

The limitation of the educator's right to strike by the child's right to basic education

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1 Introduction

Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy ... and controlling population growth. Increasingly, education is recognised as one of the best investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.¹

Education clearly plays a vital role in every person's life and is an essential fundamental right. This raises the question as to what the consequences would be if this right was being threatened, or worse, completely taken away. This may sound far-fetched in a democratic country like South Africa but the reality is nothing short of a nightmare for many struggling students, mainly children:²

In the first two weeks of June 2009, the Soweto Branch of the South African Democratic Teacher's Union (SADTU) embarked on an illegal strike/stay-away to protest against a district office of the Gauteng Department of Education

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¹United Nations Committee on Economic, Social and Cultural Rights General Comment 13 (21st session 1999) 'Implementation of the International Covenant on Economic, Social and Cultural Rights' UN Doc E/C 12/1999/10 (hereafter General Comment 13) para1.

²Fleisch 'The politics of the governed: South African Democratic Teachers' Union Soweto strike, June 2009' 2010 *Southern African Review of Education* 117 at 117.

appointment of certain school managers in Soweto. By the time the strike action came to an end, hundreds of teachers had missed more than two weeks of work, thousands of school children, including learners in the final years of secondary school, had missed their mid-year examinations, and a number of principals and teachers had been assaulted and intimidated.

In August 2010 another blow shook the country's education system in the form of a countrywide strike of educators due to the fact that unions and government could not find a solution with regard to educators' wages.³ Cases of intimidation and violence were reported.⁴ These instances illustrate that it is not only the child's right to education that is in the crossfire, but that children are also being subjected to violence and intimidation by the very persons that should be providing them with this basic right. Section 28(d) of the Constitution of the Republic of South Africa, 1996⁵ states that children must be protected from maltreatment and abuse and although this section does not fall within the scope of this article, it shows the extent to which the right of educators to strike has negatively impacted on South African children.

The two sections of the Constitution which are primarily applicable to this article are sections 29(1)(a) and 23(2)(c) which provide that everyone has the right to basic education and that every worker has the right to strike respectively. Section 28(2) of the Constitution further states that a child's best interests are of paramount importance in every matter concerning the child. At first glance it would appear that the right to strike should thus in essence be subject to the child's best interest, which would include the right to education, but as this matter has yet to be taken to court, the educators' participation in public sector strikes appears to be the order of the day and has thus had a large impact on the realisation of the right to basic education by children.

The child's right to education, as guaranteed by section 29(1)(a) of the Constitution is textually unqualified. In the *Grootboom* case⁶ however, the child's right to basic shelter contained in section 28(1)(c), which is also textually unqualified, was limited by the court by reading it together with section 26(2), a clause which limits everyone's right to housing to the state's ability to reasonably realise this right progressively within available resources.⁷ Based on this principle, it was thought that section 29(1)(a) would most probably have been interpreted to be limited by section 29(1)(b), which states that education must be made available progressively through reasonable measures. In the recent case of

³Cohen 'South African teachers' strike shuts schools, compounds educational crisis' 2010 at <http://bloomberg.com> (accessed 2011-07-11).

⁴Schultz '6000 SA schools close due to strikes and intimidation – August 2010' (2010) available at <http://1pic4twenty.co.za> (accessed 2011-10-11).

⁵*Constitution of the Republic of South Africa, 1996* (hereafter 'the Constitution').

⁶*Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) (hereafter *Grootboom*).

⁷*Grootboom* (n 6) 81H.

Governing Body of the Muma Masjid Primary School v Ahmed Asruff Essay,⁸ however, the Constitutional Court found that the right to basic education is subject to no internal limitations and is thus immediately realisable.⁹ It is submitted therefore, that if the right to basic education is subject to the right to strike, in practice, it results in the limitation of section 29(1)(a) on an unlisted ground, because it is only being realised within available resources (the resources being the teachers);¹⁰ these primary resources being incapacitated at a time of strike.

The importance of evaluating the extent to which educators' right to strike may be limited by the child's right to basic education is thus clear. This article will aim to determine the optimal balance between the educator's right to strike and the child's right to basic education.

2 Practical implications of strikes on children's right to education at ground level

Spring¹¹ argues that strikes in the American educational sector occur when a teachers' union and the department of education are unable to reach an agreement with regard to educators' salaries and working conditions. In South Africa the situation is similar: Solidarity¹² states that people in South Africa generally strike to direct attention to a grievance they might experience and to reach an agreement regarding a problem which pertains to interests of employers as well as employees. In section 1 it was shown that, in the educational sector, these grievances are generally related to educators' compensation.¹³ Strikes are usually preceded by union representatives who bargain with the Department of Education over a new contract, containing a particular wage scale and labour rules.¹⁴ When the unions and the Department of Education cannot agree on contract terms, conflict is generated and a strike may follow.¹⁵

⁸ *Governing Body of the Juma Masjid Primary School v Ahmed Asruff Essay* 2011 8 BCLR 761 (CC) (hereafter *Juma*).

⁹ *Id* para 37.

¹⁰ Calderhead 'The right to an 'adequate' and 'equal' education in South Africa: An analysis of s 29(1)(a) of the South African Constitution and the right to equality as applied to basic education' (Draft paper prepared for Section 27 and Equal Education 2011) 25 .

¹¹ Spring *American Education* (2010) 219.

¹² Solidarity '*Arbeidsverhoudinge-induksie*' (2010) available at <http://www.solidariteit-blog.co.za> (accessed 2011-10-12).

¹³ Cohen (n 3).

¹⁴ Spring (n 11) 219. Examples of these proposed bargaining agreements can be seen on various South African education unions' web pages. Wage scales will typically include educators' salaries and other benefits such as health benefits. The length of school days, class sizes and teaching loads are discussed in the labour rules.

¹⁵ Spring (n 11) 219.

It is said that the implementation of collective bargaining into public education is the primary cause of strikes by educators.¹⁶ Collective bargaining can be described as a good faith process between an organisation's management and a trade union representing its employees, for negotiating wages, working hours, working conditions and other matters of mutual interest.¹⁷

This process usually presents the management with a group of people with whom to negotiate, while greatly enhanced bargaining power is given to employees. The trade union system is based on the principle of collective bargaining.¹⁸ A strike (which is usually induced by trade unions) can be seen as the partial, or complete, and concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purposes of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to *work* in this definition includes overtime work, whether it is voluntary or compulsory.¹⁹

It is Neal's²⁰ opinion that the industrial mode of collective bargaining, in particular labour strikes, should not have been transferred to the public sector, the reason being that monopoly government services (services that cannot be purchased)²¹ are essential to the health, safety and welfare of the public. Strikes are furthermore, in principle, an economic weapon that is inappropriate to public employment. Strikes by teachers are strikes against the South African community as a whole,²² and, as part of the public sector, these strikes do not serve the same purpose as in the private sector.²³ When teachers strike, there exists no fair relationship between the economic gains for the educators on strike and the damage they inflict upon fellow citizens,²⁴ in this case, specifically children who are an especially vulnerable group of society. In the case of education, most people have no other option but to make use of government services in education.²⁵ Strikes in the public sector are thus inappropriate because they 'distort the political decision-making process'.²⁶

¹⁶Neal *The Alliance Against Education Reform* (2007) 23.

¹⁷ACM 'Collective bargaining' (2011) 2011 available at <http://www.businessdictionary.com> (accessed 2011-08-04).

¹⁸*Ibid.*

¹⁹Labour Relations Act 66 of 1995 (hereafter LRA) s 213.

²⁰Neal (n 16) 25.

²¹*Id* 26.

²²Cohen (n 3).

²³Burton and Krider 'The role and consequences of strikes by public employees' (1970) *Yale LJ* 418 at 418.

²⁴Neal (n 16) 26.

²⁵*Ibid.*

²⁶Burton and Krider (n 23) 418.

It is in the opinion of Mahlomola Kekana, president of the National Association of Parents in School Governance (NAPSG) that:²⁷

the impact of th[e] [2010] strike may affect the entire generation as the damage far outweighs the gains made by public servants, in particular the teachers.

He further states that such a strike perpetuates the class system and causes inequality, because the majority of South Africans do not have a choice between public and private schools.²⁸

It has been reported that the nation-wide strike in 2010 caused disruption and was extremely destabilising.²⁹ Schools were shut,³⁰ teachers attacked pupils and pupils retaliated.³¹ This left an array of broken relationships that had to be repaired.³² A previous educator strike in 2007 (that did not attract quite as much media attention as the 2009 and 2010 strikes) prohibited grade 12 learners from applying for bursaries on time, because they could not hand in their first term marks or testimonials from their teachers. Furthermore, many of the grade 12 learners that were to fail due to 2-3 months of missed classes, were not able to repeat their final year, because the school syllabus was changed.³³ It is obvious that this situation jeopardised the futures of countless children, especially learners from previously disadvantaged backgrounds. The 2010 strike lasted about 3 weeks³⁴ and occurred less than 2 months before the final grade 12 examinations.³⁵ It has been reported during this time that Allen Thompson, president of NATU (National Teacher's Union), made the following staggering announcement:³⁶

²⁷SAPA 'Teaching as an "essential service"' (2010) available at <http://www.news24.com> (accessed 2011-08-26).

²⁸'78 000 more teachers join strike' *Cape Argus* (2010) available at <http://www.allafrica.com> (accessed 2011-07-11). Teachers in private schools are paid better and work under better circumstances, for example, classes are smaller, whereas teachers in public schools work for smaller wages and struggle with large classes in sometimes disruptive environments. See Patsanza 'Teachers' voices heard in public sector strikes' (2010) available at <http://www.ipsnews.net> (accessed 2011-07-11).

²⁹*Cape Argus* (n 28).

³⁰Cohen (n 3).

³¹*Cape Argus* (n 28).

³²*Ibid.*

³³SAPA 'Teachers strike affects CA fund' (2007) available at <http://www.iol.co.za> (accessed 2011-07-11).

³⁴Opperman 'Onderwysstaking – geregverdig of te gisp' (2010) available at <http://www.skoolnuus.co.za> (accessed 2011-07-11).

³⁵Patsanza (n 28).

³⁶Yates 'Teachers' strike' (2011) available at <http://www.ezinearticles.com> (accessed 2011-10-14). In 2007, pass rates fell from 67% in 2006 to 61%. Also, in a 2007-study of 41 countries by the US-based National Centre for Education Statistics, South African grade 8 learners came last in Maths and Science. South Africa has also recently finished last of all *developing* countries when the literacy and numeracy skills of children were tested. South Africa has further participated in 2 cross-country comparative studies during recent years: Progress in International Reading Literacy, which

There will be no Matric exams written this year in South Africa. We have decided to use the Matric exams as a lever if the government does not come forward with a better offer.

This shows an absolute disregard for children's right to education. Anne Bernstein, director for the Centre for Enterprise Development has stated that between 75-89% of South African public schools are dysfunctional.³⁷ Woolman and Fleisch³⁸ correctly state that 'we stand very much at risk of losing a second generation of learners'. The Minister of Basic Education, Angie Motshekga, has stated that although South African schools are doing relatively well on enrolments, 'our weakness is in the quality of education'.³⁹ It has been found with regard to rural primary schools that the absence of teachers, the neglect of their duties and lack of discipline had lead to a decrease in pupil discipline, increased learner absences and the repetition of grades.⁴⁰

Another problem that is related to an average teachers' strike is the intimidation of other teachers who choose to keep working, as well as of school-going pupils.⁴¹ It is clear that violence and intimidation during strikes erode people's freedom to choose whether they want to strike or not and negatively affect the safety and security of non-striking educators and children during strikes.⁴²

There exists an important issue relating to the main question posed in the introduction of this article that needs to be answered at this point, namely, whether educator strikes aimed at influencing government policy should be permitted in a democratic state. In answer to this question, Novitz⁴³ is of the opinion that political issues should be decided and legislated upon in the open

focuses on grade 4 reading skills, and the Southern and Eastern Africa Consortium for Monitoring Education Quality, which focuses on grade 6 reading and mathematical skills. Our country compared poorly to our more impoverished neighbouring countries and even worse to developing countries in other parts of the world. See Cohen (n 3); Woolman and Fleisch *The Constitution in the classroom: Law and education in South Africa, 1994-2008* (2009) 109

³⁷Cohen (n 3).

³⁸Woolman and Fleisch (n 36) 109.

³⁹Cohen (n 3).

⁴⁰Coombe 'Unleashing the power of Africa's teachers' (1997) *International Journal of Educational Development* 113 at 113.

⁴¹A grade 10 pupil of a high school in Gauteng told a reporter that they were busy writing a test when about a 100 presumed striking teachers from other schools stormed into the classroom and assaulted the learners. One striker hit a non-striking teacher in the face and tore up test papers while other pupils were threatened that they would be hurt if they contacted their parents. At another high school, armed strikers took down a fence to gain entry, broke windows and threw garbage cans from the first floor. Learners and teachers left school early on the day of the attack and were afraid to return because of threats to burn down the school. See Rademeyer 'Chaotic scenes at Vaal Triangle schools' (2010) available at <http://www.news24.com> (accessed 2012-01-09); Rademeyer 'Stakers pluk kinders rond' (2010) available at <http://www.beeld.com> (accessed 2011-07-11).

⁴²Masiloane 'Guaranteeing the safety of non-striking employees during strikes: The fallacy of policy' (2010) *Acta Criminologica* 31 at 31.

⁴³Novitz *International and European protection of the right to strike* (2003) 62.

political arena of parliament and that those involved at the centre of the political process be accountable to the electorate. If strikes are used to influence government policy, governments can no longer act upon the views of the majority of the people they purport to represent.⁴⁴

Because the typical municipal political structure is vulnerable to strikes by public sector employees, like educators, a non-strike model is preferable to a strike-model.⁴⁵ Schermers⁴⁶ is of the strong opinion that political strikes are unacceptable in a society where the wishes of the majority of the population are the basis for decisions. He also states that a small group of persons in key positions that try to force a democratic government into a policy that the majority does not want, cannot be tolerated.⁴⁷ An important sub-question, as identified by Spring⁴⁸ is whether teachers should worry only about fulfilling their instructional duties without concern for their wages or working conditions.

Coombe⁴⁹ suggests that while severe budget constraints do not at the moment allow for dramatic increases in teachers' salaries, policy makers and planners must reflect a positive intention to pay teachers a wage which enables them to give their best as professionals.

There are however, ways in which educators' conditions of service can be temporarily improved which are not dependant on salary levels.⁵⁰ The government can formally diversify all resources that teachers depend on for their survival by rationalising and streamlining benefits that teachers already receive from outside the public budget (community built houses for example). Government can also decentralise fiscal responsibilities and do its best to ensure that the delays, inconsistencies, inconvenience and errors that currently occur in paying teachers' salaries are eliminated or, at least, drastically reduced.⁵¹ Negotiated agreements should be transformed into tangible benefits for educators and their families. The administrative capacity and sensitivity of government officials can diffuse a potentially explosive situation and peaceful negotiations are definitely an alternative to an educator strike.⁵²

⁴⁴*Ibid.*

⁴⁵Wellington and Winter 'More on strikes by public employees' (1969-1970) *Yale LJ* 441 at 441.

⁴⁶Schermers is quoted extensively in the work of Novitz (n 43) 62. The authors were unable to locate Schermers' original work.

⁴⁷Novitz (n 43) 62.

⁴⁸Spring (n 11) 220.

⁴⁹Coombe (n 40) 113-114

⁵⁰*Id* 114.

⁵¹Educators' conditions of service must be framed to suit the specific nature of the educational sector. These conditions must be put on paper and drafted in consultation with educators' representatives and must include leave arrangements the length and configuration of teaching periods, an educators' code of conduct, arrangements with regard to transfers and maternity leave, cover for educators on leave, appraisal and staff development and arrangements with regard to promotions. See Coombe (n 40) 114.

⁵²Coombe (n 40) 114.

It is, however, also claimed that the state's legislative, regulatory and budgetary attempts amount to nothing more than 'hand-waiving'.⁵³ It is therefore suggested that, in accordance with our country's commitment to transformative constitutionalism,⁵⁴ courts are in the position to assist government to achieve an adequate basic education for all,⁵⁵ as well as to provide educators with a voice with regards to the problems they face.

Keeping the above-mentioned in mind it can be said that to strike is wrong when one's decision to strike causes someone else's vulnerability: when people that cannot solve their own problems and who are not involved in a dispute between an employer and employee or do have any say in the solution become involved therein.⁵⁶ Although many people are not content with their salaries, it is important to remember what a salary is: The minimum sum that a person and his/her employer agrees on that is to be paid for services rendered according to our country's labour laws, which makes extreme exploitation very difficult.⁵⁷

These circumstances make it clear that a strike shifts the emphasis from the child as first priority with regard to education to the problems of teachers with teaching authorities.⁵⁸ This displacement of emphasis is strongly prohibited, as will be illustrated below.

3 Position according to South African law

3.1 Constitution

3.1.1 The child's right to basic education

Section 29(1) of the Constitution provides that everyone has the right to basic education.⁵⁹ The right to education has been described by authors as an

⁵³Woolman and Fleisch (n 36) 115.

⁵⁴Preamble of the Constitution. In his article, 'Transformative constitutionalism' (2006) *Stellenbosch LR* 351 at 352, Langa J refers to the Epilogue of the interim Constitution to provide a definition of transformative constitutionalism. According to the Epilogue the Constitution must provide 'a historic bridge between the past of a deeply divided society, characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex'.

⁵⁵Woolman and Fleisch (n 36) 110.

⁵⁶Joubert 'Die moraliteit van stakings' (2010) available at <http://www.rapport.co.za> (accessed 2011-07-11).

⁵⁷South Africa also has a very open labour market, so if one does not like one's job, one can always get another one if one's services are so highly in demand. South Africa has a great number of unemployed, qualified teachers who would gladly take over some of the employment and salaries educators are striking over. See Hlahla '*I am nothing just zero*': Exploring the experiences of black unemployed teachers in a South African rural community MA thesis University of the Witwatersrand (Johannesburg) (2008) 3; Joubert (n 56).

⁵⁸Strauss '*Los probleme in onderwys gou op*' *Die Burger* (2004-08-16) 18.

⁵⁹The wording of the right to education is very similar to the section on education contained in the CRC, which means that the South African Constitution complies with international law in this regard.

'empowerment right'.⁶⁰ An empowerment right provides people with control over the course of their lives and, more specifically, with control over the state.⁶¹ Without empowerment rights all other rights are 'likely to be precarious' as education provides much of the basic intellectual capacity necessary to exercise other rights.⁶²

The rights and values enshrined in the Constitution all point to the right to the provision of an adequate basic education for all children.⁶³ These rights include human rights, such as the right to equality (s 9) and the right to human dignity (s 10), as well as numerous other civil and political rights, such as the right to vote (s 19) and access to information (s 32), which cannot be properly understood or exercised if one is uneducated.⁶⁴ A good education is supposed to produce citizens who are fundamentally equal and people who actively participate in society.⁶⁵ It enables people to enjoy the rights as well as fulfil obligations that are associated with citizenship.⁶⁶ This is the type of citizen that transformation has as goal.⁶⁷

Of importance to the interpretation of the right to basic education⁶⁸ is section 39(1) of the Constitution which states that courts must consider international law and may consider foreign law when interpreting the Bill of Rights.⁶⁹ Although the

⁶⁰Donnelly and Howard 'Assessing national human rights performance: A theoretical framework' (1988) *Human Rights Quarterly* 214 at 215.

⁶¹*Ibid.*

⁶²*Id* 234-235.

⁶³Spren and Vally 'Education rights, education policies and inequality in South Africa' (2006) *International Journal of Education Development* 352 at 354.

⁶⁴Veriava and Coomans 'The right to education' in Brand and Heyns (eds) *Socio-economic rights in South Africa* (2005) at 57.

⁶⁵Woolman and Fleisch (n 36) 109.

⁶⁶Malherbe 'Equal educational opportunities in South Africa: The constitutional framework' (2004) *TSAR* 427 at 428.

⁶⁷Pieterse 'The transformative nature of the right to education' (2004) *TSAR* 700 at 714.

⁶⁸As well as to the right to strike.

⁶⁹Chapter 2 of the Constitution. According to *S v Makwanyane* 1995 3 SA 391 (CC) para 414, international law refers to both binding and non-binding law. In this regard, art 6 of the Universal Declaration of Human Rights (adopted by the General Assembly resolution 217 A(III) of 1948-12-10; art 13 of the International Covenant on Economic, Social and Cultural Rights (adopted by General Assembly Resolution 2200A (XXI) of 1966-12-16)(signed by South Africa in 1994 but not yet ratified); General Comment 13 of the Committee on Economic, Social and Cultural Rights (United Nations Committee on Economic, Social and Cultural Rights General Comment 3 (5th session 1990) 'The Nature of States Parties Obligations' UN DocE/1990/12/14) and art 28 of the United Nations Convention on the Rights of the Child (1989) can all provide guidance for the courts in the interpretation of the right to basic education. For discussion of the above, see Dugard *International law* (2011) (4th ed) 325-326; Gboyega 'Educator sector reforms and childhood education for rural development in Nigeria' (*sd*) available at <http://www.transformedu.org> (accessed 2012-01-18); Human Rights Library 'Ratification of international human rights treaties – South Africa 2011' available at <http://www1.umn.edu> (accessed 2012-01-14); Horsten *The social security rights of children in South Africa* LLM dissertation North-West University (Potchefstroom) 93; Liebenberg *Socio-economic rights under a transformative constitution* (2010) 106; Perez 'Children see, children do, teachers as reading models' (1986) *The Reading Teacher* 8 at 8; Verheyde 'Article 28 – the right to education' in Alen et

World Declaration on Education for All⁷⁰ is not a binding document, its definition of basic education can contribute to giving content to this right. Its definition was indeed used in the White Paper on Education and Training.⁷¹ Basic education, according to these documents, is supposed to address basic education needs which consist of 'essential learning tools' like literacy, oral expression, numeracy and problem solving. It also comprises 'basic learning content' like knowledge, skills, values and attitudes that are required by all people to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning.⁷²

Section 3(1) of the South African Schools Act⁷³ (which, according to its preamble, gives content to s 29 of the Constitution) prescribes that children must complete their schooling up until the 9th grade or up to the point where they reach the age of fifteen years, whichever comes first. It can be thus derived that basic education spans from grade 1 to grade 9.⁷⁴ Authors also describe the right to education as a strong, unqualified right.⁷⁵ This strong, unqualified character is linguistically reflected when section 29(1)(a) is read.⁷⁶ In the first place, instead of everyone being entitled to have 'access to' basic education, as is the case with regard to housing and health care (ss 26 and 27 of the Constitution), everyone has a *direct* entitlement to a basic education itself⁷⁷ (in contrast with only 'access to' that right, as described in *Grootboom* as the state having the duty to enable people to realise the rights in question themselves.)⁷⁸ Children can obviously not provide themselves with a basic education and from the wording of section 29(1)(a) it is clear that the state must provide children with this right directly. Even if section 29(1)(a) were to be read together with section 29(1)(b) (an approach which was recently rejected in the *Juma* case⁷⁹), it would not be subject to the availability of resources. Nurturing educational environments should be constructed, maintained and strengthened on a continuous basis and the state is obliged to allocate various critical resources for children in this regard.⁸⁰

al (eds) *A commentary on the United Nations Convention on the Rights of the Child* 1.

⁷⁰World Declaration on Education for All adopted by the World Conference on Education for All 1990-03-5/9 (hereafter World Declaration on Education for All).

⁷¹White Paper on Education and Training 1995.

⁷²World Declaration on Education for All (n 101) art 1 para 1.

⁷³84 of 1996.

⁷⁴Osman and Leibowitz *A framework for heritage, multiculturalism and citizenship education* (2003) 96.

⁷⁵See Woolman and Fleisch (n 36) 120; Malherbe (n 66) 432.

⁷⁶Woolman and Fleisch (n 36) 120.

⁷⁷*Ibid.*

⁷⁸*Grootboom* (n 6) 67B.

⁷⁹*Juma* case (n 8). See the discussion of this case in section 5.1.5.

⁸⁰Knutsson 'A new vision for childhood' in Bellamy (ed) *The child as citizen* (1996) 22.

Malherbe⁸¹ explicitly places educators on a list of services that the state *must* provide to ensure a reasonable basic education for everyone.

What then constitutes a 'reasonable' basic education? The *textually* unqualified nature of the child's right to basic education requires a standard of review that is higher than the standard that is used in respect of qualified socio-economic rights to determine the state's responsibilities with regard to the right to basic education.⁸² The possibility of using a proper standard of reasonableness review as such a higher standard will be further discussed in section 4 of this article.

If section 29(1)(a) imposes the obligation of a reasonable basic education, one can in the same breath say that a basic education should also be adequate. Education can in turn only be adequate when there exists an adequate infrastructure, equipment and *teachers*.⁸³

3.1.2 The educator's right to strike

The other end of the spectrum, namely the position of teachers, should also be taken into consideration. Many teachers are expected to work in extremely difficult conditions where they face overcrowded classrooms, unsafe and unsanitary schools, shoddy housing and a shortage of the most basic classroom resources. Teachers are 'at the mercy of bureaucracies' which appear to them to be 'irrational, unpredictable and unresponsive' and they feel that the system, and even their own principles, are disempowering them.⁸⁴ Important, in this regard, is section 23 of the Constitution, which guarantees every worker the right to strike.⁸⁵

Many teachers also feel that they do not receive a 'living wage'.⁸⁶ Whether the position is truly this problematic, is at present an unanswered question as this matter has yet to be taken to court. If one considers the judgment handed down in the case of *Mazibuko v City of Johannesburg*⁸⁷ (that determined the minimum quantity of water a human being is entitled to per day to live in a dignified manner⁸⁸), it should also be possible to determine whether teachers are receiving

⁸¹Malherbe (n 66) 432.

⁸²Veriava and Coomans (n 64) 62.

⁸³Calderhead (n 10) 4.

⁸⁴Coombe (n 44) 113.

⁸⁵Also important in this regard, as pointed out in 3.1.1 above, is the duty on the courts to consider international law according to s 39(1) of the Constitution. Applicable to the right to strike are art 8(1)(d) of the International Covenant on Economic, Social and Cultural Rights (n 69); art 22 of the International Covenant on Civil and Political Rights (United Nations Covenant on Civil and Political Rights adopted by General Assembly Resolution 2200A (XXI) of 1966-12-16 (signed in 1994 and ratified in 1998 by South Africa); the ILO's Freedom of Association and Protection of the Right to Organise Convention (1950) as well as its Right to Organise and Collective Bargaining Convention (1951). See in this regard Madhuku 'The right to strike in southern Africa' (1997) *International Labour Review* 509 at 510.

⁸⁶*Id.*

⁸⁷*Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) (hereafter *Mazibuko*).

⁸⁸*Mazibuko* (n 119) para 28.

a fair wage, depending on what a court decides a reasonable amount that the average person needs to live on for a dignified human existence would constitute. Whatever the courts may or may not decide on this point, it is still reported that 'there has been a noticeable reluctance on the part of African governments' to allocate enough money to pay better qualified teachers as more learners enrol in school. Almost 90% of the allocated money in the education budget is spent on teachers' salaries and even though they are 'rightly viewed as the foundation of educational change and development,' the salary costs of teachers are being curbed.⁸⁹ These conditions, as have been illustrated, are the ideal ingredients for a country-wide strike.

There exists an argument that the right to strike is a necessity when it comes to democratic participation, which applies not only in the workplace, but to society as a whole. This principle provides a legitimate way for workers to influence the formulation of government policy.⁹⁰ The right to strike is also associated with other rights in the Constitution such as freedom of association (s 18), freedom from forced labour (section 13) and freedom of expression (section 16).⁹¹ The right to strike can, according to some, also be seen as an 'appropriate supplement to effective worker participation in decision-making within the enterprise'.⁹² This right is available to both public and private sector workers although no-one providing essential services may strike.⁹³ Essential services are those services which will lead to the endangerment of people's lives, personal safety or health if they are interrupted.⁹⁴

An in-depth look at this definition is necessary. What is the meaning of the term 'life'? Broadly interpreted, apart from the basic biological aspects of living, it means the *quality* of one's life. If learners receive a feeble education due to strikes and are not able to pass their matric exams at all, or with the desired marks, it affects their chances of entering a tertiary education centre which in turn will affect learners' future earnings (if they are able to get a job at all), and thus, their *quality* of life.⁹⁵

With regards to the term 'health', the World Health Organisation defines this term as 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'.⁹⁶ According to Adams⁹⁷ the above-mentioned definition also points to the goal that individuals should have the chance to

⁸⁹Coombe (n 40) 113.

⁹⁰Novitz (n 43) 40.

⁹¹*Ibid.*

⁹²*Id* 59.

⁹³Madhuku (n 85) 516-517.

⁹⁴ILO 'Labour legislation guidelines' (2001) available at <http://www.ilo.org> (accessed 2011-08-26); LRA (n 19).

⁹⁵Adams 'The education sector as an essential service' LLM dissertation NMMU (Port Elizabeth) (2011) 63.

⁹⁶WHO 'Definition of health' (2011) available at <http://www.who.int> (accessed 30 August 2011).

⁹⁷Adams (n 95) 63.

develop to the maximum of their physical and mental potential and that 'health' extends beyond the boundaries of healthcare services into other socio-economic rights like education. Schools are in some cases the only places where children are taught basic hygiene (like washing their hands) and are also the only place where many children receive their only balanced and nutritious meal for the day. The child's physical health is thus being impaired when educators are not there to ensure that children actually practice healthy habits. The question as to where children are to go when schools are closed due to educator strikes is another issue pertaining to children's physical health and social well-being. Children wandering in streets amidst traffic and in dangerous neighbourhoods are an all too common sight in South Africa. If this is already a problem after school hours, it becomes even more so during educator strikes. Most parents are not at home during mornings, because they are busy trying to earn a living, leaving children without supervision. The fact that children are also physically in danger during educator strikes due to the misconduct of teachers was pointed out in section 2.

With regards to children's mental health, the effects of educator strikes are anything but satisfactory. The disruption of classes, threats against children who actually attend school, the uncertainty of not writing exams and the 'emotional turmoil' of not knowing whether they will be able to qualify for entrance to a tertiary education centre all threaten the psychological (mental) health of children. Children cannot feel emotionally safe (to be 'able to act, think and feel without fear') in an environment where teachers are allowed to strike.⁹⁸ It is thus clear that the educator's right to strike is endangering children's lives, personal safety and health on a physical, mental and social level. Education should thus technically qualify as an essential service.

If one considers the wording of section 23 in the Constitution, it implies an individualistic theory.⁹⁹ This theory 'considers the right to strike as belonging to the individual worker', although the right is exercised collectively.¹⁰⁰ Though the right to basic education is at the moment not classified as an essential service, the services that public employees perform are all essential in some way.¹⁰¹

Important to bear in mind is that the right to strike is not sacrosanct, but is a right that, like all other rights, must be weighed against the larger public interest and, where necessary, subordinated to the superior right of the public to protection against injury to health or safety.¹⁰²

More than health or safety is however claimed for the concept of essentiality. Government services are essential in two more ways, namely that the demand for it is relatively inelastic (or insensitive to changes in price). Elasticity, as opposed to

⁹⁸*Id* at 64.

⁹⁹Madhuku (n 85) 513.

¹⁰⁰*Ibid.*

¹⁰¹Wellington and Winter (n 45) 441.

¹⁰²Kheel 'Solving deadlocks without banning strikes' (1969) *Monthly Labour Review* 62 at 63.

inelasticity, is exactly what is considered a strong determinant of union power.¹⁰³ Inelasticity on the side of a resource tends to reduce the 'employment-benefit trade-off' that unions face. This is true in the private and public sector, but in the private sector inelasticity of resources is not typical.¹⁰⁴ In the private sector unions are also restricted by the entrance of non-union related members in the product market, while non-union rivals are not really an option in the public sectors.¹⁰⁵ This means that although a strike by educators may not create an immediate danger to public health and welfare (although in South Africa strikers' conduct clearly does) teachers almost never have to fear for unemployment because of union-induced wage increases. There is also almost no threat of non-union rivals (such as private schools) as long as those who use private education pay taxes to support those using public education.¹⁰⁶ It can thus be derived that current education union members are in an inappropriate position of power.

Another point of debate that has been going on for years, not only in South Africa, but also abroad, is the 'unionism-professionalism debate'.¹⁰⁷ This debate revolves around the question of whether teachers should be seen as workers (as referred to in s 23) or professionals.¹⁰⁸ Professionalism 'refers to the question of standards for controlling entrance into a profession'.¹⁰⁹ The term has become associated with strategies of persuasion and reason rather than force. Unionism on the other hand is 'concerned with maximising control in the work-related areas' like remuneration and service conditions.¹¹⁰ It is also 'concerned with broader issues of economic and political contestation with the state' and organises militant strategies such as strikes.¹¹¹ In the 1990s there were strong differences regarding the 'political' role of teachers (which included the right to strike) as some unions defined it, and other bodies' insistence on the 'learner's entitlement to uninterrupted learning'.¹¹² There is still not a definite answer to this question but it is said that the more interventionist a state's role in socio-economic matters, 'the likelier the right to strike is to be curtailed'.¹¹³

The above paragraphs cover the conflicting rights of the worker to strike and

¹⁰³Wellington and Winter (n 45) 442.

¹⁰⁴*Ibid.*

¹⁰⁵*Ibid.*

¹⁰⁶*Ibid.*

¹⁰⁷Govender 'Teacher unions, policy struggles and educational change, 1994 to 2004' in Chisholm (ed) *Changing class: Education and social change in post-apartheid South Africa* (2004) 286; Dobbs 'Are teachers professionals or public-service workers?' (2008) available at <http://www.typepad.com> (accessed 2012-03-01).

¹⁰⁸Dobbs (n 107).

¹⁰⁹Govender (n 107) 286.

¹¹⁰*Id* 286-287.

¹¹¹*Id* 287.

¹¹²*Id* 272.

¹¹³Madhuku (n 85) 509.

the child's right to education, but there is one more very important constitutional principle that should be taken into account wherever a child is involved, namely the best interests of the child. This particular principle will now be discussed in the context of the right to education.

3.1.3 The principle of the best interest of the child

Section 28(2) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning the child.¹¹⁴

The best interests of the child principle forms part of the scheme of rights of the child contained in the whole of section 28, but it also creates a right that extends beyond the other rights in this section and should be taken into account when any right (be it constitutional or legal) of a child is affected.¹¹⁵ The Committee on the Convention on the Rights of the Child made it clear in a general comment¹¹⁶ that children are dependent on responsible authorities (including professionals, like educators) to determine and represent their rights as well as their best interests with regards to any decision or action that will have an impact on their well-being. On a practical level this means that when the child's right to education is affected due to educator strikes, the best interests of the child must prevail. As already discussed, education is crucial to provide South Africa's young citizens with the necessary skills to survive as adults and to make a positive contribution in building a successful country.

Receiving an optimal education is therefore clearly in the best interests of the child and the need arises for responsible parties in the educational sector to comply with their obligations with regard to the child's interests. The committee on the CRC, in unison, states that all law and policy development, administrative and judicial decisions as well as service provisions that affect children in the school environment specifically, must not only take the best interest principle into account,¹¹⁷ but, as indicated above, make it *the* primary consideration. Sachs J made it clear in *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995*¹¹⁸ that the Constitution requires people to 'give paramount place to the interest[s] of the child'. He stressed that each child is unique and entitled to a good education

¹¹⁴This section is very similarly worded to art 3(1) of the CRC, as well as art 4(1) of the African Charter on the Rights and Welfare of the Child, which illustrates that the South African Constitution complies with international and regional law also on this point.

¹¹⁵Malherbe 'The constitutional dimension of the best interest of the child as applied in education' (2008) *TSAR* 267 at 268.

¹¹⁶United Nations Committee on Economic, Social and Cultural Rights General Comment 7 (40th session 2005) 'Implementing Child Rights in Early Childhood' UN Doc E/2006/09/20 (subsequently General Comment 7) art 13(a).

¹¹⁷General Comment 7 (n 116) art 13(b).

¹¹⁸*Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC) (hereafter *Gauteng Provincial Legislature case*) para 53.

regardless of the motives or passions of parents.¹¹⁹ If not even children's parents are allowed to jeopardise children's right to education, how much smaller a role should the motives and passions of teachers play in this regard? The principle of the child's best interests serves as a safeguard with regard to official action in the school environment, supports South Africa's ideals for education and 'strengthens our commitment to realise the best possible education for our children'.¹²⁰

The Democratic Alliance (DA) recently stated that it has taken its cue from section 28(2) of the Constitution and, with that in mind, submitted a private member's legislative proposal to the Speaker of the National Assembly which seeks to balance the best interests of the child as well as the child's right to a basic education with the educator's right to strike.¹²¹ This bill contains the following regulations:¹²²

- Teachers' strikes can only legally take place after consultation and agreement between government, unions and school governing bodies (meaning parents). Together, these various groups will agree on the manner in which the strike must be conducted, and the treatment of the learners during the strike period.
- The rule of 'no work, no pay' must be strictly enforced.
- Individual striking teachers who engage in violence, looting, vandalism and intimidation must face criminal charges for their actions.
- Severe penalties – such as stiff fines – must be imposed on unions if their members engage in violence, looting, vandalism and intimidation.

The bill also includes an alternative model of teacher/government labour relations that entail:¹²³

- The legislation of a negotiation cycle that will see bargaining tak[ing] place in June and July once every three years. The agreement would specify three-year-long wage scales with steady and predictable increases.
- The creation of a federation that includes the 13 trade unions and professional associations in the education sector. This body could develop a charter of values and craft a robust system of self-regulation. This is the hallmark of a mature, professional sector, and something that unions should enthusiastically embrace.
- The introduction of regulations that seek to link teacher performance to pay levels. This would help to promote quality teaching through financial incentives.

Although the paying of fines for bad behaviour is a good suggestion, the fact that strikes keep occurring, creating an opportunity for this kind of behaviour to exist and continue to rob children of quality learning time, is still a problem. It seems that the regulations and the alternative model the DA propose are

¹¹⁹ *Ibid.*

¹²⁰ Malherbe (n 66) 285.

¹²¹ James 'DA submits private member's bill to put learners first' (2011) available at <http://www.da.org.za>. (accessed 2012-01-21).

¹²² *Ibid.*

¹²³ *Ibid.*

somewhat contradictory. If bargaining only takes place every three years, which is a very good suggestion, why the need for regulation of strikes, unless the idea is to only allow a strike every 3 years between June and July with the approval of all of the above-mentioned parties. While approval between these parties is a plausible idea, a very concerning aspect of the first regulation proposed by the DA, is that the parties that need to approve strikes do not include children themselves.

3.2 Other legislation

3.2.1 The child's right to education

The Education Laws Amendment Act¹²⁴ sets out a minimum package of resources to which every learner is entitled.¹²⁵ It has further made several changes to the South African Schools Act¹²⁶ with regards to aspects of infrastructure. It also sets out identifiable standards for learner achievement. This progressive move by legislation specifically places focus on teacher development and remuneration.¹²⁷ Section 11 makes it clear that the Head of Department must protect the safety of the learners and the staff of any public school. It also deals with situations in which there has been a serious breakdown in the way the school is managed or governed which is prejudicing the standards or performance of the school. If such a situation occurs, the Head of Department must issue a written notice to the school which informs it that it must provide the Head of Department with a plan for correcting the situation.¹²⁸

It is clear that educator strikes cause serious breakdowns that affect school governance and learners' performance. Serious breakdowns are usually the result of poor work performance, which in turn, are caused by factors like strikes.¹²⁹ It is thus clear that educator strikes can be classified as situations that need to be corrected. In section 11(5), the Act further states that the Head of Department may implement the incapacity code, as well as procedures for poor work performance in terms of the Employment of Educators Act.¹³⁰

According to section 17 of the Employment of Educators Act, an educator shall be guilty of misconduct if he/she fails to obey the Act under discussion or any other Act with regard to education; performs an act which is prejudicial to the administration, discipline or efficiency of any department of education, departmental office or any educational institution; is negligent or indolent in the carrying out of

¹²⁴31 of 2007.

¹²⁵Woolman and Fleisch (n 36) 115.

¹²⁶84 of 1996.

¹²⁷Woolman and Fleisch (n 36) 115.

¹²⁸Education Laws Amendment Act (n 124) ss 11(2) and (3).

¹²⁹Cardy *Performance management: Concepts, skills and exercises* (2004) 48.

¹³⁰76 of 1998.

his/her duties; behaves in a disgraceful, improper or unbecoming manner, or, while on duty is discourteous to any person; is absent from office or duty without leave or without any valid reason; disobeys, disregards or wilfully defaults in carrying out a lawful order given to the educator or an authoritative person or displays insubordination in his/her word or conduct. It is clear that the conduct of striking educators discussed in section 2, entirely corresponds to the above-mentioned unlawful behaviour. According to section 20, an educator may, in response to his/her unlawful conduct and after certain processes have been followed, be suspended from his/her duties. Striking educators may, according to law, thus be fired.

Another Act applicable to this article is the South African Schools Act.¹³¹ The preamble of this Act recognises the need for a new national system for schools which will, amongst other things, redress past injustices in educational provision, provide an education of progressively high quality for all learners, advance the democratic transformation of our society, contribute to the eradication of poverty and the economic well-being of society, and uphold the rights of all learners.

It is obvious that the striking of educators cannot provide an education of progressively high quality for all learners. Further, instead of contributing to the eradication of poverty and the economic well-being of society, striking educators do the opposite. It has been reported by various authors that the strike of 2010 will have an extremely negative impact on the South African economy.¹³² The same applies to the strike of 2007.¹³³ In taking strike action educators are not upholding the rights of learners as well as the country as a whole, and are not showing any sign of the acceptance of an inherent or prescribed responsibility.

Supplementary to the above-mentioned Act is a General Notice, namely the Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners.¹³⁴ This code expressly states that learners have the right to the absence of harassment in attending classes and in writing tests and examinations.¹³⁵ It is obvious that the conduct of teachers mentioned in section 2 does not conform to these regulations.

Section 4 of the National Education Policy Act¹³⁶ further states that South Africa's education policy must be directed at, amongst other things, the advancement and protection of the fundamental rights of every person and in

¹³¹84 of 1996.

¹³²Baldauf and Kwinika 'Strikes in South Africa could have long-term economic consequences' (2010) available at <http://www.csmonitor.com> (accessed 2011-07-13); Cohen and Seria 'South Africa says strike to have huge economic impact' (2010) available at <http://www.businessweek.com> (accessed 2011-07-13).

¹³³The estimated cost of the lost productivity is R3 billion and the effect of higher wages could cause a rise in inflation and interest rates. See Fin24 'Strike hits SA economy hard' (2007) available at <http://www.fin24.com> (accessed 2011-01-21).

¹³⁴GN 776 in GG 18900 of 1998-05-15.

¹³⁵GN 776 in GG 18900 (n 134) para 4.6.

¹³⁶27 of 1996.

particular the right of every person to basic education and equal access to education institutions; of every child in respect of his/her education, enabling the education system to contribute to the full personal development of each student as well as to the social and economic development of the nation at large, including the advancement of human rights and the peaceful resolution of disputes, promoting a culture for teaching and learning in education.

The right to basic education is stressed again, and particularly the child's right to this important service. Again reference to the role of educators with regard to the economic growth of our country is made. If the above-mentioned circumstances of violence against children and other teachers are taken into account, it is blatantly clear that the peaceful resolution of disputes, as mentioned by the Act, does not take place in current strikes. Along with this sad fact it is also true that educators' conduct does everything but create a natural respect for the teaching profession. A shocking disregard for our country's educational laws and policies is the direct result of the contemporary striking teacher.

3.2.2 The educator's right to strike

The most important legislation with regards to the right to strike is the Labour Relations Act.¹³⁷ According to the LRA, there are prescribed procedures with which strikes must comply to enjoy the protection of the Act.¹³⁸ These requirements, however, do not apply in the case of educator strikes, since most educators are members of bargaining councils, which deal with the disputes in accordance with their respective constitutions.¹³⁹ Most educator strikes further qualify as protected strikes, due to educators' membership of various bargaining councils.¹⁴⁰

Section 67 of the LRA lists the consequences of protected strikes. The most important consequence for purposes of this article is that participation in a strike does not constitute in breach of contract or a delict, unless an educator's conduct comes down to criminal action.

Assault and intimidation are examples of misconduct.¹⁴¹ Both examples of misconduct as well as trespassing and vandalism could also attract criminal and civil liability.¹⁴² In section 2 it has been shown that many striking educators are guilty of the above-mentioned offenses and they should thus be held accountable

¹³⁷LRA (n 19).

¹³⁸Section 64 of the LRA (n 19) provides that the issue in dispute must be referred to a council or the CCMA, a certificate stating that the dispute remains unresolved has been issued (or a period of 30 days has passed since the referral was received by the council or CCMA) and the employer must receive forty-eight hours' written notice of the commencement of the strike. Where the state is the employer (which is the case in the education sector), s 64(1)(d) provides that the required notice period in respect of strikes is seven days.

¹³⁹LRA (n 19) s 64(3)(a).

¹⁴⁰Du Plessis and Fouché *'n Praktiese handleiding tot arbeidsreg* (2008) 363.

¹⁴¹Grogan *Workplace law* (2004) (7th ed) 132.

¹⁴²Du Toit *et al Labour relations law* (2006) (5th ed) 295.

for their conduct on a criminal and/or civil level. Unfortunately, educators who misbehave or make themselves guilty of criminal offences in this regard usually do not get prosecuted to the full extent of the law, making educator strikes scenes of chaos instead of reasonable petitions for educators' rights.

There is however, a policy consideration underlying the Basic Conditions of Employment Act¹⁴³ that certain types of disputes are better suited to resolution by a third party than by industrial action.¹⁴⁴ These disputes are commonly referred to as 'rights disputes' because they usually involve claims that are based on alleged legal rights.¹⁴⁵ These rights can be better determined by the application of objective standards.¹⁴⁶ Although the legal rights referred to in these particular circumstances are employment rights conferred by the LRA and the BCEA, it is submitted that a broader interpretation of 'legal rights' and 'rights disputes' should be allowed to include the rights of third parties (in this case the millions of children who are negatively affected by educator strikes) that could be subjected to infringement in cases of disagreements between employers and employees. It is also submitted that the most appropriate third party to adjudicate situations where rights are in conflict (as with regard to the child's right to education, the best interests of the child and the educator's right to strike) would be South African courts, as will be illustrated in section 4 below.

4 Applicable case law and the role of South African courts

4.1 Case law

4.1.1 *B v Minister of Correctional Services* 1997 6 BLCR 789 (C)

In *B v Minister of Correctional Services*,¹⁴⁷ the four applicants were inmates in Pollsmoor Prison outside Cape Town. All four were HIV-positive.¹⁴⁸ They sought an order declaring that they, as well as all HIV-positive prisoners, were entitled to adequate and appropriate medical care and treatment on the grounds of their HIV status. The order was sought to state that those prisoners who have reached the symptomatic phase be given, at state expense, antiretroviral medication including AZT.¹⁴⁹

The court found that, according to section 35(2)(e) of the Constitution (which guarantees prisoners the right to adequate medical treatment), the two of the

¹⁴³75 of 1997 (hereafter BCEA).

¹⁴⁴*Id* at 307.

¹⁴⁵Du Toit (n 142) 307; Grogan (n 141) 381.

¹⁴⁶Du Toit (n 142) 307.

¹⁴⁷*B v Minister of Correctional Services* 1997 6 BLCR 789 (C) (subsequently *B* case) at para 1.

¹⁴⁸*Id* para 2.

¹⁴⁹*Ibid*.

applicants to whom AZT was prescribed by medical doctors were entitled to receive it free of charge from the state.¹⁵⁰ AZT was not prescribed by medical doctors to the other two applicants and the court found that it was not at liberty to compel doctors to prescribe a certain drug by making the general order that *all* prisoners who have symptoms of HIV are entitled to be provided with antiretroviral drugs.¹⁵¹

The court did make a few statements in this case that are just as applicable to the right to basic education as a socio-economic right as they are to the right to adequate health care for prisoners. The court argued that budgetary constraints are no excuse for not providing a prisoner with a severe illness with the medication that will work for him/her.¹⁵² Authorities have no defence in saying that they cannot afford to pay for the medication, because prisoners have a constitutional right to be provided with adequate medical treatment.¹⁵³ Because the child's right to education is not limited by the fact that there have to be adequate resources to fulfil it, it can be argued that, just as a shortage of monetary resources is not an excuse to provide prisoners with sub-standard health care, a shortage of human resources (teachers) is also not an excuse to deny children their right to basic education. As Quinot and Liebenberg¹⁵⁴ state, failure to make optimal or efficient use of available resources should be a strong indicator of unreasonableness in the context of socio-economic rights adjudication.

While it is submitted that educators should not be permitted to strike, this judgment could be used in favour of educators in, for instance, alternative dispute resolution (that will be referred to later) when they are not being treated fairly by the state. Monetary shortages are no excuse for not providing educators with adequate salaries, because these human resources are essential to providing children with a basic education and have to be obtained and maintained on a continuous basis. This leads to a basic chain reaction: Educators may not strike, because they are a basic human resource in the process of education. In turn the state may not deny teachers fair salaries because educators are a necessary human resource that has to be taken care of in order to provide basic education. In this way children will not be denied their right to basic education as provided for by section 29(1)(a) of the Constitution and teachers will not be denied their right to fair labour practices.¹⁵⁵

¹⁵⁰*Id* para 61.

¹⁵¹*Id* para 62.

¹⁵²*Id* para 49.

¹⁵³*Ibid.*

¹⁵⁴Quinot and Liebenberg 'Narrowing the band: Reasonableness review in administrative justice and socio-economic rights in South Africa' (2011) *Stellenbosch LR* 639 at 651.

¹⁵⁵Constitution (n 5) s 23(1).

4.1.2 Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995 1996 3 SA 165 (CC)

The case of *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995*¹⁵⁶ revolved around the question of whether people have the right to demand education in their home language. While an in-depth discussion of the case is not necessary for purposes of this article, the court did however make an important statement with regard to the right to education in general. The court implied that the interpretation of section 32(c) of the interim Constitution¹⁵⁷ (which states that every person shall have the right to a basic education) places positive obligations on the state. This is derived from the fact that the grammatical and linguistic structure of section 32 supports its own context. This section creates a positive right that basic education should be provided for every person and not merely a negative right that such person should not be obstructed in the pursuit of his or her basic education.¹⁵⁸

It is thus clear that educators who strike not only fail to provide children with the basic education to which they are entitled to as well as so desperately need, but they go so far as to obstruct children in pursuing this right. This shows their blatant disregard for the judgment of the Constitutional Court.

4.1.3 Acting Superintendent-General of Education v Ngubo 1996 3 BCLR 369 (N)

In the case of *Acting Superintendent-General of Education v Ngubo*¹⁵⁹ various college campus students staged a sit-in to demonstrate against the quality of educator training. They did not, however, act according to section 17 of the Constitution that gives everyone permission to assemble and demonstrate *peacefully*. In a similar manner to the striking educators discussed in section 2, they intimidated other students, disrupted classes and vandalised college property.¹⁶⁰ This had led to the college authorities applying for an interdict against these students, who, in turn, protested that it would violate their right to assemble and demonstrate.¹⁶¹ In the court's judgment, however, Hurt J stated that these students acted beyond the scope of their rights in terms of section 17 and that it interfered with the normal and orderly conduct of educational activities.¹⁶² Of specific importance here is the way in which the court described the conduct of the offenders. It said that their intent was to use disruption of the

¹⁵⁶ *Gauteng Provincial Legislature* case (n 118) para 6.

¹⁵⁷ *Constitution of the Republic of South Africa*, 1993.

¹⁵⁸ *Gauteng Provincial Legislature* case (n 118) para 9.

¹⁵⁹ *Acting Superintendent-General of Education v Ngubo* 1996 3 BCLR 369 (N) 369.

¹⁶⁰ *Ibid.*

¹⁶¹ *Id* 369-370.

¹⁶² *Id* at 370.

College 'as a lever to attract the serious attention of the authorities'.¹⁶³ They ignored the important distinction between actions aimed at getting their message across with actions aimed at achieving the subject-matter of the message.¹⁶⁴ The same can be said for striking educators who use matric exams, violence and degradation as a lever to attract authority attention.

The Court was also very firm about the fact that the right to assemble and demonstrate is not without limits. Other rights fix the bounds of any individual right.¹⁶⁵ The court thus limited the respondents' right in terms of section 17 and granted the interdict against them.¹⁶⁶ It can thus be derived from this case that the parameters of the right to strike can be determined by the child's right to education, not to mention all of the other rights of children that are not discussed in this study, such as the right to be protected from maltreatment, neglect, abuse and degradation¹⁶⁷ and the right to freedom of movement;¹⁶⁸ all of which are infringed by the conduct of striking teachers described in section 2.

4.1.4 *Governing Body of the Juma Masjid Primary School v Ahmed Asruff Essay NO 2011 8 BCLR 761 (CC)*

The case of *Governing Body of the Juma Masjid Primary School v Ahmed Asruff Essay NO*¹⁶⁹ was an appeal case against a High Court decision¹⁷⁰ which authorised the eviction of a public school conducted on private property. The South African Schools Act¹⁷¹ requires that an agreement, setting out the tenancy terms and conditions, should be concluded when a public school is run on private property.¹⁷² The Member of the Executive Council for Education failed to conclude such an agreement.¹⁷³ The High Court granted the owner of the private property (the Juma Masjid Trust) an eviction order, which was followed by an unsuccessful attempt to appeal to the Supreme Court of Appeal.¹⁷⁴

The case was recently brought before the Constitutional Court where three key issues were addressed namely: whether the obligations placed on the council of education with regard to the child's right to basic education had been fulfilled in the current situation; whether the trustees who are responsible for the private

¹⁶³*Id* 377.

¹⁶⁴*Ibid*.

¹⁶⁵*Id* 375.

¹⁶⁶*Acting Superintendent-General of Education v Ngubo* (n 159) 377.

¹⁶⁷Constitution (n 5) s 28(1)(d).

¹⁶⁸*Id* s 24.

¹⁶⁹See *Juma* (n 8).

¹⁷⁰*Ahmed Asruff Essay v The MEC for Education KwaZulu-Natal* case no 10230/2008 2009, unreported (hereafter *Juma High Court*).

¹⁷¹84 of 1996 (n 131) s 14(1).

¹⁷²*Juma* (n 8) para 1.

¹⁷³*Ibid*.

¹⁷⁴*Ibid*.

property have any constitutional obligation with regard to the child's right to basic education; and lastly, if the applicable common law remedy in this case should be developed when an eviction will ultimately infringe the child's right to basic education.¹⁷⁵ What these aspects boil down to in the end is a balancing of conflicting rights, namely the right to basic education,¹⁷⁶ the fact that the child's best interests are paramount¹⁷⁷ and property rights.¹⁷⁸

Addressing the first matter, the court found that the primary positive obligation to provide the child with a basic education rests on the MEC.¹⁷⁹ For a long period of time, the owners of the private property were willing to stay in agreement with the Department of Education, but received no cooperation on a financial level or with regard to negotiation processes.¹⁸⁰ It is thus clear that the MEC did not fulfil its constitutional obligations in this regard. The Constitutional Court hence found that the owners of the private property acted reasonably in seeking an eviction order.¹⁸¹ Although the conduct of the owners of the private property was reasonable, the question as to whether they had any constitutional obligations with regard to the child's right to basic education still remained. This was the second matter with which the Constitutional Court had to deal.

The Constitutional Court commented on the error of the High Court in granting an eviction order based on outdated common law principles. The High Court did not take into account section 8 of the Constitution that deals with the application and binding nature of the Bill of Rights.¹⁸² Section 8(2) specifically states that any provision in the Bill of Rights can bind a natural or juristic person if, and to the extent that, it is applicable taking into account the nature of the right and the duty it imposes. In this particular case section 8(2) thus prescribes that the nature of the right of the child to a basic education and the duty imposed by that right be taken into account when determining whether the child's right to basic education binds the owners of the property.¹⁸³ The Constitutional Court stressed that the purpose of section 8(2) of the Constitution is to prevent private parties from interfering with or diminishing the enjoyment of a certain right.¹⁸⁴ The same court thus concluded on this second matter that, although the owners of the private property acted reasonably in seeking an eviction order, they do have a negative constitutional obligation not to impair the child's right to basic

¹⁷⁵ *Id* para 7.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Id* para 31.

¹⁷⁸ *Id* para 7.

¹⁷⁹ *Id* para 57.

¹⁸⁰ *Id* para 63.

¹⁸¹ *Id* para 65. Also see paras 61-65 of this case for a full discussion on the effective use of the reasonableness model with regard to socio-economic rights as discussed in s 4.2.

¹⁸² *Id* para 56.

¹⁸³ *Id* para 57.

¹⁸⁴ *Id* para 58.

education.¹⁸⁵ Should owners of private property be found to have such an obligation, it is only logical to make the deduction that teachers will also have one and may thus not negatively infringe the child's right through violence and intimidation as well as the mere withholding of their educational services.

From the fact that both the MEC and the owners of the private property have an obligation with regard to the child's right to basic education, the aspect of the best interests of the child arises and, related to this, the third issue namely, whether the common law had to be developed in this case.¹⁸⁶ The Constitutional Court stated that the High Court has failed to give effect to sections 29(1)(a) and 28(2) of the Constitution.¹⁸⁷ The court quoted extensively from *S v M*¹⁸⁸ to clarify the role of section 28, stating that just as law enforcement must always be gender-sensitive, so it must always be child-sensitive. According to the Court, statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children, and courts must function in a manner which at all times shows due respect for children's rights.¹⁸⁹

S v M, quoting Sloth-Nielsen¹⁹⁰ to provide an even deeper understanding of this particular section, also stated that the inclusion of the best interests of the child standard for the protection of children's rights in the Constitution can become a benchmark for review of all proceedings in which decisions regarding children are taken. Courts and administrative authorities will as such be constitutionally bound to give consideration to the effect that their decisions will have on children's lives.

The Constitutional Court in *Juma* confirmed that the applicants in this case acted in the best interests of children, something the High Court neglected to do in granting an order for eviction.¹⁹¹ The Constitutional Court did, however, grant an eviction order, following a provisional order stating that the owners of the private property and the MEC should conclude an agreement to keep the school open and running. The final eviction order was believed to be a just and equitable remedy for various reasons, *inter alia* because the MEC stated that it planned to close the school at the end of 2010 and relocate learners to other schools after it had been reported that there was indeed room for them there.¹⁹²

From the provisional order it can be concluded that the Constitutional Court would not have made a final order for eviction if the MEC had not made acceptable alternative arrangements for the children involved. This means that

¹⁸⁵*Id* para 60.

¹⁸⁶*Id* para 65.

¹⁸⁷*Id* para 66.

¹⁸⁸*S v M* 2008 3 SA 232 (CC).

¹⁸⁹*Id* para 15.

¹⁹⁰Sloth-Nielsen 'Some implications of the constitutionalisation of children's rights in South Africa' (1996) *Acta Juridica* 6 at 25, as quoted in *S v M* (n 188) para 15.

¹⁹¹*Juma* (n 8) para 68.

¹⁹²*Id* para 74-77.

the child's right to education is indeed counted by the Constitutional Court as a right that should enjoy special attention in constitutional matters. Further the court has also stressed that the child's best interests are indeed paramount when it comes to education.

If this is the Constitutional Court's stance with regards to the importance of education, it can safely be assumed that it will not lower its standards when it comes to the matter of educator strikes. The motivation for the owners of the private property to approach the court was most probably the fact that they were losing money due to the fact that the state did not compensate them for the contribution that they were making to education (in the form of property) and that the founding of a private school would be a more fruitful venture. The court does, to some extent, consider the loss of money an important factor in determining reasonableness¹⁹³ in circumstances where the child's right to education is also at risk of being infringed, but only on the condition that children can receive a good basic education elsewhere. Educator strikes in turn, are also based on the issue of money. If teachers strike, children however, have nowhere else to turn for a basic education. Few people have the needed skills to be able to teach children well. Allowing educator strikes will diminish the fact that a child's interest is paramount also in this situation. Thus, following the example set by the Constitutional Court, it is submitted that an educator's monetary issues are not a valid reason to leave children uneducated, because of the fact that a basic education cannot be provided via other sources.

4.2 *The role of South African courts*

It is suggested that courts, the state and other interested parties (which in this case will most likely be the various unions) work together to provide a remedy for the current failure to provide an adequate basic education for all children.¹⁹⁴ Section 172(1)(b) of the Constitution gives courts the freedom to make any order that is just and equitable. This type of approach that searches for appropriate constitutional remedies for constitutional violations can be described as a theory of experimental constitutionalism, which, according to Woolman and Fleisch,¹⁹⁵ consists of four parts, namely empiricism (the evaluation of social norms and institutional arrangements against practical experience), the reciprocal effect (the fact that social norms, institutional arrangements and their legal framework are interdependent), reflexivity (the examination of ourselves as well as social change) and destabilisation. The last element requires further discussion.

Destabilisation recognises that social norms create structures that are

¹⁹³For a discussion on how the reasonableness test was used in *Juma* (n 8) see section 4.2.

¹⁹⁴Woolman and Fleisch (n 36) 115.

¹⁹⁵*Id* 115-116.

supposed to promote their own continued existence.¹⁹⁶ The problem is that these structures can prevent meaningful attempts at change. Destabilisation then changes hierarchies in such a manner that members of a political community can pursue new possibilities with regard to the way things are done. When the above-mentioned parts are combined, the goals of experimental constitutionalism are to make social norms and institutional arrangements more open to revision and to make the revision thereof result in the use of the best practice (which is established through extensive study of laws and policies).¹⁹⁷

From the above exposition, it can be derived that the right to strike is a widely accepted social norm. When evaluated in light of the experiences of South African children, it is clear that this particular social norm is highly disruptive and, as seen, it infringes upon various rights that children have with regard to education. In terms of the reciprocal effect it can be seen that the right to strike is dependent on the legal framework of which it is part and can thus be limited just like all other rights. With regards to social change, it is important to keep in mind that South Africa still experiences the negative effects that years of apartheid had on the education system. As has been shown, children in schools are performing dismally and in that light it is clear that an educator's right to strike can under no circumstances be placed above the right to basic education of children (who are in dire need of strong academic guidance). It can also be seen that the right to strike in essence promotes its own continued existence. After the major strike in 2007, came an even worse one in 2010. What educators gain by striking today, will be the topic of unhappiness tomorrow and these circumstances make positive and sustainable change and growth almost impossible. Destabilisation should thus take place and room should be made for a new way of resolving disputes that involves the state, educators, unions and courts.

Our courts are in the position to create open-ended norms with the assistance of proper stakeholders.¹⁹⁸ In this instance the court plays three distinctive roles.¹⁹⁹ First and foremost they determine the contours of the general norm. This means that courts should establish what the right to a basic education means and establish the entitlements that should flow to the beneficiaries, in this case, children.²⁰⁰ Secondly, courts must determine whether the prerequisites for the realisation of the right to basic education are in place. This is done with the help of various role players such as the state, unions, teachers, parents, provincial departments, local communities, experts and *learners*.²⁰¹ This means that in a situation where a case of educators striking comes before the court, the

¹⁹⁶ *Id* 116.

¹⁹⁷ *Ibid*.

¹⁹⁸ *Id* 109.

¹⁹⁹ *Id* 113.

²⁰⁰ *Ibid*.

²⁰¹ *Ibid*.

court is obliged to take the viewpoints of all the mentioned parties into account before coming to a decision. In this regard the best interests of the child principle should be borne in mind. The third role of the courts is closely connected with the second. Our courts are in the unique position to create a space for sustained discourse with regards to those practices that work best when the topic of the realisation of an adequate education is in issue.²⁰² Courts must therefore give orders that compel all relevant stakeholders to report back on a regular basis to make sure that not only all parties are protected but that the best interests of the child with regard to his/her basic education is the conducting norm.

Though the courts, especially the Constitutional Court, are in the position to identify these norms, the question is how they will go about doing so. Quinot and Liebenberg²⁰³ indicate that there can be a unified model of reasonableness review across cases with regard to socio-economic rights. The various standards of reasonableness found in distinct provisions of the Bill of Rights can be interpreted so as to promote a coherent model of review, in terms of which reasonableness under the various provisions overlap but do not duplicate the same function.

The ideal reasonableness review-model is a contextual inquiry which means that the level of scrutiny will be determined by factors surrounding the normative and factual context of a specific case.²⁰⁴ The normative context includes all the applicable constitutional provisions, which in this case will be the child's right to basic education, the best interests of the child, and the worker's right to strike. This model allows a court to decide whether a decision is reasonable with regard to the merits of the case.²⁰⁵ The applicable constitutional provisions (or normative context) determine the court's options. In this instance it should be determined whether this is a case of a breach of a positive or negative duty imposed by the relevant socio-economic right²⁰⁶ (the child's right to basic education). There is clearly a positive duty on the state to provide the child with basic education²⁰⁷ and thus the court must 'subsume all aspects of the reasonableness analysis within [this] right'.²⁰⁸ In this case the focus will be more on the justificatory analysis than on the substantive content of the right.

It is however important to remember that the first step of the model is still to give content to the relevant right before a justification analysis is done; in this particular case, in terms of the general limitation clause analysis under section 36 of the Constitution.²⁰⁹ The Constitutional Court has expressed its preference for the

²⁰²*Id* 114.

²⁰³Quinot and Liebenberg (n 154) 661.

²⁰⁴*Ibid.*

²⁰⁵*Ibid.*

²⁰⁶*Ibid.*

²⁰⁷See generally Veriava and Coomans (n 64) 57-83.

²⁰⁸Quinot and Liebenberg (n 154) 661.

²⁰⁹*Id* 662.

use of this section when the child's right to basic education absolutely has to be limited.²¹⁰ Giving substance to the right to basic education as well as everyone's right to strike, narrows the 'band of options'. After that, the state's conduct is analysed against these options.²¹¹ It cannot be stressed enough, however, that courts should give all substantive rights provisions (in this case section 29(1)(a)) their full content before it considers the justificatory factors in section 36.²¹² This has, however, not been done in previous cases that deal with socio-economic rights. This higher standard of review (higher than the standard in terms of international limitations) obliges the state to implement the necessary measures to give effect to the child's right to basic education 'as a matter of absolute priority'.²¹³

However, all the above-mentioned steps that courts could take will not become reality if bodies like NGOs do not launch constitutional litigation to ensure children access to a basic education.²¹⁴ Our courts may have the final say, but there remains a moral burden on the society as a whole to address this very pressing problem.

5 Conclusion

It has been shown that strikes negatively influence children on both a physical and psychological level which is directly linked to their educational environment. For a long time the position has been that children have had to suffer where conflicting situations involving their rights existed.²¹⁵ This can no longer be tolerated.

What is thus, based on this study, the solution for this situation and how can the worker's right to strike be limited by the child's right to education? The suggestion is made that the educator's right to strike be eliminated by declaring education an essential service. The DA has already submitted an application to this effect to the Essential Service Committee (which falls under the CCMA at the labour department) in February 2010.²¹⁶ Although education is not an essential service at the moment, the ILO makes it clear that non-essential services can be transformed into essential services depending on the effects of a strike.²¹⁷ The crippling effects of educator strikes, as shown above, point directly to the necessity for education to be declared an essential service.

It is important to keep in mind though, that if the educator's right to strike is taken away, the educators concerned should be afforded 'compensatory

²¹⁰*Juma* (n 8) para 37.

²¹¹*Quinot and Liebenberg* (n 154) 662.

²¹²*Calderhead* (n 10) 34.

²¹³*Veriava and Coomans* (n 64) 62.

²¹⁴*De Vos* 'Time for litigation on education?' (2011) available at <http://constitutionallyspeaking.co.za> (accessed 2012-02-29).

²¹⁵As illustrated in section 2.

²¹⁶*SAPA* (n 27).

²¹⁷As illustrated in section 3.

guarantees²¹⁸ in the form of conciliation and mediation processes.²¹⁹ If these processes lead to a deadlock, arbitration (using machinery that both parties find reliable²²⁰) must follow. Both educators and the state should be able to participate in determining and implementing the procedure, 'which should provide sufficient guarantees of impartiality and rapidity'.²²¹ The awards of the arbitration should be binding²²² on the state and educators and should be rapidly and completely implemented.²²³

If education is not declared an essential service, organisations that pride themselves in fighting for children's rights, should approach the courts on this matter. The courts in turn must take the initiative, such as in the instance of *Ngubo* and *Juma*, to use the relevant test of reasonableness, as discussed under paragraph 4 above.

The state has not been complying with its duties and the use of either the civil or the criminal law – for example, by seeing to it that educators who are transgressors of the legislation (discussed above) are prosecuted – to enforce the right to education remain under-utilised.

²¹⁸ILO (n 94).

²¹⁹As illustrated in section 4.

²²⁰ILO (n 94).

²²¹*Ibid.*

²²²Du Toit (n 142) 314.

²²³ILO (n 94).