

An Overview of Educators' Rights in South Africa: Marching to the Same Drum

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Introduction

For many years the need for change in the socio-political landscape of South Africa was apparent. The interim Constitution of the Republic of South Africa came into operation on the 27th April 1994. The final Constitution of the Republic of South Africa, Act 108 of 1996, entrenches constitutional supremacy and a sovereign Bill of Rights. The purposes of the 1996 Constitution as underlined in the preamble, include:

- to heal the divisions of the past and create a society based on democratic values;
- to lay the foundation for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law;
- to improve the quality of life of all citizens and free the potential of all people; and
- to build a united and democratic South Africa which is able to take its rightful place as a sovereign state in the family of nations.

A Bill of Rights found in Chapter 2 of the Constitution of South Africa protects everyone's defined rights against violation. Educators like all other people in South Africa, have rights. However the fundamental question is whether they can exercise their rights in a responsible manner or whether they have the ability and knowledge to ensure that their rights are observed and respected.

The Bill of Rights is a cornerstone of democracy in South Africa (Rautenbach & Malherbe, 1998). However, how one manages his or her protected rights remains an individual decision. The people of South Africa can now say they have rights, educators in South Africa can freely say they have rights and freedom. The Bill of Rights binds all government bodies that make laws, i.e., state organs, legal persons and courts. The function of the courts is to enforce the Bill of Rights. In terms of the limitation clause, a right may only be limited in terms of law of general application. For every limitation there must be a legal rule that provides that the right may be limited although 'the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality'.

This article draws attention to teachers' rights in South Africa, and discusses issues and challenges teachers confront in exercising their rights. These challenges and issues need urgent attention to ensure the maximisation of the benefits gained in observing and respecting the provisions of the Bill of rights and related legislation.

Legal Framework

Upon gaining democracy in South Africa many new laws conferring rights to employees and regulating the relationship between the employer and the employee have been legislated and have been framed within the spirit of the Constitution of the country (Legotlo, 1999). In predemocratic South Africa teachers' constitutional rights were unknown and the right to bargain terms and conditions did not exist. With the establishment of the Education Labour Relations Council and the Labour Relations Amendment Act 42 of 1996, all registered teachers' organisations are required to be consulted in all matters of mutual interest. The government or the Ministry of Education may not make unilateral decisions on matters affecting the welfare of teachers without consulting teachers' organisations (Legotlo, 1999).

In South Africa labour relations in education are highly regulated by the Constitution (Act 84 of 1996) and the Labour Relations Act (Act 66 of 1995). The final Constitution Act 84 of 1996 is the supreme law of the country. It provides a general frame for all laws in the country. Any law that is inconsistent with the Constitution is null and void.

The Bill of Rights

Chapter 2 of the South Africa Constitution (SA, 1996) deals with the Bill of Rights. The rights of all individuals are to be observed, respected and protected by the state. Constitutional provisions affecting teachers and all other persons are enshrined in the Bill of rights. Accordingly, the fundamental rights of educators and employers are to be protected by all state organs such as the Department of Education. In the process of interpreting rights, the fundamental question is whether the right in question is being threatened, violated or infringed.

Constitutional provisions that have direct influence on the scope of the rights of teachers include:

The Right to Human Dignity

Everyone has inherent dignity and the right to have their dignity respected and protected (section 10).

The right to human dignity has been described by the constitutional court as the most protected of all human rights. Human beings are equal in dignity and treating teachers unequally could be seen as violation of rights. An infringement of any of the human rights provided in chapter 2, could also be seen as violation of the right to human dignity. Human dignity embraces feelings of self-worth, or self-respect. Educators are human beings and any unjustified attack or a threat to their humanness, could be seen as a violation of their constitutional rights. In some cases educators are attacked on the grounds of a lack of professionalism, and may, in such cases not be equally treated. When educators are not justifiably and equally treated, a prima facie case of unfair discrimination for the purpose of the right to equality and human dignity could be made. In South Africa some educators work under conditions that are unequal in terms of the distribution of resources.

It is observed that actions that may violate the educator's rights to be treated with respect and dignity include sexual harassment, intimidation, harassment and verbal abuse. It is also the

case that educators are expected to treat each other with respect, and not to resort to any measures that are degrading when dealing with their colleagues.

In South Africa teachers also have a right to the protection of their reputation and may now sue for defamation when this right is harmed. However to succeed in such an action the self-esteem of the teacher must actually have been impaired and a sensible person would regard the act as offensive. The question is always to prove that there was some harm to the teacher's reputation.

Equality

The equality clause in the South African Bill of Rights has a long way to go, and for sometime its interpretation in different and complex settings will be guided by the courts of laws. Essentially, however, educators may not be unfairly discriminated against on the grounds of race, colour, ethnic or social origins, sex, religion or language at the workplace or any place on matters relating to the relationship between the employer and employee's organisations.

The Right to Privacy

Everyone has the right to privacy (section 14).

The right to privacy includes the right to be free from intrusions and interference by the state and others in one's personal life. It may also include freedom of unauthorised disclosure of information about one's personal life. The right could be interpreted to include that individuals have control over who communicates with them, and who has access to the flow of information about them. This implies that the teacher may decide under what circumstances private facts may be made public.

Legotlo (1999) argues that teachers' personal property may not be invaded, or their right to communication be infringed. However, the right to privacy is not absolute. If it is suspected that a teacher has a dangerous weapon and intimidates others, the interest of the educator or the union may be weighed against the interests of the school or the union.

The Right to Freedom of Expression

Freedom of expression is an indispensable instrument in a democratic society. Every citizen has the right to free expression. Educators are entitled to their opinion and to hold divergent views or opinions.

Acceptance of employment in the government sector does not imply that teachers should relinquish their right to freedom of expression, academic freedom, freedom of association, freedom of choice in appearance or their privacy rights. However, the right of the teacher may be weighed against the interest of the district/provincial government in maintaining an effective and efficient system. Courts of law must attempt to reach/achieve an appropriate balance between these interests in the process of time.

Teachers have the right to air their views on matters of public concern. However it needs to be certain that the expression of their views does not jeopardise the relationship between employer and employee, classroom performance, harmony with co-workers or school operations.

The burden is on the employer or employee to show that the conduct was constitutionally protected.

If the expression pertains to matters of public concern, it is likely this will be considered protected speech. It is important to note that the burden of proof increases as educator's speech more directly involves public issues and decreases as the expression interferes with close working relationships that are essential to fulfilling public responsibility.

In the past, schools had grooming codes for teachers. More recently schools have relaxed these codes as they might be seen to infringe teachers right to free expression and it is now the case that right to decide one's own appearance is a constitutional right.

Right to Access to Information

There is a fundamental connection between access to information and efforts to create constitutional democracy based on principles of openness. Participatory governance requires a meaningful participation in decision making. Access to information is also important in order to gain knowledge. The question arises, however, of what is a reasonable time to provide information needed by the individual to protect his or her rights. In addition the scope of information required for protection of one's right will remain a challenge to the courts of laws. The limit to this right could include considerations of privacy and confidential information. If the state refuses to provide the information then it is up to the State to justify its refusal.

The Right to Just Administrative Action

Every teacher has the right to administrative action that is lawful, reasonable and procedurally fair. All administrative actions of the employer (state) should be reasonable and justifiable (section 23). An educator whose rights and privileges are affected by the conduct of the employer must be given reasonable opportunity to state his or her side of the case.

All state organs are legally bound to uphold these rights. Most importantly, however, rights are not absolute, so they may be limited by law, provided that the reasons for imposing limitations are reasonable, justifiable and necessary in a democratic society.

Freedom of Association

Everyone has the right to freedom of association (section 18).

Every educator has the right to join a union and participate in the activities and programmes of the union of his or her choice (section 23). Similarly every employer has the right to form and join an employers' organisation and to participate in its activities. Further interpretation of these provisions is that every educator or employer has the right not to join a trade union or not to associate with a trade union or other persons.

So, freedom of association also implies freedom not to associate. Similarly teachers may not be forced to disclose their union membership and cannot be dismissed for their political or religious affiliation. In theory affiliation to a political party cannot influence the decision to employ, promote or dismiss an employee. However, 'free riders' have to abide by the collective agreements in their respective sectors.

Every teacher union or employers' organisation has the right to determine its own administration, programmes and activities, to organise, to form and join a federation and to engage in collective bargaining. At the time of writing there are three main teacher unions in South Africa, SADTU, NAPTOSA, and SAOU and, unlike the situation that existed in the past, these unions are not based on race or colour. Importantly, in the new South Africa teachers are free to join any union of their choice.

Freedom of association is a major issue in collective bargaining in the education sector. The representative teacher unions are in many respects or circumstances left to work out ways of most effectively expressing the group's or union concern to the employer. Such a process makes representative democracy or participative democracy possible. The union consults, collects views of members and makes a position on a number of mandatory issues like salary increases. The Union with a mandate articulates the views of the followers, and presents its demands to the employer.

The teacher Unions have shown their strength and powers over the past five years and this increase in strength shows the interest of educators in teacher unionism.

It is important to note that teachers are protected by the Constitution. The right to freedom of association (section 18) protects the association and allows the relevant union to pursue its objectives. The existence of the association is protected, and the association develops its own constitution, runs its internal affairs without any interference from the state. Like any person the association has rights and needs protection against any infringement of its rights.

Self-determination Principle

Section 18 protects the Association or any person from state infringements of their freedom and rights. Teacher unions are protected subject to the operation of the limitation clause.

The right of educators not to join or stay out of, or resign from the association is also protected. To date no compulsion, or law that forcing teacher to be members of registered teacher union exists.

The right to fair labour practice is also included in the Constitution. The importance of this right cannot be overemphasised in the current process of restructuring, transformation, rationalisation and redeployment of educators and the need to remove unfair labour practices.

The Labour Relations Act (LRA) has specific guidelines with regard to the conduct of the employer when retrenching employees. For retrenchment to be successful and pass the test of fair labour practice, employers are obliged to:

- engage in extensive consultative process with employee organisations prior to initiating a retrenchment exercise;
- to explore alternatives to retrenchment;
- to furnish proper notice to affected employees; and
- to compensate targeted employees.

The Right to Assembly, Demonstration, Picket and Petition

Teachers have the right to peacefully, and unarmed, assemble, demonstrate, picket and present a petition (section 17).

The Right to Strike

Educators who cannot withdraw their labour have little collective bargaining power, so the right to strike is an important weapon for unions. Educators in South Africa have the right to strike and to give effect to a more organised strike. The union has to follow a specified route for the strike to be declared legal. There are some restrictions on how and when strikes can occur which is only after the Union has declared a dispute and all other means have failed to address the deadlock. The management employer also has the right to lock employees out.

Law of Strike and Lockouts

The right to strike is a fundamental right guaranteed by the Constitution just as the employer has the right to lock out. However, such rights are not absolute. The LRA encourages the employer and employees' organisations to design their own procedures for strikes and lockout.

Parties to a dispute who are members of the ELRC must follow the dispute procedure provided in the ELRC constitution before they can engage in a protected strike or lockout.

Educators, as employees have the right to strike provided that the issue in dispute has been referred to the ELRC or the CCMA and the certificate stating that the dispute remains unresolved has been issued, or a period of 30 days, or any extension of the period agreed between the parties to the dispute has elapsed. In the case of a strike, at least 48 hours notice of the commencement of the strike must be given in writing to the employer.

No person may take part in the strike or lock out or in any conduct in contemplation or furtherance of a strike or lockout, if that person is bound by the collective agreement that prohibits a strike or lockout in respect of the issue in dispute. Further, that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;

The issue in dispute must be one that a party has the right to refer to arbitration or to the Labour Court.

Moreover, subject to a collective agreement, no person may take part in the strike or lockout if the person is bound by any arbitration award or collective agreement that regulates the issue in dispute.

If employees participate in an unprotected strike the employer has the right to:

- apply for a court interdict to prohibit the strike;
- apply for compensation through the Labour Court; and
- dismiss employees that participated in the strike.

Participation in an unprotected strike constitutes a fair reason for dismissal.

Protection

Participation in a protected strike has the following consequences:

- employees may not be dismissed;
- The employee may not be sued for damage arising out of the breach of contract or delict. However, for any criminal activity the employee may be sued;
- The employer is not obliged to remunerate an employee for service that could have been rendered during the strike; and
- Strikers cannot be interdicted.

Right to Fair Labour Practice

Every employee has the right to fair labour practice. This right is a fundamental and enshrined in the Constitution. Schedule 7 (section 2 (1) of the LRA (RSA, 1995) defines unfair labour practice as any unfair act or omission that arises between the employer and the employees' involving:

- Direct or indirect discrimination on any arbitrary ground, including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture language, marital status or family responsibility;
- Fair discrimination does not constitute unfair labour practice. Affirmative action is allowed. Through affirmative action the employer is allowed to adopt the employment policies designed to protect or advance persons who had been disadvantaged by unfair discrimination;
- Any discrimination based on an inherent requirement of the job does not constitute unfair labour practice. Courts of law will help to clarify the inherent requirements of the job;
- unfair suspension or any other disciplinary action short of dismissal;
- Suspension without pay or without fair procedural requirements may constitute unfair labour practice. Disciplinary action without compliance with procedural requirements, such as transfers, may constitute unfair labour practice;
- refusal to reinstate or reemploy a former employee in terms of any agreement.
- The employer may not refuse to rehire the retrenched employees in terms of the agreed agreement with trade union; and
- unfair conduct of the employer relating to promotion or demotion or training of an employee or relating to the benefits to an employee.

If the promotion is not based on the policies of the employer or on merit, the employee may allege that the employer has committed unfair labour practice. That is the employer should always state the requirement for the position, and avoid appointing persons who do not meet the criteria. Reasonable justification should be advanced for any promotion or demotion. The employer may promote a policy of internal promotion, and if he or she fails to keep that policy that is unfair labour practice.

Right not to be Dismissed Unfairly

The employee has the right not to be unfairly dismissed (section 185 of the LRA)

In terms of the Labour Relations Act (section 186) dismissal means:

- an employer has terminated the contract of employment of the employee with or without notice;
- an employee reasonably expects the employer to renew a fixed term contract of employment on similar terms but the employer offered to renew on less favourable terms or refuses to renew it. Although the employee has a legitimate expectation, such expectations must be based on reasonable grounds;
- If the employer refuses to allow an employee to start work after she took maternity leave in terms of any law, collective agreement or her contract of employment or if she was absent from work for up to four weeks before the expected date, and up to eight weeks after the actual date of the birth of her child;
- an employer who dismissed many employees for the same or similar reasons has offered to reemploy one or more of them but has refused to reemploy another; or
- the conduct of the employer made the continued employment of the employee intolerable, and the employee terminates the employment relationship.

Automatically Unfair Dismissals

In terms of section 187 of the LRA, a dismissal is automatically unfair if the employee is dismissed for any of the following:

- participation in a protected strike or protest action, or the employee intends to participate in the strike;
- Refusal to do the work of the striker;
- Refusal to accept new terms and conditions of employment;
- Exercising a right in terms of the LRA;
- Pregnancy
 - any reason related to pregnancy;
 - intended pregnancy; and
 - any reason related to pregnancy; and
- The employer unfairly discriminates against an employee, directly or indirectly on any arbitrary ground, including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

Other Unfair Dismissals

In terms of section 188 of the LRA, the dismissal that is not automatically unfair is unfair if the employer fails to prove that -

- the reason for the dismissal is fair related to the employee's conduct or capacity or the operational requirements, and according to fair procedures.

Dismissals Based on Operational Requirements

When the employer contemplates dismissing one or more employees on the grounds of operational requirements, the employer must consult with any person as required by the collective agreement. The consulting parties must try to reach consensus on appropriate measures to:

- avoid dismissals;
- minimise the number of dismissals;
- change the timing of the dismissals;
- mitigate the adverse effects of dismissals; and
- provide severance pay

The employer has the duty to disclose information on:

- the reasons for the proposed dismissals;
- the alternatives considered by the employer and reasons why those alternatives are not acceptable to the employer;
- the number of employees who are likely to be affected and the job categories;
- the method of selecting employees to be dismissed; and
- The proposed severance pay and the possibility of future re-employment of the dismissed employees.

The employer must accept and respond to the presentations made by the other consulting party (the union or workplace forum or representative), and select the employees to be dismissed using agreed upon selection criteria or mechanism.

Dismissals for Misconduct

In terms of schedule 8 item 4 of the LRA, dismissing an employee for a first offence is not appropriate, except if the offence is serious and of such gravity that it makes a continued employment relationship intolerable. Such offences might include gross dishonesty, wilful damage to property, physical assault of the employer or fellow employee, client or customer (the learner).

In such cases the employer should determine appropriate action and consider factors including:

- employee circumstances (length of service, previous disciplinary records, and personal circumstances); and
- nature of the job and the circumstances of the infringement itself.

In determining whether the dismissal for misconduct is unfair one should consider whether an employee contravened a rule or standard regulating conduct, and if the rule or standard was contravened, whether the rule: was reasonable, the employee was aware or could reasonably be expected to have been aware of the rule or standard, and whether the rule has been consistently applied by the employer, and whether dismissal was appropriate section?

Fair Procedure for Dismissal

In terms of schedule 8 item 4, the employer should carry out an investigation to determine whether there are grounds for dismissal and notify the employee of the allegations. The employee should be given time to prepare a response to the allegations and may be assisted by the trade union. Fair hearing should be given to the employee. The employee should be given reasons for dismissals and be notified or reminded of any rights to refer the matter to the council with jurisdiction or any dispute resolution procedures established in terms of the collective bargaining.

Conclusion

In the past South Africa had a judicial system that was used as an instrument of torture and used to suppress the rights of individuals in line with the policy of apartheid. With the dawn of the new democracy all educators have rights like all other persons in South Africa. The inclusion of the Bill of rights as a cornerstone for democracy is most important. However, rights on paper do not provide a full guarantee that persons or educators shall fully enjoy and exercise their rights.

Leaders of educational institutions and unions are challenged to ensure that the rights are safeguarded. Like educators in other countries, educators in South Africa should march to the same drum.

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