1 Introduction
South Africa follows the almost universally accepted principle of giving effect to fundamental rights regarding education through prescribing compulsory school attendance (see s 29(1) of the Constitution concerning a right to basic education). Some of the important questions examined in this contribution relate to who is responsible to ensure that a learner attends school, what the scope and content of the obligation is and how it is actually enforced. However, education of children in its broadest sense is obviously not confined to school attendance. It is thus a serious misconception to put undue emphasis on formal education which is organised or supervised by the state and to ignore other instances of formal, non-formal or informal education (see, eg, Visser “Juridiese aspekte van tuisonderwys” 1998 THRHR 646–647 on a lawful alternative to school attendance). In any event, school attendance in itself does not necessarily result in the proper education of all children.

2 Basic statutory provisions
Section 3 of the South African Schools Act 84 of 1996 (“Schools Act”) contains provisions which are analysed in this contribution:

“(1) Subject to this Act and any applicable provincial law every parent must cause 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, which ever occurs first.

[ss (2) deals with the prescribed ages for compulsory school attendance for learners with special education needs and ss (3) and (4) with the state’s duty to provide school places]

(5) If a learner who is subject to compulsory school attendance in terms of subsection (1) is not enrolled at or fails to attend a school, the [provincial] Head of Department may –

(a) investigate the circumstances of the learner’s absence from school;
(b) take appropriate measures to remedy the situation;
(c) failing such a remedy, issue a written notice to the parent of the learner requiring compliance with subsection (1).

(6) Subject to this Act and any other applicable law –

(a) any parent who, without just cause and after a written notice from the Head of Department, fails to comply with subsection (1), is guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding six months;
(b) any other person who, without just cause, prevents a learner who is subject to compulsory attendance from attending a school, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months.”

A “parent” is defined in section 1(1) of the Schools Act as:

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

(For a discussion of aspects of this definition, see Visser “Some principles regarding the rights, duties and functions of parents in terms of the provisions of the South African Schools Act 84 of 1996 applicable to public schools” 1997 TSAR 627–628; see further Mawdsley and Beckmann “Who is a parent for the purposes of making educational decisions on behalf of children? A comparison of approaches taken by the United States and South Africa” 2006 De Jure 354–384.)

A “learner” for the purposes of the Schools Act is “any person receiving education or obliged to receive education in terms of this Act” (s 1(1)). A “school” is a public school or an independent school which enrols learners in one or more grades from grade R (reception) to grade twelve (ibid). Section 5(1) of the Schools Act obliges a public school to admit learners and serve their educational needs without unfairly discriminating in any way (see generally Visser “The admission of learners to public schools: Who makes the decisions?” 1998 THRHR 487–491; “Notes on some legal aspects concerning the admission of learners to public schools” 1999 THRHR 295–300).

3 Analysis of aspects of the Schools Act concerning school attendance

The following general comments could be made regarding aspects of the statutory provisions referred to above:

• The Schools Act is explicit in placing a duty to cause a learner to attend a school (public or independent) on a parent (who qualifies in terms of the wide definition referred to above) only if such parent can also be regarded as a parent who is “responsible” for the learner. While this should normally not provide too much of a problem, there may be difficulties in more exceptional instances to establish who is actually “responsible” in terms of this rather vague criterion. Is responsibility objectively determined in terms of legal criteria or does it also involve a choice on the part of a parent?

• A sensible interpretation of the duty on a parent (s 3(1)), compels the conclusion that a parent is only legally obliged to take reasonable steps within his or her power and capacity to cause a learner to attend school. What is reasonable would depend on the facts and circumstances of each individual case and the actions of a reasonable person in such circumstances. Failure to cause a learner to attend school may be the result of other forms of neglect or mistreatment of a child by his or her parents – such as an omission or refusal to provide adequate food, clothes or medical treatment. In such instances more drastic and comprehensive official action will be required than is made possible in terms of the Schools Act.

• The duty on a parent is of a continuous nature and lasts as long as the period indicated in section 3(1) of the Schools Act pertains. The duty implies that a
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A parent must take reasonable steps to achieve the result indicated in section 3(1), namely “attendance” of a school as defined. In a general sense attendance means to go regularly to or being present at a place or event. It is implicit in the provision that attendance means participating in the full, applicable and compulsory educational programme of the school, unless there is some other ground justifying a learner’s non-attendance (eg, illness, lawful suspension, etc). Although educators presumably play a decisive role in a learner’s participation in the school programme, a parent’s negative or obstructive conduct in this regard may probably also fall foul of the duty to “cause a learner to attend” as contemplated in section 3(1) of the Schools Act. Thus, a wider meaning of “attendance” than mere physical presence should be used.

• Section 3 does not directly place a duty on a learner to attend school (or participate in the school programme). For example, there is no wording to the effect that every learner must attend school in certain defined circumstances – and it would have been simple to insert such a provision. There is also no provision making it an offence for a learner not to attend school – as in the case of a parent or other person involved in the learner’s non-attendance. Despite section 1(1) defining a “learner” as “any person . . . obliged to receive education”, the reference in section 3(5) to “a learner who is subject to compulsory school attendance”, and section 4 which provides for the exemption of a learner from compulsory attendance (s 4), it remains doubtful whether there is a substantive statutory duty on a learner to attend school. It could be argued that a learner must make himself or herself available to attend school and that such a duty must be implied from the provisions of the Schools Act cited above – and seen in the context of the common law provisions obliging a child to obey his or her parents. In any event, it would obviously constitute a defence to a parent criminally charged for allegedly having failed to cause a learner to attend school if, despite all the parent’s reasonable efforts, the child elected to avoid school attendance.

• When a learner is not enrolled at a school or does not attend school, the head of the provincial education department “may” take certain steps. Usually “may” indicates a discretionary power and the absence of a legal duty to act. However, this could hardly have been the intention of the legislature in this context. Moreover, section 28(2) of the Constitution, which states that in any matter concerning a child the best interests of the child are paramount, probably compels an interpretation obliging the head of department to take all reasonable steps necessary in the circumstances to deal with non-enrolment, absence from school for a prolonged period or various instances of occasional absenteeism. There are no specific powers regarding “investigation” and “appropriate measures” as used in this provision and these terms presumably refer to general and reasonable steps such as endeavours to obtain information and attempting to persuade a parent to take reasonable and appropriate steps to cause a child to attend school. However, it would also include steps aimed at persuading any other person preventing a learner from attending school, and the learner as well, to cease their obstructive or preventative actions.

• A criminal charge against a parent as contemplated in section 3(6)(a) may only be prosecuted if it is preceded by a proper notice. The notice must be formally in order and contain reasonably sufficient details informing a parent of his or her legal obligations, while giving the parent a reasonable opportunity to comply. In addition, the notice will probably have to be served in a
legally recognised manner on the parent – although the provisions do not deal with this expressly. Generally the notice should be brought to the personal attention of the parent and this will have to be proved by the prosecution.

- A parent can only be found guilty in terms of section 3(6)(a) if it is proved beyond reasonable doubt that, *inter alia*, the parent acted without just cause and in an intentional or negligent manner (see generally on strict liability and the arguments in favour of negligence, Snyman *Criminal law* (2002) 242–247). If a learner assists his or her parent not to cause the learner to attend school, the learner could perhaps be charged with complicity and in some instances with conspiracy or incitement if all the other requirements are met. However, this is probably only a theoretical possibility. There is no *numerus clausus* of grounds constituting “just cause” on which a parent may rely.

Examples may be found in existing grounds of justification such as necessity (e.g., the parent or child is intimidated by a third person), the learner must be protected from unlawful harm at school, (e.g., illegal corporal punishment, or unacceptable bullying at or on the way to school), impossibility (there is no school which the learner can reasonably attend, or the school which the learner should attend refuses to admit the learner), or in other factors such as lawful exemption from school attendance (s 4 of the Schools Act), the personal circumstances and health of a learner making school attendance inadvisable (irrespective of the absence of an official exemption of a learner), the learner is lawfully educated at home (s 51), or the learner cannot be induced or persuaded to attend school. In terms of the general evidential onus in criminal matters it would be for the prosecution to prove the absence of a just cause. However, a parent could be expected to place sufficient relevant information before the court indicating some basis for the existence of a “just cause” for the prosecution to answer and rebut.

- Section 3(6)(b) is worded in general terms and refers to “any person” who, without just cause, prevents a learner from attending school. This could even include a school principal or members of a school governing body illegally suspending or expelling a learner or refusing a learner admission to a public school in terms of an invalid admission policy or irregular administrative action. A “just cause” here would include necessity (the protection of other persons from a highly infectious disease), private defence (the protection of persons and property against a dangerous learner), or other reasons such as the application of a valid admission policy, lawful suspension or expulsion of a learner (s 9 of the Schools Act).

## 4 Final comments

The statutory provisions analysed above to deal with the core issue of school attendance, generally appear to be adequate from a legal perspective. Certain technical improvements may be effected when the Schools Act is reviewed as a whole (e.g., placing a clear duty on officials to properly investigate non-attendance, the manner of serving of notice on parents, inserting a substantive obligation on children to attend school and participate in its programmes in a reasonable manner, etc).

The most comprehensive and elegantly formulated legal provisions do not, however, solve problems on their own. It is obvious that proper implementation is vital. In this context, information suggests that there are still hundreds of thousands of learners who do not attend school as they should. Some provincial
education authorities thus seem to lack the will or the capacity to ensure higher levels of school attendance. It will be more important to properly address this issue than to adopt new legislative provisions.

Finally, school attendance is not sufficient. It could be supposed that a parent’s obligation to cause a child to attend school until the last school day he or she reaches 15 years or the ninth grade, is realistic in the current South Africa (see generally a 28.1 of the Universal Declaration of Human Rights (1948) which states that “elementary” education must be compulsory and “free”; a 13 of the International Covenant on Economic, Social and Cultural Rights (1966) and the more modest a 17.1 of the Banjul Charter on Human and People’s Rights adopted by the then Organisation for African Unity (1981), which merely states that “every person shall have the right to education”). However, over time much more will have to be done to ensure higher levels of “compulsory” quality school education for many more learners if South Africa is to become a more developed country and poverty and backwardness are to be reduced in a meaningful manner. Compulsory school education can only play its proper role provided that it is a properly functioning school providing quality education which learners are compelled to attend (see generally Education for all: The quality imperative (UNESCO 2004) 19 on the goal to achieve universal primary education (UPE); see also Visser “Equal educational opportunities defined and evaluated – some practical observations” 2004 Perspectives in Education 149–151). Although South Africa has some good public schools, there is much room for improvement in this sphere. Obliging parents to send their children to poor quality schools makes a mockery of what “compulsory” education is all about.

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