

CHAPTER THREE

MEDIATION AND LEARNERS' FUNDAMENTAL RIGHTS: A LEGAL FRAMEWORK

*In the field of education, and in particular the education of the young,
the pursuit and maintenance of conditions conducive to sound
and effective education are of the highest priority*

- Judge Selikowitz²

3.1 INTRODUCTION

As pointed out before in Chapter One (*cf.* 1.1), since 1996 the new-fangled South African education dispensation seeks to develop a national school education system that will promote quality education committed to increasing learners' potential. At the same time, according to the Schools Act (84 of 1996:Preamble) the system seeks to maintain learners' fundamental rights. The focus must thus fall on the legal expectations that concern educators in general. For example, a proficient educator is someone who shows the knack of fulfilling the seven roles and competences successfully in their classrooms (SA, 2000:reg.3.6): the first of these roles being to act as a learning mediator (*cf.* 1.1).

The previous chapter, Chapter Two, therefore looked at a mediational approach to teaching and learning, pointing out that modern-day educators need to intervene intentionally and direct learners during the learning process. However, they should never tell them what to think.

It is specifically section 10 of the Policy Framework for Teacher Education (SA, 2007) that indicates this changed traditional role of educators. This policy is intended to develop a teaching profession able to meet the needs of a democratic South Africa. It brings lucidity and coherence to the complex but decisive milieu of teacher education activities, from initial recruitment as a

student educator, throughout the professional career of an educator. The superseding aim of the policy is to endow educators appropriately with the ability to carry out their indispensable and demanding tasks, to allow them continually to augment their professional proficiency and performance, and to hoist the regard in which they are held by the people of South Africa (SA, 2007:4).

Regulation 3 of the Norms and Standards (SA, 2000) points out that the modern-day educator is expected to demonstrate *applied competence* to guide learners towards becoming dynamically involved in comprehending their recently found knowledge and being able to demonstrate the thinking skills that accompany their learning process actively. In support of this, the *directive principles* in the National Policy Act (27 of 1996:sec.4(a)(vi), (b), (e) & (f)) indicate the need to (1) acknowledge learners' rights concerning their religion/conscience/belief; (2) encourage the development of learners' potential; (3) promote fundamental rights; (4) offer chances and support lifelong learning; and (5) endorse independent critical thinking.

With the Constitution holding the highest legal authority in South Africa (1996:sec.2), all governmental agencies, including educators, are subject to it and all law – thus also education law – and behaviour must be in agreement with its stipulations.

With reference to this thesis, it would imply that South African educators need to be aware of the relevant legal parameters when teaching their learners, especially concerning their fundamental rights, since authentic mediation would only become possible once the legal framework is known and understood.

This chapter is structured in such a manner that a juridical framework could be developed that would indicate the relevance of learners' fundamental rights within the overall education process aimed at successful teaching and

2 *Swart v Minister of Education and Culture, House of Representatives* 1986 3 SA 331 (C) at 343.

learning. At the same time the researcher will indicate the legally specified mediation responsibilities of educators.

A framework for learners' fundamental rights will be indicated by specifically analysing the relevant sections from Chapter 2 of the Constitution (1996), by pointing out and discussing relevant sections from the Schools Act (84 of 1996; *cf.* 3.4.1) and by exploring complementary Department of Education guidelines and regulations. The researcher will indicate the juridical framework concerning mediation by referring to the National Policy Act (27 of 1996; *cf.* 3.4.2), Norms and Standards (SA, 2000; *cf.* 3.4.2.1), South African Council for Educators Code of Professional Ethics³ (31 of 2000; *cf.* 3.4.3; 3.4.3.2) and the Employment of Educators Act 76 of 1998 (76 of 1998; *cf.* 3.4.4).⁴

In sum, this chapter is aimed at developing a juridical link between the constitutionally-based expectations concerning learners' fundamental rights and mediation as a prerequisite for effective teaching under the new education dispensation.

In order to understand the suggested legal framework, a brief background follows in the next section.

3.2 LEARNERS' FUNDAMENTAL RIGHTS: THE BACKDROP TO A LEGAL FRAMEWORK

Global confirmation exists for the premise proposing that educators' individual and combined competence and its connection with school-wide competence for advancing learners' learning guide educational transformation (Stoll, Bolam, McMahon, Wallace & Thomas, 2006:221). Obviously *capacity* is a multifaceted mixing together of various aspects, including those of motivation, proficiency, supporting communication channels, informed teaching and legal stipulations. All these aspects thus need to come together within an organized education system.

3 Hereafter SACE Code of Ethics.

4 Hereafter Employment Act.

As pointed out by Thomas, Cambron-McCabe and McCarthy (2009:1), it is the law that provides justification for setting up and managing especially public schools. Confirming this, Joubert (2009a:24) argues that regulation and agreement are indispensable in formal education if well-organized education is to take place.

The concept of educators making contact with learners, their colleagues, the principal, the Department of Education, the parents/caregivers, the teaching profession, the School Governing Body and other parties who share an interest in education is termed *Professional Learning Communities* or PLCs (Stoll *et al.*, 2006:221-223). Order and harmony within each of these relationships stipulate the necessary regulation in connection with the following (Joubert, 2009a:24):

- The formation of structures of education administration and management
- The provision of functions, tasks, duties and responsibilities
- The granting of authority to act
- The differentiation of spheres of authority and the harmonizing of authority
- The re-establishment by sanction should the legal order be disturbed

Soon after the adoption of the Constitution (1996), De Groof (1996:23) wrote that *the realization of the... [South African] Constitution...[forces] a reverential respect and high degree of deference* of especially the Western world. Moreover, having introduced several innovative legal ideas and procedures, this democratically prepared document holds the promise of a high degree of individual and shared awareness of accountability. The same author (De Groof, 1996:24) reminds the reader of the fact that authentic democracy is dependent on putting rights and freedoms into effect.

Oosthuizen (2009c:18) is of the opinion that education law functions to bring about equilibrium concerning the reciprocal rights and obligations of the respective participants in education in order to procure a serene and

harmonious environment of *geborgenheit*⁵ conducive to optimal education and training.

According to Joubert (2009a:25), the foremost function of law is the protection of calm and security in education. Additionally, the law facilitates the upholding of safekeeping expectations – as in the case of the right to education (*cf.* 3.3.1.3) – the decree of contradictory social concerns and the directing of societal transformation. With law, the most difficult mission is frequently not identifying values, but assigning main concerns, such as occurs when one value cannot be examined completely without forgoing another (Joubert, 2009a:25).

Excellent education is pointless if learners are not granted their fundamental rights as humans in pursuing their educational rights in surroundings that are evenly protected and safe (Joubert, 2009b:138). Dunklee and Shoop (2002:3) confirm this by stating that one function of law is to regulate human behaviour so as to ensure a harmonious and safe environment.

There is a worldwide insistence that education should be effective, and characterized by skilled and well-trained educational staff (Stoll *et al.*, 2006:222-223) who are, among others, capable of imparting knowledge to learners (SA, 1998:reg.5.5; 27 of 1996:sec.8) so as to equip them for a technologically specialized and competitive labour market (Oosthuizen, 2009a:215).

It is crucial to determine what is meant by the term *fundamental rights* before we can look into the individual rights guaranteed to learners.

3.2.1 What is a fundamental right?

The phrase *fundamental right* refers to whatever a person is entitled to. To name one place, section 3(2)(a) of the Constitution (1996) affords all citizens rights, freedoms and advantages. Yet the reader should not lose sight of the fact that the very next sub-section (1996:sec.3(2)(b)) reminds everyone of the

⁵ The German word indicating feeling safe and taken care of.

conditionality of rights being linked firmly to their equivalent obligations and accountabilities.

Learners, for example, not only have the right to a basic education (1996:sec.29(1)(a); *cf.* 3.3.1.3): according to the Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners (SA, 1998; hereafter Guidelines for Codes of Conduct) they are also subject to accepting accountability in this regard (SA, 1998:reg.2.2 & 4.7.4). The accountability would include being obliged to be present at school on a regular basis (SA, 1998:reg.5.4) and to contribute towards the learning process enthusiastically (SA, 1998:reg.5.5).

Similarly, educators need to be aware of protecting, promoting and fulfilling the fundamental rights that are acknowledged in the Constitution, as pointed out by the Guidelines for Codes of Conduct (SA, 1998:reg.4.1). Regulation 4.1 implies educators' obligation to advance learners' fundamental rights.

Smit (2008:213) emphasizes that fundamental rights have purposively been enshrined in terms of Chapter Two of the Constitution and they include rights to equality, human dignity, life, security of the person, privacy, religious freedom, freedom of expression, basic education, and language and culture (1996:sec.9, 10, 11, 12, 14, 15, 16, 29 & 30).

Now that the term *fundamental rights* has been described, the importance of learners' fundamental rights will be pointed out.

3.2.2 Why are learners' fundamental rights important?

To emphasize one significant aspect in this regard: although the Guidelines for Codes of Conduct (SA, 1998:reg.4.6) stipulate that ...*[l]earners have the right to a clean and safe environment that is conducive to education...*, reality proves the opposite.

According to Smit (2008:211), among others, learners experience much conflict and everyday challenges in school classrooms and in the school environment. Joubert (2009b:138) supports this statement when she indicates

extensive reports of criminal proceedings and occurrences at schools and/or in the school community. These incidents frequently lead to learners either fearing for their lives or being too scared to use the school facilities.

On an international level, Nieuwenhuis (2007b:33) points out that the General Assembly of the United Nations adopted the Convention on the Rights of the Child in 1989. Six years later, 178 countries had endorsed the Convention. This Convention stipulates the fundamental rights to which children (learners) are entitled. It is underpinned by basic principles: (1) the right of children not to be discriminated against; (2) the right to participate in decisions affecting their lives; (3) the right to be heard; (4) the fact that the best interests of the child is of the utmost importance (Nieuwenhuis, 2007b:33; *cf.* 3.3.1.3).

Inspired by the Constitution (1996), the National Policy Act (27 of 1996) and the Schools Act (84 of 1996), the researcher would like to advocate that educators need to be aware of and advance learners' fundamental rights. In this way, educators will become part of creating excellence within the national education system.

The next section will focus on the expectations of the supreme Constitution (1996) concerning learners' fundamental rights.

3.3 LEARNERS' FUNDAMENTAL RIGHTS: CONSTITUTIONALLY BASED EXPECTATIONS

According to Oosthuizen (2009b:153), it is vital that educators should be aware of the well-being of learners and consider their legal status within the South African legal system.

It is common knowledge that education is also driven by constitutional principles, as will be pointed out below.

3.3.1 A new constitutional order in South Africa

The Constitution was approved in 1996 and came into effect on 4 February 1997. Chapter Two of this Act contains the Bill of Rights, comprising of

sections 7-39, in which the State pledges the protection of each individual's fundamental rights (1996:sec.7(1) & (2)).

The South African Constitution contains the most important rules of law in connection with the governance of this country. These rules of law determine government authority, and regulate and bind the exercise of authority. As Joubert (2009a:3) puts it, the Constitution is the key constituent to being a human being in South Africa.

According to Joubert (2009a:15), the basic features of the Constitution comprise:

- a Bill of Rights in which fundamental rights are protected;
- a democratic system of government;
- cooperative government which recognizes and bonds the three spheres of government (national, provincial and local); and
- a public administration in which, for example, provincial education departments and public schools are bound to govern according to democratic values and principles enshrined in the Constitution.

Nieuwenhuis (2007b:87) emphasizes that the Constitution (1996) has an enormous effect on education in South Africa. Therefore, especially during the period it takes a learner to grow into adulthood, a learner should be treated with dignity and respect and all persons who work with them should therefore remember that learners are entitled to most of the rights that adults have, with, for example, the exception of the right to vote or appear freely in court.

For the sake of this study, it was deemed relevant to pay attention to the Preamble (1996), three directive constitutional provisions and nine fundamental rights that are of specific relevance to learners. These aspects will be addressed below.

3.3.1.1 The Preamble

We, the people of South Africa...

...adopt this Constitution as the supreme law of the Republic so as to –

*...establish a society based on ... **fundamental human rights**;*

*Lay the foundations for a democratic and open society in which...**every citizen is equally protected by law**;*

*Improve the quality of life of all citizens and **free the potential of each person**...*

Devenish (2005:26) points out that, beyond the introduction and the conclusion, four themes make up the Preamble:

- Remedying the past divisions and starting a novel society founded on *democratic values, social justice and fundamental rights*
- Creating a society founded on social equality and directness
- Humanizing all citizens' quality of life
- Committing to building a unified and democratic South Africa

The first theme is of specific relevance to this thesis concerning its reference to focusing on the fundamental rights of everyone. At the same time, the intention of this theme is to be therapeutic, liberating and healing (Devenish, 2005:26). The reference to fundamental rights is reminiscent of two of the directive principles of the National Policy Act (27 of 1996:sec.4(a) & (b)), which point out the need for promoting and protecting the fundamental rights of all learners (*cf.* 1.1 & 3.1).

The cathartic intention of the theme that refers to starting a novel society founded on fundamental rights, as pointed out by Devenish (2005:26), is reminiscent of the directive principle of the National Policy Act (27 of 1996:sec.4(b)) that indicates the need for encouraging the development of

learners' potential. Of significance is the fact that the Preamble of the Constitution also reminds the reader of the importance of (1) fundamental rights; (2) everyone being protected equally by the law; and (3) freeing everyone's potential.

When looking at mediation, Tzuriel (2000:220) reminds the reader that a mediator should arrange the learning environment to ensure every learner's success in such a way that he/she is aware of the capability of functioning successfully and independently (*cf.* 2.4.2.1).

3.3.1.2 Directive constitutional provisions

Oosthuizen and Van der Westhuizen (2003:15) point out that legislation regulated the relationship between the State and individual organs or bodies with the ultimate aim to protect also the public interests of the relevant parties. Constitutional provisions are of primary importance for education legislation since the former make up the supreme law of the country (1996:sec.2) and determine the powers and functions of all state organs (1996:sec.195(2)(b)).

3.3.1.2.1 Section 1 – Aspirations of the Republic of South Africa

Of significance to this study is the very first section (1996:sec.1(a)) that points to enshrining human dignity, achieving equality and promoting human rights and freedoms. Devenish (2005:31) describes section 1 as being influential or directive.

According to Feuerstein (2007:14), mediators should encourage learners towards goal-directed behaviour. Vakalisa (2004:2) emphasises that mediators should assist learners in achieving certain outcomes (*cf.* 2.5.2.1; 2.5.2.4).

3.3.1.2.2 Section 2 – Supreme authority of the Constitution

As pointed out by Currie and De Waal (2005:7), the fundamental nature of South Africa's new constitutional order is that the central aspects can be settled by applying the principles of law. This refers to the reality that any act

or behaviour that would not be in agreement with these principles *may be declared invalid* (1996:sec.2).

Section 2 of the Constitution (1996) enshrines the fundamental rights of each citizen of South Africa. It declares that each act that contradicts the Constitution is unconstitutional. To the researcher, it is essential to remind the reader that one of the main focuses of this study is on the advancement of learners' fundamental rights in the classroom when mediation is applied. It is therefore vital to remember that section 2 forms part of the backbone to this study.

3.3.1.2.3 Section 3 – Obligations and duties concerning citizenship

The heading of section 3, citizenship, which points to a common nationality, is reminiscent of the first section (1996:sec.1(d)) that refers to a *national common voters roll*. A common nationality entails all the accompanying rights, advantages and opportunities of citizenship. However, section 3(2) reminds the reader that every citizen is at the same time similarly subject to the obligations and accountabilities of citizenship.

Prinsloo (2009:71) emphasizes that people who fulfil certain duties, have an obligation to do it according to expectation and, by implication, to the best of their abilities. At the same time, people may only insist on their rights being honoured and respected if they fulfil their duties as expected.

According to Vakalisa (2004:3), mediation is a conscious approach which is not just the educator's responsibility. Learners should devote themselves to active involvement (*cf.* 2.6.2). Furthermore, Vakalisa (2004:6) is of the opinion that participative learning results from the type of teaching that gives the learner ownership of the learning development.

3.3.1.3 Fundamental rights of specific relevance to learners

The researcher has identified nine sections from the Bill of Rights (Chapter 2 of the Constitution, 1996) that have specific bearing on learners. A brief discussion of each of the sections follows in the paragraphs below.

3.3.1.3.1 Section 7 – Entrenchment of fundamental rights

As pointed out by Duma (2009:125), this Bill of Rights is the cornerstone of the modern South African democracy, as it protects the rights of all the people in the country and avows the democratic values of human self-esteem, equal opportunity and liberty (1996:sec.7(1)).

When applying mediation in classes, educators should remember that it is crucial to ensure that every learner in the classroom enjoys equal rights.

One should, however, not lose sight of the fact that South African fundamental rights are not absolute and can be limited by the rights of others, by laws of general application and by the definitional parameters of rights as described in the Constitution (1996). Section 7(3) warns everyone of the possibility of legal limitations and section 36 concerns itself with outlining the constitutionally allowed limitation of rights (*cf.* 3.3.1.3).

Of specific relevance for this thesis, the researcher would like to point out that the limitation clause embedded in the Bill of Rights implies that learners are not legally entitled to maintaining an elevated attitude towards their educators, parents/caregivers and schools since it is clear that the possibility for limiting learner rights exists legally. At the same time, however, the same clause also implies that educators do not have free reign at schools.

3.3.1.3.2 Section 9 – Equality clause

Concerning equality, according to the Constitution (1996), learners have the following rights:

Section 9(1): Everyone is equal before the law and has the right to equal protection and benefit of the law

Section 9(3): The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth

Currie and De Waal (2005:30) emphasize that it is a controversial, social ideal to supply equal treatment to all learners as people situated similarly, as well as receiving suchlike in return. In the opinion of Oosthuizen *et al.* (2009:30), equality implies *inter alia*, that unfair discrimination may not occur directly or indirectly against anyone or on any grounds.

Section 9 is thus particularly important when setting admission requirements of a school. When a learner is denied admission to a particular school, it could point to the possibility of unfair discrimination. All learners should enjoy equal rights (Oosthuizen *et al.*, 2004:54).

Jacobs (2004:61) reminds everyone that individual differences between learners should be recognized. This means that learners should be permitted to learn at their own pace, educators should use alternative methods and approaches and learners' inimitable talents and precincts should effectively be addressed (*cf.* 2.3.5).

3.3.1.3.3 Section 10 – Innate dignity

Section 10: Everyone has inherent dignity and the right to have their dignity respected and protected

In the opinion of Joubert and Prinsloo (2001:121), an important purpose of the school's Code of Conduct is to ensure each learner's human dignity. It is thus imperative to bear in mind that a learner's rights should never be infringed, even in the case of disciplinary measures taken against him/her. Currie and De Waal (2005:273) mention that human dignity is a source of a person's right to freedom and physical integrity from which various rights emerge.

In the opinion of Oosthuizen (2004:20), innate dignity implies that no person has to deserve dignity. According to the author, a person is born with dignity. It is thus evident that, in order to obtain a harmonious mediated environment, each learner should be treated with innate dignity.

3.3.1.3.4 Section 12 – Guarantee concerning freedom and security

Section 12(1): Everyone has the right to freedom and security of the person, which includes the right –

(c) to be free from all forms of violence from either public or private sources; and

(e) not to be treated or punished in a cruel, inhuman or degrading way.

Section 12 addresses the right to freedom and security of the person, as well as the right to bodily and psychological integrity (Currie & De Waal, 2005:292). This includes the right not to be maltreated, tortured or to be punished in any cruel, inhumane or degrading way (Joubert & Prinsloo, 2001:122).

Unfortunately, a problem born in this section is that of corporal punishment. Corporal punishment is seen as cruel and as an ineffective way to educate or rear a child (Nieuwenhuis, 2007b:93). In the opinion of Oosthuizen *et al.* (2009:183), the eradication of corporal punishment left a vacuum in methods dealing with serious learner misconduct. When taking this opinion into consideration, it is evident that educators should think of more creative, educational and safer ways to discipline a child.

Oosthuizen *et al.* (2009:32) remind everyone that corporal punishment was administered at South African schools as a lawful way of disciplining learners in the past. However, already in terms of the interim Constitution of 1993, the Constitutional Court decided in *S v Williams* 1995 (3) SA 632 (CC) that such corporal punishment was unconstitutional. When seen in light of promoting fundamental rights in the classroom, it is surely disadvantageous if educators take away the freedom and security of a child – especially by means of corporal punishment.

3.3.1.3.5 Section 14 – Privacy

Section 14: Everyone has the right to privacy, which includes the right not to have –

(a) their person or home searched;

(b) their property searched.

The right to privacy is a fundamental principle, which includes the right that persons or their property may not be searched. However, due to the fact that a learner or his/her property may be searched at school (for example, in the case of stolen goods), valid reasons do exist to limit the learner's right to privacy in a way (Davel, 2000:306). Educators should therefore bear in mind that even learners' fundamental rights are not absolute and may be legally infringed under certain conditions. It is, after all, the educator's duty to ensure learners' safety. If there is reasonable suspicion that a learner is carrying drugs or weapons, the principal or educator – who has been afforded the necessary delegated authority – has a right to rely on section 36 of the Constitution (1996) which, in return, would have an impact on a learner's right to privacy (Joubert & Prinsloo, 2001:121). It is crucial to consider Oosthuizen *et al.* (2009:39) when quoting Bray, stating that it is essential to balance the welfare of learners with those of other learners and the public education authority to establish whether any limitation of rights is lawful or unlawful.

A mediator should therefore ensure the safety of all learners in class. It is crucial to ensure that learners feel safe in their learning environment if an educator desires a pleasant learning environment.

3.3.1.3.6 Section 15 – Freedom of religion and opinion

Section 15(1): Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

This section protects learners against being forced to partake in religious activities that conflict their own beliefs. It forces schools to acknowledge

religious diversity and prohibits authorities from preventing learners to live their religious freedom to the fullest (Lemmer & Badenhorst, 1997:389).

Jacobs (2004:61) points out that learning programmes should promote the growth of and common respect for various value systems. The behaviour of both educator and learner should demonstrate that they do not discriminate unfairly against anybody on the basis of religion and opinion and other forms of unfair discrimination stipulated in the Constitution.

3.3.1.3.7 Section 16 – Freedom of expression

Section 16(1): Everyone has the right to freedom of expression

Joubert and Prinsloo (2001:64) mention that, although freedom of expression is a fundamental right, total freedom of expression and speech is not possible at schools. A learner's right to freedom of expression, is especially limited in cases where:

- it negatively influences general discipline and order;
- foul and vulgar language is used;
- lies are spread; and
- it encourages misconduct.

Educators who are mediators should accommodate diverse personalities. They must be approachable; otherwise learners may be afraid to seek help when they do not understand (Vakalisa, 2004:15; *cf.* 2.2.1). It is thus vital that educators should remember that the learners in their classroom are unique and therefore different. Moreover, content should be mediated in a manner that discourages the violation of rights.

3.3.1.3.8 Section 28 – Specialized children's rights

To Devenish (2005:140), section 28 forms a *mini charter of rights for children*. As mentioned previously (*cf.* 3.3), this section (1996:sec.28) is reminiscent of the Convention on the Rights of the Child of the United Nations that contains

specified provisos related to protecting children's rights (Nieuwenhuis, 2007b:33). Sadly, in the case of South Africa during the apartheid-years, most of the children were prone to intense suffering and unwarranted sacrifices (Devenish, 2005:140). Currently, however, the situation is not much better, as thousands of impoverished *street children* and thousands of malnourished and/or abused children are a general sight in South Africa's foremost cities (Devenish, 2005:140).

According to Malherbe (2004:899), education is the one area where learners find themselves within a direct relationship with the State; therefore section 28 of the Constitution, which guarantees the rights of the child and therefore of learners younger than 18, needs to be carried out and realised to the full.

As if in answer to Malherbe (2004:899), Bonthuys (2005:603) argues that South Africa needs additional legislation to give effect to the responsibilities that section 28 entails. The State must pass further laws that plainly set out the rights of children and the obligations of parents/caregivers and the State proportionate to those rights.

Section 28(1)(b): Every child has the right –

(b) to...appropriate alternative care when removed from the family environment

Section 28(1)(b) of the Constitution (1996) contains the *in loco parentis*-principle (*cf.* 3.5.1), which involves that while learners are attending school or school activities, they are left in the care of educators and the school (Malherbe, 2004:900). Educators take the place of the parent/caregiver and are therefore liable for taking care of the welfare and safety of such learners (*cf.* 3.5.1).

De Waal (2011:239) argues that persons in whose care learners are left must take responsibility for them; in the same token, the learners must accept the responsibility to adapt to standards that have been put in place to ensure their safety.

Section 28 compels schools to promote the rights of learners and as representatives of the State, schools are also compelled to act if they have any suspicion that learners' rights are infringed upon illegally (Malherbe, 2004:910).

Rossouw (2004:57) emphasizes that the wrong application of learners' rights often causes much conflict and stress at schools. A stressful and conflict-filled school environment is definitely detrimental to the successful application of mediation in a class.

Section 28(2): A child's best interests are of paramount importance in every matter concerning the child.

The common law-principle, that the best interests of children deserve paramount consideration, forms the backbone to section 28; therefore, as indicated by Malherbe (2004:900), the education set-up must consider all the relevant parties when decisions are made that affect learners.

Moreover, this section focuses supremely on the rights of the child (Nieuwenhuis, 2007b:97). A specific note of warning is sounded in section 28(2) of the Constitution (1996) regarding advancing learners' fundamental rights.

While it is generally known that section 29(1)(a) of the Constitution (1996) grants everyone the right to a basic education, section 28(2) enhances learners' right to education by stipulating their best interests as of paramount importance in every matter relating to them (Grösser & De Waal, 2006:21). Van der Vyver (1997:303) emphasizes that, although there are numerous children's rights, one right can be highlighted. According to Van der Vyver (1997:303), all people working with children – therefore including educators – need to keep in mind that they always have to take learners' best interests into consideration.

When applying the chapter Bonthuys (2005:599-620) wrote on children, her remarks concerning *a particular difficulty* that surrounds the application of the best interests-criterion deserve attention. Bonthuys (2005:618) points out two

parts to the particular difficulty: (1) the impracticality of foreseeing if particular decisions will really be to the advantage of a certain child/learner; (2) the *subjective and culture-specific nature* of all the choices that comprise raising a young person.

There is evidence not only in South Africa, but also worldwide, that the best interests standard is used to justify and articulate the interests of parents/caregivers, instead of their young ones (Bonthuys, 2005:619). The reason for this is that the best interests principle has failed to provide a reliable or determinate standard in the past.

Bonthuys (2005:619) refers to the court case between *Jooste v Botha* 2000 (2) SA 199 CD). The judge ruled that the meticulous application of the best interests standard could indicate that the rights of parents and siblings are always subject to those of their children and that the standard should consequently be seen as a general parameter where children are involved, rather than as a legal decree. Slabbert (2012:1) comments that this case covered the child's right to parental care as provided for in section 28(1)(b), but from rather a novel approach. The applicant was a young boy and the defendant was his biological father. The act was based on delict, that the child claiming the effect of the father's disregard of his life in general had made him endure damage in the form of an *iniuria*, emotional pain and loss of amenities of life. At the central part, therefore, was the dispute that the defendant was under a legal duty to supply the applicant love and attention. The High Court reasoned, that given that the father was not a parent within the meaning of the words *parental care* of section 28(1)(b) and also because the law cannot inflict the unattainable (it cannot create love and affection where there is none), there is no legal duty to afford plaintiff love and where there is no legal duty, there was no remedy (*Jooste v Botha*).

In the opinion of the researcher, the judiciary needs to take note of the urgent need for indicating the exact and definite limits of the best interests of the child-principle carefully in laymen's terms. This would support educators, especially, in order to advance the fundamental rights of all learners in a sensible manner.

Section 28(3): In this section, child means a person under the age of 18 years.

Beckmann *et al.* (1995:55) alert that, during punishment – such as for example detention – educators should still remember that learners also have the right to be treated in a humane manner and that their age should be taken into consideration when thinking of which applicable measures to take.

Rossouw (2004:57) notes that the principle that the best interests of a child – in this case a person younger than eighteen years of age – is a decisive factor to anything relating to it, is also important in the light of international documents, for example article 3 of the Convention of Children's Rights of 1989.

Since one of the roles of educators is that of a learning mediator (Vakalisa, 2004:25; *cf.* 3.4.2.1), educators should ensure that the learning task is successful within the learning context. A child is seen as vulnerable and an educator should ensure that the best interests of the child prevails at all cost (Rossouw, 2004:60).

3.3.1.3.9 Section 29 – Guarantees concerning education

To the researcher section 29 would arguably be the section which is commonly referred to as the *education right* (1996) that has allowed for the biggest leap to be taken towards supporting all public school learners in becoming *worthy and responsible citizens* as advocated in legal guidelines (SA, 1998:reg.1.4).

Section 29(1)(a) provides: Everyone has the right to a basic education, including adult basic education

Oosthuizen and Rossouw (2001:3) mention that, internationally, the right to education is one of the fundamental rights of the child. Osler (1994:147) refers to the 1989 Convention on the Rights of the Child and mentions that the young person has the right to education. At the same time, the State's duty is (1) to ensure that the primary education is compulsory and free of charge; (2)

to encourage different forms of education to be accessible to all children; and (3) to make education available to all.

In terms of the Constitution, everyone has the right to a basic education – including adult basic education, as well as the right to have access to education institutions. This measure results in the fact that the government not only has an obligation to supply education, but also to ensure that each person's substantial right to a basic education is honoured (Maithufi, 1997:239).

In the opinion of Oosthuizen *et al.* (2004:22), the reference to *basic* refers to a limitation to education to a certain extent, not necessarily implying free education.

Currie and De Waal (2005:636) highlight the fact that education rights imply fundamentally that people have *rights to positive action*: positive action then refers to the fact that education rights can only be guaranteed by combined action. The Constitution splits the charge of the combined action between individuals and/or institutions on the one hand and the State on the other (1996:sec.29(1)(b) & (3)).

Oosthuizen and Rossouw (2001:6) agree that the right to a basic education is a positive right – specifically in the sense that it supplies in clear terms the right to claim basic education from the State.

A problem that may arise from this specific right is that the term *basic education* is quite vague. Oosthuizen and Rossouw (2001:6) are of the opinion that the concept basic education can be defined as the type of education that learners receive which equips them with the basic abilities of functional literacy – which includes basic skills in reading, writing and accounting – as well as a basic knowledge and an awareness of economy, culture and politics (Oosthuizen & Rossouw, 2001:6).

When focusing on the right to a basic education, Davis *et al.* (1997:296) argue that *basic education* is a flexible concept which must be defined so as (1) to meet the *learning needs appropriate to the age and experience of the learner*,

whether child, youth or adult and (2) to provide access to nationally recognized qualifications. Oosthuizen and Rossouw (2002:61) mention that there is no unambiguous explanation of the concept *basic education*. The problem is that the meaning attached to it is different from country to country and from culture to culture.

The State's obligation

Duma (2009:126) argues that section 29 not only provides that every person has the right to a basic education, but also to equivalent access to educational institutions. This means that the State has to do everything that it reasonably can to make sure that everyone receives education.

At this point an interesting dichotomy needs reflection: the phrase *basic education* is defined by the education ministry as the accomplishment of a General Education Certificate on completion of Grade 9, as specified by the National Qualifications Framework Act (67 of 2008). However, in the opinion of the study leader, Prof. Elda de Waal, the recent parliamentary division of education into the portfolios of the Minister of Basic Education and the Minister of Higher Education seems to indicate a different definition. The division rather suggests the phrase *basic education* as referring to Grade R-12, since those are the levels that are included in the portfolio of the Minister of Basic Education. It would be of significance to clear up the definition, since the State is under a constitutional obligation to supply education up to the last level of basic education.

Rossouw (2004:61) emphasizes that education and the provision thereof are considered as a high priority in the Constitution. Seen in this light, mediation in the classroom may support this level of importance, knowing that optimal learning will occur in classes if mediation is applied as required (*cf.* 2.1).

Section 29(2): Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable...

To highlight the difficulties which are entailed in this right, one controversial aspect stands out above the rest: the medium of instruction. Section 29(2) of the Constitution (1996) determines that everyone has the right to receive education in the official language of his choice at public schools where it would be reasonably practicable. In the opinion of Curie and De Waal (2005:637), the level of reasonableness denotes that where mother-tongue education is not supplied, there should be an unbiased reason for denying the right. One possibility would be that of using *a sliding-scale formula* to calculate the number of learners who speak a language in an area. According to article 8 of the European Charter for Regional or Minority Languages (in Currie & De Waal, 2005:637), such a formula would not only focus on how large the number is, but also on how high the level of education is. The latter would imply that a higher education level poses less of an obligation concerning providing mother-tongue education in every language spoken in an area.

In the opinion of the researcher, such an unbiased reason for not complying with the right to receiving schooling in an official language of choice at a public school points to educators being aware of their responsibilities that accompany learners' right to a basic education.

Lindeque and Vandeyar (2004:125) mention that at many South African schools, the mother tongue of the majority of learners varies from the medium of instruction. This contextual factor must be taken into consideration by educators during lesson preparation.

In the researcher's opinion, educators as mediators should bear in mind that learners who are being taught in a language different from their mother tongue will experience problems in understanding certain concepts and terminology in various subjects.

In *Governing Body of Mikro Primary School and others v Western Cape Minister of Education*,⁶ the High Court was faced with the provincial

⁶ 2005 (2) All SA 37 (C).

Department of Education that had compelled an Afrikaans-medium school to include an English-medium course. The department did this in the face of promoting the best interests of the English-speaking learners involved, forcefully attempting to *override* Mikro Primary's language policy unlawfully. Although the best interests of the child-principle is of supreme importance according to the Constitution (1996:sec.28(2)), the judge found that it does not automatically trump the rule of law. In the words of the court, ...*[i]t is a matter of striking a proper balance between the two...* In this case the High Court had to strike the balance between the constitutional right to administrative justice and learners' best interests. While the school relied heavily on the High Court to find the balance weighing stronger on the side of their right to administrative justice, the Minister of Education relied on the High Court to find that the best interests-principle weighed heavier. The 21 English-speaking learners had only been attending Mikro Primary School for 23 days when the Court finalized the issue: the court dismissed this case as well as the appeal case⁷ with costs. The High Court found that the English-speaking learners' best interests would not be affected negatively if they moved to the nearby De Kuilen.

Yet, in the matter of *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys*,⁸ the school had been dragging their feet. A representative of the Education MEC had instructed the Afrikaans-medium school in November 2001 to enrol 20 English-speaking learners for the next year. The School Governing Body refused and told the parents of their decision. The department withdrew the school's power to admit learners in January 2002 and thus a number of learners were enrolled at Laerskool Middelburg. By the time the matter went to court, the 24 English-speaking learners had already been at the school for eight to nine months.

Although the court found the department guilty of not having *paid any attention to the interests of the learners who were to receive their instruction in*

⁷ *Western Cape Minister of Education v Governing Body of Mikro Primary School* 2005 10 BCLR 973 (HHA).

⁸ 2003 4 SA 160 (T).

English,⁹ forcefully turning these learners away could influence them negatively and/or make them feel unwanted. The court ruled that it would be in the learners' best interests to remain at the school, in spite of the administrative deficiencies of the enrolment process.

While it can therefore be deduced that the best interests of a learner should not be seen as a way of neutralizing all other rights in legal disputes, educators need to take cognizance of the fact that all education legislation and Department of Education guidelines and regulations lay down the need for promoting learners' fundamental rights. This would definitely include advancing learners' best interests at school level.

According to Grösser and De Waal (2006:21), together with the international endeavour at pushing for including fundamental rights of all people in all constitutions across the globe, a forceful interest group has been aspiring to being acquainted with the fundamental rights of young people, thus including those of learners.

Davis *et al.* (1997:265) are of the opinion that over the past three decades there has been an increasing attempt to formulate and to ascertain special safeguards for learners on account of their vulnerability to violations of human rights more specifically arising out of inadequate social conditions, armed conflict, exploitation, hunger and disability.

Educator mediators should therefore remember that they need to be sensitive to the miscellaneous needs of learners, never forgetting that they fulfil the roles of negotiator, arbitrator, representative, intermediary, referee and moderator. These words give the initiative of active involvement that an educator should comply with (Vakalisa, 2004:25; *cf.* 2.2).

With the constitutionally based expectations having been put in place, the next section will focus on the relevant legislation and authoritative standards.

⁹ *Ibid* at 166.

3.4 FUNDAMENTAL OBLIGATIONS OF EDUCATORS: A LEGAL FRAMEWORK

The fundamental obligations of educators are promoted in several documents at school level: most important would be the relevant Acts, as they form part of legislation. Yet, the dictionary points out the following definitions for concepts that form part of the headings of other Department of Education guidelines (Merriam-Webster, 1995:421, 541, 806, 1148-9; Hornby, 2000:529, 788 & 1161):

- Ethic – an honourable obligation; a rule of conduct that governs an individual or an occupation
- Guideline – a demarcation of behaviour, such as is handed down by government; an indication of which way to follow
- Norm – an authoritative and obligatory measure that is required of specific members and which standardizes acceptable conduct
- Standard – an honourable principle that is ascertained by law and members are thus called to conform to it; a distinguished and stable value

Based on the above-mentioned definitions, for the sake of the title of this study aimed at suggesting a teaching and learning programme to advance learners' fundamental rights as educators become mediators of learning, the focus will not only fall on original legislation, but also on complementary subordinate Department of Education guidelines and regulations. As the Schools Act (84 of 1996) is described as the legal octopus (De Waal, 2011:16), the discussion leads off with this Act.

3.4.1 The Schools Act

The propagation of the Schools Act (84 of 1996) was a crucial milestone in the transformation of the education system in South Africa. Initially, the main intention of the Schools Act was to initiate a system that would support democratic change in the community, integrating various and diverse school models into one model that should be satisfactory to all citizens and grant

equivalent opportunities to everyone (Loock *et al.*, 2003:40). The Schools Act (84 of 1996) aims towards establishing a uniform system for the organization, management and finance of schools in South Africa. This Act reflects the wishes of the whole South African population, providing all interested bodies, relevant institutions and the public were consulted in advance.

Nieuwenhuis (2007b:62) highlights the fact that the Schools Act (84 of 1996) is aimed towards creating an education system that will redress injustices in educational provision from the past, as well as contribute to poverty eradication and the economic well-being of society. Joubert, De Waal and Rossouw (2004:80) call attention to the fact the Schools Act (84 of 1996) awards every School Governing Body a significant function concerning building a safe school environment which is aimed at creating equal chances for all learners.

Duma (2009:127) reminds everyone that the Schools Act (84 of 1996) came into effect in January 1997. However, the starting point of this Act can be traced back to the White Paper on Education and Training and the 1995 Hunter Commission's Report, with the latter's duty being to advocate a national framework of school organization, functioning and formal governance.

In barring corporal punishment at school level, section 10 of the Schools Act (84 of 1996) grants effect to the fundamental rights of learners to be protected from maltreatment or punishment that is cruel, inhuman and degrading (1996:sec.12(1)(c) & (e)).

The Schools Act (84 of 1996) stipulates the following in its preamble:

Whereas this country requires a new national system for schools which will redress past injustices in educational provision, provide an education of progressively high quality for all learners and in so doing lay a strong foundation for the development of all our people's talents and capabilities.

Duma (2009:127) is of the opinion that the Schools Act is the engine of school governance. It not only deals with the most essential school administration

policies, but is also the *de facto* key player of educators' activities at schools. Moreover, learners' rights are addressed specifically, as will be indicated below.

3.4.1.1 Learners' rights within the Schools Act

Oosthuizen (2004:24) reminds everyone that the Schools Act (84 of 1996) aims towards the implementation of a uniform system regarding organization, management, finance and everything relating to schools in our country. In its content, the Schools Act devotes a chapter to learners, and this chapter contains references to aspects such as obligatory school attendance and disciplinary measures.

More important than anything else, learners' rights are protected by the Schools Act (84 of 1996). Some of these rights relevant to this study are:

- learners' right to education (section 3 of the Schools Act – compulsory school attendance);
- learners' right to equality (section 5 of the Schools Act – admission to public schools);
- learners' right to freedom of religion is protected (section 7 of the Schools Act – religious observances at public schools);
- learners' right to administrative action is protected (section 8(5) of the Schools Act – Code of Conduct); and
- learners' right to human dignity (section 10 of the Schools Act – corporal punishment is prohibited).

Section 6 of the Schools Act (84 of 1996) determines that the Minister, via notice in the Government Gazette, may establish the norms and standards for the language policy at public schools. However, section 6(2) determines that a School Governing Body may determine a school's language police, subject to the Constitution, Schools Act and other relevant legal documents.

Although the Schools Act is one of the most important legal documents that direct education in South Africa, one should never forget that the Constitution is the highest level of legal authority in a country. All other Acts should comply with this important stipulation (1996:sec.2).

Second in importance to the Schools Act (84 of 1996), for the sake of this study, the National Policy Act was identified and will be discussed briefly below.

3.4.2 The National Policy Act

In the opinion of Nieuwenhuis (2007b:61), the National Policy Act (27 of 1996) commits the State to enable the education system to contribute to the full personal development of each learner and to the moral, cultural, social, economic and political development of the nation, including the advancement of human rights, the peaceful resolution of rights and democracy.

The National Policy Act (27 of 1996) determines the following in its preamble:

Whereas it is necessary to adopt legislation to facilitate the democratic transformation of the national system of education into one which serves the needs and interests of all the people of South Africa and upholds their fundamental rights.

Section 4 of the Directive Principles of the National Policy Act (27 of 1996) reads as follows:

The policy contemplated in section 3 shall be directed toward

–

(a) the advancement and protection of the fundamental rights of every person guaranteed in terms of Chapter 2 of the Constitution, and in terms of international conventions ratified by Parliament, and in particular the right –

(iv) of every child in respect of his or her education

- (b) enabling the education system to contribute to the full personal development of each student;*
- (e) providing opportunities for and encouraging lifelong learning;*
- (h) recognizing the aptitudes, abilities, interests, prior knowledge and experience of students;*
- (i) encouraging independent and critical thought; and*
- (k) promoting enquiry, research and the advancement of knowledge.*

The researcher is of the opinion that, already in the preamble of the National Policy Act (27 of 1996), there is clarity that educators should at all times respect learners' fundamental rights at school. It is also evident from the reference to particular aspects in this Act, that educators have certain legal obligations. Educators should never forget that each piece of work that learners do, should contribute to the full personal development of each learner. The way educators manage this aspect, may then also affect another aspect in this Act which refers to the encouragement of a learner's lifelong learning. Furthermore, educators should not neglect paying special attention to the recognition of each individual's abilities and interests in the event of supremely focusing on sufficient advancement of the syllabus.

In showing sound interest in each learner, the educator will – intentionally or unintentionally – evoke critical thoughts in each individual. Effective mediators should always keep these aspects in mind and never focus on their personal well-being, but rather on that of the learners whom they teach.

In conclusion, this Act specifies clearly that an educator should go beyond force-feeding curricula down learners' throats! Educators should walk the extra mile in ensuring that learning content serves eternity-values in an individual's life.

With specific reference to this study, the Norms and Standards (SA, 2000) were identified as linking up best with the role of educators as mediators. A brief discussion of relevant aspects will follow.

3.4.2.1 The Norms and Standards

The Norms and Standards (SA, 2000) provide the details of the competences required for initial educator education qualifications in South Africa (Ferguson & Roux, 2003:292).

Section 3 of the Norms and Standards (SA, 2000), as determined in terms of section 3(4)(f) and (l) of the National Policy Act (27 of 1996), contains the seven roles of educators. According to the *Notes on the Roles and their Associated Competences* (SA, 2000:reg.7), the following aspects are relevant to this study that looked at suggesting a teaching and learning programme to advance learners' fundamental rights –

5. The role of learning area/subject/discipline/phase specialist relates to the central role of learning mediation.
6. The list of roles and their associated competences is meant to serve as a description of what it means to be a competent educator.

Human-Vogel and Bower (2005:229) are of the opinion that the Norms and Standards for Educators unfortunately do not offer any specific suggestions about how to create complex learning environments that can facilitate knowledge mediation, or about the mechanisms by which knowledge construction is mediated.

According to Vakalisa (2004:24-25), the educator is a determining factor in classroom activities. In recognition of the vital part played by the educator, the National Department of Education identifies the following seven roles of educators (SA, 2000:reg.3(7)):

- Learning mediator
- Interpreter and designer of learning programmes and materials

- Leader, administrator and manager
- Scholar, researcher and lifelong learner
- Community, citizenship and pastoral role
- Assessor
- Learning area/subject/discipline/phase specialist

Only the first role, that of learning mediator, was of special significance to his study in that it refers to the following aspects:

- ✓ The educator will mediate learning in a manner which is sensitive to the diverse needs of learning – this would imply that educators should take learners' capabilities and needs into consideration at all times (Fraser, 2006:1; *cf.* 2.2.1).
- ✓ The educator will construct learning environments that are appropriately contextualized and inspirational – this would lead to learners interacting with their environment, which is a desirable outcome of mediation (Feuerstein *et al.*, 1994:7; *cf.* 2.2.1; 2.3.5).
- ✓ The educator will communicate effectively showing recognition of and respect for the differences of others – this would include advancing learners' fundamental rights (Egan & Gajdamaschko, 2004:83; *cf.* 2.2.1).
- ✓ The educator will demonstrate sound knowledge of subject content and various principles appropriate to teaching – this would imply that educators should know their subjects well enough and interact with learners in such a manner that they will obtain optimal subject knowledge (Fraser, 2006:1; *cf.* 2.2.1).

According to Grösser and De Waal (2006:22) and De Waal and Grösser (2009:697-698), it is clearly indicated from the above-mentioned roles that classroom teaching and learning need to accommodate different approaches in order to comply with the pedagogic needs of learners, as well as with their fundamental right to learn according to their own style (*cf.* 2.2.1).

Coleman *et al.* (2003:87) argue that the notion of *role* takes on wider meanings than that of a job description or a list of duties. It can be regarded as the behavioural characteristic of position, indicating how the role-holder performs in practice, rather than what may be set down in formal citations. The authors cite Hall who defines *roles* as constituting the parts people anticipate and are expected to play in the daily drama of educational life. Vakalisa (2004:29) mentions that a characteristic feature of participative educators is that they are purposive and effective mentors and role models (*cf.* 2.2.1). These attributes place educators in a favourable position to accomplish the roles of an educator as stipulated in the Norms and Standards of Educators.

According to Fraser (2006:2; *cf.* 2.2.1), as far as competences that are expected of educators are concerned, it seems that the Norms and Standards focus strongly on the idea of *applied competence* as it is explained as referring to the skill of putting something that was learnt into effect (SA, 2002:Glossary).

Du Plessis *et al.* (2007:11) point out that the Norms and Standards (SA, 2000) list certain practical, fundamental and reflective competences that should be mastered in respect of every role. As this study focuses more on the mediational role, the researcher looked into the practical, foundational and reflexive competence of a learning mediator as directed by the Norms and Standards (SA, 2000).

The following competences in respect of the role of the educator as learning mediator were relevant to this study that aimed at suggesting a teaching and learning programme to advance learners' fundamental rights:

Table 3.1: Educators as mediators – competences relevant to advancing learners’ fundamental rights

<p>PRACTICAL COMPETENCE</p> <p><i>(where learners demonstrate abilities in authentic contexts)</i></p>	<p>FOUNDATIONAL COMPETENCE</p> <p><i>(where learners demonstrate understanding of the knowledge and thinking which underpin actions)</i></p>	<p>REFLEXIVE COMPETENCE</p> <p><i>(where learners demonstrate abilities to integrate decision-making with understanding)</i></p>
<ul style="list-style-type: none"> • Educators adjust teaching strategies to help fulfil learners’ potential • Educators create a learning environment in which learners can challenge stereotypes 	<ul style="list-style-type: none"> • Educators understand different explanations of key concepts, particularly concerning education in a diverse country such as South Africa 	<ul style="list-style-type: none"> • Educators analyse the strengths and weakness of the ways in which fundamental rights issues have been addressed

(SA, 2000:reg.3(7))

In the researcher’s opinion, educators need to be fully aware of the expectations that the Norms and Standards (SA, 2000) highlight in order to become competent learning mediators. Not only should educators use their knowledge and skills to assist learners to have a sense of fulfilment in their lives, but also to encourage them to become productive workers and efficient learners in the modern world of today. From this statement, it is clear that more is expected of educators than merely to facilitate the learning of content.

When contemplating the professional conduct of educators, SACE is the responsible body. In the next section, a discussion will follow on two relevant documents.

3.4.3 The SACE Act

This Act (31 of 2000) has as its objectives the following three aspects: (1) to support educators' registering officially; (2) to approve of educators' developing themselves in a specialized manner; and (3) to put in place and uphold specific standards that set moral and professional measures for all educators.

The powers and duties of SACE are subject to the National Policy Act (27 of 1996) and include promoting, developing and maintaining a professional image (31 of 2000:sec.5(b)(ii)(1)); advising the Minister of Education on issues concerning education and educator training; and establishing an educator code of ethics (31 of 2000:sec.5(b)(c)(i)).

The focus now turns to the SACE constitution and Code of Ethics in order to indicate which guidelines educators should follow and with which rules educators should act in accordance.

3.4.3.1 The constitution of SACE

According to its Preamble, this constitution, which comprises 11 articles, refers to – among others – SACE as having *the capacity to enforce the criteria* for entering the teaching profession, and *the capacity to enforce the Code of Ethics* (cf. 3.4.3.2).

It is thus clear that, although the criteria laid down in the Norms and Standards (cf. 3.4.2.1) and Code of Ethics (cf. 3.4.3.2) cannot be regarded as legislation, the enforceability of *subordinate legislation* should not be underestimated.

3.4.3.2 Code of Professional Ethics: SACE

SACE established a professional code of ethics that can be used as criterion for educator behaviour (31 of 2000). In this regard, Nieuwenhuis (2007b:62) remarks that an educator is *a person who strives to enable learners to*

develop a set of values consistent with those upheld in the Bill of Rights as in the Constitution of South Africa.

In the opinion of Du Plessis *et al.* (2007:153), educators are only able to acquire status through the diligent execution of their responsibilities and their work, by carefully adhering to the norms and standards of the SACE Code of Conduct. First of all, educators need to be registered with SACE before they can be appointed (31 of 2000:sec.21(1) & (2)).

Oosthuizen *et al.* (2004:28) remark that SACE was purposively established to improve the professional development of the education profession and to take care of the ethical standards of educators. This code therefore deals with educators' relationships with learners, the community, colleagues, parents/caregivers, the profession, employer and the council.

On the whole, educators who are registered or provisionally registered with SACE (SA, 2000:reg.2):

- regulation 2.1: recognize that their occupation calls for the dignified education and training of all learners;
- regulation 2.2: recognize that, among others, the mind-set, commitment, strength of mind and behaviour of the teaching profession establish the excellence of education;
- regulation 2.3: recognize, endorse and advance fundamental human rights, as embodied in the Constitution of South Africa;
- regulation 2.4: acknowledge their commitment to act according to the ideals of their profession when fulfilling their duties; and
- regulation 2.5: act appropriately, so that their conduct would not disgrace the teaching profession.

It is therefore clear that educators are expected to act in a respectable and responsible manner, thereby never forgetting about the exemplary role that they fulfil in being an educator.

More specifically, as would be relevant to this study concerning educators' behaviour towards the learners, SACE expects educators who are registered or provisionally registered with them to (SA, 2000:reg.3):

- regulation 3.1: hold the self-esteem, convictions and constitutional rights of learners in high regard;
- regulation 3.2: recognize the distinctiveness and individualism of all learners, while supporting them to get in touch with their potential;
- regulation 3.3: make it possible for learners to extend personal values compatible with the fundamental rights included in the Constitution;
- regulation 3.13: not be careless or laid-back when performing their duties; and
- regulation 3.14: acknowledge learners as education partners, where it would be fitting.

In the last instance, concerning putting a legal framework in place for mediation and learners' rights, SACE expects educators who are registered or provisionally registered with them to (SA, 2000:reg.7, 8 & 9):

- regulation 7.3: remain informed of educational trends and inclinations;
- regulation 8.2: recognize that legislation grants their employer particular authority and responsibilities, and therefore carry out their work as best they can;
- regulation 9.1: take trouble to acquaint themselves with the stipulations in the Code of Professional Ethics; and
- regulation 9.2: abide by all the provisions of the Code of Professional Ethics.

These four provisions (SA, 2000:reg.7.3, 8.2, 9.1 & 9.2) clearly indicate that the Code of Professional Ethics expects registered or provisionally registered educators to meet the terms connected specifically to the profession, the

Department of Education and SACE. These four provisions emphasize that educators need to act within certain parameters and cannot merely do and act as they wish. There are thus specific guidelines that educators need to follow.

It is essential to point out to the reader that, once registered or provisionally registered as an educator, the clear undertaking is to comply with the Code of Professional Ethics. Should educators not comply with the ethical code, their employer may decide to take disciplinary steps against them and SACE may remove them from the register. The Code of Professional Ethics calls on educators to consciously serve their learners, parents/caregivers, community, profession and employer to the best of their ability. Moreover, as is the case with other subordinate legislation, SACE also falls under the Constitution, which results in the fact that not complying with the Code of Professional Ethics may also point to not complying with the Bill of Rights.

A final Act that was identified as relevant to this study was the Employment Act (76 of 1998) and a brief discussion of especially Personnel Administration Measures follows below.

3.4.4 The Employment Act

The long title of the Employment Act¹⁰ (76 of 1998) gives an indication of the purpose of this Act:

To provide for the employment of educators by the State, for the regulation of the conditions of service, discipline, retirement and discharge of educators and for matters connected therewith.

Rossouw (2009:250) mentions that this Act serves as the most prominent statute for employment matters in education and should therefore be consulted first in matters regarding the employment of an educator.

Although the Employment Act refers to educators' conditions of service in Chapter Two of the document (76 of 1998:sec.4), the relevant section

¹⁰ As amended by the Education Laws Amendment Act 24 of 2005.

indicates that the Minister would, among others, establish *other conditions of service* for educators. In Chapter Two of the *Regulations Regarding the Terms and Conditions of Employment of Educators* (SA, 2001) a specific directive termed *official duty* regulates that educators are obligated to fulfil their duties throughout the official school timetable and throughout other school-related activities (SA, 2001:reg.23(1)(a)(i) & (ii)).

However, in terms of section 4 of the Employment Act (76 of 1998), the actual directives on educators' duties occur in the Personnel Administration Measures (SA, 2003:reg.4.5) as will be indicated below.

3.4.4.1 Personnel Administration Measures

The Personnel Administration Measures (SA, 2003; hereafter PAM) make up a significant part of the conditions of service for educators. As indicated by the short introduction, the measures need to be read together with the regulations found in the Employment Act (76 of 1998).

PAM (SA, 2003:reg.4.5(e)) highlights the central role of the educator in teaching as follows:

- To be involved in classroom teaching that will encourage resolute progression in learning
- To arrange lessons while considering, among others, innovative approaches and methods
- To assume a management role relating to their subject, if necessary
- To be aware of the fact that learning is active and therefore to be ready to incorporate a selection of teaching strategies in order to reach the curriculum's outcomes
- To create a class atmosphere that encourages constructive learning, while engaging the learners actively
- To reflect on using the learners' personal experiences

The object of teaching includes ensuring the appropriate advancement of learners' education (SA, 2003:reg.4.5(d)).

Oosthuizen and De Wet (2004:68) remark that an educator finds himself amid a web of relationships and has an obligation toward his/her profession, employer, community, colleagues and learners. It is essential that all educators comprehend their obligations towards teaching learners, such as being a learning mediator, and advancing learners' fundamental rights.

In this regard, the researcher identified two common law principles that apply to education as relevant to the advancement of learners' rights by mediation in the classroom and they will be discussed below. No such connection between common law principles and mediation has yet occurred in South Africa, which makes this part of the research a novel contribution of the study.

3.5 THE RELEVANCE OF COMMON LAW PERTAINING TO MEDIATION

Common law can be denoted as the part of law that has evolved because of customs, past developments and judicial decisions (Joubert, 2009a:20-21; Roos, Oosthuizen & Smit, 2009:105). In the case of South Africa, common law is best depicted as a mixture of legal systems (Joubert, 2009a:20-21): it comprises Roman-Dutch law originally influenced by English law, as well as African customary law or indigenous law.

Roos *et al.* (2009:107) point out on the one hand that the nature of common law lends itself to being able to adjust to changes in circumstances, characterizing it as not stagnant. On the other hand, the legal duties of, among others, educators have been established by referring to accepted common law lawful duties (Roos *et al.*, 2009:108).

Oosthuizen and Rossouw (2002:106-107) mention the international practice of educators having legal duties of care towards learners at their schools concerning curricular and non-curricular activities, reminding everyone that educators take over as professional people from the parents/caregivers during school time and while managing after-school events.

3.5.1 The *in loco parentis*-principle

In terms of education, translated accurately, the common law Latin term *in loco parentis* refers to anyone in the place of a parent/caregiver who is charged with the rights and responsibilities of parents/caregivers (Thomas *et al.*, 2009:509; *cf.* 3.3.1.3). Nieuwenhuis (2007b:215) points out that educators at a school have a legal duty in terms of the common law principle, *in loco parentis*. This implies that they should ensure the safety of all learners in their care. Educators are thus equipped with a special status that empowers them to act with authority in legal terms.

Maithufi (1997:261) mentions that two co-extensive pillars of the *in loco parentis* role that educators play exist. The first pillar is the duty of care, which implies that educators should look after the physical and mental well-being of learners. The second pillar is the duty to maintain order at a school.

In accepting the *in loco parentis*-role, educators should be aware of learners' differences and needs (Du Plessis *et al.*, 2007:2). Educators should thus focus also on preventing an intimidating and negative teaching environment which may have a negative impact on the learning process.

The three aspects that would explain educators' legal duty when, among others, looking after learners' safety, are the following (Neethling, Potgieter & Visser; Van Wyk & Van der Walt, quoted in Botha, Smit & Oosthuizen, 2009:187):

- The influential position that an educator holds
- The distinctive educator-learner connection
- The management of hazardous objects

Joubert and Prinsloo (2001:81) summarize the duties of educators as (1) upholding learners' fundamental right to a basic education; (2) protecting learners' welfare and safety; (3) schooling learners by way of the approved educational content; (4) directing them to develop their potential completely; and (5) maintaining order at school. Vakalisa (2004:2; *cf.* 2.4) adds to Joubert

and Prinsloo's opinion (2001:81) on the duties of educators, by mentioning that the educator needs to train learners to participate actively in their own learning.

Joubert and Prinsloo (2001:25) remind the reader that educators, who fulfil the specific duty of teaching learners, have an obligation to teach not only according to the Department of Education's expectations, but also to the best of their abilities (*cf.* 3.5.2).

Educators should also be mentors and sound role models as they act in their *in loco parentis* capacity. Oosthuizen and De Wet (2004:68) remind the reader that the *in loco parentis*-principle implies that educators, in the course of their duties as educators at school and during school activities, should act in the absence of the parent as caregiver to the child. Roos *et al.* (2009:127) point out that the rights, status and duties of the educator as a person *in loco parentis* are largely regulated by legislation, such as the Schools Act (84 of 1996), the Employment Act (76 of 1998) and the SACE Act (31 of 2000).

Educators should never forget that, to some extent, they are involved in shaping what learners become in their adulthood. Educators should thus be exemplary of what they should become when mature, how they should act in certain cases, which norms and values should be treasured and how to behave. In applying mediation in their classrooms as deliberately instructed, educators are one step closer to playing such a vital role in learners' lives.

In trying to pinpoint the essential duties of educators who act in their *in loco parentis* capacity, Joubert (2009b:145) submits three aspects as distinctive: accomplishing teaching objectives; upholding control through a Code of Conduct; and generating a secure learner environment.

According to Patton (2005:24), an approach that emphasizes an active learner necessitates a new role for learners. Contrary to an information-loaded instructional approach, it is imperative that all aspects of the learning process are designed for every individual learner. As such, the author states, the amalgamation of the educator's role, curriculum and learning and teaching

approaches, needs to be centred on developing active learners: learners who are prepared for a future in which lifelong learning is a core proficiency.

In following a mediation approach in the classroom, educators end up standing-in for parents/caregivers in a secondary role, since educators do not *replace* parents/caregivers (Joubert, 2009b:145; Roos *et al.*, 2009:125). Oosthuizen and De Wet (2004:68) support the above statement and add that the educator merely fulfils a caring role in the absence of the parent. It points towards the obligation to ensure the safety and well-being of each learner carefully.

Now that the role of educators as professional persons in learners' lives has been indicated, the focus turns to educators teaching and performing their duties to the best of their abilities, as indicated above. This would support educators as mediators of learning who advance learners' fundamental rights.

3.5.2 The *diligens paterfamiliae*-principle

In terms of education, translated accurately, the common law-principle *diligens paterfamiliae* refers to educators acting as *good and committed* parents/caregivers (Thomas *et al.*, 2009:241).

Mason (2000:347) emphasizes that educators should be mediators of knowledge and operate as socio-cultural critics, which entails that they, as mediators of knowledge, need to be aware of the learner's level of understanding and development at all times so that learning can be appropriately stressed and educators should be actively mediating between what is known and what is not known (*cf.* 2.2; 2.2.1).

Du Plessis *et al.* (2007:35) add to Mason's statement (2000:347) by emphasizing that educators need to guide learners to construct their own knowledge, to think creatively and to solve problems on their own. Educators should therefore identify learners who experience learning difficulties, accommodate their needs in the classroom and adapt their teaching strategies accordingly. Nieuwenhuis (2007b:215) warns that an educator is still expected by law to act as *diligens paterfamiliae* which points to

reasonability. An educator's duties are compared to the degree of care that diligent parents/caregivers should serve towards their children, thereby advancing young ones' fundamental rights.

3.6 LINKING MEDIATION AND FUNDAMENTAL RIGHTS: THE RESEARCHER'S PERSPECTIVE

The researcher feels obliged to lead the reader back to the initial focus of this study: the educator as mediator of learning...to advance learners' fundamental rights in the classroom. It is imperative never to forget that with every right there is a closely interwoven responsibility. Although educators have a right to insist that their rights should be respected, they have a major responsibility: to teach. The obligation, however, does not end with these two words. It goes much further. Nieuwenhuis (2007b:216) mentions that reasonable educators are more able to function safely within all the parameters of the law. Educators should be aware of law applicable to the education and their profession. If they were more conscious of these essential guidelines, they would fulfil their duties as expected. They would soon realize that mediation is not only expectancy, but also an obligation, which, if applied correctly, will benefit both themselves and their learners.

3.7 SUMMARY

This chapter started off by providing a legal backdrop to the legal framework that was developed for mediation and learners' fundamental rights (*cf.* 3.1). The backdrop comprised defining the term *fundamental right* (*cf.* 3.2.1), and indicating why learners' fundamental rights are important (*cf.* 3.2.2).

Secondly, the focus turned to constitutionally based expectations concerning learners' fundamental rights (*cf.* 3.3), by referring to the Preamble of the Constitution as it has relevance to education (*cf.* 3.3.1.1); pointing out the relevant directive constitutional provisions of sections 1-3 (*cf.* 3.3.1.2); and discussing nine sections that concern the fundamental rights of learners specifically (*cf.* 3.3.1.3).

In the third place, legislation and authoritative standards that pertain to learners' fundamental rights were identified and discussed (*cf.* 3.4), indicating that ethics, guidelines, norms and standards were also regarded as significant to this study.

The legislation sub-section looked at sections of the Schools Act (84 of 1996; *cf.* 3.4.1) that are relevant to the fundamental rights of learners. In the next instance the sub-section reflected on the Norms and Standards as determined in terms of the National Policy Act (27 of 1996; *cf.* 3.4.1 & 3.4.2.1), with specific reference to educators as mediators of knowledge (*cf.* Table 3.1). The role of the SACE Act (31 of 2000) in advancing learners' fundamental rights was addressed (*cf.* 3.4.3): special attention was paid to the constitution of SACE (*cf.* 3.4.3.1) and the Code of Professional Ethics (*cf.* 3.4.3.2) with which all registered educators need to comply.

A brief discussion of the Employment Act (76 of 1998; *cf.* 3.4.4) that contains PAM (SA, 2003) formed the final leg of the legislation sub-section, with PAM highlighting the central role of educators in the teaching and learning process (*cf.* 3.4.4.1).

Chapter Three then focused on the relevance of common law pertaining to mediation (*cf.* 3.5). Here, the educator concluded the chapter by referring to two common law principles that are relevant to education practice, namely the *in loco parentis*-role and the *diligens paterfamiliae*-role.

The *in loco parentis*-role results in the obligation to act on behalf of the parent/caregiver at school and after school during school events (*cf.* 3.5.1). Moreover, the *in loco parentis*-role would comprise educators' contributing to the holistic development of a learner in becoming an adult citizen of South Africa.

Taking it one step further, the *diligens paterfamiliae*-role refers to educators' obligation to be committed caregivers (*cf.* 3.5.2).

The next chapter, Chapter Four, will focus on the empirical design which was used in this study.