

## CHAPTER 3: LEGAL FRAMEWORK FOR THE FUNDING OF EDUCATION IN SOUTH AFRICAN PUBLIC SCHOOLS

### 3.1 Introduction

With the advent of the new democratic dispensation in South Africa following the first democratic elections in 1994, the new government was faced with the dilemma of integrating fifteen different departments of education into a single education system: There were ten from the so-called homelands, four from the four independent republics (the so-called TBVC countries: Transkei, Bophuthatswana, Venda and Ciskei) and the four departments within the Republic, namely those of the House of Assembly's Department of Education and Culture (catering for white learners), the House of Representative's (catering for Asian/Indian learners), House of Delegates' (catering for Coloured learners) and the Department of Education and Training (catering for Black learners).

The integration was complex and also affected the funding of the education system. The new system had to cater for the diverse needs of South African society: Approximately forty five-million people with eleven official languages and eight major religious groupings.

The legal framework for the funding of education in South African public schools can be traced back to the White Paper on Education and Training of 1995 published by the Department of Education (hereafter DoE) and the three principles contained therein, namely:

- Access
- Equality
- Equity and redress (DoE, 1995: Chapter 4 par 5, 6 and 7)

It is further underpinned by the preamble to the South African Constitution of 1996 in which the following founding values are entrenched in Section 1:

*The Republic of South Africa is one, sovereign, democratic state founded on the following values:*

- (a) *Human dignity, the achievement of equality and the advancement of human rights and freedoms.*
- (b) *Non-racialism and non-sexism.*
- (c) *Supremacy of the constitution and the rule of law.*
- (d) *Universal adult suffrage, a national common voter's roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness*

In addition to the adoption of the Constitution of 1996, the creation of an entirely new education system led to a comprehensive set of legislation to regulate the new education system. What follows is a list of important laws promulgated to structure the system:

- The National Education Policy Act, Act 27 of 1996
- The South African Schools Act, Act 84 of 1996
- The Further Education and Training Act, Act 98 of 1998
- The Higher Education Act, Act 101 of 1997
- The Employment of Educators Act, Act 76 of 1998
- The Adult Basic Education and Training Act, Act 52 of 2000
- The South African Qualifications Authority Act, Act 58 of 1995
- The South African Council for Educators Act, Act 31 of 2000
- Education White Paper 6 of 2001.
- The National Norms and Standards for School Funding of 1998 as amended in 2006.

Although they are all important for the effective functioning of the education system, not all of these have a direct bearing on the funding of public school education. In the sections below the legal framework for the funding of

education in public schools will be discussed with special reference to education offered in South African public schools. Before we do so it is also important to devote some time to a discussion of the structure of the education system that has evolved since 1994 and to explain why it is necessary to consider the legal framework in this dissertation.

## **3.2 Organisation of the South African education system**

### **3.2.1 Macro (education system) level**

Immediately after the 1994 elections an education system was created that provided for a structure that is depicted in Figure 3.1. After the 2009 general elections in South Africa, the structure of the education system was changed to what is contained in Figure 3.2.

#### **Legend to figures 3.1 and 3.2:**

DoE = Department of Education (Prior to 2009)

PED = a Provincial Department of Education

ECD = Early Childhood Education (Preschool /Kindergarten)

GET = General Education and Training band (Grades 1 to 12)

ABET = Adult Basic Education and Training (for adults who did not have the opportunity to complete a basic education and to acquire basic skills training)

FET = Further Education and Training (for learners who want to pursue career focussed training following the completion of Grade 9)

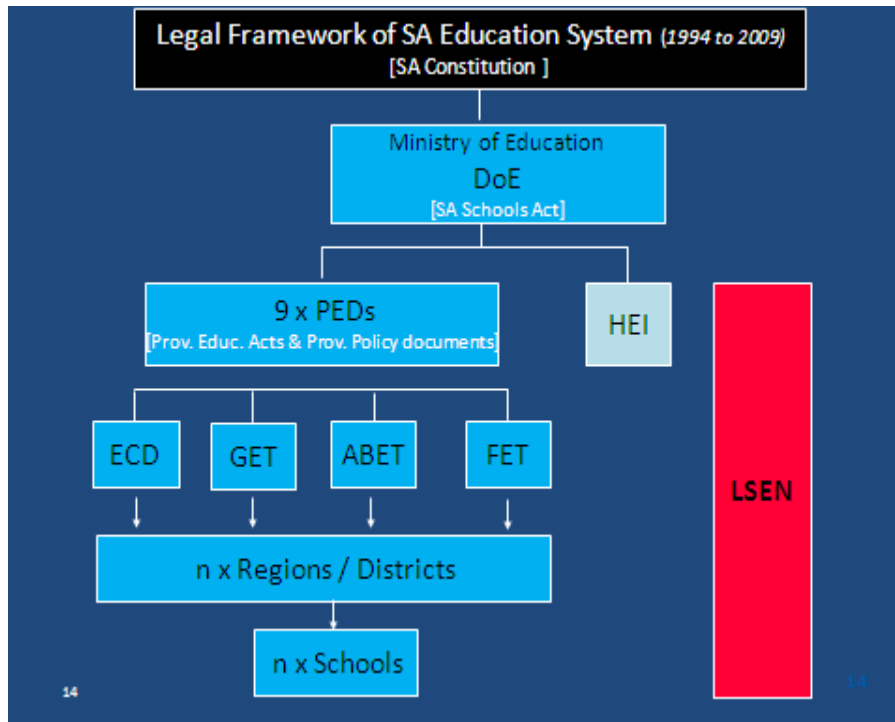
HEI = Higher Education Institutions (tertiary education offered at Universities and Universities of Technology)

LSEN = Learners with special education needs

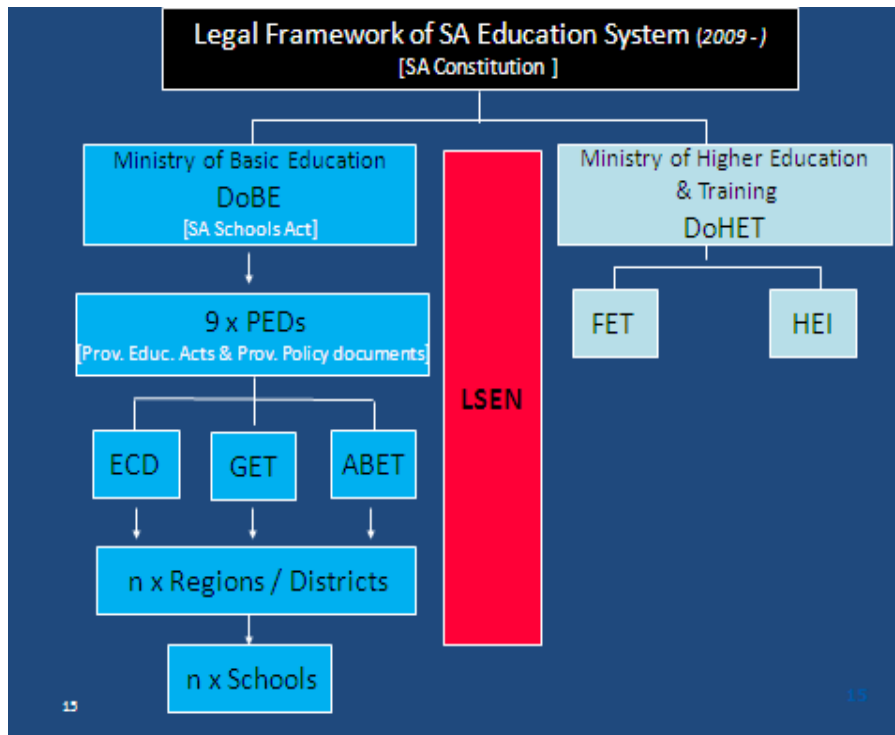
DoBE = Department of Basic Education (post 2009)

DoHE = Department of Higher Education and Training (post 2009)

**Figure 3.1:** Structure of SA Education system 1994 to 2009



**Figure 3.2:** Structure of SA Education system after 2009 elections<sup>11</sup>



<sup>11</sup> Figure 3.3 below depicts the organisation of a public school. Figures 3.2 and 3.2 depict the macro education structure established in terms of the Constitution of 1996.

### 3.2.2 Micro (institutional/school) level

For the purposes of this study I will focus on the legal framework for the funding of South African public schools. I define public education as education offered to all children at an institution, funded in whole or in part from taxes by the government (whether national, regional, or local). SASA defines a “*public school*” as a school contemplated in Chapter 3 of the Act.

Section 16 (1) and (2) of SASA provide that

*16. Governance and professional management of public schools*

*(1) Subject to this Act, the governance of every public school is vested in its governing body and may perform only such functions and obligations and exercise only such rights as prescribed by the Act.*

*(2) A governing body stands in a position of trust towards the school.*

This spells out both the responsibility of a school governing body (SGB) as well as its fiduciary role regarding the management of the finances of a public school. The SGB thus acts as the agent of the public school.

This relationship emanates from the fact that public schools in South Africa are juristic persons. Section 15 of SASA reads as follows in this regard:

*15. Status of public schools*

*Every public school is a juristic person, with legal capacity to perform its functions in terms of this Act.*

Legal capacity means that the public schools have

- capacity to be bearers of rights and duties;
- may own property;
- may enter into contracts;
- the right to sue other juristic persons;
- the right to remedial action if it can prove damage;

- the capacity to be held liable for unlawful acts (delicts) (<http://www.businessdictionary.com/definition/legal-capacity.html>-, accessed on 20 August 2011)

This has enormous implications for the financial management of public schools in terms of accountability and liability. It is appropriate here to refer to the ruling of the High Court in the case between Schoonbee and the MEC of Mpumalanga (*Schoonbee and Others v MEC for Education, Mpumalanga and Another 2002 (4) SA 877 Case No 33750/01(T)*) with regard to the collective accountability of the SGB for the financial management of public schools. This matter is discussed in more detail in paragraph 4.5 of chapter four.

The management of the finances of public schools vests in the school governing body. This is different from many other countries (e.g. England, Finland, the Netherlands, Sweden and the USA) where it is the responsibility of a local authority.

Public school governing bodies are elected for a three year term of office in terms of Section 28 of SASA and their functions are described in Sections 20 and 21 of SASA in as much as they apply to a specific school. That is, all public schools have the functions described in Section 20 of SASA, but only schools that qualify and have applied therefore are allocated one or more of the functions described in Section 21 of the SASA.<sup>12</sup> The organisation of a public school is depicted in Figure 3.3.

**Legend to Figure 3.3:**

SMT = School Management Team (normally the principal, deputy principal and heads of departments / may also include other senior staff)

P = Principal

DP = Deputy principal

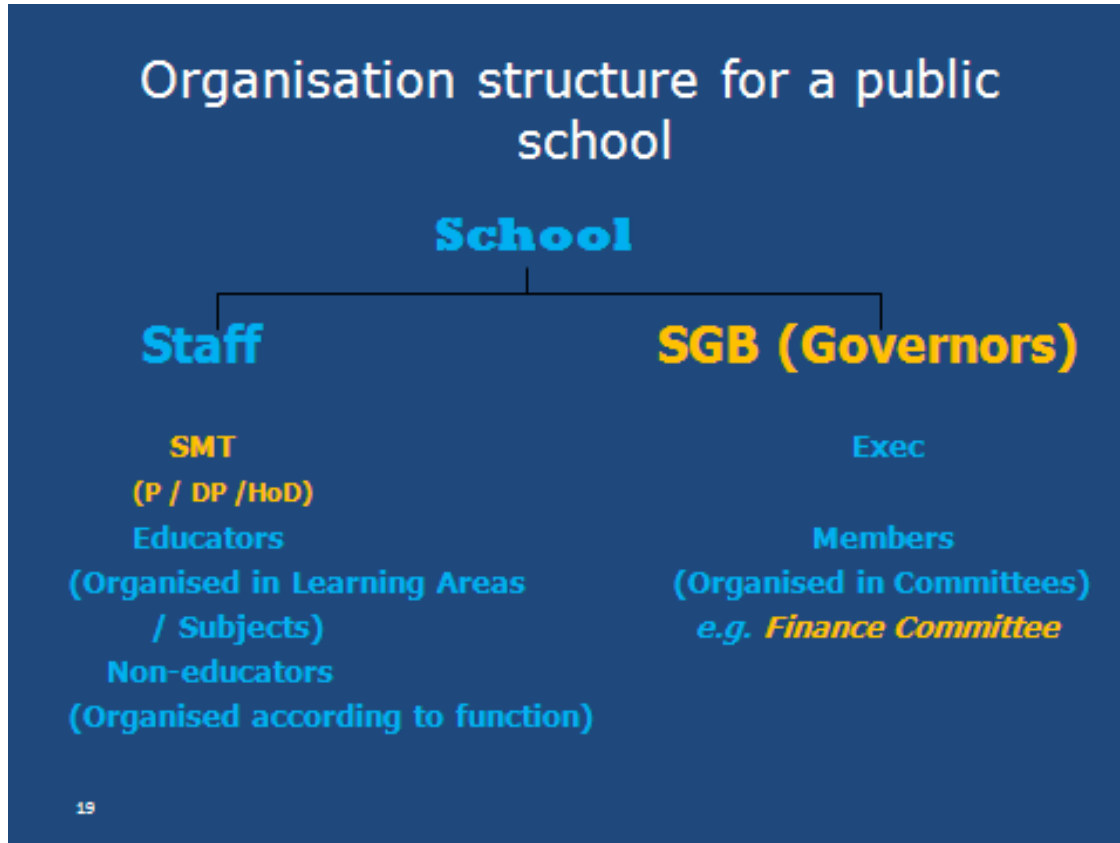
HoD = Head of Department

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<sup>12</sup> Public schools may also be allocated the functions enumerated in section 21 without having made an application in this regard - see SASA section 21(6).

SGB = School governing body

Exec = Executive committee of the SGB (normally the chairperson, deputy chair, secretary, treasurer, chairpersons of SGB committees and the school principal)



**Figure 3.3:** *The organisation of a South African public school*

It is important to note that the composition of school governing bodies is prescribed in Sections 23 and 24 of SASA and that Section 29 of SASA determines the internal structures of a SGB. It is further important to note that Section 30 of SASA provides for SGBs to form committees to address the needs of the specific school:

30. *Committees of governing body*
- (1) *A governing body may -*
- (a) *establish committees, including an executive committee; and*

(b) *appoint persons who are not members of the governing body to such committees on grounds of expertise, but a member of the governing body must chair each committee.*

(2) *A governing body of an ordinary public school which provides education to learners with special education needs must establish a committee on special education needs.*

This means that a school governing body is at liberty to form any committee to provide for effective governance according to its needs. It further means that there are no directives that prescribe the composition or the structure of any committee or sub-committee of a SGB, other than it must be chaired by a member of the governing body (*S30(1)(b) of SASA*). This is particularly important when it comes to the creation of a Finance Committee (hereafter the FC). SGBs can therefore appoint the most knowledgeable persons in a community to serve on the FC and its subcommittees for the school community they serve as long as the FC is chaired by a member of the governing body.

### **3.3 The funding of public education**

#### **3.3.1 General background**

The legal basis for the South African education system is derived from Section 29(1) of the Constitution of 1996 that articulates the right of every individual to a basic education:

29 *Education*

(1) *Everyone has the right-*

(a) *to a basic education, including adult basic education; and*

(b) *to further education, which the state, through reasonable measures, must make progressively available and accessible.*

It is important to note that the Constitution is silent on the meaning of the concept “*basic education*”. As far as can be ascertained, there has been no court pronouncement on this. The Constitution also makes no reference to the quality of such basic education. It is also silent on whether or not such education is free.



We find the second anchor for the provisioning of public education in Section 12 of SASA which reads as follows:

*12. Provision of public schools*

*(1) The Member of the Executive Council must provide public schools for the education of learners out of funds appropriated for this purpose by the provincial legislature.*

Two important aspects are addressed in this quote namely (i) that the state must provide public schools and (ii) that these schools must be funded from funds made available to provincial departments of education by the provincial legislature. It is therefore wrong to assume that funds for schools are provided to the provincial education departments by the national Department of Basic Education.

Sections 13 and 14 of SASA deal with the property on which public schools are erected - whether it is on state or private land. It also needs to be noted that, where public schools are erected on private land, an agreement needs to be drawn up between the state represented by the Member of the Executive Council for education in a specific province and the owner of the land. This constitutes a contractual arrangement and may have financial implications.

Public education is funded from two sources, namely public money provided by the state and private money provided by individuals and or organisations - often parents from the community.

### **3.3.2 Public funds**

It is interesting to note that SASA does not define the concepts “public funds” or “public revenue”. The common understanding of these two concepts and the interpretation, which is used for this research project, is that it refers to monies paid to the state by individual citizens and or organisations in the form of taxes.

Section 34 of SASA clearly outlines the state's obligation to fund public schools:

*34. Responsibility of State*

*(1) The State must fund public schools from public revenue on an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of past inequalities in education provision.*

*(2) The State must, on an annual basis, provide sufficient information to public schools regarding the funding referred to in subsection (1) to enable public schools to prepare their budgets for the next financial year.*

Section 34 also refers to three other important dimensions to this responsibility to fund public schools, namely

1. that this obligation is of such a nature that it must enable learners to exercise their individual rights to education as described in Section 29(1) of the Constitution of 1996;
2. that it must enable the education system to effect redress of past inequities; and
3. that the state must provide management information for three consecutive years that will enable SGBs to budget for the next financial year.

Section 35 of SASA provides the mechanism or method through which the state must address this obligation to give effect to the obligation contained in Section 34 of SASA.

*35. Norms and standards for school funding*

*(1) Subject to the Constitution and this Act, the Minister must determine national quintiles for public schools and national norms and standards for school funding after consultation with the Council of Education Ministers and the Minister of Finance.*

*(2) The norms and standards for school funding contemplated in subsection (1) must -*

- (a) *set out criteria for the distribution of state funding to all public schools in a fair and equitable manner;*
- (b) *provide for a system in terms of which learners at all public schools can be placed into quintiles, referred to as national quintiles for learners, according to financial means;*
- (c) *provide for a system in terms of which all public schools in the Republic can be placed into quintiles referred to as national quintiles for public schools, according to the distribution of learners in the national quintiles for learners: and*
- (d) *determine the procedure in terms of which the Member of the Executive Council must apply the criteria contemplated in paragraph (a).*

This section of SASA contains a number of important aspects that need to be kept in mind with regard to the funding of education. Before discussing these, it is important to note that public funds regulated by Section 35 of SASA are for the operational budget of the school and exclude the salaries of state employed educators.

In the first instance Section 35(2)(b) provides for the creation of quintiles for individual learners. This has not been done yet. The reason is that the National Norms and Standards for School Funding (NNSF) provides in paragraph 87 (RSA, 2006: 27) that “...*The national quintile for learners is always the same as the national quintile for the public school in which the learner is enrolled*”. This is clearly not in line with the original intention.

Second, the criteria used as basis for the decision to allocate any given school to a given quintile are explained in paragraph 101 on pages 31/32 of the NNSF. It reads that

*“ The PED [Provincial Education Department] must assign to each school a school poverty score that will allow the PED to sort all schools from poorest to least poor. ... The principles governing the determination of the school poverty score are the following:*

- (a) *The score should be based on the relative poverty of the community around the school, which in turn should depend on individual*

*household advantage or disadvantage with regard to income, wealth and/or level education.*

*(b) The score should be based on data from the national Census conducted by Stats SA, or any equivalent data set could be used as a source.”*

These criteria are vague and problematic in the sense that income, wealth and level of education are privileged information and in many schools the learners do not attend school in the vicinity where they live but commute to school by bus. Despite the good intentions of the NNSSF, there are many instances where schools have been allocated to an inappropriate quintile and learners are consequently disadvantaged because the incorrect funding formula is used to calculate the state subsidy to a given school.

Schools do, however, have a right of appeal when paragraph 107 on page 33 is read in conjunction with the preceding paragraph 101. A dispute may be lodged with the PED concerned and the procedures in resolving the matter “... *should not exceed six months in duration*”.

The amount of subsidy that a public school receives is based on the national table of targets for school allocation. This table of targets is published annually by 1 August (par. 119 on page 38 of the NNSSF) by the Minister of Basic Education and by 30 September by the provincial Members of the Executive Councils (MECs). This is in line with the medium term expenditure framework budgeting process of the National Treasury (MTEF) and provides for a three year window period.

The latest information in this regard is depicted in Tables 3.1 and 3.2. Based on the budget needs of a province, provincial governments have discretionary powers with regard to the amounts paid over to public schools. This amount is calculated by multiplying the tenth school day enrolment with the amount allocated to a given quintile for the financial year concerned.

**Table 3.1:** *The national table of targets for school allocation (2007 to 2009)*

A		2007		2008		2009	
		B	C	B	C	B	C
NQ1	30.0	R738	100%	R775	100%	R807	100%
NQ2	27.5	R677	100%	R711	100%	R740	100%
NQ3	22.5	R554	100%	R581	100%	R605	100%
NQ4	15.0	R369	67%	R388	67%	R404	67%
NQ5	5.0	R123	22%	R129	22%	R234	22%
Overall	100%	R492	89%	R517	89%	R538	89%
No fee threshold		R554		R581		R605	

**Table 3.2:** *The national table of targets for school allocation (2010 to 2012)*

A		2010		2011		2012	
		B	C	B	C	B	C
NQ1	30.0	R855	100%	R905	100%	R960	100%
NQ2	27.5	R784	100%	R829	100%	R880	100%
NQ3	22.5	R641	100%	R678	100%	R720	100%
NQ4	15.0	R438	67%	R453	67%	R480	67%
NQ5	5.0	R147	22%	R156	22%	R165	22%
Overall	100%	R571	89%	R604	89%	R633	89%
No fee threshold		R784		R829		R880	

It has been reported in the media on several occasions that district office officials responsible for the payment of these allocations to public schools, have not paid over these amounts timeously leading to financial problems at public schools. This has led to litigation in at least one instance where such officials had to be coerced into making such payments. Urgent application

was made to the High Court of the Free State to hear the matter between *Ebenhaeser Intermediêre Skool* and *Taaibos Gekombineerde Skool* versus the Premier of the Free State (as first defendant), the MEC for Education in the Free State (as second defendant), and the Head of Department for Education in the Free State (as third defendant) on 4 June 2009. The application was that the High Court of the Free State force payment of monies of this nature to the respective schools. The matter did not go to Court as the responsible parties agreed to make urgent payment of the amounts owed to the two schools.

It is important to note that in terms of Section 37 (1), (2) and (3) of SASA, an SGB (as agent) for the school is required to establish a school fund, to open a bank account in the name of the public school as juristic person and to pay all monies received (irrespective of its source – own phrasing) into the school fund. Once money has been allocated to a public school and or paid into the school's bank account, such money legally becomes school funds to be managed at the discretion of the SGB as agent and accounting authority of the public school. It is further important to note the significance of Section 37 (4) of SASA in this regard where it reads:

*37(4) Money or other goods donated or bequeathed to or received in trust by a public school must be applied in accordance with the conditions of such donation, bequest or trust.*

The legal requirements of this section can be applied to all monies and or assets received by a public school. That is, the government has certain requirements that have to be met regarding the allocation made in terms of Section 36 of SASA. School fees, money raised through special projects as well as donations paid by parents or other benefactors are all subject to the provisions contained in the school budget, the objectives communicated regarding the fundraising project or conditions agreed to regarding donations and sponsorships. These conditions create an imperative to account to the parties concerned regarding financial management and expenditure. This is dealt with in more detail in chapter four.

### 3.3.3 Private funds

SASA is also silent on the definition of private funds. For the purpose of this dissertation private funds are considered to be funds that emanate from natural or juristic persons other than the state. However, before I discuss the funding of education from private funds, it is important to take note of the content of Section 20 (1) (a) of SASA regarding the responsibilities of the SGB of all public schools in South Africa:

20. *Functions of all governing bodies*

(1) *Subject to this Act, the governing body of a public school must -*

(a) *promote the best interests of the school and strive to ensure its development through the provision of quality education for all learners at the school;...*

Reference is made to two very important aspects. The concept of “best interests” as it relates to the school (and therefore to the best interests of the child) is mentioned and should play a major if not decisive role in all matters related to the funding and management of the finances of public schools. The best interests of the child are dealt with in paragraph 2.2 of chapter two on quality education. The second very important aspect relates to the matter of the quality of education. This concept is also not defined or explained anywhere in SASA. However, it is again contained in Section 36 that deals with the responsibility of the governing body regarding fundraising. It reads:

36. *Responsibility of governing body*

(1) *A governing body of a public school must take all reasonable measures within its means to supplement the resources supplied by the State in order to improve the quality of education provided by the school to all learners at the school.*

The above provisions provide for the individual learner’s right not only to a basic education as contained in Section 29(1) of the Constitution but also to quality education. This matter is also discussed in more detail in paragraph 2.1 of chapter two.

Section 36 of SASA places an obligation on the SGB of every public school to find additional sources of funding to supplement those of the government. There are a number of possible sources of funding from private funds. The first and most convenient is to charge parents school fees for the education of their children when attending a specific public school. School fees are defined in Section 1 of SASA as meaning:

*“school fees” means school fees contemplated in section 39 and includes any form of contribution of a monetary nature made or paid by a person or body in relation to the attendance or participation by a learner in any programme of a public school;*

As indicated in the definition of school fees, SASA has provided for this possibility in Section 39.

39. *School fees at public schools*

- (1) *Subject to this Act, school fees may be determined and charged at a public school only if a resolution to do so has been adopted by a majority of parents attending the meeting referred to in section 38 (2).*
- (2) *A resolution contemplated in subsection (1) must provide for -*
  - (a) *the amount of school fees to be charged;*
  - (b) *equitable criteria and procedures for the total, partial or conditional exemption of parents who are unable to pay school fees;*

This implies that the SGB has to draw up a draft budget in terms of Section 38, give thirty days written notice of an annual general meeting (AGM) convened to consider the budget and make a copy of the budget available for public scrutiny fourteen days before such a meeting. At the AGM the parents have to decide by a majority vote whether school fees will be charged and to what amount if such a decision was taken. The requirement of Section 39(1)(b) also needs to be addressed and communicated to the entire parent community. The levying and collection of school fees are regulated by SASA in Sections 39, 40 and 41. Parents are liable for the payment of school fees if a decision to that effect was taken as discussed above. Such a decision must also provide for possible exemption from the payment of school fees and for procedures and criteria regarding exemption. Parents may be forced to pay



school fees by process of law taking into account the extent that they qualify for exemption and may only be sued if the requirements of Section 41 as set out in subsections 41(2) to 41(6) have been met. These include:

- the fact that the exemption from payment of school fees must be calculated according to the regulations contemplated in Section 39(4) as per s41 (2);
- the exemption from payment of school fees in terms of this Act is calculated retrospectively from the date on which the parent qualifies for the exemption as per s41(3);
- a public school may act in terms of subsection (1) only after it has ascertained that –
  - the parent does not qualify for exemption from payment of school fees in terms of this Act – s 41(4)(a);
  - deductions have been made in terms of regulations contemplated in Section 39(4), for a parent who qualifies for partial exemption – s41(4)(b); and
  - the parent has completed and signed the form prescribed in the regulations contemplated in Section 39(4) – s41(4)(c):
- Despite subsection (4), a public school may act in terms of subsection (1) if –
  - that school can provide proof of a written notification to the parent delivered by hand or registered post that the parent has failed to apply for exemption contemplated in Section 39 – s41(5)(a); and
  - despite the notice contemplated in paragraph (a), the parent fails to pay the school fees after a period of three months from the date of notification – s41(5)(b);
- the dwelling in which a parent resides may not be attached by a public school – s41(6).

However, if the school is listed as a no-fee school in terms of Sections 39 (7), (8), (9) and (10) of SASA no school fees may be charged. At the moment all

public schools in quintiles 1 to 3 (or about 60% of public schools) are no-fee schools.

Irrespective of whether they or not they levy school fees all public schools have a number of other possibilities to explore to raise addition funds as required by Section 36(1) of SASA. They include creative entrepreneurial fundraising projects, sponsorships and donations as well as endowments. The only avenue that is not open to the so-called ‘*no fee schools*, is to charge school fees.

### **3.4 Responsibilities regarding the financial management of public schools**

Whenever the financial management of public is mentioned, the general perception is that it relates to the raising of funds (primarily through school fees), drawing up a budget and managing expenditure based on the school budget.

This viewpoint, however, constitutes an error in thinking as the responsibilities entail much more. When referring to the responsibility of a SGB regarding the management of the finances of a public school as contained in legislation, all the provisions should be considered. This includes responsibility for the immovable property (land and buildings), movable property as well as the school fund. What follows is an exposition of these responsibilities.

#### **3.4.1 The management of funds in public schools**

The process of funding public schools was discussed in detail in paragraph 3.3 above. At this point it is important to emphasise that:

- The school is a juristic person (S15 of SASA)
- The SGB acts as agent of the school as juristic person from a fiduciary position (S16(2) and S21(1)(a) of SASA)

- The school should have an established school fund
- All monies received should be paid into the school's bank account except in the case of public schools without Section 21 functions, where the allocation from public funds is managed on behalf of the school, by the provincial department of education through its local district offices.

The responsibility of managing the funds of a public school should be an integral part of the strategic plan of the school. This includes establishing a vision and mission for the school. Translating the mission statement into achievable goals and objectives is only possible if financial planning is an integral part of such plans.

Financial planning can be equated to the budgeting process. A budget has been defined as:

- an expression of the school's mission statement in monetary terms;
- an estimate or plan for spending income;
- a plan for the allocation and expenditure of resources to achieve the objectives of a school (Bisschoff & Mestry, 2003: 122); and
- is a document that, on one hand, serves as a financial overview of the organisation and, on the other hand, serves as an instrument that reflects the income and expenditure of every project or division / department (Berkhout & Berkhout, 1992: 47)

The SGB's obligation to draw up a budget is contained in Section 38 of SASA. Specific legal requirements in this regard are:

- The budget has to be drawn up annually for the next financial year.
- The financial year of all public schools commences on the first day of January and ends on the last day of December of each year (S.44 of SASA).
- It must meet the prescriptions of the Member of the Executive Council as published in a *Provincial Gazette*

- A draft budget must be submitted to an annual general meeting (AGM) of parents convened on 30 days *written* (my emphasis) notice
- The draft budget must be available for scrutiny by parents at least 14 days prior to the meeting
- The draft budget is approved by the SGB after it has been accepted by the majority of parents present and voting at the said AGM
- Although not a legal requirement, it is customary to provide the district office with a copy of the approved budget for the next financial year.

Once the budget has been approved, the SGB is in a position to start managing the finances of the public school at the onset of a new financial year. The utilisation of school funds are regulated by Sections 37(4), (6) and (7) of SASA that read as follows:

**37. School funds and assets of public schools**

*(4) Money or other goods donated or bequeathed to or received in trust by a public school must be applied in accordance with the conditions of such donation, bequest or trust.*

*(6) The school fund, all proceeds thereof and any other assets of the public school must be used only for -*

*(a) educational purposes, at or in connection with such school;*

*(b) educational purposes, at or in connection with another public school, by agreement with such other public school and with the consent of the Head of Department;*

*(c) the performance of the functions of the governing body; or*

*(d) another educational purpose agreed between the governing body and the Head of Department.*

*(7) (a) Money from the school fund of a public school may not be paid into a trust or be used to establish a trust.*

*(b) If a trust was established from a school fund of a public school or if such money was paid into a trust prior to 1 January 2002, such trust or payment is invalid and the money must be paid back into the school fund.*

*(c) A governing body of a public school may not collect any money or contributions from parents to circumvent or manipulate the payment*

*of compulsory school fees and to use such money or contributions to establish or fund a trust, and if such money or contributions of parents were paid into a trust prior to 1 January 2002, the trust must pay such money or contributions into the school fund.*

Over and above expenditure related to the provision of education in public schools regulated in Section 37 of SASA, the SGB of a public school may employ both educators and non-educators in addition to the staffing establishments paid for by the state from public funds subject to the conditions set out in sub-sections 20(4) to 20(11) of SASA. This means that a public school can through its SGB assume the role of an employer and thus become subject to the provisions of the Labour Relations Act, No 66 of 1995, the Employment of Educators Act, No. 76 of 1998, the Basic Conditions of Employment Act, Act 75 of 1997 and the Public Service Act (Proclamation No. 103 of 1994).

In addition to expenditure referred to in the previous two paragraphs, the SGB of a public school may apply to the employer of members of staff, employed in terms of the Employment of Educators Act, (Act No. 76 of 1998), or the Public Service Act, (Proclamation No. 103 of 1994), for permission to pay additional remuneration to members of staff. Such payments must, however, comply with the requirements of Section 38A of SASA.

### **3.4.2 The management of facilities in public schools**

#### **3.4.2.1 Property rights**

Before discussing the legal framework pertaining to the management of facilities at a public school, let me explain what I mean when I refer to *facilities*. For the purposes of this dissertation, the management of facilities at a public school is deemed to refer to and include the land on which the school buildings are situated, the school buildings themselves, sporting facilities and all assets (movable and immovable) of the school.

In this context assets are deemed to be anything of monetary value, owned and or used by the school in the provisioning of education at that public school. The concepts movable and immovable assets are used in the generally accepted sense of these two words that is used to distinguish between assets that can be moved from one place to another or not.

In this sense immovable assets would normally refer to fixed property such as land and buildings. This provides for the possibility that a public school may from school funds (i) erect buildings in addition to the existing school buildings on land owned by the state or private owner and (ii) buy additional land and erect buildings on such land for educational and or entrepreneurial purposes.

Movable assets would include furniture and equipment owned and used by the school for educational and related purposes.

Any discussion in this regard is premised on the fact that a public school as juristic person has property rights and the legal capacity to deal with such property. The discussion of Sections 37(5), 52 and 55 of SASA that follow, will show their relevance in this regard.

Section 37(5) refers to the fact that all assets, acquired on or after the commencement of the Act<sup>13</sup>, ‘... *are the **property** of the school*’ of the school as juristic person (my emphasis).

Section 52(1) deals with the *status of public schools* and provides that any school (excluding private / independent schools) that was deemed to be, and functioned as a public school prior to the promulgation of the SASA, will be a public school (with legal capacity in terms of S.15 of SASA) after the promulgation of the Act. Sections 52(2) and (3) of SASA are important as far as *assets and liabilities as well as funds and other movable assets* are concerned. Section 52(2) determines that the assets and liabilities which

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<sup>13</sup> 1 January 1997.

vested in a public school immediately prior to the commencement of SASA, vest in the public school in question and section 52(3) determines that funds and other moveable assets used by, or held for or on behalf of, a public school which in law were the property of the State, remain at the disposal of the school, and devolve on the school on a date and subject to conditions determined by the Minister.

As far as *immovable property (land and buildings)* is concerned, Section 55 of SASA deals with this in detail. Crucial elements thereof are mentioned briefly. Section 55(1) relates to the fact that immovable property of schools which were previously declared to be state-aided schools under Section 29(2A) of the Education Affairs Act, 1988 (House of Assembly) (Act No. 70 of 1988), devolved back upon the State on a date determined by the Minister after the promulgation of SASA. Section 55(5) determines that all costs payable as a result of the transfer of the immovable property back to the state, had to be paid in full or in part from funds appropriated by Parliament for that purpose and Section 55(6) that these transfers were to be free from transfer duty, stamp duty, other fees or costs contemplated to be paid in respect of the transfer of said property. It is, however, important to note that the rights of third parties with claims against the school in respect of the immovable property affected by the transfer contemplated in this section are not extinguished by the transfer and that rights of the state are also protected in this regard in terms of Section 55(7).

Schools affected by the above section were, in terms of Section 55(9), not allowed to let, sell or otherwise alienate the immovable property, or grant to any person any real right thereon or servitude thereon without the written consent of the Member of the Executive Council. Any immovable property belonging to the State which was used by such a school and not transferred or endorsed into the name of the school remained the property of the State in terms of Section 55(12) of SASA and immovable property which was transferred into the name of these schools devolved upon the state, if such a school was subsequently closed in terms of SASA or any other applicable law.

### 3.4.2.2 Responsibilities of the SGB with regard to the management of facilities at a public school

These responsibilities emanate from and are governed by Section 20 of SASA that addresses the functions of the governing bodies of all public schools. Sub-sections 20(1)(a), (1)(g), (1)(k) and 20(2) are deemed to be of particular importance regarding the management of facilities of public schools as will be shown in the paragraphs that follow.

Section 20(1)(a) emphasises the relationship between the public school, as a juristic person, and the SGB as being a fiduciary one in that the SGB stands in a position of trust to the school. The fact that it has an obligation to promote *the best interests of the school* includes a responsibility with regard to the assets of the school.

Section 20(1)(g) determines that the SGB must ...

(g) **administer and control the school's property, and buildings and grounds occupied by the school, including school hostels,** *(my emphasis) but the exercise of this power must not in any manner interfere with or otherwise hamper the implementation of a decision made by the Member of the Executive Council or Head of Department in terms of any law or policy;*

To administer and control the school's property, buildings and grounds means that the SGB has to manage (administer and control) all property; that is all assets as discussed above as well as the buildings and land associated with the school, in such a manner that quality education can be offered at that public school (see S.20(1)(a)).

Section 20(1)(k) of SASA determines that the facilities of a public school must be made available, under fair conditions (determined by the Head of Department) for educational programmes not conducted by the school, at the request of the Head of Department.



In terms of the obligation of SGBs to raise additional funds as provided in Section 36 of SASA it is important to take note of Section 20(2) of the same act. School governing bodies may in terms of Section 20(2) of SASA, ... *“allow the reasonable use of the facilities of the school for community, social and school fund-raising purposes, subject to such reasonable and equitable conditions as the governing body may determine, which may include the charging of a fee or tariff which accrues to the school”*.

### **3.5 Conclusion**

This chapter has explained the legal framework regulating the funding of education and the management of funds and facilities of public school in the South African education system. It started by providing background information to the period immediately prior to the 1994 democratic elections, explaining the principles and values that guide the funding of education and then proceeded to explain what is meant by public education. The legislation relevant to education is listed and those that have specific relevance to the management of finances in education were pointed out and discussed. This chapter also contains an exposition of the organisational structures related to the management of finances in education at macro (system) and micro (school/institutional) levels. The majority of the chapter is dedicated to a discussion of the legal frameworks regulating the funding and the management of school funds as well as property rights and the management of facilities as complimentary aspect of the provisioning of education at a public school.

Schools have to (i) function within the parameters of the law and (ii) manage the funds of the school, as a legal person, in an accountable manner. Providing quality education requires that a school establish a functional organisation structure, manage the professional matters in such a manner that effective teaching and learning can take place and use the available funds to obtain optimal return on investment for all stakeholders concerned.

Chapter four will address the issue of accountability in the management of the finances of public schools.

## CHAPTER 4: ACCOUNTABILITY REGARDING THE FINANCIALMANAGEMENT OF EDUCATION

### 4.1 Introduction

In chapters two and three the provision of quality education and the legal framework that regulates the funding of such education were discussed. In this chapter the accountable management of finances associated with public schools will be addressed.

The democratisation of South Africa, the drafting of the South African Constitution and the ensuing changes taking place in the South African education system have been matters of interest and discourse in all spheres of life. Constitutional lawyers and academics working in this field have studied our Constitution with keen interest. Educationists have likewise studied the evolving of our education system from fifteen separate, disparate systems into a single system based on the blueprint of the TIRISANO document released by the former minister of Education, Prof Kader Asmal, in 1999. Our Constitution is unique in the sense that the Bill of Rights is contained in chapter two as an integral part of the Constitution. The creation of a Constitutional Court in the South African judicial system marks further significant progress towards guarding against the violation of the rights of all it citizens.

The Bill of Rights emphasises and guarantees the claiming and safeguarding of individual rights in the South African society at large and in our education system. However, there needs to be a corresponding emphasis on the accompanying duties / obligations when claiming a right with an ensuing responsibility to account for individual actions or lack thereof.

The South African Education system has undergone major changes since 1994. Some of its successes include:

Creating a single department of education out of the fifteen it inherited from the apartheid era and improving access to primary and secondary schooling, with near universal enrolment in primary schooling and 91% enrolment in secondary schooling. This translates to an average enrolment figure of 98% achieved by 2006. The participation rate among girls is also among the highest in the world (<http://www.education.gov.za/EMIS/emisweb/03stats/2003%20Stat%20at%20a%20Glance.pdf> - accessed May 2006).

Access to school education was further improved by exempting poor learners from paying school fees, and outlawing discrimination against, and exclusion of, learners who cannot afford school fees. Increasing access to free education for was taken forward with the introduction of no-fee schools in January 2007. Improving the performance of learners throughout the schooling system and especially in the Grade 12 Senior Certificate examination has apparently happened as the improvement of the pass rate from 54% in 1996 to 67% in 2006 suggests. Improving the qualifications of educators, with the proportion of under-qualified educators being reduced from 36% in 1994 to 18% in 2006 was an important step forward as was establishing more equitable learner:educator ratios, from an average of 43:1 in 1996 to 35:1 in secondary schools and 40:1 in primary schools. Spending an average of 22% of the national budget on education since 1994 was commendable. This represents 5.8% of GDP on average (<http://www.education.gov.za/EMIS/emisweb/03stats/2003%20Stat%20at%20a%20Glance.pdf> - accessed May 2006).

Despite the successes of since 1994 there are a number of serious challenges that still need to be addressed. These include:

- Creating physical infrastructure (provision of classrooms, water, sanitation and electricity) in the remote rural areas
- The quality of education

- Accountability in education

This dissertation focused on some of the dimensions related to the matters mentioned in the last two bullets. Before doing so, it is necessary to provide background information to these matters and to define a number of concepts relevant to this discussion

## 4.2 Conceptualisation

### 4.2.1 Rights

We, in South Africa, are privileged to have a negotiated constitution. As part of the process we had the privilege of drafting our Constitution in modern terms, including a bill of rights. The *Bill of Rights* is enshrined in Chapter 2 of the South African Constitution (henceforth referred to as *the Constitution*). According to Burns (1999: 15) Section 8(1) of the Constitution provides that the bill of rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. One such right is the Right to Education (Section 29 of the Constitution).

When referring to a *right* in the context of this dissertation, it is viewed as a *claim derived from and justified by the law* (Hiemstra & Gonin, 1992: 454/455). Joubert and Prinsloo (2001: 30) define rights as *something one is entitled to, the ability to claim something*. It is further interesting to note that the bill of rights in the South African Constitution is not limited to the interpretation that it only has *vertical application* that is it that the rights conferred on persons are intended to protect the individual against the power of the state. It also has *horizontal application* and the rights also govern relationships between individuals and may be invoked by them in private law disputes (Burns, 1999: 17,18). This is articulated in Section 8(2) of the Constitution that reads: *A provision of the bill of rights binds a natural juristic person, if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.*

It is further important to note that no right is absolute and that according to Burns (1999: 7,8) rights are by their very nature subject to constraints such as:

*Inherent limitations*: an individual's rights are limited by the rights of others, that is, when balancing conflicting rights, the courts must weigh them against each other.

A *general limitation clause*: even in modern democratic societies, the exercise of fundamental rights must be limited at certain times and a general limitation clause, which applies to all rights, has been included in the constitution (Section 36 of the South African Constitution).

*Specific limitations*: over and above the limitations of the general limitation clause, there are a number of rights which are subject to specific additional limitations. For example the right to freedom of expression is subject to specific limitations, namely the prohibition of propaganda for war, incitement of imminent violence or advocacy of hatred.

*Internal modifiers*: such as the qualifiers *peaceful* and *unarmed* which apply to the right to assembly and demonstration.

#### 4.2.2 Responsibility / duty / obligation

The concepts *responsibility / duty / obligation* are used interchangeably in this dissertation. These concepts are related and refer to the legal principle '*obligationum substantia ... in eo consistit .. ut alium nobis obstringat ad dandum aliquid, vel faciendum vel praestandum*' meaning that the nature of obligations ... consists in that they impose a duty upon another to give, to do or be responsible for something (Hiemstra & Gonin, 1992: 247). Joubert and Prinsloo (2001:30) define duties as '*what one is bound to or ought to do, an obligation to perform*'. Kerzner (1998:236) defines responsibility as the assignment for the completion of a specific event or activity. Bisschoff & Mestry (2003:50) view responsibility as *the duty that rests on a person to carry out his or her task to the best of his or her ability*.

Again referring to Section 8(2) of the Constitution, it is evident that every right listed in the bill of rights has (a) corresponding duty(ies) in order to claim that right.

In the context of my dissertation, I will primarily be using the word responsibility. But in doing so, I will be including the concepts duty and obligation into the meaning. For the purposes of my dissertation I attach the following meaning to these related concepts. I view duty and responsibility as the task/action(s) that need to be performed to achieve a specific objective, whereas obligation refers to the imperative to perform, that rests on the individual/structure from the moment that responsibility is either accepted / placed upon the individual/structure.

### 4.2.3 Accountability

For the purposes of this dissertation I refer to *accountability* as the obligation on an individual to account for actions taken and being held to account for these actions by a party / person legally entitled to require such account. Hiemstra & Gonin (1992: 479) refer to this as *having to account for, justify, being answerable, the duty to account*'. Sinclair & Hanks (1989: 6) define being accountable in terms of being *accountable to someone for something that you do, you are responsible for it and you must be prepared to justify your actions to that person*. Stoner & Wankel (1986: 307) define it as *the requirement that organization members to whom responsibility and authority are delegated be held answerable for results*. Maile (2003:210) postulates that to be *accountable is to be responsible, explicit about obligations and answerable for one's actions*. Bisschoff & Mestry (2003: 50) define *accountability as reporting on the control and use of resources, by those accountable for their control and use to those to whom they are accountable*.

It is important to note that, both from a legal and managerial perspective accountability has **no direct bearing** on the quality of the action whether it is excellent, good, bad, improper or illegal. It simply refers to the inalienable right of persons (both natural and juristic) with the delegated or original authority, to require information on the actions or performance of another person.

For the purposes of this dissertation I will distinguish between professional accountability and executive accountability. When I refer to **professional accountability** I am referring to accountability that emanates from the professional responsibilities delegated to principals and educators working in public schools in South Africa in terms of the Employment of Educators Act, No 76 of 1998, the SACE Act, No 31 of 2000, the South African Schools Act, No 84 of 1996 and the Personnel Administrative Measures, Government Notice 222 of 1999, that regulate the professional aspects of an educator's task. **Executive accountability** on the other hand refers to accountability resting with the state pertaining to obligations regarding the provision of education in public schools in the South African Constitution and the South African Schools Act. In this regard, Beckmann and Prinsloo (2004:134) argue that the wording of Section 1(d) of the South African Constitution (... , *to ensure accountability, responsiveness and openness*) elevates accountability beyond a management task to a national goal, ideal and value. They further argue that there is an intimate link between accountability and that the socio-economic embeddedness of education needs to be borne in mind (*Op cit.*, 2004: 144). Although my research primarily focuses on the professional accountability of role players in providing quality education in schools, the executive accountability of the State in providing the overarching structure and infrastructure should be kept in mind.

#### 4.2.4 Liability

For the purposes of this dissertation, I refer to **liability** as the obligation on a person to accept responsibility for, and to act on his / her actions or lack thereof. A very important argument in this regard is made by Oosthuizen (1998: 73):

*The question of the liability or non-liability of an educator (or a school) in a specific case is largely dependent on these two principles.*

*The basic point of departure of South African law is that **damage lies where it falls** (my emphasis). This means that when someone sustains damage he must in fact bear his own damages. This principle, however, is subject to one notable exception and that he is when*



*damages are caused by the **unlawful** and **negligent** or **intentional act** of another (my emphasis), the legal duty to bear the damage is transferred to the latter, who unlawfully and negligently (or intentionally) caused the damage. This transfer of the duty to bear the damage is referred to as liability.*

Neethling *et al.* (2006: 338) define **vicarious liability** as *the strict liability of one person for the delict of another. The former is thus indirectly or vicariously liable for the damage cause by the latter. This liability applies where there is a particular relationship between the two persons. Three such relationships are important, namely that of employer-employee, principal-agent and motor car owner - motor car driver.*

In the case of education in a public school, it will be mainly the employer-employee relationship that may apply in certain circumstances. In such an instance, *where an employee (servant), acting within the scope of his employment, commits a delict, his employer (master) is fully liable for the damage. Fault is not required on the part of the employer, and therefore this is a form of strict liability* (Neethling *et al.*, 2006: 338). They proceed to discuss the three requirements for an employer's vicarious liability for the delict of his employee (*Op cit*: 339 -341): (1) There must be an *employer-employee relationship* at the time when the delict is committed; that is there must be a contract of service and the employer must be able exercise control from a position of authority over the employee. A contract or mandate where another independent party renders a service on behalf of the employer, but is not subject to his control does not constitute vicarious liability. (2) The *employee must commit a delict* and (3) the *employee must act within the scope of his employment when the delict is committed.*

Section 60 of SASA regulates the vicarious liability of the state as the employer in the provision of education in public schools. The implications thereof are manifested in a number of court cases that are referred to in paragraph 4.5.3.

### 4.3. Primary responsibilities regarding the provision of education in South Africa

In this paragraph I will discuss the responsibilities and obligations of the different role players in education before I discuss how these responsibilities make them accountable to different structures in society.

Education in South Africa is underpinned by Section 29(1) of the South African Constitution, Act 108 of 1996 (hereafter referred to as the Constitution) and the South African Schools Act, Act 84 of 1996 (hereafter referred to as SASA).

Section 29 of the Constitution guarantees every person's right to a basic education (it is important to note that Section 29 of the Constitution does **NOT** state that education is free or compulsory).

*29. (1) Everyone has the right -*

- a. to a basic education, including adult basic education; and*
- b. to further education, which the state, through reasonable measures, must make progressively available and accessible.*

For the purposes of this dissertation I am focussing on education provided to learners at school level, thus I will be excluding adult basic education, further education and training and higher education and training.

The role players in this regard are: the state (as represented by different state organs and individuals in state structures tasked with the provision of education in public schools), parents, the school governing body as the duly elected representatives of the parents, educators, the principal and learners. Different role players have different responsibilities in the provision of education in the South African education system. Before discussing these responsibilities it is necessary to have a look at how these role players are defined in SASA.

SASA provides the following definitions of the different categories of stakeholders in Section 1:

**“education department”** means the department established by section 7(2) of the Public Service Act, 1994 (Proclamation No. 103 of 1994), which is responsible for education in a province. It is important to distinguish between the roles of the provincial departments of education as the providers of infrastructure and funding of education and the national department of education (1994 to 2009 and since then the Department of Basic Education) with more of a policy making and managerial / supervisory / oversight / enabling role.

**“educator”** means any person, excluding a person who is appointed to exclusively perform extracurricular duties, who teaches, educates or trains other persons or who provides professional educational services, including professional therapy and education psychological services, at a school. It was fashionable after 1994 and because the term was used in SASA, to refer to this category of people as educators. Then, and even more so now the term teacher, is again being used to describe persons fitting this description and fulfilling this role. I will be using the terms interchangeably throughout the dissertation. The Employment of Educators Act, Act 76 of 1998 in Section 1(v) defines **“educator”** as *“any person who teaches, educates or trains other persons or who provides professional educational services, including professional therapy and education psychological services, at any public school, further education and training institution, departmental office or adult basic education centre and who is appointed in a post on any educator establishment under this Act;”*

**“governing body”** means a governing body contemplated in Section 16(1). This category of role players represents the democratisation of public education in the South African education system; they are the voice of the community in educational matters concerning a specific public school. The

terms governing body and school governing body are used interchangeably and are abbreviated as SGB / SGBs. They fulfil the functions that are given to them in SASA

**“Head of Department”** means the head of an education department. As per the definition of an education department this implies that this definition refers to the head of a provincial department of education.

**“learner”** means any person receiving education or obliged to receive education in terms of this Act. As with the concepts educator / teacher, the term learner became official with the promulgation of SASA. It has, however, been common practice to use the term *student* as a synonym for the word *learner*. I will again be using the terms interchangeably throughout the dissertation.

**“member of staff”** means a person employed at a school. This category has a wide meaning; it can refer to persons representing different categories of people with vastly different roles. It can include educators / teachers and non-educator / teaching staff employed by the state or employed by the SGB in a school.

**“parent”** means -

- (a) the parent or guardian of a learner;
- (b) the person legally entitled to custody of a learner; or
- (c) the person who undertakes to fulfil the obligations of a person referred to in paragraphs (a) and (b) towards the learner’s education at school.

Parents have a very important function. In the first instance, they have a moral obligation to have their children educated. This is also entrenched in Section 3 of SASA compelling parents to send their children to school from the ages of seven to fifteen. Secondly, over and above their duty to care for their children they also have a financial obligation by either paying taxes or school fees or both.

*“principal” means an educator appointed or acting as the head of a school.* The principal as head teacher has a dual role in that he / she is responsible for the professional management of the school AND also serves on the SGB *ex officio*, resulting in a role as governor as well. Paragraph 4.2 of the Personnel Administrative Measures (hereafter PAM) contains a detailed job description of the position of principal.

### 4.3.1 The state

The *state* is democratically elected and derives its authority from the South African Constitution. As such the state is responsible for a number of functions bestowed on it by the Constitution. One of which, is the provision of education via its education system in terms of Section 29(1) of the Constitution. For the argument in my dissertation, the following are important responsibilities in this regard: (i) providing public schools (both ordinary schools and schools for learners with special educational needs) in terms of Sections 12, 13 and 14 of SASA; (ii) making provision for independent schools in terms of Chapter 5 of SASA; (iii) funding public schools in terms of Sections 34 and 35 of SASA; (iv) conducting governing body elections every three years; (v) annually conducting the National Senior Certificate examination and certifying candidates that qualify; and (vi) the staffing and remuneration of persons in schools and provincial departments of education to make the provision of education and the administration thereof possible.

### 4.3.2 The school

The concept school is defined in SASA as *a public school or an independent school which enrolls learners in one or more grades from grade R (reception) to grade twelve.*

Schools in the South African education system are of two types namely public schools and so-called independent schools. An *independent school means a school registered or deemed to be registered in terms of Section 46*; whereas a *public school means a school contemplated in Chapter 3*. In terms of Section

15 of SASA, the status of public schools is described as *a juristic person, with legal capacity to perform its functions in terms of this Act.*

Public schools in South Africa are divided into two groups on two grounds. In the first instance, public schools can be divided on the basis of the school phases they cater for; namely, pre-schools, primary schools that provide education to learners from grades 1 to 7 and secondary schools that provide education to learners from grades 8 to 12. Secondly public schools can be divided on the basis of the students they serve, namely main stream education offered in ordinary public schools and schools that provide education to learners with special educational needs. The Education Laws Amendment Bill of 2011 provides for a possible third type of public school in Section (3)(a)(iii)

*“a public school that provides education with a specialised focus on talent, including sport, performing arts or creative arts”.*

This dissertation deals with the accountable funding and the provision of quality education in public secondary schools and independent schools that have grade twelve learners that sit for the National Senior Certificate examination.

Three important responsibilities of a public school come to the fore. Firstly the school is there to enable learners to enjoy the right to education as enshrined in S.29(1) of the Constitution and as alluded to in S.20(1)(a) of SASA. It is assumed that this education must be of a high quality.

Secondly public schools should provide a safe environment in which education can take place in terms of Sections 12(1) & (2) and 24(a) of the Constitution and the common law right to psycho-physical integrity. Section 12(2)(b) that deals with the security in and control over their bodies, is of particular importance when dealing with children in terms of the duty of care of educators (the younger the children are, the bigger this responsibility). Part of the safety and security of the child, as a person, also relates to the physical environment in which they are educated. This is catered for in the provision of

Section 24(a) of the Constitution when it determines that the environment may not be *harmful to their health or well-being*. Again, in as much as this is true for every adult member of the South African society, it places a bigger responsibility on the school to ensure that these rights are catered for, because of the age of the children attending the school.

Thirdly schools have a duty to provide information in terms of S.59 of SASA. This duty relates to the right of both parents and learners to information that affects their academic progress and well-being as well as the accountable use of funds made available to a school in the provision of education. This applies equally to all types of schools that one may encounter. This right to information is, however, subject to the qualifiers in both Section 32 of the Constitution and Section 59(1) of SASA, that such information must be *required for the exercise and protection of such person's rights*.

The responsibilities of a school mentioned above are by no means exhaustive, but were included in my discussion because they relate directly to my research. The responsibilities related to the provision of a quality education and the accountable use of funds towards that purpose flow logically from the research question. The responsibility to provide a safe and secure environment in which education can be provided is a prerequisite to comply with the former.

### **4.3.3 The parent**

The concept *Parent* is defined in detail and in broad terms in chapter 1 of the SASA. Parents have a duty of care towards their children. This includes that they must be fed, clothed and they must be protected against possible harm. Children also have a fundamental right to be educated as guaranteed in Section 29(1) of the South African Constitution. These are all in line with the rights of the child as discussed in Chapter 2 paragraph 2.2.

In terms of SASA parents have to send children to school to be educated. Section 3(1) of the South African Schools Act (SASA) spells out this responsibility of parents regarding school attendance of learners in detail. The parent has to ensure that *every learner for whom he or she is responsible to attend a school from the first school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first.* In addition, and still related to the child's right to education, parents have to pay for the education of their children (Sections 36,39,40 and 41 of SASA). This is done by paying taxes (Income, Value Added Tax (VAT) etc.) to local, provincial and central government; thus providing public funds that the state must use to fund education as per Sections 34 and 35 of SASA. Another financial responsibility of parents linked to the education of their children emanates from Sections 36 and 39 of SASA in terms of which the funding by the state must be supplemented from private funding.

The obligation of the learner is to attend school, to study and to perform to the required standards in order to obtain a qualification in line with his/her ability and field(s) of interest.

#### **4.3.4 The School Governing Body**

The collective interests of parents in the functioning of public schools are vested in the school governing body (hereafter SGB). The **SGB** is elected in terms of Section 28 of SASA. The introduction of school governing bodies in the South African education system as manifested in SASA is a mechanism to democratise and decentralise decision making in education. The role of school governing bodies is described in Section 16(1) and (2) of SASA that read as follows:

16. *Governance and professional management of public schools*

- (1) *Subject to this Act, the governance of every public school is vested in its governing body and may perform only such functions and obligations and exercise only such rights as prescribed by the Act.*
- (2) *A governing body stands in a position of trust towards the school.*



The school governing body is therefore tasked with the governance of a public school as the agent of the school as a juristic person and the relationship is a fiduciary one. The responsibilities of all school governing bodies of public schools are spelt out in Section 20 of SASA. Some schools also qualify for some or all of the additional functions contained in Section 21 of SASA. Further responsibilities permeate the rest of SASA for example to determine the language policy of the school (S6), to determine the admission policy of the school (S 5(5)) and to adopt a code of conduct for learners (S8).

The following functions, emanating from Section 20 of SASA, are important from the perspective of this dissertation:

- To promote the best interests of the school and to ensure that quality education is provided to all learners at the school by supporting the principal and other staff of the school in the performance of their professional functions.
- Determine times of the school day consistent with any applicable conditions of employment of staff at the school.
- Administer and control school's property, buildings and the grounds occupied by the school.
- Recommend to the Head of Department the appointment of educators at the school.
- At the request of the Head of Department, allow the reasonable use of the facilities of the school for educational programmes not conducted at the school.
- May allow the reasonable use of the facilities of the school for community, social and school fund-raising purposes by charging a fee or tariff which accrues to the school.
- Presenting the annual budget to the AGM.

Any one or more of the following five functions, emanating from Section 21 of SASA may apply to a public school, depending on whether the school has applied for these functions OR whether any one or more of these functions

have been allocated to the school by the Member of the Executive Council in terms of Section 21(6). These functions are likewise important from the perspective of this dissertation:

- To maintain and improve the school’s property, buildings and the grounds occupied by the school.
- To determine the extra-mural curriculum of the school and the choice of subject options.
- To purchase textbooks, educational materials or equipment for the school.
- To pay for services to the school.
- To provide an adult basic education and training class or centre on a needs basis

#### 4.3.5 The principal

According to Section 16 (3) of SASA, the principal of a public school is responsible for the professional management of the school (under the authority of the Head of Department). This responsibility was broadened with the promulgation of the Education Laws Amendment Act, Act 31 of 2007. Section 16A now provides a great amount of detail of what functions are associated with the position of the principal. Section 16A needs to be read in conjunction with paragraph 4.2 of the *Personnel Administrative Measures* (hereafter referred to as the PAM). I will again only refer to functions that are deemed to be relevant for my dissertation. For this purpose I have integrated the contents of Sections 16 and 16A of SASA and the PAM (paragraph 4.2) to arrive at five categories of responsibilities. These are listed in Table 4.1.

**Table 4.1:** *The responsibilities of the principal of a public school.*

Category	Responsibilities
Academic	<ul style="list-style-type: none"> <li>• To provide quality education to all the learners attending the school</li> <li>• To create a structure and to support and manage the academic performance of learners on an individual basis as part of an academic improvement plan</li> </ul>

	<ul style="list-style-type: none"> <li>To annually report to the relevant stakeholders on the academic performance of the school</li> </ul>
Administrative	<ul style="list-style-type: none"> <li>Creating and managing an effective administrative infrastructure</li> <li>Creating and maintain an effective (and up-to-date) regulatory framework for the school</li> <li>Creation and implementation of effective policies and procedures emanating from the regulatory framework, related to all aspects that impact on the effective functioning of the school</li> <li>The effective administration of the school's property and finances</li> <li>Creating and maintaining of an effective records system</li> <li>The effective utilisation of all facilities at the disposal of the school by regular inspection and maintenance of all resources and facilities of the school</li> </ul>
Human resource management (HRM)	<ul style="list-style-type: none"> <li>To develop a comprehensive HR short and medium term plan based on the actual needs of the school</li> <li>The timeous appointment of staff to address the needs of the school</li> <li>Manage the performance of individual staff members</li> <li>Create and manage an individualised HR development plan</li> </ul>
Communication	<ul style="list-style-type: none"> <li>Develop a comprehensive and effective communication strategy</li> <li>Keep all stakeholders informed on a regular basis</li> </ul>
Governance	<ul style="list-style-type: none"> <li>Regular attendance of SGB meetings</li> <li>Keep SGB informed</li> <li>Be an active and involved member in all functions of the SGB</li> </ul>

#### 4.3.6 The educator

**Educators** have been allocated seven roles:

- learning mediator,
- designer of learning programmes and materials,
- leader, administrator and manager,
- scholar, researcher and lifelong learner,
- assessor,
- community developer with a pastoral role (perhaps better phrased as community, citizenship and pastoral role), and
- context/phase/subject/learning area specialist.

(<http://www.saqa.org.za/show.asp?include=structure/nsb/nsb5/delineatin.html>

- accessed on 14 June 2008)

For the purposes of my dissertation, I will refer to the roles and responsibilities from the context of my investigation, which may not necessarily be

transferable to other contexts. Table 4.2 represents an integration of the duties of educators (teachers) based on paragraph 4.5 of the PAM.

**Table 4.2:** *The responsibilities of educators.*

Category	Role(s) that apply	Responsibilities
Academic	<ul style="list-style-type: none"> <li>• learning mediator,</li> <li>• designer of learning programmes and materials,</li> <li>• leader, administrator and manager,</li> <li>• scholar, researcher and lifelong learner,</li> <li>• assessor,</li> <li>• context/phase/subject/learning area specialist.</li> </ul>	<ul style="list-style-type: none"> <li>• To properly prepare for every lesson he/she will teach in a creative manner based on recent information</li> <li>• To teach every class to the best of his / her ability catering for the individual learning needs of every child in his/her care</li> <li>• To plan, co-ordinate, control, administer, evaluate and report on learners' academic progress.</li> <li>• To assist the principal in overseeing learner counselling and guidance, careers, discipline and the general welfare of all learners.</li> <li>• To continually improve their subject knowledge and teaching skills</li> </ul>
Administrative	<ul style="list-style-type: none"> <li>• designer of learning programmes and materials,</li> <li>• leader, administrator and manager,</li> </ul>	<ul style="list-style-type: none"> <li>• To establish an effective administrative system related to student administration</li> <li>• To create a system to effectively manage the administrative aspect of all teaching and learning activities that the educator/teacher is responsible for</li> <li>• Create and manage an administrative system for all stock and facilities utilised in the teaching and learning processes in the classroom.</li> </ul>
Human resource management (HRM)	<ul style="list-style-type: none"> <li>• leader, administrator and manager,</li> <li>• scholar, researcher and lifelong learner,</li> <li>• context/phase/subject/learning area specialist</li> </ul>	<ul style="list-style-type: none"> <li>• To review his/her professional practice on a regular basis</li> <li>• To continually improve his/her teaching, learning and management</li> <li>• To contribute to the professional development of colleagues by sharing knowledge, ideas and resources.</li> </ul>
Communication	<ul style="list-style-type: none"> <li>• learning mediator,</li> <li>• leader, administrator and manager,</li> <li>• community developer with a pastoral role</li> </ul>	<ul style="list-style-type: none"> <li>• To conform with the general communication strategy of the school</li> <li>• Keep all stakeholders informed on a regular basis</li> <li>• To communicate with learners about their academic performance and progress</li> <li>• To meet parents and discuss with them the conduct and progress of their children.</li> <li>• To participate in departmental committees, seminars and courses in</li> </ul>

		<p>order to contribute to and/or update one's professional views/standards.</p> <ul style="list-style-type: none"> <li>• To maintain contact with sporting, social, cultural and community organisations.</li> <li>• To have contacts with the public on behalf of the principal.</li> </ul>
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## 4.4 The funding of education in South Africa

This is discussed in detail in chapter three. The following constitutes a summary of the responsibilities of the different role players in the provision of education in public schools in the South African education system and how these responsibilities relate to the funding of education. The corresponding accountability for each one of the responsibilities listed below is discussed in paragraph 4.5 below.

- The **state** has the responsibility to provide public schools and to fund such schools in terms of facilities, staff and operational costs;
- the **parent** has the responsibility to send learners (of school going age) in his/her care to school and to pay school fees to the extent that it applies in the specific school that the learners are attending;
- the **SGB** has the responsibility to govern the school in terms of the functions assigned to it in SASA, including all the functions listed in S20 and those from S21 of SASA that may apply, to generate funds (private funding) to augment the state's funding (S36 of SASA) as well as the financial management of the school fund as prescribed in S37 to 44 of SASA
- the **school** has the responsibility to provide quality education in a safe environment conducive to teaching and learning;
- the **principal** is responsible for the professional management of the school in terms of S.16 and 16A of SASA as well as the measures spelt out in paragraph 4.2 of the PAM;
- the **educator** has the responsibility to fulfil the seven roles contained in the Norms and Standards for Educators, those duties and responsibilities contained in S4.5 of the PAM as well as the duty of

care under the common law principle of *in loco parentis* while the learner is at school;

- the *learner* has the responsibility to attend school, to learn and to perform according to the best of his / her ability.

## 4.5 Accountability in the South African education system

I will now discuss accountability as it applies to educators in terms of (i) professional accountability regarding providing quality education through effective teaching and learning in the classroom, (ii) professional accountability regarding the effective utilisation of physical resources to enhance the quality of the education provided in the classroom and (iii) professional accountability regarding the effective utilisation of available funds to ensure the provision of quality education in the classroom.

Accountability includes a number of different dimensions of the task of being an educator; the duty of care, the teaching task linked to the curriculum, the utilisation of supportive structures and equipment and the management of facilities and finances. A very important dimension of this discussion is the accountability of school principals regarding academic output as a manifestation of his or her human resource management function. Vicarious liability and Section 60 of the South African Schools Act are discussed as additional dimensions to the accountability debate in education. In all instances reference will be made to the liability implications of not conforming to / performing to the expected standards inherently linked to the respective areas of responsibility in an accountable manner.

Having looked at the specific duties / responsibilities of the different role players in the South African education system, I will now discuss their respective accountability in term of these responsibilities.

The *state* and its respective structures involved in the provision of education in public schools are accountable to the citizens of the country among others for

(i) the provision of schools and facilities from public funds; (ii) the quality of the education provided in public schools; and (iii) the safety and security of learners while attending school for educational purposes. The *parent* is accountable to (i) the state for sending learners in his / her care to school and (ii) to the SGB for paying school fees to the extent that they are applicable.

The *SGB* is accountable to (i) the parent community who elected them, (ii) to the state for all the functions legally assigned to them in terms of Sections 20 and 21 of SASA with regard to the governance of the school, (iii) to the state for the management of the public funds granted to the school for a given financial year, irrespective of whether the school has Section 21 status or not, (iv) to the parent community for the management of public funds paid into the school fund; (v) and all other private donors for the management of public funds paid into the school fund; (vi) all stakeholders for the drafting, approval and accountable management of the school's budget; and (vii) to both the state and the parent community for having the financial statements of the school audited and providing feedback to the parent community at the annual general meeting called for that purpose and to the state as specified in S43(5) of SASA.

It is important to note at this stage that the Public Finance Management Act, Act 1 of 1999 (hereafter the PFMA) does not apply directly to schools and school funds (see Sections 13, 22, 36 and Schedule 4 of the PFMA). In line with the preceding references in the PFMA and in terms of the findings of the court case between *Schoonbee and Others v The MEC for Education in the Mpumalanga and Another*, that neither the principals of public schools nor the SGBs are Accounting Officers as defined in the PFMA. The SGB members are collectively accountable for the financial management of a public school's assets.

The *school* is accountable for those actions undertaken as a juristic person to such parties as may be involved in such actions.

The *principal* is accountable to (i) the provincial department of education in whose employ he/she is for the effective professional management of the school in fulfilling its primary function, namely to provide quality education to the learners enrolled at the school, (ii) the SGB for duties / responsibilities formally delegated to him / her by the SGB in as much as it falls within their authority to delegate such tasks/responsibilities to the principal; and (iii) the parent community that the school serves for providing quality education in the school and to keep the community informed about the functioning of the school.

*Educators* employed at a public school are accountable to (i) their immediate supervisor for all the duties and responsibilities listed in paragraph 4.5 of the PAM, (ii) every parent of every learner that they teach for taking reasonable care of the children under the *in loco parentis* principle and (iii) every parent of every learner that they teach to provide for teaching and learning opportunities that will culminate in quality education.

*Learners* are accountable to (i) themselves to make optimal use of the opportunities created for them by all the stakeholders to obtain a quality education in preparation of becoming a useful contributing member of the South African society (ii) their parents that afford them the opportunity to go to school and (iii) the state that has the best interests of every learner at heart.

## 4.6 Liability

I defined and discussed the concept liability and vicarious liability in paragraph 4.2.4 above.

It falls beyond the scope of this discussion to attempt to address every possible example of negligence, damage and liability that can be encountered in the process of providing education in public schools. However, if one looks at the South African education system, two conspicuous aspects cannot be ignored.



#### 4.6.1 Academic performance

The academic performance, or lack thereof, of the South African education system is discussed in detail in paragraph 2.3 of Chapter 2 of this dissertation. In addition to what was previously discussed, the Centre for Evaluation and Assessment of the University of Pretoria (hereafter referred to as CEA) had the following comments on the second Progress in International Reading Literacy (PIRLS) study. PIRLS 2006 is the second, after PIRLS 2001, in a five-year cycle of assessment that measures trends in children's reading literacy achievement and policy and practices related to literacy (<http://www.iea.nl/iea/hq/index.php>). PIRLS aims to provide trends and international comparisons on:

- *The reading achievement of Grade 4 learners.*
- *Learners' competencies in relation to goals and standards for reading education.*
- *The impact of the home environment and how parents foster reading literacy.*
- *The organization, time and reading materials for learning to read in schools.*
- *Curriculum and classroom approaches to reading instruction (CEA, 2006:3).*

According to Campbell, Kelly, Mullis, Martin and Sainsbury (2001), PIRLS focuses on three aspects of reading literacy namely:

- *Processes of comprehension.*
- *Purposes for reading.*
- *Reading behaviours and attitudes.*

A study undertaken by the Department of Education during 2003 on literacy levels among grade 3 learners showed that 61% of children cannot read or write at the appropriate level for their age. This is supported by the fact that up to 18.5% of learners in some provinces already fail at this level and have to repeat grade 3. ... The implication of poor literacy levels among young

learners is that they not only leave primary school illiterate, but that the trend continues as they enter secondary school (CEA, 2006: 8).

This information as well as numerous other studies (see the 2003 TIMMS report as well as the work by Professor Servaas van der Berg of the University of Stellenbosch (van der Berg, 2009) reveals that there is something seriously amiss with the levels of competence of learners leaving our education system. The quality of education provided by our education system is cause for major concern.

#### **4.6.2 Funding levels of education**

Since 1995, the South African Government has on average been spending 22% of the national budget on education. This translates into approximately 5.5% of GDP (which compares very favourably with the  $\pm 6\%$  of GDP in the USA). Taking the backlogs from the apartheid era that had to be addressed into account, it still is a matter of grave concern that the amount of money invested in education does not render a corresponding result reflected in the quality of the education of the South African education system (<http://www.education.gov.za/EMIS/emisweb/-03stats/2003%20Stat%20at%20a%20Glance.pdf>, accessed 20 May 2006).

The question that begs answering is; *who should be held liable for the poor return on investment of our education system?*

#### **4.6.3 Vicarious liability of the state**

The following examples from case law illustrate different dimensions of the vicarious liability that the state may incur in terms of Section 60 of the South African Schools Act.

In *Knouws v the Administrator of the Cape Province* (1981), the state was liable for damages caused by negligence on the part of the school when a girl was injured by a lawnmower.

In *South View High School v Financial Services of South Africa (Pty) Ltd*, the state was liable for debt incurred by the school to an amount of R684 848.

In the initial case of *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School*, the state was held liable for the termination of a lease contract for a photocopying machine. However, the ruling was repealed by the South African Supreme Court of Appeal.

In the *MEC for Education, Western Cape Province v Edith Strauss*, the state was held liable for injuries that Strauss sustained while coaching learners to throw the discus.

In *TM Jacobs v The Chairman of the Governing Body of Rhodes High School and Others*, Judge Moosa ruled that the plaintiff be granted damages amounting to R1 393 356.69. He deducted 20% from this amount, because in the apportionment of fault he found that that Ms Jacobs was guilty of contributory negligence. The State will have to pay the balance of 80 % of this amount in terms of S60 of SASA on behalf of the defendants.

## 4.7 Conclusion

The state is accountable to the broad South African society for the quality of the education provided through the South African education system. This argument rests on the preamble to the Constitution where it states:

*We, the people of South Africa (my emphasis), ...adopt this Constitution as the supreme law of the Republic so as to- ... Lay the foundations for a democratic and open society in which government is based on the will of the people (my emphasis) and every citizen is equally protected by law; Improve the quality of life of all citizens and free the potential of each person (my emphasis); ...*

It would appear from the track record of the past fifteen years that the Department of (Basic) Education is making serious efforts to address this. Public revenue is paid to the state with the assumption that services of high quality will be rendered (this includes education). If the state or its structures offer poor quality education, this could constitute an infringement of the right to quality education of all learners and it also raises questions regarding accountability for return on investment.

If the poor quality of education on offer is attributable to the school, the principal and educator staff could become liable for damages both regarding the quality of education as the learner's right to quality education and regarding the poor return on investment for the amounts provided from public and private funds to fund the provision of education.

Barring learners from attending school and excluding them from specific educational programmes or activities and withholding their results constitute an infringement of their right to education. Parties guilty of such actions could thus be liable for damage inflicted on the learner(s) involved.

The unavailability of sufficient funds for the normal functioning of a school to enable it to offer education of an acceptable standard could equally constitute an infringement of the right of a learner to quality education. Non-payment of government subsidies to schools by government officials for any reason could qualify as such an infringement irrespective of the reason for such non-payment.

If such non-payment of government subsidy is attributable to SGBs not conforming to the requirements of SASA to submit audited financial statements to the provincial department of education within six months of the end of a financial year, they should be held accountable for such neglect. Such lack of action would then also constitute a contributing factor to the infringement of a learner's right to education. Such a transgression on the part of the SGB does, however, not constitute substantive reason to limit the right to education of learners attending a public school by allowing the non-

payment of the government subsidy to a public school by government officials.

In conclusion I argue that if we are serious about the provision of quality education in South Africa in order to produce citizens that can make a meaningful contribution to the economy of our country and to be competitive on the global market, we should be much more serious about dealing with matters of accountability and liability. In the interest of excellence in education, lawyers and educators should work together to litigate and let damage lie where it falls when the right to a quality education of learners is infringed!

Chapter five will address aspects of the research design of this dissertation.