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South African Education Law Association

## The role of Courts in affirming Values & Ethics in Education: Conundrum in South Africa

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# LAYOUT

1. Why values and ethics?
2. Promise
3. Courts' duty to patrol the constitutional borders?
4. Conclusions



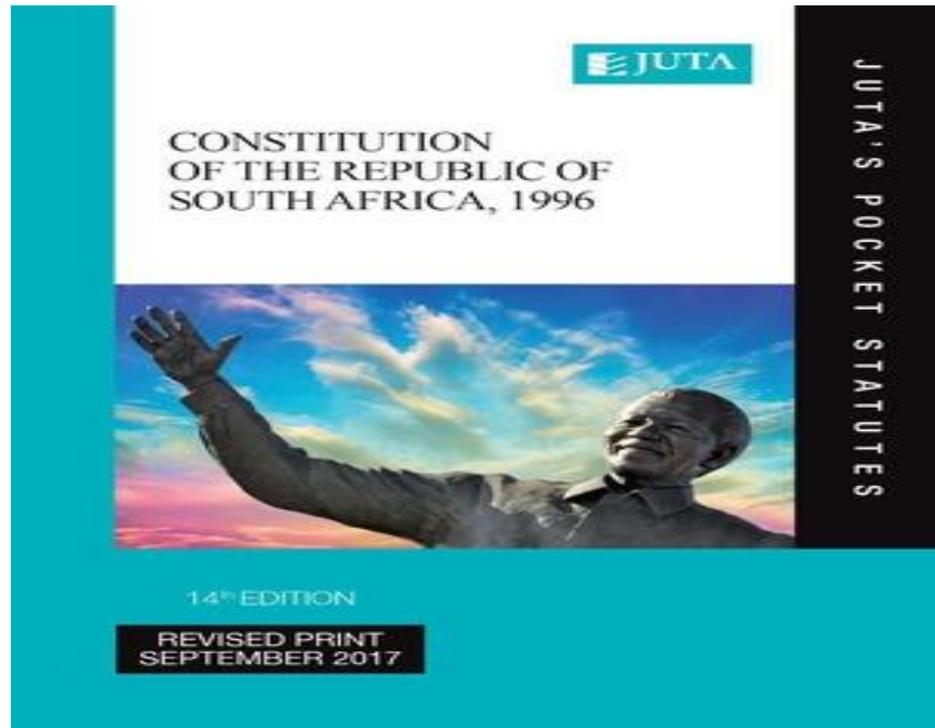
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# 1. Why values and ethics?

- The Bill of Rights affirms the democratic values and principles of our democracy.

(s 7 of the Constitution)



# 1. Why values and ethics?

- Constitutional values and principles forms an important part of education. (*Pillay*, 2008 (1) SA 474, (CC),[104])
- Moreover, *the State must respect, protect, promote and fulfill the rights* in the Bill of Rights.

# 1. Why values and ethics?

- In *Juma Musjid*, 2011 (8) BCLR 761, (CC), [50], CC stated that:

*“Our government is the potent, the omni-present teacher. For good or for ill, it teaches the whole people by its example.”*

- Our s 195 Constitution requires that the State in its all dealings, *inter alia*, must:

*promote a high standard of professional ethics*  
• S(1)(a)

*peoples’ needs be responded to,* S(1)(e)

And that:

*Public administration be accountable.”* S (1)(f)

## 2. Promise

- It is trite that education is fundamental to a well-functioning democracy.
- The Preamble to the Constitution contains a commitment to improve the quality of life of all citizens and free the potential of each person.
- The promise is: S 29 Constitution which guarantees everyone the right to a basic education (*Rivonia Primary School*, 2013 (6) SA 582 (CC), [1]).
- To date, there are number of Court's judgements concerning the expulsion of children at schools on, *inter alia*, the misbehaviour or failure of their parents to pay for school fees in terms of contracts or a failure by the State to perform its constitutional obligations of providing a basic education,

## 2. Promise

- In *Grootboom* , 2001 (1) SA 46, (CC), CC stated:
- *“those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right... The Constitution requires that everyone must be treated with care and concern .”* [44]
- *“The poor are particularly vulnerable and their needs require special attention.”* [36]
- *“The goal of the Constitution is that the basic needs of all in our society be effectively met.”* [45]

## 2. Promise

- *“State must be implement its programme with due regard to the urgency of the situations it is intended to address.” [67]*
- *“State must ensure that a significant number of desperate people in need are afforded relief, though not all of them need receive it immediately.” [68]*
- *“But, the obligation does not require the state to do more than its available resources permit” [46]*



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## 3. Courts' duty...

- A public promise is enforceable if it would be unethical for a public body to renege on its promise.



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## 3. Courts' duty ...

- Courts have the duty to patrol the constitutional borders defined by the Constitution, but they cannot cross those borders. (*DPP, Transvaal*, 2009 (4) 222 (CC), [183])
- Their role is to protect the most vulnerable by promulgating the ideals that the other government branches need to meet.

*Stokwe*, 2019 (4) BCLR 506 (CC)

## 3. Courts' duty...

### Facts

- In August 2009, Ms Stokwe, the then Deputy Chief Education Specialist in the Department of Education, Eastern Cape, awarded a temporary transport services contract to her husband's unregistered company.
- Although she reported the temporary awarding of the contract, she did not obtain the approval and consent of the Head of the Department as required. On 22 July 2010, the department brought four counts of misconduct against her.
- But disciplinary hearing was only held the following year on 30 March 2011, found guilty and ultimately dismissed on 22 June 2011.

## 3. Courts' duty...

### Facts

- Ms Stokwe appealed against the dismissal. In terms of the Employment of Educators Act, a sanction may not be implemented pending the outcome of an appeal.
- On several occasions she and her attorneys enquired about the outcome of the appeal, even recording that in the absence of a response from the department they were of the view that it had abandoned the disciplinary action.
- They received no quick response from the department. Finally, on 14 February 2014, Ms Stokwe was informed that her appeal had been dismissed.

# 3. Courts' duty...

- Unhappy with that she then challenged her dismissal, which failed before the ELRC and Labour Court. She contended that the arbitrator misunderstood the employer's policy and overlooked the delay in finalising the disciplinary process.



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# 3. Courts' duty...

- The Labour and Labour Appeal Courts dismissed her review and leave to appeal applications.
- Stokwe then took the matter to the apex court to exhaust her legal remedies.

# 3. Courts' duty...

At ConCourt:

- Undaunted, she appealed to the CC.
- The Constitutional Court agreed that the arbitrator's finding that her dismissal was substantively fair was beyond criticism.
- The finding fell within the “band of reasonableness” at which a reasonable decision-maker could arrive.

# 3. Courts' duty...

- The Constitutional Court did, however, find that this was not the case with the procedural fairness of the dismissal.
- It held that the principle that discipline should be prompt and fair and that disciplinary processes should be concluded in the shortest possible timeframe, applied to both the Labour Relations Act and the Employment of Educators Act.
- The court found that the Department had no explanation for the delay and that Ms Stokwe's dismissal was procedurally unfair.

### 3. Court 's duty:

- As a measure of its disapproval of the Department's conduct the court made an adverse costs order against it.
- It remitted the matter back to the Labour Court, as a specialist court to decide on the appropriate remedy, as a matter of priority.
- This case serves to reiterate a core principle of our labour law: employment disputes should be conducted and concluded in a speedy and efficient manner.

### 3. Court's duty:

*Pridwin Preparatory School*, 2019 (1) 327 (SCA)

- The issue on appeal concerned the cancellation of two identical parent contracts by the principal of a private school, Pridwin Preparatory School.



PRIDWIN  
Preparatory School

### 3. Court's duty:

- The appellants (parents) concluded the contracts with the school on 8 March 2011 and on 9 March 2015 for their children DB and EB respectively.
- There were a series of events that led the school to cancelling the contracts that occurred over a period of eight months.
- In these events, the father of the children was involved in a number of altercations with school staff. The persistent harassment of the school's staff members, according to the principal's affidavits, led to the cancellation of the contracts.

### 3. Courts' duty....

- On 30 June 2016, the principal wrote a letter to AB, informing him of the cancellation of the contracts.
- The principal explained that the incidents that AB was involved in amounted to breach of the contracts and as a result, the school was entitled to invoke the breach clauses in terminating the contracts.
- However, the Principal elected to invoke the termination on notice clause, solely in the interests of the children so that their parents could make adequate arrangements to place them in another school.

### 3. Courts' duty....

- That clause permitted both the parents and the school to terminate the contracts on any ground on reasonable notice.
- The appellants sought to have the termination of the contracts declared unconstitutional, invalid and unlawful, reviewed and set aside.
- They relied, mainly, upon two constitutional provisions, namely s 28(2), that the child's best interests are of paramount importance in every matter concerning the child, and s 29(1)(a), which confers the right to a basic education.

### 3. Courts' duty....



SCA's decision per Cachalia,

- First, s28(2). He held that there was no dispute that Pridwin applied the best interests of the child principle when it terminated the contracts.



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### 3. Courts' duty....

- He emphasized that the principal had “considered the best interests of the children when he used the termination clause instead of the breach clause”, as he was entitled to because of the continuous breaches committed by AB.
- In addition, “the principal balanced the rights of the two children against those of all other children at the school as well as other stakeholders, in coming to his decision.”

### 3. Courts' duty....

- He held that the appellants' insistence that they were entitled hearing before the contracts were cancelled focused on the interests of their children to the exclusion of all others.
- He rejected this approach and held that “every person's rights are worthy of equal consideration”. The court thus rejected the argument that s 28(2) gives rise to right to be heard before the parent contracts are terminated.

## 4. Courts' duty....

- Justice Cachalia found that “the obligation to provide basic education is an obligation on the state, not one imposed on private institutions.”
- Pridwin only has a negative duty not to unreasonably diminish a learner’s access to existing education.

## 4. Courts' duty....

- Thirdly, the appellants contended that there was 'governmental' interest in the decision to cancel the contracts.
- Justice Cachalia held that Pridwin was not accountable to the public for a decision to terminate a parent contract.
- Neither was it answerable to any public authority for the manner in which it terminates the parent contracts.
- Justice Cachalia also held that the School had acted reasonably in cancelling the contracts and that termination clauses in private contracts of the kind in issue in this case were not contrary to public policy and therefore not unconstitutional.
- In the result the appeal was dismissed with costs, including the costs of two counsel.

## 4. Courts' duty....

### *Dissenting view*

- In a dissenting judgment Justice Mocumie found that the School ought to have given a hearing to the parents before terminating the contracts and had acted unreasonably in doing so.
- She also found that the termination clause contrary to public policy. She would have accordingly upheld the appeal.

## 4. Courts' duty....

### Mhlongo, 2019 (2) SA 557 (KZD)

- The background of this case, *inter alia*, a minor child attended a private school in Durban. In and during the first few months of 2016, the parents of the minor child fell into arrears with the school fees.
- Between January 2016 and February 2016, there were letters and telephone calls from the school, demanding payment from the parents. The parents pleaded to the school for leniency and to afford them time to pay their arrears, as they were experiencing financial setbacks.

## 4. Courts' duty....

- The school did not accept this excuse and confirmed that they will not accept repayment terms and requested the full settlement of the arrear amount, failing which, the minor child would not be able to write the upcoming exams in May 2016.
- Although the parents pleaded with the school to allow their child to write the exams and that they will settle the fees by end of May 2016, the principal refused to negotiate any repayment terms.
- Subsequently the **minor child, in terms of the school's exclusion policy, was asked to sit in the art room while the rest of the children wrote the exams.**

## 4. Courts' duty....

- The father then brought an application and requested the Court to declare the exclusion policy, practised by the school, as unconstitutional.
- He also contended that the exclusionary provisions of the policy violated section 28(2) and 29 rights of the minor child.
- The School argued that it had no option but to implement the exclusion policy, as the applicant was not paying the school fees, which was required for the school to operate.
- And that the applicant did not need to enrol his child in a private school if he could not afford the fees, as there is the option of the public schools.

## 4. Courts' duty....

Court held:

- As Mr Broster argued, the attitude of the school failed to consider the impact it would have on the relationship between ZM and his parents branding them as uncaring when they had a legitimate reason for the non-payment. Clearly this was not in the best interest of ZM.
- The exclusion policy as a result of non-payment of school fees in so far as it is applied by the first respondent results in a standard inferior to that which is applicable in public education.

## 4. Courts' duty....

- Policy is clearly contrary to public policy and is aimed at humiliating, degrading and victimising learners as was the case with ZM.
- The suggestion that it was a reasonable and justifiable means for the limitation of the rights in ss 28 and 29 of the Constitution is devoid of any merit.
- It is unjustifiable and infringes on the rights in both ss 28(2) and 29(3) of the Bill of Rights.
- It is thus unconstitutional and falls to be declared as invalid.

## 4. Court's duty: continued....

- In the context of a public school in a private property and the Trustees of it acting reasonably in seeking the order for eviction and granted by the High Court, in *Juma Masjid, CC* held:
- *It is clear that there is no primary positive obligation on the Trust to provide basic education to the learners. [57]*
- *The High Court therefore misdirected itself in finding that the Trustees had no obligation in relation to the learners' right to a basic education. [60]*
- *Accordingly, I conclude that the Trust does have a negative constitutional obligation not to impair the learners' right to a basic education. [60]*
- *Breach of this obligation occurs directly when there is a failure to respect the right, or indirectly, when there is a failure to prevent the direct infringement of the right by another or a failure to respect the existing protection of the right by taking measures that diminish that protection. [58]*

## 4. Court's duty: continued....

- *It needs to be stressed however that the purpose of section 8(2) of the Constitution is not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights. [58]*
- *It is rather to require private parties not to interfere with or diminish the enjoyment of a right. [58]*
- *Its application also depends on the —“intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the State or organs of State”. [58]*
- **Did the High Court properly consider the best interests of the learners?**
- *In my view, the High Court failed to give efficacy to guaranteed rights in sections 29(1) and 28(2) of the Constitution.*
- *Section 28(2) provides that —[a] child's best interests are of paramount importance in every matter concerning the child. [66]*



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## 4. Court's duty: continued....

- *What must be weighed against the right of ownership, in each case, will depend on the content of each specific countervailing right. [70]*
- *e.g (the common law right to contract which must be developed in accordance with the constitution)*
- *Here, the High Court privileged the right to property over the learners' right to a basic education. [71]*
- *In doing so, the Court failed to accord sufficient weight to the entrenched rights of the learners and to the paramount importance of their best interests. [71]*



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## 4. Conclusion

- At the intersection, there are competing rights and interests which must be balanced in accordance with the **values and principles of our Constitution**.
- Courts as patrollers of the boundaries of the Constitution, finds themselves in a precarious position.
- Lost in translation is that the best interests of the children at the schools were of paramount importance and that the rights and **obligations of the contracting parties were subservient to the children's needs**.  
*Welkom*, 2014 (2) SA 228 (CC), [132]

## 4. Conclusion

- Their voice is conspicuously absent in cases involving them. *Pillay*, [56] *Hoërskool Fochville*, [22,25]
- *Moreover, there is an obvious danger. Children could become stepping stones...for their parents instead of being valued for who they are.* *Grootboom*, [71]



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Enkosi!

I nkoma!

Dankie! **Thank you!**

Ngiyabonga! Re ya leboha!

*Re itumetse!*

UKHANI!



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