Chapter 3

3.0 EDUCATION MANAGEMENT AND THE LAW

3.1 Introduction

According to Malherbe and Beckmann (2001:2) the word education "implies activities such as developing, influencing, growing, inducting, accompanying, guiding, actualising, strengthening, assisting, meeting, supporting, liberating, instructing and learning." They furthermore say that the word law "comprises those rules of conduct that apply generally in society, are enforced by the state, and exist for the purpose of regulating the affairs of society justly and equitably" (Malherbe & Beckmann (2001:7). It must be noted that there is relationship between education and law.

Because of the fact that education is an affair of society, its three forms, namely informal, formal and non-formal need to be regulated by law (Malherbe & Beckmann 2001:3-4). For example, parents and other community members protect the rights of the child by applying legal rules. In South Africa and other countries, the government is responsible for the provision of formal and non-formal education to its subjects. It is for this reason that the government is obliged to legally regulate education (Malherbe & Beckmann 2001:5).

In each and every country where education is regulated by the government, a public education policy is formulated (Malherbe & Beckmann 2001:5). The education policy that is formulated by the government must be implemented by all the managers who manage education in all levels of education management structures. Referring to the private sector, Swanepoel, Erasmus, Van Wyk and Schenk (2000:292) also confirm that legal prescripts have to be taken into account when dealing with policy and procedures.

Before a look is taken at how education managers should take legal prescripts into account when managing procedures regarding misconduct, it is deemed necessary to mention that there are three levels of education management structures discernible in each and every province in South Africa. These levels can be designated as micro, meso and macro levels. In practical terms these are, the school level, the district level and the provincial level. In each of these levels, there are managers

who manage the workforce or human resources (West-Burnham 1994:89). As human resource practitioners, these managers need to have a balanced perspective on the management of employees in the public education sector as well as on the functional role of each management level with regard to legal aspects and education policy (Oosthuizen 1994:129-134).

The procedures that are stipulated in the legislation and other prescripts, the necessary circulars and the relevant provisions of the Acts and Regulations need to be consulted and duly applied when managing human resources in general, and particularly when dealing with misconduct (cf. section 22(1)(2)(3) of the EEA (No. 76 of 1998), and Sch. 8, item 3(1)-(30 of the LRA (No. 66 of 1995). The human resource managers in each level of the education management structure must for instance know how to formulate charges, and how to call on the educator concerned to respond to the charge or charges of misconduct (cf. paragraph 3.3.1).

It must always be borne in mind that, when the new dispensation was ushered in in 1994, the interim Constitution Act (No. 200 of 1993) was adopted. This Constitution was amended and finally adopted in 1996. After its final adoption, it was known as the Constitution Act (No. 108 of 1996). The Constitution (No. 108 of 1996) is the supreme law which enshrines fundamental human rights. When human resource managers at all levels of education manage misconduct in particular, and human resources in general, the basic values and principles governing public administration as set out in chapter 10 of the Constitution (No. 108 of 1996), more especially section 195(1)(2) of the Constitution (No. 108 of 1996) must be considered.

In fact, public schools, as organs of state are bound by the provisions of section 195(1)-(6) of the Constitution (No. 108 of 1996). Like the government in the national and provincial spheres, the governance and management of schools as organs of state must comply with the provisions of chapter 10 of the Constitution (cf. section 195(2)(c) of the Constitution (No. 108 of 1996). For example, section 195(1)(a) stipulates categorically that public administration must be governed by the democratic values and principles which are enshrined in the Constitution (No. 108 of 1996), including the principle of high standard of professional ethics.

It has however been noted that the bureaucrats who have not been trained in human resource management, or who lack human resource management knowledge are incompetent in managing systems and procedures. As a result the values and principles contemplated in section 195(1)-(6) of the Constitution (No. 108 of 1996) are not satisfied. The lack of human resources

management knowledge renders the education management structure ineffective (cf. paragraph 2.5.1). In this regard, Bush (1994:320) implies that the education structure cannot be functional in the case where bureaucrats neglect their duty attached to their posts because the education structure has been designed to deal effectively with organisational issues that cannot be attended to by the single individual. Before further discussion can be embarked upon, the different levels of the education management structure are diagrammatically represented as follows:

Figure 3-1: The levels of the education management structure

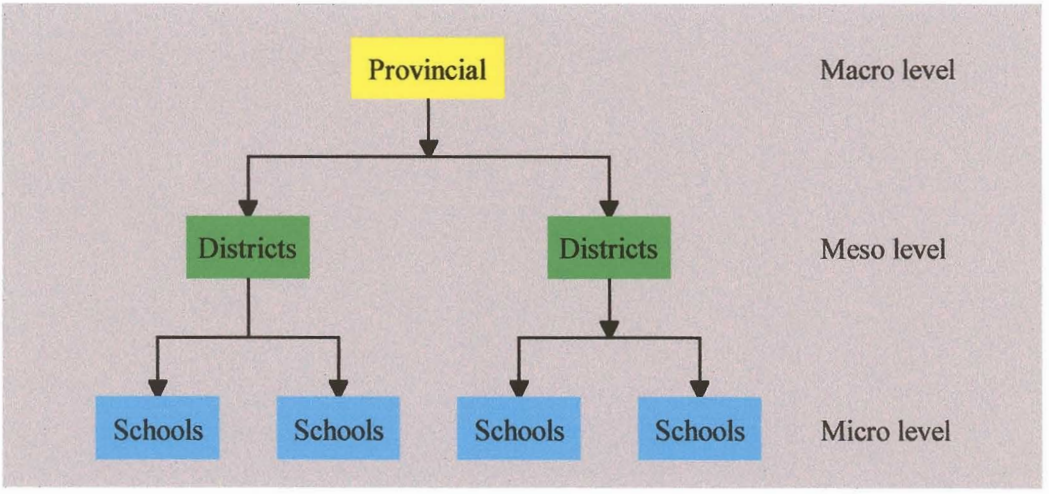

Figure 3-1 depicts the levels of the education management structure in each province in South Africa. At the macro level there are different directors who manage different sections. The head of the directors (director general/superindent) is also the overseer of education in the province. At the meso level we have district managers who head the district and who manage education with the assistance of other officials such as the school management developers, learning facilitators and examination officers. The principals, deputy principals and heads of department are the lower education managers who work at the micro level.

All the above-mentioned human resource managers must have knowledge of legislation and education policy which enables them to analyse legislation relevant to human resource management in the education public sector e.g. investigations, disciplinary hearings and procedures to be followed in respect of misconduct cases (sections 18(1)-(2), 19(1)-(5); 20(1)-(3) & 21(1) of the EEA, No. 76 of 1998). The education managers in general, and principals of schools in particular, manage labour relations as part of human resource management with regard to educators and non-teaching staff (Oosthuizen 1994:119-122).

This chapter aims at relating law to education. Misconduct and insubordination that are committed by teachers will be discussed in relation to law, while at the same time attention will be paid to the role the human resource managers play in terms of the management of misconduct and that of the state or government as the regulator of public education. When discussing issues surrounding the cases of misconduct the promotion of just administration act and the basic values and principles governing public administration as stipulated in section 33(1)-(3) & section 195(1)(2)(c) respectively of the Constitution (No. 108 of 1996) and other relevant prescripts will be considered.

3.2 Misconduct in relation to legal aspects

3.2.1 Administrative law

Busher and Saran (1995:11) view a principal of a school as a professional leader and a manager (the leadership and management of a principal will be discussed in detail in paragraphs 4.1 and 4.3). At a school there is a school-based management structure (cf. Figure 2-2). The school management covers the administrative aspect of the law of education at every school. The formulation of the school policy and rules is the responsibility of the school principal and his or her staff members, while the administration of the school is the principal's responsibility who also ensures that his or her staff members' administration within their classrooms is effectively carried out (Oosthuizen & van der Westhuizen 1994:114).

As a professional leader, a principal is responsible for the internal administration of the school. Nobody should interfere with the internal administration of a school, including the courts of law. It does however happen that under certain circumstances the intervention of the courts of law is needed. When the policy and the rules of a school are formulated, the principal and his or her staff members should consider the Constitution which is underpinned by democratic values and principles (Duke & Canady 1991:6-7). According to Duke and Canady (1991), an implemented and observed policy and rules of a school help to promote sound labour relations and effective school administration.

Principals ought to think about professionalism when administering the affairs of the educators, the learners and the parents. They must at all times consider values and principles which govern

public administration. These values and principles are embedded in the Constitution (No. 108 of 1996) which is the supreme law of this country. Among others these principles include high standards of professional ethics, the services which must be provided impartially, fairly, equitably and without bias, the people whose needs must be responded to and the public who must be encouraged to participate in policy-making (section 195(1)(a)(c)(e) of the Constitution, No. 108 of 1996).

The principal has the power to implement the policy and the rules of the school. A person who interferes with the implementation of the school policy and rules impedes the administrative acts of the principal. Among others, the tasks of the principal are, the control of the attendance registers, the issuing of school fund receipts to educators who have been assigned to collect school funds, division of work among the staff members and the planning of the time-table and the year programme. In addition to the powers and authority vested in him or her, a principal of a school has a discretionary power which helps him or her to use his or her judgement which is based on the policy, rules, particular circumstances and the principles of reasonableness (Oosthuizen & van der Westhuizen 1994:115).

An ordinary educator is not delegated the power to manage a school in the presence of a principal (section 36(1)-(4) of the EEA, 76 of 1998). It is true that a principal may assign functions to an educator. However, a principal remains accountable and answerable because he or she is the central figure vested with legislative control and administrative power (Oosthuizen & van der Westhuizen 1994:116). Be that as it may, the crux of the matter is that some educators of the former DET schools act *ultra vires* by taking over the administrative function of a principal, and by so doing, they contravene the administrative law (cf. paragraph 2.5.5).

It was reported elsewhere in the research project that educators rejected the time-table because it was said to be congested, and that they drew up another time-table in which they reduced the number of periods per week (cf. paragraph 2.4.8.5). The allotting of duties to staff members was also completed by educators who disregarded the principal's administrative powers. The extra-mural time-table was cancelled by educators and they instructed other educators to stop taking part in extra-mural activities. The educators took upon themselves to register learners, and they tampered with the administrative function of the human resource section of the Provincial Education Department by illegally dismissing a principal who had entered into a contract with the Department of Education (c.f. paragraphs 2.5.1 & 2.5.5). When someone is elevated to a higher

position, administrative work is involved, for instance, the issuing of a letter of appointment to a particular individual (cf. Appendix A of the Public Service Regulations of 1999).

A principal of a school is vested with the authority to draw up a policy which could help him or her to regulate and control matters that are within his or her realm of authority (Duke & Canady 1991:1). A principal may therefore establish a policy requiring all educators to record the time of their arrival and departure from the workplace. Such time is normally recorded in the attendance register kept for this purpose (Boshoff & Morkel 1999:3B-17). If implemented by the principal and observed by educators, this policy will improve the conditions of the school, the labour relations and the control of educational activities. It is reported that educators contravened the administrative act of the principals by reporting late and leaving the school premises at any time during working hours. This means that the recording of the arrival and departure in the time register is not observed by educators (cf. paragraph 2.2.4).

3.2.2 Common law

Bray (2000:57) holds the view that the main source of law is the Constitution. After the Constitution and other legislation case law, common law and custom are the most important and most frequently used sources of education law. She furthermore points out that common law is that branch of the law which is not written in legislation (Bray 2000:59). South Africa has derived common law from Roman-Dutch law and English law. When applying common law to the education system of South Africa, the cultural diversity and the legal background of this country should be taken into consideration. There are principles of common law which should be considered by the human resources managers and educators who deal with cases in the public-education structure. Among these principles are the *ultra vires* doctrine, in *loco parentis* and rules of natural justice (Oosthuizen 1994:40-41).

It was mentioned in paragraph 3.2.1 that an employee who exceeds the powers entrusted to him or her in terms of the empowering Acts or Regulations acts *ultra vires*, if (s)he is aware of her/his actions, such actions are invalid and *mala fide* because the intention was to act unprocedurally. In a case where the principal does not know or understand his/her legal functions, (s)he may without knowing it and without bad intentions, act *ultra vires*. In paragraph 3.2.1, it was reported that a principal who was newly appointed at one of the schools in Soweto was illegally dismissed by SADTU members, who went so far as to confiscate the school's keys from the principal. The

educators acted *ultra vires* in that they acted intentionally and in that they did not have legal authority to dismiss the principal, in that they acted unfairly and unreasonably, and in that they exceeded the jurisdiction of their competency (cf. paragraph 2.5.1).

To ensure that justice prevails in the public education sector, employee and employer should apply the rules of natural justice. For instance, when the case of a person is to be dealt with, there should be evidence of justice. Justice can only prevail if everybody involved in the case is given the opportunity to state his or her case in order to ensure fairness, accuracy, objectivity and the making of the right decision. The principle in which a person is given the opportunity to put his or her case across is referred to as the *audi alteram partem* rule (Oosthuizen 1994:41:42).

In the case of the principal who was dismissed by the members of SADTU, justice was not done (cf. paragraph 2.5.1). The SADTU members acted *mala fide* and unconstitutional by dismissing the principal without giving him the opportunity to state his case; and they also contravened the rules of natural justice by dismissing the principal - besides which they had no power to dismiss him. The right of the newly appointed principal was infringed by the members of SADTU who did not even have the discretionary powers which allowed them to take discretionary decisions (cf. paragraph 2.5.1).

All the educators attached to a school, including the principal, are the secondary educators of a learner or a school-going child, whereas the parents are the primary first educators. All the learners or the school-going children have been entrusted into the care of educators while the parents are absent. Educators are professionals who purposefully educate and teach learners different subjects and special fields such as the art of music etc. While carrying out his or her task, an educator exercises authority over the learner or school-going child. The act of exercising authority is justified by the educators' position in *loco parentis*. Authority that is exercised over the learners ensures an orderly and harmonious environment which allows a good quality of education to take place (Oosthuizen 1994:45-46).

In light of the preceding paragraph, it is deduced that discipline is the cornerstone of an ideal school. It is because of this reason that discipline and the exercising of authority must be given attention. In paragraph 2.2.3, it was pointed out that the educators who were supposed to act in *loco parentis* neglected learners. These educators put moratoriums on the maintenance of discipline and the exercising of authority over the learners. They befriended the learners they

were supposed to discipline, to authoritatively give instructions and to see to it that the learners adhere to the school's rules and policy. The resultant repercussions from this negligence were ill-disciplined learners, ineffective school management and poor matric results (cf. Table 4.1 & Figure 5.1).

3.2.3 Criminal law

Criminal law is part of public law (Bray 2000:18). The primary source of criminal law is common law. It must however be noted that there are crimes which are referred to as statutory offences such as drug offences which are regulated by the Drugs and Drug Trafficking Act (DDTA) (No. 140 of 1992). Because of this, it becomes clear that legislation is also a source of criminal law (Kleyn & Viljoen 1998:143). The main concern here is to identify offences which are criminal in nature at schools and to briefly discuss criminal law as a source of the law of education. Similarly, the differences and similarities between a criminal offence and a civil offence will be alluded to (Elliot & Allen 1993:1). It is also notable that sometimes it is difficult to classify an offence under criminal law because of the fact that other crimes are not defined in statutes (Smith & Hogan 1993:1).

Dine and Gobert (1993:18) hold the view that it is difficult to define a crime or to state whether an action is a criminal offence. They argue that in their attempt at defining a crime, scholars of criminal law made omissions in their definitions. They furthermore suggest that when a definition of a crime is formulated, the following should be included in the definition: *moral wrong*, though it is difficult to criminalise all immoral conduct. They also mention *harm or damage to the public*, which also makes it difficult to say whether the public is harmed or injured by the conduct of the defendant; the *punishment of offences*, which is the most important characteristic of the criminal law, though it may be difficult to say as to what constitutes punishment; finally, *a criminal procedure and proceeding* which should be employed when dealing with a criminal case (Dine & Gobert 1993:18-19).

The deduction which is made from the above exposition is that the following acts may constitute criminal offences: falsification of documents; stealing of the organisation's money; public drunkenness; fighting and killing; malicious damage to property; ethnic, racial and sexist insults; raping of learners; the forging and selling of reports; corporal punishment and assaults (cf. paragraphs 2.2.1; 2.2.2; 2.2.6; 2.4.1; 2.4.2 & 2.4.3). For one to be able to say whether an action

is a criminal offence, it is of vital importance to identify the procedures and proceedings which could be followed in the case. It must also be noted that not all criminal offences involve immoral conduct or damage to the public (Dine & Gobert 1993:7; 19).

From the above-mentioned offences which have already been discussed, it will suffice to pay attention to only one offence, namely, killing in the workplace. It was reported earlier in paragraph 2.2.5 that one of the educators attached to a school in Soweto gunned down another educator on the school premises. According to the report, the accused threatened the victim many a time before the actual killing. The principal who is the immediate human resource manager of the accused and the bureaucrats did not act pro-actively, though they were informed about the behaviour of the accused educator in time. The action of the accused constitutes a criminal offence in that it has the characteristics or aspects of a crime (Dine & Gobert 1993:18-22).

To differentiate this action from a civil action, it is deemed necessary to highlight the following: In this case the concern is the public wrong which was done by the accused, and the initiator of the suit which is the South African Police Services (SAPS) which took the decision to arrest the accused. After his arrest, the case was referred to the Protea Magistrates Court where the prosecutor brought formal charges against the accused. In this incident, the title of the case would be *S v Defendant.* The letter *S* stands for the State and defendant stands for the accused who is legally accused of murder. Because of its status, the State is referred to as a titular victim in a criminal case (Oosthuizen 1994:49, Dine & Gobert 1993:20-21).

In this case, moral fault and blame-worthiness are the main concerns. The State should therefore establish whether there was an intention to kill. Unlike the civil law, criminal law is concerned with carelessness or that which puts other people's lives in danger. If the accused intentionally missed or injured the educator he killed, he was still going to be charged with attempted murder. For the prosecutor to declare the action of the accused a criminal offence, he or she must first of all ascertain beyond reasonable doubt that it is indeed a criminal case. In a criminal case, procedures to be employed should be stricter than the procedures employed in a civil case, and the defendant should be allowed access to a lawyer. If found guilty, the penalty to be meted out may amount to a number of years imprisonment, depending on the presence or not of extenuating circumstances (Dine & Gobert 1993:20-22).

3.2.4 Constitutional law

In section 2 of the Constitution (No. 108 of 1996) it is stated that the Constitution is the supreme law of the Republic of South Africa. This means that all the laws of our country are subordinate to the Constitution. The Constitution of South Africa is underpinned by democratic values and principles, while the Bill of Rights is enshrined in it. The Bill of Rights and the democratic values and principles are very important for the human resource managers in the public education sector to know, and to manage human resource according to them (Jeffery 1997:5;8-9). The Bill of Rights, the democratic values and principles seem not to be observed or respected by employees in the public education sector in general and in schools in particular (cf. paragraphs 2.2.3; 2.3.1; 2.3.2; 2.3.3; 2.5.4 & 2.5.5).

The Bill of Rights which is the cornerstone of democracy in the Republic of South Africa is applied to all laws of the country. In all public-law relationships the person/party in authority must act with the public interest in mind because the Constitution or constitutional law has to do with the public interest (Neethling, Potgieter & Visser 1996:16, 31, 55). When the rights are to be exercised, principles of common law should be considered in order to promote the spirit, purport and objects of the Bill of Rights as set out in section 39(1)&(2) of the Constitution (No. 108 of 1996). In terms of section 34 of the Constitution (No. 108 of 1996), a person is allowed to lodge his or her case with the court if such person feels that his or her fundamental right entrenched in the Constitution has been violated (van der Waldt & Helmbold 1995:51).

From the foregoing exposition, it becomes clear that constitutional law which falls under public law deals, among others, with the contravention of the democratic rights of a juristic or natural person. As a component of public law, constitutional law has to do with the individual and the State (Neethling *et al.* 1996:16, 31, 55). As was discussed in paragraph 2.3.3 educators of a school in Hoopstad took an officer hostage to solve labour problems, despite the fact that they had other mechanisms at their disposal to solve labour problems (cf. sections 64(1) of the LRA, No 66 of 1995 & 23(2)(b)(c) of the Constitution, No. 108 of 1996). This was a crucial violation of human rights which might have been urgently and immediately interdicted by the High Court which would have freed the officer who was taken hostage and after that the law could have taken its course.

The dignity and other democratic rights of the officer were infringed in that the educators who were his subordinates humiliated him by swearing at him and intimidating him. The officer's right to freedom and security was violated by educators who held him hostage in the classroom, and who denied him the right to go to the toilet and to go to the restaurant to buy food. During the ordeal, the officer felt insecure because he was threatened, and psychologically tortured by his junior subordinates. The educators infringed the privacy of the officer in that they forced him to put up with them in the same classroom, when some of them were worthy to be called his children. Above all, they denied him the democratic right to freedom of movement (cf. sections 10; 12(1)(2); 13 & 21(1) of the Constitution, No. 108 of 1996).

3.2.5 Law of evidence

Sexual abuse of learners by educators is increasing to such an extent that it warrants attention. Cases of sexual abuse of learners mostly occur on the school premises where the culprits are educators into whose care a learner has been entrusted, and who are supposed to be acting in *loco parentis*. There is reason to believe that most of the cases of the learners who are sexually abused by educators are not reported. However, those that have been reported show that learners are indeed subjected to child abuse such as rape and public indecency (Swanepoel 2000:2).

Sexual intercourse with a minor constitutes a criminal offence irrespective of consent, and the act is regarded as rape which renders an educator who commits the act guilty of a criminal offence (cf. paragraph 3.2.3). The researcher attended the court hearing of the sexual abuse case discussed in paragraph 2.4.1, and it was found that a learner who was allegedly raped by an educator was from a broken home. This particular learner stays with her unemployed father who has been deserted by her mother. The proceedings, the findings and the verdict of the case are as follows:

(a) Offence : Rape
(b) Case Number : SHB 195/98
(c) Defendant : Y*
(d) Title : *S* v *Y*
(e) Finalising date : 17 June 1999

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* Y stands for the name of an educator who was accused of allegedly having raped a leaner. His name can be found on the file whose case number is SHB 195/98 in the Welkom Magistrate court.

i) Facts and evidence

The presiding magistrate over the proceedings of this case which was put on trial in the Welkom magistrate court was M. Schutte, and the state prosecutor was S. Ferreira. The accused who was the educator in this case was represented by Advocate M. Stanley. It was alleged that the accused raped a thirteen year old girl attending the same school where the accused was teaching. Owing to the fact that the state prosecutor brought formal charges against the educator, the State acted as a titular victim (cf. paragraph 3.2.3). The educator was accused in accordance with the provisions of the Criminal Procedure Act (CPA) (No. 51 of 1977), and the proceedings were made easy for the learner and the accused in that they were allowed to speak in the language in which they were conversant through S. Modiroa who acted as an interpreter.

The accused denied that he had raped the learner, and on the basis of the evidence induced from the witnesses, the witnesses' statements and the medical report, the presiding magistrate acquitted the educator of the charge of rape. According to the learner, she was raped by the educator on Friday afternoon - a day on which the school had a film show. In terms of the records of the school, the date on that day was 15 May 1998. In other words, the learner was allegedly raped on 15 May 1998. The learner was not taken to the medical practitioner immediately after the alleged rape. Instead she went to see him on 27 May 1998.

In spite of the fact that the doctor found that the learner was no longer a virgin, it was difficult for him to detect whether she was raped or not because she had since washed herself after the alleged rape. Furthermore, it can be said that another factor that influenced the responses of the learner was the level of maturity. Immaturity contributed to stating facts illogically. She, for instance, told the doctor that she was raped on Friday. Counting the days back on the calendar from 27 May 1998, the first Friday was that of the 22 May 1998, so the doctor recorded 22 May 1998 as the date on which she was raped, and this date did not agree with the statement she made at the police station namely that she was raped on 15 May 1998.

When she was further cross-examined by the prosecutor and the accused's lawyer, she said that she was raped on 18 May 1998. According to the statement made by one of the witnesses, and who is also one of her classmates, the complainant told her that she was nearly raped by the accused. Even here, it could be argued that as a young girl, who has respect for her teacher, she was scared of being frank, and mention must also be made that the witness did not want to

involve herself in a case where a learner and an educator were featuring because at one stage she told the court that when the complainant related the rape story to her, she told her that she must stop talking about the educator because she did not want to discuss an issue which involves an educator.

In the statement she made to the police, the complainant said that she was standing next to the hall with her two friends on Friday afternoon - on the day the school staged the film show, and that she was called by the accused to the staff-room. According to the complainant, in the staff-room the accused wanted to know whether she was in love with someone. Upon denying that she was, the accused told her that as from that day they would be lovers. He then instructed her to go to the Grade One classroom which is far from the hall where the function was held. It is in this classroom where the alleged rape took place. In the statement which the complainant made to the two female educators of the school, she said that the accused had sent her to fetch him water which she was to deliver to the Grade One classroom where the accused would be waiting for her.

When asked whether she screamed, or whether her clothes were torn while being raped, the complainant responded by saying that she indeed screamed while she was being raped. As regards to the issue of clothes, she told the court that they were not torn because the accused instructed her to take her panties off before raping her. The deduction which is made here is that the little girl who was staying with her unemployed father, and whose mother had left her and her father, consented to have sex with the accused in order to secure a source of income, unaware that she was being sexually abused and exploited.

ii) Decision

Schutte M. SHB 195/98:

The court found that it was not clear as to the date on which the alleged rape did take place. It was also not medically confirmed that the complainant was indeed raped because she went to see the medical practitioner long after she had washed herself. The statements she made to the police, to the two female educators of the school and to the witness were contradictory. Another thing that made the court decide in the accused's favour was that it found it very strange that the complainant's screams were not heard by anybody, even by the factotum who was said to have

been working nearby, and that the complainant did not report the rape incident to anyone or any teacher before leaving for home on that day. Having considered the aforementioned points and facts, the accused was discharged in compliance with section 174 of the CPA (No. 51 of 1977).

iii) Comment

The principal of the school did not manage this case as he should have. After a thorough investigation it was found that the case was reported by somebody else to the police, not the principal. This case serves as an eye-opener to human resource management practitioners that learners who are alleged victims of rape should consult a medical doctor immediately before washing themselves, and that the victims must be subjected to counselling prior to the court hearing.

However, it must be made clear that, in terms of section 17(2) of the EEA (No. 76 of 1998), the Department of Education has the right to take disciplinary action against the educator in spite of the fact that he was acquitted by the court on the charge of rape. Finally, a fine not exceeding one month's salary or dismissal and the removal of the educator from the register of SACE for a specified period or indefinitely can be imposed by SACE on the educator (section 5(iii)(bb)(cc) of the SACEA, No. 31 of 2000).

3.2.6 Private law

Private law has been in existence since time immemorial, and it developed as an entity from Roman law (Neethling, Potgieter & Visser 1996:47-50). Private law aims at looking into the relationships that exist among legal subjects. There are however concepts and institutions that are found in private law, which are similar to those found in other law disciplines. Persons are legal subjects because the relations that exist between them are governed by the law. A legal subject is any individual, irrespective of his or her gender, age, belief, mental capacity and ability; while a juristic person is any association or organisation e.g. companies, banks, schools, universities, School Governing Bodies, and the South African Broadcasting Corporation (Cronjé 1994:7,9, Bray 2000:14-15).

In this study, learners as natural persons, with regard to the right to *corpus* or body, will be looked into. The action of SADTU as a juristic person will also be given attention. The rights of

an individual which are catalogued in Chapter 2 of the Constitution (No. 108 of 1996), under the Bill of Rights will be alluded to in the discussion of the law of persons. According to Cronjé (1994:3-4) the law of persons has norms of conduct which regulate the behaviour of persons. For example, it is not permissible for a person to drive a car while under the influence of alcohol. There are relationships among legal subjects which are governed by the law of persons. These relationships have to do with the rights of the legal subjects. A person has for an example, the right to own property, which must be respected by another legal subject.

It must be mentioned up-front that the Bill of Rights renders more protection to personal rights because they are fundamental rights which have to be recognised by both the state and government schools - in the vertical relationship and between persons in the private law relationship or a person respecting another person's rights - in the horizontal relationship.

For example, in section 12(1)(d)(e) of the Constitution (No. 108 of 1996) it is categorically mentioned that everybody has the right not to be tortured in any way and not to be treated or punished in a cruel, inhuman or degrading way. The state or government schools are obliged to legally protect the body or *corpus* of a learner from any assault. However, in paragraph 2.4.7, it is indicated that three educators of a school whipped an eleven year-old learner repeatedly till he sustained bodily injuries, in spite of the fact that section 12(1)(d)(e) of the Constitution (No. 108 of 1996) and section 10(1)(2) of the South African Schools Act (No. 84 of 1996) prohibit corporal punishment.

In another incident which is also discussed in paragraph 2.4.7, an educator meted out an outlawed corporal punishment in terms of sections 12(1)(d)(e) & 28(1)(d) of the Costitution (No. 108 of 1996) and section 10(1)(2) of the South African Schools Act (No. 84 of 1996) to a seven year-old girl and harmed her. The grievous bodily harm was so severe that the girl had to be taken to the hospital. The pain the two learners suffered as discussed above is viewed in a serious light, and is liable to be awarded compensatory damages by a court of law or the state (cf. section 7(2) of the Constitution No. 108 of 1996).

A person can suffer bodily harm or *iniuria* as a result of rape. The cases of alleged rape which are discussed in paragraph 2.4.1 refer. In the discussion, it is alleged that a principal of a Soweto school raped a nine-year old school girl attending his school. It is assumed that the raping of this girl by the principal caused pain because the principal could have not raped the nine-year old girl

without forcing sexual penetration against the little girl's consent. The right of this girl, as set out in section 28(1)(d) of the Constitution (No. 108 of 1996) namely to be protected from maltreatment, neglect, abuse or degradation was violated. The violation of dignity as mentioned in section 10 of the Constitution (No. 108 of 1996) occurred because the principal could not have raped the little girl without soiling her with his sperms and without kissing her against her consent.

The right to bodily and psychological integrity which includes the right to security in and control over the body of the little girl as set out in section 12(2)(b) of the Constitution (No. 108 of 1996) was violated. The raping of the little girl by the principal constitutes bodily harm which caused the girl to lose sentiment and to experience feeling of out-range. Because of this serious bodily violation it was reported that the little girl was traumatised, and she had to be given counselling (cf. paragraph 2.4.1). The report went further to say that subsequent to the raping of the nine-year old girl a criminal charge was laid against the principal.

As set out in section 11 of the Constitution (No. 108 of 1996), a legal subject has the right to life. In terms of this section, it is unconstitutional and a criminal offence to take the life of a person by killing her/him. In paragraph 2.2.5, it was indicated that one of the educators at a school in Soweto outside Johannesburg gunned down three educators in the staff-room, and killed one of them. The killing infringed on the right to life of the killed educator as a legal subject, and the injured educators suffered bodily harm.

Section 12(1)(c)(d) & (2)(b) of the Constitution (No. 108 of 1996) stipulates that every person has the right to freedom and security of the person which includes the right to be free from all forms of violence and not to be tortured in any way. Furthermore, it stipulates that every person has the right to bodily and psychological integrity which includes the right to security in and control over their body. The education officer who was taken hostage (cf. paragraph 2.3.3), was psychologically harmed by the educators who took him hostage because he was threatened by violence which caused fear. Emotional anxiety came about as a result of threats.

The education officer was psychologically tortured in that the educators used insulting remarks which caused emotional shock. The fear and emotional shock from which the education officer suffered affected his physical-mental well-being. The educators who took the officer hostage furthermore infringed on his right to security and control over his body. For example, the officer

could not move his body freely by going to wherever he wanted to go. The education officer's inherent dignity and the right to have his dignity respected and protected as set out in section 10 of the Constitution (No. 108 of 1996) were violated in that he was forced by the situation wherein he found himself to sleep in a classroom which he shared with teachers who took him hostage.

The foregoing discussion concerned natural persons. At this juncture attention is paid to a juristic person who has the following characteristics: *continuous existence*, (a school exists continuously irrespective of its members who change from time to time); *possessing property* (a school is a juristic person because it possesses property which has been provided by the School Governing body or the State); *does not acquire gain*, (a school does not make any financial gain when teaching and educating learners). Other organisations which do not make gain, and which are classified as juristic persons are the Education Labour Relations Council (ELRC) and trade unions. SADTU, whose activities have been discussed in this research project, is therefore a juristic person because it has the three characteristics mentioned above (cf. paragraph 2.3.1).

In section 25(1)-(9) of the Constitution (No. 108 of 1996), it is alluded that every person has the right to own property, which must be respected by another legal subject. It is contravention of section 21(1) of the Constitution (No. 108 of 1996), if another person damages or destroys the property of another person, because such act is tantamount to depriving a person of property. In addition to this, the act constitutes the crime of malicious damage to property.

As discussed in paragraph 2.3.5, the members of SADTU (a juridical person) maliciously damaged the property of the state (juridical person) during an industrial action. The damage of property by the members of this particular union is viewed in a serious light in terms of section 25(1) of the Constitution (No. 108 of 1996), and if steps were taken against the members of this union, they could have been held liable for malicious damage to property (cf. Picture 2.1).

3.2.7 Case law

There are legal subjects in education such as the learners, the educators, the education officials, the state and the parents who are liable to the law. The cases of these legal subjects are tried in the different courts should they transgress the law. Discussing case law without looking into the different courts that deal with cases in South Africa may cause confusion. In terms of section 166(a)-(e) of the Constitution (No. 108 of 1996), there is a hierarchy of courts which deal with all

judicial matters. These courts are the Constitutional Court, the Supreme Court of Appeal, the High Courts, the Magistrates Courts or any other court established in terms of the Act of Parliament.

The courts are independent bodies which are subject to the Constitution and the law. It is because of this independence that nobody or no organ of the state may interfere with the function of the courts. It must also be mentioned that the courts are protected by legislation in order to ensure impartiality, dignity, accessibility and effectiveness. For instance, an order, a ruling or any decision given by any court in South Africa must be obeyed or carried out by the person concerned, failing which such person is charged with contempt of court (cf. section 165(1)-(5) of the Constitution, No. 108 of 1996).

Case law has two characteristics, namely, the doctrine of precedents or *stare decisis* and the legal principles on the basis of which decisions were taken or *ratio decidendi* as they are sometimes called. The doctrine of precedents means that the decisions taken by a higher court are binding over courts that are over the lower level. For example, the decisions of high courts, including any high court of appeal are binding over the Magistrates' Courts and any other lower courts established in terms of an Act of Parliament. In South Africa the highest court is the Constitutional Court whose decisions are binding over all courts (Oosthuizen 1994:47).

The principle of *ratio decidendi* means that the courts have a reason or reasons for passing judgement, and these form precedents. This means that the lower courts will in future consider the reason or reasons which were used by higher courts when passing judgement. It must be noted that all the proceedings of the Constitutional Court and that of the Supreme Court are recorded in the volumes of law reports. These law reports are the sources which contain case law. It is also notable that in the provinces, the decisions of the provincial supreme courts are binding over the lower provincial courts of that particular province, but not over the lower courts of other provinces (Oosthuizen 1994:48, Bray 2000:55).

An example of a case of which the decisions and reasons would be binding over the lower courts is the one discussed in paragraph 3.2.4, should the officer have taken the Department of Education to the other courts, for example High Court first, because the case concerns constitutional matters such as the right to dignity, privacy, freedom of movement, after this it would then have gone to the Constitutional Court. This case could have been recorded in the law

reports for further reference. Its title would have been indicated as *the Officer (his surname) v Free State Department of Education.*

Regarding the rape case (cf. paragraph 3.2.5) which was put on trial in the Magistrates' Court, the magistrate who presided the proceedings made decisions which are not reported in the law reports. However, but the proceedings are kept on record and there is nothing to prevent other lower courts in the same province from following the verdict of the first court. The lower courts are established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts (cf. section 166(e) of the Constitution, No. 108 of 1996).

Another example of a case of which the decision will be binding on those who smoke dagga, and who were discussed in paragraph 2.2.6 is that of a man called Gareth Prince who recently asked the Appeal Court in Bloemfontein to allow him to smoke dagga while practising as an attorney (Reckard 2000:6). This man claimed that the smoking of dagga was a religious requirement for Rastafarians. However, five judges of the Appeal Court turned down his request. The court indicated that the smoking of dagga including cannabis was dangerous to society, and that the law was obliged to protect everybody in South Africa, including the Rastafarians, from the harm that could be inflicted by dagga (Rickard 2000:6).

3.2.8 Labour law

The sources of labour law are the Constitution (No. 108 of 1996), common law, case law and public law. It must also be mentioned that, among others, the following Acts form part of labour law: Employment Equity Act (No. 55 of 1998); Labour Relations Act (No. 66 of 1995); Employment of Educators Act (No. 76 of 1998); Basic Conditions of Employment Act (No. 75 of 1997) etc. The aim here is to look into what the labour law has to say with regard to the termination of educators' employment, or to be precise, the dismissal of educators.

In paragraph 1.5.9 the word dismissal was defined. It will therefore be unnecessary to define it. The following are *inter alia* the grounds for which an educator can be dismissed or discharged by his or her employer: on account of ill-health; appointment on probation; incapability; and on account of misconduct (cf. sections 11(1)(2), 12(1)(3), 13(1)-(3), 14(1)-(10) & 17(1)-(3) of the EEA, No.76 of 1998). The main aim here is to discuss dismissal on account of misconduct. The

other grounds for which an educator may be dismissed will therefore not be entertained. It must also be noted that fair and unfair dismissal of educators will be given attention to.

When the human resource manager in the public-education structure has decided to recommend the dismissal of an educator, it is necessary for him or her to make sure that what is decided upon is in accordance with the relevant provisions of the sections of the EEA (No. 76 of 1998) and LRA (No. 66 of 1995). This is very important because in terms of section 33(1) of the Constitution (No. 108 of 1996), everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

A human resource manager may dismiss an educator on the basis of section 14(1)(a) of the Employment of Educators Act (No. 76 of 1998) which stipulates that an educator who absents him/herself from work for 14 consecutive days without the permission of his/her employer is treated as having dismissed him/herself. However, section 34 of the Constitution (No. 108 of 1996), stipulates that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing, before an independent and impartial tribunal or forum. Such educator would therefore still have recourse to the law.

Secondly, a human resource manager who dismisses an educator without giving him/her a hearing contravenes section 35(3)(a), (c), (e) & (f) of the Constitution (No. 108 of 1996) which stipulates that every accused person has a right to fair trial, which includes the right to be informed of the charge with sufficient detail to answer it, to a public trial before an ordinary court, to be present when being tried and to choose, and be represented by, a legal practitioner [in the case of disciplinary hearing, by a fellow employee or a union representative], and to be informed of this right promptly.

Earlier in the research project, educators' actions, which seem to be falling within section 17(1) of EEA (No. 76 of 1998), and some which might have been recorded in case law were discussed. The human resource managers should consider rules and procedures which will determine whether an educator is liable for dismissal. Before an attempt can be made at looking into the dismissal of educators on the grounds of misconduct, the following actions which may constitute the reason for dismissal are mentioned: transgression of codes of conduct; misconduct stemming from protest actions; insubordination as a dimension of misconduct and phenomena having a bearing on misconduct (cf. paragraphs 2.2; 2.3; 2.4; 2.5; & 2.6).

As has already been mentioned, a school is an organisation which has a hierarchical structure (cf. Figure 2-2). All the human resource managers in the different levels of the school structure, manage cases of misconduct. The principal as an immediate manager must make sure that the necessary steps are followed before the case is reported to the district level. Sch. 8, item 4(1) of the Labour Relations Act (No. 66 of 1995) is clear on this point. Among others it stipulates that the principal should notify an educator of the allegations against him or her using a form and language that an educator can reasonably understand.

An educator should be allowed the opportunity to respond to allegations (cf. section 34 & 35(3)(a) of the Constitution, No.108 of 1996). In addition to this, it must be mentioned that an educator is entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow educator (cf. section 35(3)(b) of the Constitution, No.108 of 1996). With regard to internal disciplinary hearing, the principal should communicate the decision taken, and preferably furnish an educator with written notification of that decision. In any case, the educator has a right to access to the reason for such decision (cf. section 32(1)(b) of the Constitution, No. 108 of 1996).

If a principal has satisfied himself or herself that the necessary steps with regard to misconduct committed by an educator have been followed, and that reasons surrounding the case which has been established are fair, the charge of misconduct is referred to the District Manager, who in turn will refer it to the Director for Human Resources at the Provincial level (cf. Figure 3-1).

After satisfying him/herself that the allegations need to be investigated, the Director for Human Resources appoints an investigation team. If the investigation findings warrant a hearing, a disciplinary tribunal which should be objective, reasonable and fair in judging the misconduct case is set up (Upex 1994:147). If the disciplinary tribunal proves on a balance of probabilities that the educator is guilty of misconduct, or if the educator admits to the charges, the recommendations of the sanctions are forwarded to the Head of Department or the Member of the Executive Council (MEC) for education as an employer (cf. sections 1(vi)(b) & 24(2)(a)(iv) of the EEA, No. 76 of 1998).

The Head of Education or the MEC for education may, after considering the documents, discharge the educator from service or implement any sanction that has been recommended by the

disciplinary tribunal or reject it if (s)he deems it necessary to do so (cf. section 24(2)(iv)(3) of the EEA, No. 76 of 1998). The educator concerned has the right to appeal to the Minister or the MEC for education against the findings of the disciplinary tribunal. The Minister or the MEC for education may dismiss the appeal or uphold it (cf. section 25(1)-(5) of the EEA, No. 76 of 1998).

Thirdly, a human resource manager should take into consideration section 185 of the Labour Relations Act (No. 66 of 1995) which categorically stipulates that an employee has the right not to be unfairly dismissed. In terms of section 188(a)(b) of the Labour Relations Act (No. 66 of 1995) unfair dismissal occurs when the employer fails to prove that the reason for dismissal is fair related to the employee's conduct or capacity, or based on the employer's operational requirements, and that the dismissal was effected in accordance with a fair procedure.

To belong to a trade union and to participate in its activities does not constitute misconduct. An educator who is dismissed because of his or her belonging to a trade union is unfairly dismissed. If an employer dismisses an educator without having given him or her the opportunity to state his or her side of story or without having written a warning to him or her, such dismissal will automatically be considered as unfair. On the other hand, dismissal is unfair if it is based on personal feelings of the employer, instead of the facts emanating from the fair procedures and proceedings.

The action of an educator shall not constitute insubordination if he or she refuses to teach the subject for which he or she has not been trained, in the situation where an educator who teaches that particular subject is absent. Should the employer dismiss such educator, the dismissal will be referred to as an unfair dismissal (Fouché 1998:279-281 & section 187(1)(2) of the LRA, No. 66 of 1995).

3.3 Legal aspects of managing misconduct

3.3.1 Systems and procedures

A system is a method of connecting parts in order to make a whole. In administering education affairs at a school level, the principal connects all the activities of a school systematically. When the affairs of a school are treated fairly and within the reasonable time which allows the decision to be taken, in accordance with the rules and the policy of that particular school, such process is

referred to as a procedure (Carrell *et al.* 1995:784). Systems and procedures to be followed in administering the school affairs are laid down in circulars, regulations and some statutes. A principal of a school manages systems and procedures on a daily basis. It is therefore expected of a principal to manage systems and procedures effectively and efficiently in order to ensure sound labour and human relations (Greenberg & Baron 1997:15;159).

Before an educator can be charged with misconduct, all the human resources managers from the lower level to the upper level of the hierarchical structure should employ the systems and procedures that are in place (cf. Figure 3-1). A principal who is an immediate human resource manager at school level should take precautional measures before a case of misconduct is reported to the District office, because such a case may not hold in court if procedures are not followed. It is incumbent on the principal to discuss the rules, regulations, and the school policy with the educators before any step is taken against the transgressors. For example, educators should be made aware that alcohol does not go with work; that late coming and absenteeism retard the progress of the school; that abusing learners sexually is taboo; that political activities in the workplace are not allowed; and that contravening financial control regulations is punishable (Dessler 1997:596).

The second chapter of this research project revealed that some educators are ill-disciplined. Punitive disciplinary measures should not be applied before a principal follows the necessary procedures that are prescribed, including counselling, when managing misconduct. The fact that a principal is responsible and accountable suggests that he or she is responsible for drawing up development programmes or for organising workshops that would improve the behaviour of his or her educators (cf. section 2(1)(c)(d) of the Skills Development Act (SDA) (No. 97 of 1998). In the training sessions, the educators concerned could discuss problems related to their behaviour which affect their performance. This could be done by using a method referred to as sensitivity training, which is a technique that could make educators understand their own behaviour, and the impact it has on other educators and on labour relations (Greenberg & Baron 1997:564-567).

Following a principal's explanation of the norms and standards, as well as the training of his or her educators in issues that are related to discipline, it is then that disciplinary steps could be taken against an educator who does not want to comply or conform with the accepted standards of the school. Labour unions that are operating within a school are a reality, and one cannot ignore this fact. Most of these unions have site committees attached to a school. The site committee should

therefore be allowed to discuss issues relating to their member's disciplinary action with the principal (Dessler 1997:596). Despite the fact that SASA (No. 84 of 1996) does not afford the School Governing Body the opportunity to discuss disciplinary issues with the educator concerned, the principal should involve them in order to maintain sound human relations (cf. section 20(1)(2)(3) & 21(1)-(6) of the SASA, No. 84 of 1996).

Section 33(1) of the Constitution (No. 108 of 1996) stipulates that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Among others, fair procedure, in terms of Sch. 8, item 4(1) of the Labour Relations Act (No. 66 of 1995) means that the employee should be allowed the opportunity to respond to the allegations. This is done by writing a letter to him or her, in order to afford the educator the opportunity to put his or her case in writing, in which he or she explains as to why he or she persistently comes to school late or whatever the case may be (Dessler 1997:598, Squelch 1999:29-30).

An example of a letter that could be written to an educator who has contravened the provision of section 17(1)(m) of the EEA (No. 76 of 1998) is as follows (cf. paragraph 2.2.4):

Institution's Address

Mr/Mrs/Ms_____

_____

_____

Dear Mr/Mrs/Ms_____

ALLEGED UNAUTHORISED LEAVE

It has come to my attention that you were absent from your duty without leave or valid reason on/from..... This action is viewed in a serious light due to the fact that you have contravened section 17(1)(m) of the EEA (No. 76 of 1998). The school is considering instituting proceedings to the effect of leave without pay.

You are therefore afforded the opportunity to comment in writing within seven calendar days after receiving this letter why I should not give you leave without pay for the said period. In failing to submit the said response, I will take it that you agree to the granting of leave without pay for the above stated period.

Please forward your reply to the Principal at the above mentioned address.

Principal's signature: ..... Receiver's signature: .....

Date: ..... Date: .....

The case is then reported to the District Office with all the facts surrounding it, including the letter of response from the educator. If the educator refuses to respond to the letter which afforded him or her the opportunity to state his or her side of the story, the principal can nevertheless proceed with the case, and he or she should include the letter in which he or she explains that the educator in question was afforded such opportunity, but he or she failed to respond (cf. paragraph 3.2.2). After studying the documents, and satisfying itself that systems and procedures were effectively managed by the principal, the District Office must forward all the documents to the Human Resource Director at Provincial level, who in turn will study the documents of misconduct (Carrell *et al.* 1995:710-712).

Having satisfied himself or herself that the case holds water, the Human Resource Director will appoint in writing one of the human resource managers as the investigating officer to investigate the case by obtaining evidence in order to determine whether there are grounds for which the educator concerned could be charged with misconduct. The investigating officer is expected to report to the Human Resource Director following the completion of the investigation. During the investigation of the case, it is not permissible for the investigating officer to cross-question the educator concerned without ascertaining from him or her whether he or she was prepared to respond to questions without assistance from a representative. The educator concerned has the right to remain silent should the investigating officer ask questions that make the educator concerned feel that the response will be used against him or her in future (cf. section 18(1)(2) of the EEA, No. 76 of 1998).

3.3.2 Formulation of misconduct charges

A charge of misconduct is formulated after the investigating officer has forwarded the documents of misconduct to the Human Resource Director following the investigation (cf. paragraph 3.3.1). If the human resources director is of the opinion that there was reasonable fairness and that the misconduct which was investigated constitutes reasons to continue with the case, the charge of misconduct is formulated in writing. A letter that charges the educator concerned is delivered to

him or her, and it is handed over to him or her in the presence of a witness. The educator concerned must sign both the original letter and the copy thereof. The educator concerned keeps the original letter, while the copy is filed in the educator's personal file (section 19(1)(2) of the EEA, No. 76 of 1998).

On the charge sheet, the educator concerned is instructed to write a letter within 21 days after the receipt of the charge sheet to the Human Resources Director in which he or she denies or admits the charge. It is also expected of the educator concerned to give explanations when responding to the charge of misconduct. It must be noted that the educator concerned has the right to refuse to give his or her explanations in his or her response. It is incumbent on the Human Resource Director to inform the labour union to which the educator concerned belongs about the charge. If the educator concerned admits the charge, he or she will be regarded as guilty of misconduct (section 19(2)-(5) of the EEA, No. 76 of 1998).

Examples of the charge sheet and a letter which instructs the educator concerned to respond within 21 days after the receipt of both the letter and the charge sheet are given below. Note that the case of misconduct is based on the discussion in paragraph 2.2.4 of the research project.

The Address of the Human Resource Director

Mr/Mrs/Ms_____

_____

_____

_____

ALLEGED MISCONDUCT

You, (the name of an educator concerned), employed by the Department of Education and therefore an educator as defined in section 1(v) of the EEA (No. 76 of 1998), hereafter referred to as the Act, are hereby, and in terms of section 19(1)-(5) of the Act charged with the following misconduct:

Charge 1

You are guilty of misconduct in terms of section 17(1)(m) of the Act in that on or about *X* date (the actual date on which the misconduct was committed) you were absent from duty without leave or valid reason when you did not report for duty.

Alternative to charge 1

You are guilty of misconduct in terms of section 17(1)(b) of the Act in that on or about *X* date (the actual date on which the educator concerned was absent) you performed or caused or permitted to be performed or connive at any act which is to the prejudice of the administration, discipline or efficiency of any department, office or institution of the *State* when you did not report for duty.

A directive calling on the educator concerned to respond to the charge

You are hereby requested, in terms of section 19(2) of the Act, to send or deliver a written admission or denial of the above-mentioned charge with which you are charged, within twenty one (21) calendar days after receiving this charge sheet. Such admission or denial and/or representation is to be made to: The Head of Department (give his or her address in full). Your attention is also drawn to the provisions of sections 19(5) and 21(1) of the Act. It must be noted that the contents and the facts pertaining to the charge sheet are based on section 19(1)-(5) of the EEA (No. 76 of 1998).

The Human Resources Director is empowered by the provisions of the EEA (No. 76 of 1998) to suspend an educator before or after the formulation of the charges against such educator, if there are grounds which cause the Human Resource Director to feel that the educator concerned should be suspended. Before suspending an educator, the *audi alteram partem rule* is applied i.e. the Human Resource Director informs the educator concerned about the suspension in writing, furnishing him or her with reasons as to why he or she is to be suspended, and he or she is given 14 days within which he or she must tell the Human Resource Director why he or she should not be suspended. Having received a letter from the educator concerned, the Human Resource Director considers provisions of the EEA before suspension is instituted. The educator concerned is suspended in writing if there are grounds which validate suspension (section 20(1)-(3) of the EEA, No. 76 of 1998).

Example of a letter in which the reasons for the intended suspension are furnished, and which should be responded to within 14 days as well as a letter which suspends an educator concerned are given below:

A letter stating reasons for the intended suspension

The Human Resource Director's address

Mr/Mrs/Ms_____

_____

_____

Dear Mr/Mrs/Ms_____

Intended suspension on account of alleged misconduct

The Department is considering suspending you with salary in accordance with section 14(2) of the EEA (No. 76 of 1998), pending a departmental investigation regarding a minor's sexual abuse charge against you. Before the Department may suspend you with salary, you are afforded the opportunity to submit to the Department all the facts relevant to this issue which may influence the Head of Department with regard to the envisaged suspension. If there is anything that you want to bring to the attention of the Head of Department which might change his or her decision, you may write a letter to him or her, in which you explain everything to him. Note that the correspondence should reach him or her within 48 hours after the receipt of this letter. His or her address is as follows: (Give the full address of the Head of Education).

If the Head of Department does not receive a letter from you within 48 hours after you have been given this letter, the decision will be made without your response. You are therefore advised to view this in a serious light.

Your co-operation in this regard is highly appreciated.

..... Recipient's signature: .....
Human Resources Director

Date: ..... Date: .....

A letter suspending an educator concerned

Address of the Human Resource Director

Mr/Mrs/Ms_____

_____

_____

_____

Suspension with immediate effect

Subject to section 14(2) of the EEA (No. 76 of 1998), the decision has been taken that you be suspended with salary from duty with immediate effect, pending a departmental investigation into the alleged sexual abuse you committed against a minor.

You may under no circumstances visit or enter any building, office or institution of the Department without the permission of the Head of Department.

Your co-operation in this regard is highly appreciated

.....
Human Resource Director

Date: .....

The above-mentioned letters are based on the sexual abuse of a learner which was discussed in paragraph 2.4.1.

3.3.3 Disciplinary hearing

After the initial steps have been taken in terms of the charge of misconduct contemplated in paragraph 3.3.2, the next step to be taken will be the inquiry by the Disciplinary Tribunal. The tribunal is a group of people consisting of one or more of the educators working with the one charged with misconduct, and management representatives from the Human Resource section at provincial level (cf. Figure 3-1). The Human Resource Management representatives should be conversant with the policies, the systems and procedures that are in place, so that they are able to explain them, where necessary, to other members of the panel (French 1994:511-512). To be more specific, there should be a chairperson, someone acting as a prosecutor, and two other persons who shall be nominated by the educator concerned. If the educator concerned belongs to a trade union, the two persons shall be union representatives (section 21(1) of the EEA, No. 76 of 1998).

The chairperson of the disciplinary tribunal shall decide upon the time and place where the disciplinary hearing must be held. All of the above is done in consultation with the Head of Department. The educator concerned will be given 14 days' notice in writing of the time and place where the disciplinary hearing will be held. The trade union to which the educator concerned belongs shall also be told about the disciplinary hearing. The disciplinary tribunal will

summons any person who might have information which may assist them in handling the disciplinary hearing, as well as the documents or anything recorded in the administrative books like the logbook, the time register, the appraisal record etc. All the persons who are summonsed to the disciplinary hearing shall be asked questions to adduce information that may help in resolving the issue at hand. All records, in the form of books or documents shall be perused in order to find information relevant to the issue at hand (section 21(2)(3) of the EEA, No. 76 of 1998).

The letter which summons the educator concerned will be signed by the chairperson of the Disciplinary Tribunal, or any person designated by the chairperson. The letter will be posted by registered mail or it may be handed over to the educator concerned in the presence of a witness. When questioning the individuals who have been summonsed, as well as perusing books, objects and documents, the law relating to privilege should apply. The Head of Department has the right to call on any person to attend the inquiry into the charge of misconduct. Such a person may cross-question the educator concerned, as well as the witnesses in order to adduce evidence surrounding the case of misconduct (section 22(1)(2) of the EEA, No. 76 of 1998).

The educator concerned has the right to be present, to be assisted and represented by another person, to call witnesses, to ask questions to any person who supports the charge, and to have access to documents that implicate him or her. The records of the proceedings as well as the evidence emanating from the disciplinary hearing should be kept by the Disciplinary Tribunal. Subsequent to the inquiry, the Disciplinary Tribunal will determine whether the educator concerned is guilty or not. Should the Disciplinary Tribunal find that the educator concerned is guilty or not guilty of misconduct, such educator will be told about the findings which shall be forwarded to the Head of Department with the Disciplinary Tribunal's recommendations (section 23(a)-(c) of the EEA, No. 76 of 1998).

A letter summonsing an educator concerned to attend a disciplinary hearing

Address of the Human Resource Director

Mr/Mrs/Ms_____

_____

_____

_____

Dear Mr/Mrs/Ms_____

In terms of section 21(3) of the EEA (No. 76 of 1998) you, (the name of educator concerned) are hereby given notice to appear on (the date on which he or she must appear) at (the commencement time) at the (the place where the disciplinary hearing will be held), before the disciplinary tribunal appointed in accordance with section 21(1)(b) of the EEA (No. 76 of 1998), where a disciplinary hearing is going to be conducted in respect of the alleged misconduct you have been charged with on (the date which appear on the charge sheet and on the letter which afforded the educator concerned the opportunity to state his or her side of story as contemplated in paragraph 3.3.2. Note that the procedures and your rights during the proceeding are catalogued in section 22(1)(2) of the EEA (No. 76 of 1998).

Your co-operation in this regard is highly appreciated.

.....
Head of Department

Date.....

Signature of the educator concerned..... Signature of the Witness.....

Date: ..... Date: .....

3.3.4 The role of the governing body

Figure 2-2 clearly shows that the School Governing Body (SGB) is not in the line function. The reason being that this body does not manage the school but governs it (cf. section 16(3) of SASA, No. 84 of 1996). The word govern among others means to rule as contemplated in section 16(1) of SASA (No. 84 of 1996). In other words, the School Governing Body stands in a position of trust towards the school (section 16(2) of SASA, No. 84 of 1996). Someone who is a governor or ruler has powers and responsibilities. It is therefore, expected of a ruler to protect, to supply basic needs, to develop and to improve his or her organisation and the well-being of his or her subjects. Most of the black parents who serve on the SGB cannot deal with the wayward educators because they do not have legal power to handle teacher misconduct (A concerned parent 1999:12).

The School Governing Body is empowered by the provisions of SASA (No. 84 of 1996) to recommend the appointment of an educator. But when it comes to discipline, the School Governing Body has no say whatsoever. In other words, they are not empowered by the Act to recommend the dismissal or the suspension of an educator, in spite of the fact that they

recommend the appointment of an educator or non-educator staff (section 20(i)(j) of SASA, No. 84 of 1996). If one has to consider the functions of the School Governing Body listed in section 20(1)-(3) of SASA (No. 84 of 1996), it becomes clear that it is illegal and unlawful for the School Governing Body to summons an educator to an internal disciplinary hearing. For instance, the School Governing Body of a school in Daveyton, on Gauteng's East Rand acted *mala fide* and *ultra vires* by suspending an educator while sorting out differences that existed between educators at that school (cf. paragraph 2.5.3).

The provisions of section 20(1)(a) of SASA (No. 84 of 1996) confer upon the Governing Body the function to promote the best interests of the school and its development by providing quality education for learners. It is really ironical to say that the Governing Body is to see to it that quality education is provided, when they are not empowered to discipline educators who in actual fact are the people who should see to it that quality education is provided. The Act does not give direction as to how the Governing Body should deal with an educator who refuses to carry out instructions; an educator who does not want to submit to authority and control; an educator who abuses alcohol and an educator who sexually abuses learners (cf. paragraphs 2.2.2; 2.2.4; 2.4.1 & 2.5.1).

The functions and the powers of the Governing Body need to be reviewed if stability, order and discipline are to be established and maintained at schools. However, Gantsho (1998:15) feels that this is not possible because people who make decisions in the Education Labour Relations Council are mostly from the SADTU camp. As a result of this, parents are deprived of the opportunity to make important decisions with regard to misconduct committed by educators. This has caused a lot of dissatisfaction among parents who are also not satisfied with the limited functions and the powers vested in the SGBs (A concerned parent 1999:12).

Parents complain, for instance, that they are not involved in discussing and debating policies and bills before they are formulated and passed. They furthermore complain that when a case of misconduct is investigated, only the views of educators are considered, and that no one takes cognisance of the fact that the parents' children pay the worst price for the unbecoming behaviour of educators discussed earlier in this research project as well as educators' resistance to authority and control (Concerned Parent 1999:12). With regard to disciplining an educator, the principal may, if he or she so wishes, involve the Governing Body, more especially when the principal's intention is to warn the educator who persistently commits the same offence. But in reality, the

School Governing Body does not play a role in disciplining educators (cf. section 20(1)-(3) of SASA, No. 84 of 1996).

3.3.5 The role of the principal

The principal of a school is an immediate supervisor who manages human resources at school level (cf. Figure 3-1). The principal is not empowered by any provision of any Act to dismiss or to suspend an educator on account of misconduct. As the head of the school, the principal's role is to manage potential misconduct by staff members and report incidents. This could be done by effectively maintaining discipline and exercising authority over human resources. Principals should perceive discipline as a learning opportunity for educators, not as an end in itself (Chapter A, regulations A4.1 & A4.2 of the PSA Regs, No. R. 1091 of 1994). Before an attempt can be made to maintain discipline, the principal should identify factors that lead to educators committing misconduct.

Following the identification of these factors, the principal should train staff, build educators' capacity, and develop educators' skills in respect of legal aspects (Chapter 1, regulations B.1-B.4 of the PSA Regs, No. R. 679 of 1999). It is evident from the research project that misconduct at schools is often committed out of a sheer ignorance or lack of legal knowledge. With a view to training educators for the purpose of developing their legal knowledge and skills, the principal should draw up a development programme in which all educators are included according to their status or level. For instance, the principal may indicate that on a particular day, the sports committee or cultural committee or top management of the school or the union site committee or whatever the case may be, are to be trained in legal aspects (Graham & Bennett 1998:302).

With regard to the factors which contribute to the commitment of misconduct discussed in this research project, the principal can decide to train union representatives in issues pertaining to the disclosure of organisational information; illegal marches, chalk-downs and strikes; unauthorised time off; holding others hostage; illegal demonstration and insulting slogans; malicious damage to property; political activities on the school premises during school hours; failure to honour agreements; inciting and instigating others against the principal or other officers and usurping the principal's role. All these seem to be done by unions, more especially SADTU. If the principal could build capacity and develop the union representatives, this could help them to equip themselves with legal skills and knowledge for handling the above. It is also assumed that

misconduct in relation to the above could be minimised, and that labour relations could improve (French 1994:298, Graham & Bennett 1998:302).

Other staff members including the union representatives could be trained in laws which deal with the following topics: dishonesty; drunkenness; gross negligence; persistent idleness; indolence and absenteeism; fighting on the school premises; sexual abuse of learners; transgressing financial control regulations; the forging and selling of reports; using school property without permission; allotting marks to learners without marking their scripts; corporal punishment and assault; insolence or lack of respect for authority; refusing to carry out legitimate instructions; defiance and intimidation. People who need legal knowledge more than others in the school setting are union representatives and the school's top-structure (French 1994:298-299, Graham & Bennett 1998:302).

3.3.6 The role of the Provincial Human Resource Managers

As has already been mentioned, the school as an organisation has a hierarchical structure (cf. Figures 2-2 & 3-1). The hierarchical structure forms a line through which the activities of the organisation are carried out. This line is referred to as the line function or the organisational line. In practical terms, this means that at the top of the organisational structure there is a person (manager) who is in authority. This person's authority percolates down through other persons (managers) in the different levels of the hierarchical structure of the organisation. The main object of having the line function or the organisational line is to make the task of the organisation easier, and to distribute duties evenly among the managers in each level of the hierarchical structure (van der Westhuizen 1991:165).

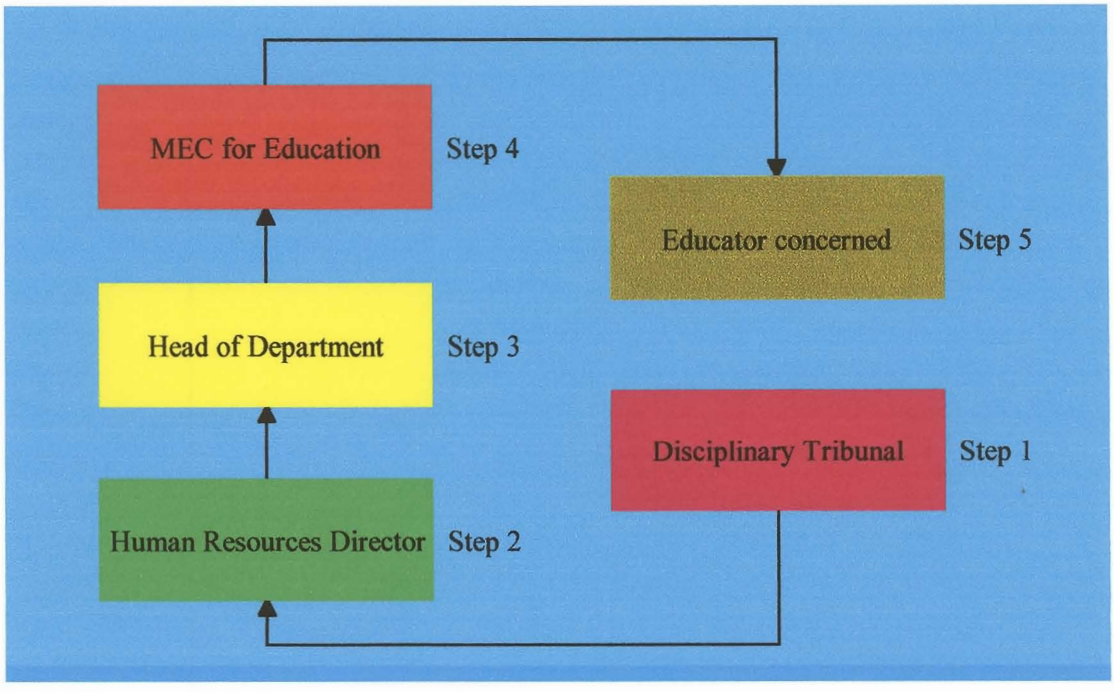
Each manager in each level of the hierarchical structure of the education system is empowered by the provisions of the Acts or Regulations to make decisions in accordance with the legislation (cf. Chapter 2, Part II, regulation C.3(a)(b) of the PSA Regs (No. R. 679 of 1999) & Chapter A, regulation A22.2(f)(i) of the PSA Regs, No. R. 1091 of 1994). Section 36(4)(b) of the EEA (No. 76 of 1998) authorises any Head of Department to perform any duty regarding the handling of the cases of misconduct. By any duty, it is presumed that decision making is included. Making decisions in accordance with the Acts and Regulations ensures the attainment of goals. Managers need not be scared of making decisions because they are authorised to make decisions which will

allow them to carry out their managerial tasks. If decisions are not made, there will definitely not be any progress in the organisation (van der Westhuizen 1991:40).

After the procedure contemplated in paragraphs 3.3.1; 3.3.2 and 3.3.3 has been followed, one of the Human Recource Managers must make a decision, because his or her role is to make decisions based on the findings of the Disciplinary Tribunal. For instance, he or she must make the decision to forward all the documents to the Head of Department if he or she feels that the findings hold water (cf. section 24(1) of the EEA, No. 76 of 1998). The Head of Department should without any waste of time make a decision on the findings. He or she may reprimand, fine, deduct money from the salary of the educator concerned or dismiss him or her (section 24(2)(3) of the EEA, No. 76 of 1998). The foregoing exposition depicts the Provincial Human Resource Managers' function that is performed through the organisational line.

The last person to make a decision with regard to the findings of the disciplinary tribunal is either the Head of Department or the MEC who are employers (cf. section 1(vi) & 36(1)-(4) of the EEA, No. 76 of 1998). Their decision will get things done, and things can only be done if managers operate like links of a chain used to pull a load. If one link is broken, it will be impossible for the chain to pull a load. With regard to Human Resource Managers at Provincial level, it seems as if there is no link between them. The incidents discussed in paragraphs 2.2.4; 2.2.6; 2.3.2 & 2.3.4 are cited as an example. From the foregoing paragraphs, it was evident that Human Resource Managers failed to play their role. The link between the Human Resource Managers can diagrammatically be represented as follows:

Figure 3-2: The link between the human resource managers at provincial level



The above Figure 3-2 shows steps that are followed when a disciplinary hearing is instituted. After the necessary evidence has been collected the disciplinary tribunal deals with the case of misconduct. If it is proved on a balance of probability that the educator is guilty, the case of misconduct is referred to the human resources director. After satisfying him/herself, that the educator in question has contravened the Act, the head of department with or without the collaboration of the MEC endorses or rejects the sanction which have been recommended by the disciplinary tribunal. The last step is where the educator who was accused is informed about the final verdict.

The activities of the organisational line should produce a chain-reaction as depicted by the above diagramme. In step one the Disciplinary Tribunal forwards the misconduct documents with their recommendation to the Provincial Human Resources Director in step two. The Human Resource Director sends the documents with his or her recommendation to the Head of Department in step three. Either the Head of Department or the MEC in step four decides the fate of an educator concerned. Lastly, the educator concerned gets feedback in step five, either from the Head of Department or the MEC.

3.3.7 The role of the South African Council for Educators (SACE)

The South African Council for Educators (SACE) came into being as a result of a collective agreement reached by the Education Labour Relations Council (ELRC) (cf. section 4 of the SACEA, No. 31 of 2000). As a statutory body which has been put into place collectively, it has a role to play with regard to professional ethics of educators. SACE consists of educators and other stakeholders. Educators are collectively nominated by the organised profession. Other stakeholders are nominated by the Department of Education, the national associations representing school governing bodies, the Council on Higher Education, the councils of further education and training and the national bodies representing independent or private institutions recognised by the Minister (section 6(1)(a)-(h) of the SACEA, No. 31 of 2000).

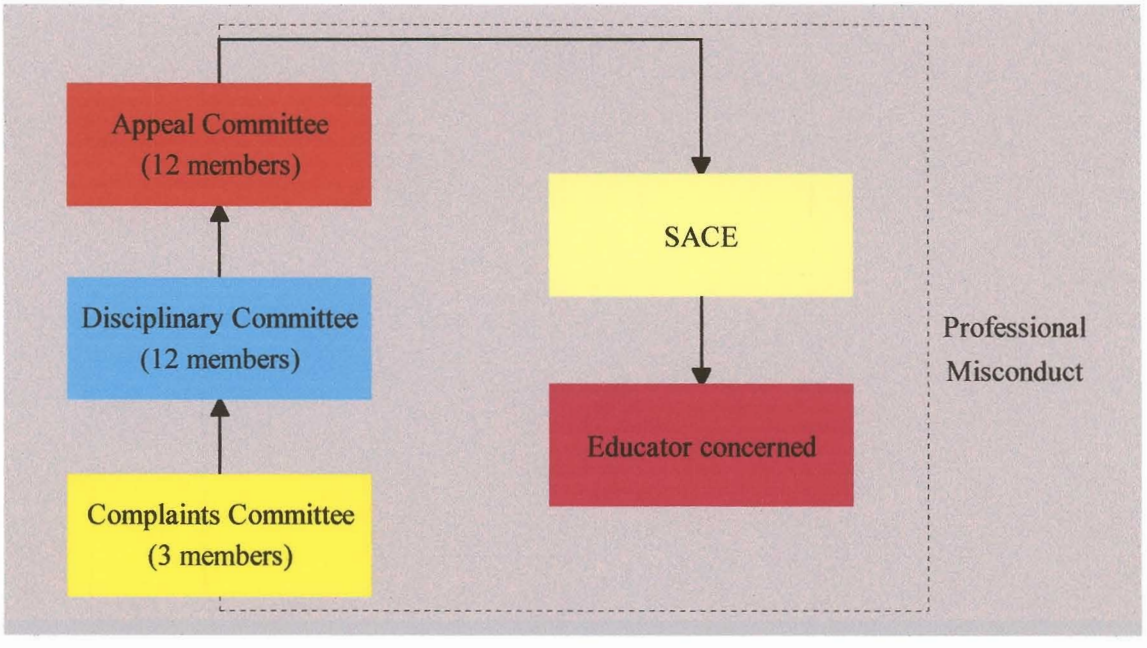
Like any other body, the SACE cannot run its affairs without funds. Therefore, this body is funded by all educators who are defined in terms of section 1(vi) of the EEA (No. 76 of 1998), and who are registered with this body. It is notable that the SACE is not a government body, but an independent body which helps the Department of Education with professional and disciplinary matters by liaising and exchanging ideas with the education officials and the organised teaching profession. The link between the teaching profession and the officials is made possible by members appointed by the Minister with due consideration to representation in respect of race, gender, disability and geographic distribution (section 6(1) of the SACEA, No. 31 of 2000).

SACE is a juristic person whose function is to determine minimum criteria and procedures for registration or provisional registration of educators (section 5(a)(i)-(v) of the SACEA, No. 31 of 2000). This body is responsible for the development and the training of educators who are registered with it and it also advises the Minister of Education on matters relating to the education and training of educators (section 5(b)(i)-(vii) of the SACEA, No. 31 of 2000). Unlike section 17(1)(a)-(n) of the EEA (No. 76 of 1998) which deals with misconduct, section 5(c)-(d) is primarily concerned with the professional ethics of educators or professional misconduct.

Professional ethics and misconduct cannot be separated because they are related. For example, an educator who uses profane language to learners commits misconduct and at the same time he/she breaches the code of professional ethics. The role of the SACE is therefore to see to it that professionalism and educational standards are maintained. For example, an educator who breaches the code of professional ethics may be brought to the SACE Disciplinary Committee

which determines a fair hearing procedure (section 5(c)(ii) of the SACEA, No. 31 of 2000). After it has conducted a hearing, the Disciplinary Committee may caution or reprimand an educator; impose a fine not exceeding one month's salary on the educator; or remove the educator from the register for a specified period or indefinitely should he/she be found guilty by the SACE Disciplinary Committee (section 5(d)(iii)(bb)-(iv) of the SACEA, No. 31 of 2000). The function of the above mentioned committee can diagrammatically be represented as follows:

Figure 3-3: Inquiry into the contravention of the professional code of conduct



As is the case with misconduct cases, an educator who is not satisfied with the penalty imposed by the above-mentioned committee, has the right to lodge an appeal with the committee meant for this purpose. The Appeal Committee must in turn follow the procedures that are laid down when dealing with the case of breach of the professional ethics. Having satisfied itself that the procedures and the proceedings were fairly done and legally followed, the SACE Appeal Committee may institute the penalty recommended by the Disciplinary Committee. All the committees that deal with the cases of a breach of the professional ethics must keep a record of the proceedings of every investigation and disciplinary hearing (cf. section 14(7) of the SACEA, No. 31 of 2000).

3.3.8 The role of the Education Labour Relations Council (ELRC)

The ELRC is a juristic person that has been established in terms of Sch. 1, item 2(1)-(6) of LRA (No. 66 of 1995). This Council consists of the employer organisations and the employee organisations as determined by the Act, and the stipulations in the constitution of the Council. The employer organisations can only negotiate within the ELRC if they have been empowered to do so while the employee organisations are allowed to negotiate if they have sufficient members who are affected by the issue at hand. This means that both the employee organisation and the employer organisation should be authorised to represent their members in the ELRC (Sch. 7, item 16(1)-(4) of the LRA, No. 66 of 1995).

The role of the ELRC is really not to deal with cases of misconduct *per se.* However, this Council may deal with misconduct related to labour. This is done by way of a collective agreement that may be reached by the council. The council has, for instance, agreed to regulate professional discipline of educators (Sch. 7, item 16(8) of the LRA, No. 66 of 1995). For the organisation to function effectively and efficiently, discipline should be established and maintained, because discipline is the cornerstone of every organisation. Discipline is therefore of mutual interest to the employer and employees of the ELRC, and it should be negotiated or discussed (Sch. 7, item 17(d) of the LRA, No. 66 of 1995). Chapter two revealed that some educators were wayward and ill-disciplined to such an extent that they brought schools as organisations into disarray (cf. paragraphs 2.2.6; 2.3.1; 2.3.2 & 2.3.3).

Misconduct related to labour are as follows: disclosure of organisational information; illegal marches, chalk-downs and strikes; unauthorised time off and hostage taking. Surely, these issues can constitute disputes that could be discussed by the employer organisations and the employee organisations in order to reach an agreement of some sort. For instance, it could be agreed upon as to what should be done if employees hold an employer hostage. With regard to the disclosure of organisational information; chalk-downs and strikes; as well as unauthorised time off, the employer has the right to take these matters to the ELRC, because the Act does not permit educators to embark on them. This is normally done in writing within fourteen days after the incident (Sch. 7, item 22(1) of the LRA, No. 66 of 1995).

The Act gives direction as to what should be done if educators disclose organisational information, embark upon illegal marches, chalk-downs and strikes, as well as unauthorised time

off (cf. sections 16(1) 65(1) of the LRA, No 66 of 1995). It must also be noted that an agreement reached by the employer organisations and the Employee organisations is done in writing and signed by the parties concerned. The signed agreement is binding to the members of the ELRC, and it should under no circumstance be breached within the stipulated period of agreement.

Section 32(7) of the Labour Relations Act (No. 66 of 1995) stipulates that in the event of a deadlock, that is when the registered trade unions whose members constitute the majority of the members of trade unions or the registered employers' organisations, whose members employ the majority of employees that are party to the bargaining council, vote in favour of the extension (cf. section 32(1)(a)(b) of the Labour Relations Act, No. 66 of 1995), the minister, at the request of the bargaining council, must publish a notice in the Government Gaztte cancelling all or part of any notice published in terms of section 32(2)(6) of the LRA (No. 66 of 1995) from a date specified in the notice. In this way the collective agreement intended to bind all parties concerned is nullified.

3.3.9 Conclusion

The foregoing chapter provided an overview of the legal aspects that should be known by Human Resource Managers in the public education sector. Different disciplines of law that should be considered when managing the work-force proved to be a valuable source to the law of education. Administrative law for instance, deals with the legal administrative task of the Human Resource Manager, and it affords discretionary powers to the Human Resource Managers and authority which enable him or her to carry out his or her administrative task. Other disciplines like constitutional law assist the human resource managers to manage organisations in accordance with the democratic principles and values as set out in section 195(1) of the Constitution (No. 108 of 1996).

It was also evident from this chapter that the Human Resource Managers cannot effectively manage the organisation if legal aspects are ignored. It became clear that it is imperative to apply the law of procedure and the rules of natural justice when managing systems and procedures, while it is not acceptable to formulate charges without considering the law of evidence. From the discussion in the chapter it was shown that the Human Resource Managers can effectively manage the system and procedures if they know the prescribed procedures, regulations, manuals, acts and circulars. The role of each and every manager on each level of the hierarchical structure, and that

of the following juristic persons shed light with regard to management of misconduct: the school governing body, the SACE and the ELRC.