of the person in the following words: “*Everyone has the right ... to be free from all forms of violence from either public or private source.*” Section 24 of the Bill of Rights stipulates that “*everyone has the right to an environment that is not harmful to their health or well-being.*”

In addition, education-specific legislation provides for the protection of the educator as employee. Sections 8 and 9 in the SA Schools Act (SA, 1996b) (hereafter referred to as the SASA) deals extensively with learner conduct, and provides for suspension or expulsion following serious misconduct. The annexure to the SASA, the *Guidelines for the consideration of Governing Bodies in adopting a code of conduct for learners*, condemns victimisation (article 5.6) and specifies that “*disrespectful, objectionable behaviour and verbal abuse directed at educators or other school employees or learners*” are regarded as offences that may lead to suspension (article 11(j)) (SA, 1998c).

Despite this well-developed, protective legal framework, there is a widespread conviction amongst educators (Roux, 2007) that their rights, and the rights of obedient, respectful learners, are put second to the rights of unruly learners who are undoubtedly guilty of different forms of serious misconduct, including criminal behaviour. Ample evidence exists that educators experience a lack of protection from education authorities (Smit, 2011:64; Rossouw, 2010:81; *Maritzburg College v Dlamini NO & others*).

Legal provisions for industrial action by educators

When employees experience a lack of support and protection from their employers, a number of remedies are available, including lodging grievances and collective bargaining. When these possible remedies have been exhausted, but without the desired effect, industrial action in the form of strikes or protest actions could be considered as an option.

No reference about strike action is made in the Employment of Educators Act 76 of 1998 (SA, 1998b), which indicates that the LRA should be consulted in all matters regarding in-

dustrial action by educators. The LRA provides in Chapter IV (sections 64–77) for a variety of aspects with regard to strike actions, protest actions and lock-outs, collectively referred to as industrial action.

As previously discussed, the LRA definition of a strike includes a refusal to work for the purpose of “remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee”.

What should be noted here is that the purpose, as such, should relate to a matter of mutual interest between an employer and employee. Similar to but clearly distinguishable from a strike, a *protest action* is defined in the LRA (s. 213) as follows:

“*protest action*” means the partial or complete concerted refusal to work, or the retardation or obstruction of work, for the purpose of promoting or defending the socio-economic interests of workers, but not for a purpose referred to in the definition of strike.

The basic distinction is the fact that a protest action should have the improvement of socio-economic interests (s. 77 of the LRA) in mind, which eliminates this kind of reaction by educators in cases of insufficient employer protection against learner abuse or severe disruption.

The definition of a strike distinguishes four criteria that any form of industrial action has to comply with in order to be deemed a strike (Grogan, 2010:378): a *stoppage of work*; a *joint action* by more than one person for the same reason; *directed at an employer*; for a *recognised purpose* — the purpose must be to resolve a clear grievance or dispute.

From the above it is clear that no strike, if it purports to be protected, can be an impulsive, unannounced action. Any action to the contrary is unprotected by law and can be met with charges of misconduct. No protection is offered for misconduct during a strike and employees can and should be disciplined. It is also clear from the definition that a strike action, as previously pointed out, should always be directed at an employer, and not against any other individual or group.

As stated, a protected strike is preceded by a proper, well-structured process involving a variety of meetings, negotiations and written declarations, which will include an opportunity afforded to the employer to rectify the dispute. In the case of learner misconduct seriously impacting on the physical or psychological security of educators, such as harassment or assault, the employer should have the opportunity to confirm the expulsion of the learner in question, on the grounds of recommendations made by the SGB. These are the internal remedies that should first be exhausted. As discussed above, specific time frames have been set since the beginning of 2006 in the amended SASA to force both schools and departments of education to handle cases concerning expulsion expediently and in a timely fashion. If properly adhered to, these provisions will minimise the detrimental effect of disruptive conduct or criminal actions by transgressors for both educators and peers.

In the discussions that follow, national and international examples from the education sector will be offered to describe and assess the prevailing situation regarding the effect of delinquent behaviour of learners on educators.

Considering localised protest action by educators

In the definition of a localised strike action the basic elements are that it is considered by a relatively small group, that all other legal remedies should be exhausted, and that it is based on either dangerous, abusive, criminal or utterly disruptive conduct of one or more learners. The strike action is then considered on the grounds of a matter of mutual interest — a safe

environment and effective education. The lack of employer protection then adversely and seriously influences the educators' security. The current labour legislation only allows strike action that is aimed at the employer, and can only be initiated by a registered trade union, according to the provisions in s. 64 of the Labour Relations Act 66 of 1995 (SA, 1995). Considering any type of localised protest action, groups of educators should adhere to these provisions.

Le Roux (2010, pers. comm.), Regional Secretary of the Suid-Afrikaanse Onderwysers-unie (SAOU), mentions in an interview that groups of educators would welcome and without doubt employ such an option provided that it is protected by the law. Educators or teacher unions that consider localised protest action should recognize the provision in the Labour Relations Act definition of a strike (s. 213) that the work stoppage can only be aimed against the employer. A group of educators, if they are dissatisfied with a specific disciplinary issue at their school, should therefore urgently take up such a matter with their employer via their union. If an attempt to expel the learner and all other remedies fail, the dispute will have to be against the employer, based on his reluctance to deal with the matter properly. Although the disruptive learner's right to education will be limited in the event of such an action, the strike action cannot directly be aimed against such a learner.

Departmental influence on educator security

Maritzburg College v Dlamini NO & Others

One prominent problem encountered by schools in disciplinary matters that involve suspension and expulsion, is the unreasonable delay by Heads of Education Departments (HODs), which has led to considerable prolonged uncertainty amongst educators, principals, parents and the learners involved. In *Maritzburg College v Dlamini NO & others* [2005] JOL 15075 (N) three learners at this school were found guilty during October 2003, after a procedurally correct investigation and hearing, of smashing the window of a hired bus. Two of them were found to be smelling of alcohol and a bottle of brandy was discovered in one learner's sports bag. Apparently all three of them had in the past been guilty of frequent acts of misbehaviour. After recommending expulsion, the school waited unreasonably long for a response to their recommendation. During the case the school pointed out that, prior to this last problem, it had to wait on three different occasions for between a year and 21 months for the first respondent, the HOD, to respond to their repeated correspondence. In this case the reaction only came after he was summoned to a High Court hearing. Judge Combrink expressed his dissatisfaction with the attitude of the respondent in the following words: "*I find it disturbing (to put it mildly) that a public official had to be galvanised into action to do his duty only when served with a court application.*"

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

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

Following the *Maritzburg* case, the legislators have amended section 9 of the SASA in 2006. This section on suspensions and expulsions now includes specific time frames. A governing body may impose the suspension of a guilty learner for up to seven school days or make a recommendation to the Head of Department to expel such learner from the school. Heads of

Department are now also bound to a time frame: they must decide on the recommendation for expulsion within 14 days. If the provisions in section 9 are followed properly, such an unruly learner may be suspended for a maximum of 21 days after the transgression — an initial seven days, plus a maximum of 14 days, pending the decision by the Head of Department whether or not to expel such learner from the public school.

Victoria Park High School, Port Elizabeth

The time frame within which departmental officials have to make their decisions, as discussed in *Maritzburg College v Dlamini* above, is, however, not the only problem associated with expulsion of learners. The judgment regarding the seriousness and effect of specific transgressions differs as well.

In March 2007 a Port Elizabeth school was unable to expel a pupil after the Eastern Cape Education Department had ruled that "alternative measures" should be found to discipline the Grade 10 learner. In late 2006 this pupil had been caught with cannabis on the school premises where he was apparently selling it. He was reported by a fellow pupil (Matomela, 2007:3). The principal of Victoria Park High School, Mr Mike Vermaak, said the department's decision could set a precedent for drug abuse: "I fear that pupils will get the message that this is condoned by the authorities and they have a licence to do it" (Matomela, 2007:3).

The Education Department said it had to take the learner's constitutional rights into consideration. The fact that he was a first offender was also taken into consideration. Nomlami Mahanjana, the Superintendent-general, stated that discipline was regarded as a serious issue and that drug abuse could never be promoted. The department wanted to support the school, but also had to look at the learner's rights. "We know this is a serious offence, but the child has constitutional rights and we now want the school governing body to look at other options of discipline", said Mahanjana.

In weighing the rights of this individual learner against the rights of educators and other learners, the Eastern Cape Department of Education clearly gave the former the nod. The application of the school's code of conduct by the SGB, by strictly acting against a type of criminal behaviour on the school premises that can seriously harm many learners, was nullified. In cases of criminal conduct, even first time offenders should be dealt with decisively. This decision of the Department of Education went directly against basic educational principles, effectively broke down the disciplinary structure, and in effect seriously affected the working environment of these educators.

P v National Association of Schoolmasters/Union of Women Teachers

A localised strike action was successfully implemented in the United Kingdom against a specific learner whose disruptive conduct had adversely affected the security of his teachers. In the United Kingdom strikes are regarded as a freedom rather than a right (Deacon & Cilliers, 2009:135). In the House of Lords, in the case of *P v National Association of Schoolmasters/Union of Women Teachers* [2003] 1 All ER 993 [2003] UKHL8 the applicant P was a learner at a voluntary aided school. He was found by educators to be disruptive in class and violent and abusive on the playground. The principal directed that he should be permanently excluded from school, but the governors in their role as employers directed his reinstatement. The principal therefore instructed the educators to take him back into their classrooms. In protest, the staff followed the correct procedures for industrial action, involved their respective unions, went through the prescribed ballot process, and eventually refused to teach the specific learner.

This action is in essence a localised strike aimed at both the specific learner and the governing board as employer. The learner subsequently sued the teachers' unions that sanctioned the strike, a case that was decided in favour of the two unions involved. The appeal by the learner was also dismissed, which confirmed the decision of the initial court that the correct procedure was followed, and that the educators acted within their rights. This judgment was passed despite the fact that very strict statutory provisions regarding strikes are part of the British labour legislation. Strikes are often regarded as a breach of contract, and even small deviations from the legal prescriptions may lead to civil and even criminal charges against employees and their unions (Deacon & Cilliers, 2009:117). The eventual finding in *P v National Association of Schoolmasters/ Union of Women Teachers* [2003] 1 All ER 993 [2003] UKHL8 is an indication the extent to which the English courts were willing to support the educators and their unions in their localised strike action.

Concluding remarks

During a time when learner misconduct and violence on the school campuses of South Africa is, in many instances, seemingly out of control, teacher unions could play a significant role in defending the rights of their members, not only when higher salaries are at stake, but also as regards their security in the workplace. If provincial departments of education, as employers, are too slow, ineffective or reluctant to remedy these issues that have a severe impact on school level, educators will have to look for other methods that exist within the legal framework.

To avoid industrial action, the first option in cases of any form of personal harassment by learners, is to follow the *Ntsabo* and *Grobler* judgments and bring proceedings against the employer for not effectively protecting their right to equality. A prerequisite in the application of this option is that a detailed complaint should have been directed at the employer first.

A second option is aimed at the disruptive or delinquent learner, and not the employer. In this case a staff group might engage in a protest action by withholding labour. This is contrary to the labour law principle that industrial action should always be against the employer. In practical terms this will mean that educators will refuse to teach a specific learner or a group of learners, after unsuccessfully following all steps to persuade the department of education to rectify the situation by accepting a governing body's recommendation regarding expulsion. To make such an action legal and protected, the definition of a protest action in section 213 of the LRA would first have to be amended as follows:

“protest action” means the partial or complete concerted refusal to work, or the retardation or obstruction of work, for the purpose of promoting or defending the socio-economic interests of workers, **or to act against any form of serious disruption of employees' work, including harassment, assault or victimisation from any source**, but not for a purpose referred to in the definition of a strike. (The **bold** phrase indicates the suggested addition to the existing definition.)

As a third and last option, educators may resort to localised strike action against their employers. The initial claim of this article was that industrial action by educators in the form of localised strikes or other forms of protest action is feasible when all other remedies have been exhausted. The current legislative framework does allow this form of reaction, but then the educators should first be able to prove the incapability, reluctance or ineffectiveness of their employer to offer ample protection, and the seriousness of the effect thereof. Such an admittedly aggressive approach may provide part of the solution to numerous problems involving disruptive, delinquent and especially dangerous forms of learner misconduct that grossly

infringe the rights and security of educators.

In education especially, drastic measures such as strike actions should obviously always be seen as a last resort. The provincial departments of education can and should play a prominent role in the solution of the problem, by actively enhancing the professional status of the educators and proper protection of their interests. A final, all-encompassing plea and recommendation, therefore, is that the department of education should actively support educators in their quest for order and stability, especially in cases of serious learner misconduct where educators' dignity is violated. This prevailing injustice should not be tolerated and the dignity of the educator must be restored by the state as employer. Of crucial importance is the reinstatement of the authority of principals and educators, by effectively balancing the rights of learners against the fundamental rights of all educators.

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