

**LAWFUL, REASONABLE AND FAIR DECISION-MAKING IN
DISCIPLINARY CASES IN SECONDARY SCHOOLS**

by

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DEDICATION

I dedicate this study to the five most important persons in my life:

My wife, Dr Elize Herselman

My daughter, Marica Herselman

My son, Wihann Herselman

My father, Carl Herselman

My late mother, Lena Herselman

You are the reason for my being!

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At the end of my journey I can look back and see that the Lord has carried me. All praise to my Heavenly Almighty Father for giving me the courage to follow my dream. I praise Your Name Lord! To You I surrender my life!

Declaration

I, Lodewikus Stephanus Herselman (student no. 04251830), declare hereby the following:

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2014-06-30

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SUMMARY

Section 16 A (2) (d), (e) and (f) of the *South African Schools Act, Act 84 of 1996* assumes that a school principal has specialised knowledge in interpreting legislation, dealing with disciplinary matters pertaining to learners, educators and support staff, and making disciplinary decisions. The legal framework of the *Promotion of Administrative Justice Act, Act 3 of 2000*, as well as section 33 of the *Constitution of the Republic of South Africa, Act 108 of 1996*, affects disciplinary decision making in education. The need to understand how legislation affects disciplinary decision making is important, because section 16 A of the *South African Schools Act, Act 84 of 1996* assumes that education managers have the requisite knowledge and understanding of the law when dealing with disciplinary decision making. Disciplinary decisions taken by education managers fall in the domain of administrative law. *The Promotion of Administrative Justice Act, Act 3 of 2000*, forms the foundation for administrative action that is lawful, reasonable and fair. Since this Act is relatively new, and education managers have a lack of education law knowledge in general, it can be argued that principals might struggle to take disciplinary decisions that are lawful, reasonable and fair. Thus, there is a need to answer the following question: What are the legal requirements that should be considered in taking disciplinary decisions that are lawful, reasonable and fair and how can these disciplinary decisions be made more effectively?

The purpose of the study was to understand the context and content of Section 33 of the *Constitution of the Republic of South Africa, Act 108 of 1996*, the *Promotion of Administrative Justice Act, Act 3 of 2000*, and Section 16A of the *Schools Act, Act 84 of 1996* and how they would positively influence disciplinary decision making in South African education. The main research question was: What are the legal requirements that should be considered in taking disciplinary decisions that are lawful, reasonable and fair and how can these disciplinary decisions be made more effectively?

Chapter 2 answered the research question of which decision-making processes could assist the education manager to take disciplinary decisions that are lawful, reasonable and fair. It was established that principals make frequent use of the rational model for decision making. However, the more comprehensive data-driven decision-making model was

proposed. This not only focuses on a single disciplinary decision, but on the cause and trends of all transgressions that exist in a school. This model enables a principal to draw up a plan of action to deal with the cause of the problem.

After analysing the applicable legal framework, the concepts of *lawful*, *reasonable*, and *fair* were defined and interpreted in Chapter 3. An administrative action is lawful when an administrator is duly authorised by law to exercise power. Reasonableness has two elements, namely rationality and proportionality. Rationality means that evidence and information should support a decision an administrator takes, while the purpose of rationality is to avoid an imbalance between the adverse and beneficial effects. The approach to fairness has changed since the pre-democratic era. The main components that are linked to procedural fairness are the common-law principles of *audi alteram partem*, and *nemo iudex in sua causa*.

The qualitative approach was followed in this study to shed light on the perceptions of the participants on the meaning of the legal concepts of *lawful*, *reasonable*, and *fair* in disciplinary decision making, and their understanding of the legal framework of this study. Furthermore, this study sought answers to which decision-making processes could assist the education manager, as well as to the advantages of having a disciplinary coordinator to assist education managers in making lawful, reasonable and fair disciplinary decisions.

Convenience and purposeful sampling was used because the schools were conveniently located. Four secondary school principals in Cape Town were chosen, as well as two officials from the Western Cape Department of Education. The reason for purposive sampling was that two of the four schools that were selected had to have a discipline coordinator. Semi-structured interviews were held with the abovementioned principals and officials to answer the main research question.

The following information emerged from the semi-structured interviews which were incorporated in the data-driven, decision-making model of school improvement. Some of the findings were:

- i. Animosity exists between some school principals and the Western Cape Education Department (WCED). There is a lack of communication between the WCED and principals, as well as a lack of training on disciplinary decision making.
- ii. It was also established that principals made common mistakes related to the interpretation of legislation or applicable regulations.
- iii. A good practice emanating from the study is a paper trail of all interventions kept by schools.
- iv. Principals tend to use only the *South African Schools Act* as a legal framework for disciplinary decision making.
- v. Principals need to focus on strategies to address the link between bad behaviour and poor academic performance.
- vi. A discipline coordinator can assist the principal in maintaining discipline, investigating transgressions, organising disciplinary hearings, and in disciplinary decision making.

Decision making, lawfulness, reasonableness, and fairness were combined in this research to establish the legal requirements that should be considered in taking disciplinary decisions that are lawful, reasonable and fair, and how these disciplinary decisions can be more effective for the sole purpose of school improvement.

Key words and phrases

Administrative law in education

Data-driven decision making

Disciplinary decision

Fair

Lawful

Learner discipline

Reasonable

The Promotion of Administrative Justice Act, Act 3 of 2000

Section 33 of the *Constitution of the Republic of South Africa, Act 108 of 1996*

Section 16 A of the *South African Schools Act, Act 84 of 1996*

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CHAPTER 1

PROBLEM STATEMENT AND ORIENTATION

1.1 INTRODUCTION

In the pre-democratic era, law was used to racially divide and suppress the people of South Africa (Hoexter, 2009:10). Apartheid tainted South African public law, particularly administrative law. De Waal, Currie and Erasmus (2001:490) state that it was a system of legislative supremacy. The doctrine of parliamentary sovereignty was followed, implying that parliament decided what was lawful and unlawful (Burns, 2013:3). The Supreme Court had the inherent power to test administrative decisions and review administrative actions by officials who had statutory duties (De Waal *et al.*, 2001:490; Hoexter, 2007:13). However, the doctrine of parliamentary sovereignty restricted the courts in their administrative power. According to Hoexter (2007:13), parliament could authorise administrative officials to restrict the rights of people through a wide range of discretionary powers. This forced the courts to focus on legislation, and not the particular discretionary decision. Furthermore, the courts' authority was curtailed by undermining clauses created by parliament (De Waal *et al.*, 2001:489).

Hoexter (2009:18) concedes that administrative law is an ever-expansive discipline of law that is not easily defined. Hoexter (2007:2) describes administrative law as:

Regulating the activities of bodies that exercise public powers or perform public functions, irrespective of whether these bodies are public authorities in a strict sense.

Judge Chaskalson describes administrative law in *Pharmaceutical Manufacturers Association of SA; Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) (hereafter *Pharmaceutical Manufacturers case*), para 45, as follows:

Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their interrelationship and the boundaries between them.

Administrative law has undergone a dramatic transition since the apartheid era (De Waal *et al.*, 2001:488; Hoexter, 2007:2). De Waal *et al.* (2001:490) state that the promulgation of the Constitution of the Republic of South Africa in 1996 (hereafter Constitution) ushered in a new era of administrative law. The fundamental principles of administrative law are entrenched in Chapter 2 of the Constitution. This means that the legislature cannot depart from the principles stated in the Bill of Rights. Thus, the doctrine of constitutional supremacy guarantees the right to administrative action. This is affirmed by Judge Chaskalson in the judgment of the *Pharmaceutical Manufacturers* case (paras 44 and 45) that the Constitution is the supreme law in South Africa and the exercise of public power must be inline with the Constitution.

It is clear that the Constitution, as the supreme law, has been the departure point for administrative law since 1996. De Waal *et al.* (2001:494) state that section 33 of the Constitution changed the status of administrative action and administrative law as a whole. section 33 of the Constitution (RSA, 1996a) states:

33. Just administrative action

1. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
2. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
3. National legislation must be enacted to give effect to these rights, and must
 - a. provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - b. impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - c. promote an efficient administration.

The question remains: What is the relationship between administrative law and common law? According to Beaton-Wells (2003:86), the judgment in the *Pharmaceutical Manufacturers* case resolved the relationship between section 33 of the Constitution and common law relating to administrative law.

I cannot accept this contention which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

In 2000 the *Promotion of the Administrative Justice Act 3 of 2000* (PAJA) (RSA, 2000) was enacted to give effect to section 33 of the Constitution. Currie (2007:2) is of the opinion that the PAJA has “become the legislative foundation” for South African administrative law. The aim of the PAJA is to provide a legislative framework for administrative action and procedures for administrators to follow in making rules and taking decisions. It could be argued that administrative law is there to guard against poor decision making. Thus, administrative law has a positive side in that it encourages good decision making, efficient administration and good governance (Currie, 2007:2; Hoexter, 2007:9).

Other legislation also encourages good and standardised decision making. With the *Education Laws Amendment Act 31 of 2007* (RSA, 2007), section 16 A was inserted in *The South African Schools Act, Act 84 of 1996* (RSA, 1996c) (hereafter the Schools Act). Joubert (2010:10) states that the aim of section 16 A of the Schools Act is to set a standard in practices that will enlighten principals in their day-to-day disciplinary decision making.

1.2 PROBLEM STATEMENT

Authors believe that the job of the school principal has increased in its complexity and demands and that principals are facing greater challenges on a daily basis (Tirozzi, 2001:437; Oosthuizen & Van der Westhuizen, 2003a:3; Masheula, 2009:1). Van der Westhuizen and Van Vuuren (2007:431), as well as Tirozzi (2001:437-438), are of the opinion that one of the shortcomings is that principals lack education management training.

It is evident that education management and education law are interrelated. Joubert (2009a:1) states that education managers and also educators in general lack sufficient knowledge of educational law and as a result struggle with the interpretation and understanding of legislation. This is more evident with regards to for legislation that was amended or that underwent several amendments since inception.

Examples of legislation (relevant to this study) that increase the complexity and demands on principals are:

- Section 33 of the Constitution
- The Promotion of Administrative Justice Act
- Section 16 A of the Schools Act.

It is important at this stage to define education law to show how the above legislation is applicable to education. Joubert (2006:18) defines education law as law relating to education. It is not a separate field of law. It entails the entire field of law and focuses on the contact points between law and education (Oosthuizen & Van der Westhuizen, 2003:15). The contact point between the above-mentioned legislation and education is decision making.

Education is part of the domain of administrative law (Hoexter, 2007:3, 6, 9). Disciplinary decisions taken by education managers must therefore be in compliance with administrative law. The Act that governs administrative action that is lawful, reasonable and fair is the PAJA. Joubert (2009a:29) is of the opinion that education managers have a lack of education law knowledge in general, it can be argued that education managers will struggle with disciplinary decisions that are lawful, reasonable and fair. A wrong decision made by an education manager can result in a costly legal battle (Joubert, 2009a:29).

Antonie v Governing Body, Settlers High School, and Others 2002 (4) SA 738 (C) (paras 16-18) (hereafter *Antonie*) and *Michiel Josias de Kock v the Head of the Department of Education and Others, Province of the Western Cape* 1998 (3) SA12533 (C) (para 14) (hereafter *De Kock*) are examples of court cases where poor decisions were made by education managers.

In *Antonie*, a 15-year-old Rastafarian female learner grew her hair in dreadlocks. She asked the principal repeatedly for permission to cover her dreadlocks with a black cap that would fit in with the school colours. The principal took the decision to forbid her to wear the cap. She wore the cap in spite of the decision, because she believed that she had a right to freedom of religion and expression. Although it was not stated in the school rules, the school held that *Antonie* was guilty of serious misconduct. She was accused of

serious misconduct and suspended by the governing body for five days. The court deemed this not to be an act of serious misconduct and stated that the rigid manner in which the School Governing Body made the decision to suspend the learner was in contrast with the values and principles of justice, fairness and reasonableness.

It could be argued that the School Governing Body took the decision to suspend the learner. This decision, however, is not the focus of the study. In this study, the focus will be on the initial decision made by the principal that was unlawful, unfair and unreasonable. According to section 16 A (2)(d) of the Schools Act, the principal should have had the necessary education law knowledge to assist the School Governing Body in making the correct decision. What must be stressed here is that the principal decides when misconduct should be addressed by the School Governing Body. It was therefore the initial decision to take action by the principal that was wrong.

In the *De Kock* case, the father of Floris, a 17-year-old boy, was the applicant. Floris, a learner from Overberg High School, was accused of possessing dagga. It was deemed serious misconduct. The principal and deputy principal decided to investigate the incident. During the disciplinary hearing the principal gave evidence in written and oral form. The deputy principal later confirmed this evidence. After a disciplinary hearing, the School Governing Body recommended to the Head of the Department of Education that Floris should be expelled from the school. Floris gave oral evidence and questions were put to him by the School Governing Body and Edwards (principal) and Bester (deputy principal). Both the principal and his deputy made the decision to deliberate with the School Governing Body on the outcome of the case. Judge Griesel found that this was a “gross irregularity because the principal and deputy principal were simultaneously witness, prosecutor and judge (para 14)”.

Again, it can be argued that the School Governing Body made the wrong decision. To give another perspective, the following question can be asked: “Where in these events did things go wrong?” The answer would lie with the decisions made by the education managers to take part in the process as witness, prosecutor and judge.

The assumption at this stage is that a large number of principals don't consider section 33 of the Constitution, the PAJA and section 16 A of the Schools Act when making disciplinary decisions. Faulty decisions lead, not only to legal uncertainty in schools but to many cases ending up in court.

1.3 RATIONALE

The questions that should be asked are:

- Why is this research important?
- What is the need or reason for this research?

Bloch (2009:105) states that a “society of lawlessness” is creating disciplinary problems in our schools. Learner discipline has been the topic of many research projects. Steyn, Wolhuter, Oosthuizen and van der Walt (2003:225) conclude in their research that learner discipline is an acute problem in South African schools. An enormous burden of responsibility is placed on the shoulders of the education manager because discipline issues are complex (Botha, 2004:239). It is imperative that an education manager takes efficient disciplinary decisions as effectively as possible. Education managers are appraised on the effectiveness of their decisions, since such decisions play a significant role in shaping the success of a school. Although efficient disciplinary decisions should be taken as effectively as possible, there is a need for specialised knowledge. Research can create a body of specialised knowledge related to making disciplinary decisions that are lawful, reasonable and fair.

Herselman (2006:143) states that educators have misconceptions of their knowledge of educational law. Joubert and Prinsloo (2009:1) concur that educators, including principals, lack knowledge concerning educational law. To enhance their authority it can be argued that educators and principals have a duty to equip themselves not only with teaching and training knowledge, but with knowledge of legislation and disciplinary decision-making skills.

Badenhorst, Steyn and Beukes (2007:310) note that disciplinary issues are also created by factors such as dysfunctional families and ever-changing policies and legislation. Educational law is a dynamic discipline and more so in South Africa because of the political changes over the past 20 years. Section 16 A of the Schools Act was amended in 2007. According to section 16 A (2)(d), (e) and (f) of the Schools Act, a principal **must**:

- d) assist the governing body in handling **disciplinary** matters pertaining to **learners**;
- e) assist the Head of Department in handling **disciplinary** matters pertaining to **educators** and **support staff** employed by the Head of Department;
- f) inform the governing body about policy and legislation.

Section 16 A (2)(d), (e) and (f) assume that a principal as education manager has specialised knowledge of dealing with disciplinary matters pertaining to learners, educators and support staff. This also implies that the education manager has the ability to take disciplinary decisions. It must be remembered that not only education legislation (section 16 A Schools Act) changed over this period, but that Acts like the PAJA also influenced education, without educators and education managers realising it (Prinsloo, 2009:184). The need to show how this legislation affects disciplinary decision making is important because section 16 A assumes that the education manager has knowledge of dealing with disciplinary decision making. The burden of specialised knowledge is increased because the education manager should also understand the effect the PAJA has on education. Van Deventer (2003:96) mentions that decisions taken by the education manager are important because they can influence both learners and staff members, as well as the future of the school.

1.4 PURPOSE OF THE STUDY

Section 33 of the Constitution and PAJA are fairly unknown legislation in an educational setting. It is a given that the above-mentioned legislation, related to administrative law, changed the role of the education manager in making disciplinary decisions that are lawful, reasonable and fair. It determines how the education manager has to approach and deal with administrative action and make disciplinary decisions.

The purpose of the study is to understand the context and content of section 33 of the Constitution, the PAJA, and section 16 A of the Schools Act, and how they influence disciplinary decision making in South African education. The study explores the methods education managers use when making their decisions. It also explores methods that assist education managers in making disciplinary decisions that are lawful, reasonable and fair. The value of a disciplinary coordinator, in assisting the principal in making lawful, reasonable and fair disciplinary decisions, is also addressed.

1.5 RESEARCH QUESTIONS

Main question

What are the legal requirements that should be considered in taking disciplinary decisions that are lawful, reasonable and fair, and how can these disciplinary decisions be made more effectively?

Sub-questions

1. What is the meaning of the legal concepts of *lawful*, *reasonable* and *fair* in disciplinary decision making?
2. What are the context and content of section 33 of the Constitution, the PAJA, and section 16 A of the Schools Act?
3. Which decision-making processes could assist the education manager to take disciplinary decisions that are lawful, reasonable and fair?
4. What are the advantages of having a disciplinary coordinator in assisting education managers in making disciplinary decisions that are lawful, reasonable and fair?

1.6 SIGNIFICANCE OF THE RESEARCH

The study contributes to the body of knowledge in educational law in the following ways:

- A conceptual analysis of the legal concepts of *lawful*, *reasonable* and *fair*, which are founded in administrative law, provides insight for education managers to understand their influence in South African education.

- Particular attention is given to section 33 of the Constitution, the PAJA, and section 16 A of the Schools Act, and their importance as well as relevance to South African secondary education is shown.
- This study adopts a problem-solving approach to identify decision-making processes that could assist the education manager to take disciplinary decisions that are lawful, reasonable and fair.
- Tirozzi (2001:437) states that education managers' "training is insufficient and does not turn out competent principals". In the light of the problem-solving approach to this study, methods of assisting education managers in disciplinary decision making were investigated. Light is shed on the role a disciplinary coordinator plays and in what ways he/she can assist the education manager. This study also demonstrates the advantages of having a disciplinary coordinator as a staff member.
- An in-depth comparison between the rational decision-making model, data-driven decision-making model and group decision-making related to disciplinary decision making was done.
- Administrative action in an education setting from the perspective of a principal with regards to disciplinary decision-making were discussed.
- A comparison between rules of natural justice, PAJA and the Schools Act was done which could assist principals in handling disciplinary cases.
- A conceptual framework was proposed to show the relationship between administrative action, disciplinary decisions and data-driven decision-making in an educational setting.
- A summary of a comparison between an administrative action and a disciplinary decision was made for principals to understand the relationship.
- A learner profile tool (table 9 and 10) was developed based on information received from literature and participants.
- Table 11 was developed with critical questions for a principal to establish whether a disciplinary decision is lawful, reasonable and fair. Table 11 also linked to the learner profile that was developed.
- Table 12 was developed to explain and give an example of an action plan based on learner profile (table 9 and 10) and table 11.

1.7 THEORETICAL AND CONCEPTUAL FRAMEWORK

Research in social sciences that is linked to law is of immense importance. It elucidates the effects of Acts promulgated by the legislature and how effective those Acts are in attaining the attempted goal (Tremper, Thomas & Wagenaar, 2010:242). Since this study falls within the social sciences, more specifically education management and law, one could assume that different approaches should be linked to achieve the goals of this study. The legal requirements in taking a disciplinary decision, that an education manager should adhere to, fall within the field of law. The processes needed to take a disciplinary decision by an education manager fall within the scope of social sciences, and specifically within the field of education management. It is therefore obvious that the research takes place against the backdrop of a school.

Latess (2008:5) is of the opinion that when research is done, it is of the utmost importance to understand the workings and dynamics of the institution in which it is conducted. A researcher needs to understand that a social institution has specific systems and fundamentals in place to execute an essential function. Schools are bureaucratic systems that are governed by mechanisms like rules and regulations. They are hierarchical in structure, where authority is centralised. Principals, as education managers, manage their subordinates in such a way that they will take action in attaining the goals of the school. Functionalism falls into the above explanation of a school. Furthermore, all participants work in such a manner that the goals of the institution are reached.

The interpretivist paradigm is used when examining the legal issues of this study. Interpretivists view society and the social world as created through interaction by individuals (Burton & Bartlett, 2005:22). Thus, society is not stagnant or hidden. Law falls into this paradigm, since it is dynamic, public and about individuals that interact in society (Burton & Bartlett, 2005:22). People use norms and values to interpret events. These norms and values can undergo change for people to respond to and interpret certain events. Interpretivism seeks to understand the interactions between individuals and how choices are made by participants (Burton & Bartlett, 2005:22). Interpretivist research studies tend to be small in scale because they focus on detail. The interpretivist paradigm

is suitable for this study because legislation must be interpreted in detail by case law and secondary legal literature. The legislation interpreted is:

- Section 33 of the Constitution;
- PAJA; and
- Section 16 A of the Schools Act.

Tremper *et al.* (2010:246) are of the opinion that the changes in legislation over time must be taken into consideration in law research. If the changes in legislation over time are not considered in research, results will be misleading and this can result in poor public policy (Tremper *et al.*, 2010:243). Thus, this research focuses on certain concepts of law that have changed over the past 20 years. The conceptual framework can be presented as follows:



Figure 1: Conceptual Framework

The sources of law were used as framework to clarify legal concepts relevant to this study. The sources of law can be defined as the ‘places’ where law can be found (Kleyn & Viljoen, 1998:52). Russo (2005:42) states that the sources of law are the foundations law is based on. The South African sources of education law that are relevant to this study are: the Constitution (being the framework where the entire legal system operates), legislation (made by the legislative arm of government), case law (handled by the judiciary arm of government), common law, and writings of legal experts.

1.8 CLARIFICATION OF CONCEPTS

1.8.1 Branches of South African law

Law cannot be studied as a disorganised collection of rules. Since Roman times, law has been divided into different branches (Kleyn & Viljoen, 1998:103), although differentiation of the law is artificial and various interpretations are given by different writers.

Kleyn and Viljoen (1998:103) state that the advantages of the differentiation of law are the following:

- One gets a broader or general view of all the law branches.
- How the law subjects are related to one another is revealed.
- How the law subjects function in relation to each other is apparent.

The following diagram of differentiation of South African law has been adapted for the study to show where administrative law is positioned within the general framework of all law subjects:

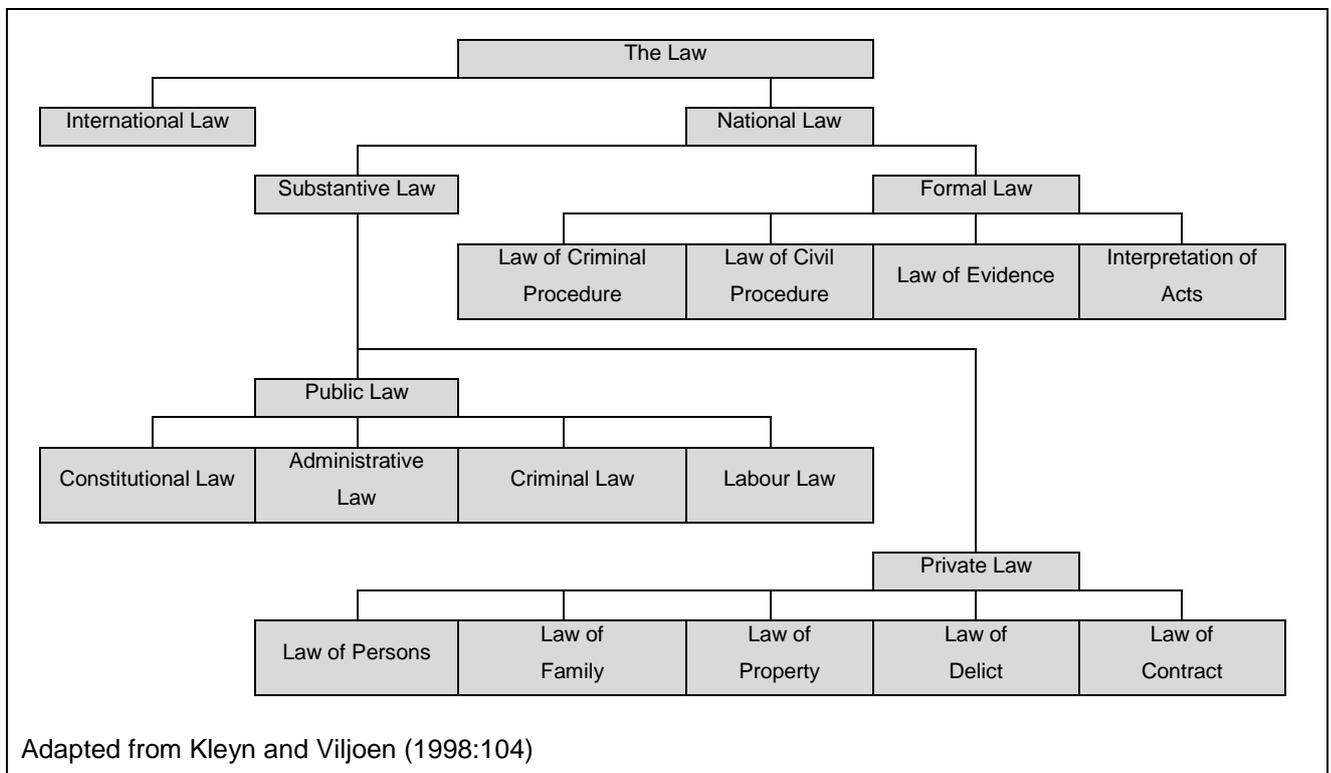


Figure 2: The differentiation of South African law

Kleyn and Viljoen (1998:105) clarify the concepts as follows:

- National Law

The total legal system of a state that encompasses all the legal rules that citizens are compelled to follow. For South Africa, this legislation is known as South African Law.

- Substantive Law

This comprises the law that adds content and meaning to law principles and norms. These legal principles determine what human activities constitute a crime, for example, murder.

- Public Law

Public law determines the authority of the state. It organises relationships between the different state institutions and the state and its subjects.

- Constitutional Law

The Constitution forms the basis of Constitutional Law. It determines the organs of the state as well as the relationship between them. In Constitutional Law, state authority is divided into the legislature, judiciary, and executive authority.

- Administrative Law

Administrative law focuses on the relationship between an individual and the state. It falls within the branch of public administration (Currie, 2007:6). It is discussed in the following sub-section.

1.8.2 Administrative Law

Administrative law is the focus of the study. Hoexter (2009:18) is of the opinion that administrative law is an ever-expansive discipline of law that is not easily defined. Hoexter (2007:2) describes Administrative law as:

Regulating the activities of bodies that exercise public powers or perform public functions, irrespective of whether these bodies are public authorities in a strict sense.

Judge Chaskalson describes administrative law in *Pharmaceutical Manufacturers* case, para 45, as:

Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their interrelationship and the boundaries between them.

The concepts of 'separation of powers' and 'branches of government' need to be clarified. According to Joubert and Prinsloo (2009:2), government is divided into three arms, namely legislature, executive, and judiciary. The reason for this division of powers is so that no monopoly of power can exist in one person or body.

Separation of powers means that according to section 44 (1) of the Constitution, Parliament has the power to make and amend legislation (SA: 1996a). Ministers have to submit Bills to Parliament. Benefits to the community are then discussed in depth before said Bills are passed as law. Laws are made at national, provincial and municipal level. Note that laws are made by Parliament and provincial legislature and by-laws and regulations are made at municipal level. The president and cabinet ministers form the executive arm of government. They govern the country according to the laws passed by Parliament. The functions of the executive arm include implementing legislation and policies, developing policy, and coordinating the functions of the different departments. The constitutional court, the supreme court of appeal, the high court and the magistrates courts form the judiciary arm of government. These courts determine and resolve disputes through applicable legislation. If government's action is not in line with the Constitution, said courts have the power to invalidate those actions.

1.8.2.1 The sources of Administrative law

The legislature and executive authority of every branch of government can only exercise power if its function to do so is authorised by law. This implies that the administrative power is not self-generated. Only legislation can authorise the use of administrative power

(Hoexter, 2007:28). Hoexter (2007:29) names the following five sources of administrative law:

- The Constitution

The preamble to the Constitution of the Republic of South Africa states:

We therefore, through our freely elected representatives, adopt this Constitution as the **supreme law** of the Republic.

By acknowledgement that the Constitution is the supreme law of South Africa, Hoexter (2007:29) deduces that the Constitution is the most significant source of law. In the application of administrative law it is important to remember that section 2 of the Constitution determines that:

The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

From the above, it is clear that the Constitution takes precedence over any other source of administrative law and other laws.

- Original and delegated legislation

According to Hoexter (2007:30) legislation is an ideal source of administrative law. Administrative power is therefore conferred to administrators by legislation. Hoexter (2007:30) contends that it is a characteristic of modern government that decision making is entrusted to administrators authorised to do so.

The difference between original and delegated legislation relevant to administrative law can be summarised as follows:

Table 1: The difference between original and delegated legislation

Legislation	Definition	Example
Original	Legislation enacted by Parliament. Also known as primary legislation.	Administrators are authorised to make rules, award licences, and charge fees, appoint and dismiss staff.
Delegated	Legislation made under authority of original authority.	Regulations made by ministers and proclamations made by the president

Adapted from Hoexter (2007:30)

In both original and delegated legislation, power is conferred to an administrator and serves as a source of administrative law. The PAJA can be seen as original legislation which serves as an administrative law source (De Waal *et al.*, 2001:491; Quinot, 2008:98).

- Prerogative powers

Before 1994, South African law acknowledged an inherited English common-law principle where the head of state had prerogative powers. According to Hoexter (2007:32), the powers included conferring of honours, pardoning offenders, war declarations and peace treaties, appointing diplomats, and entering into international treaties. With the enactment of the Constitution, the prerogative powers of the president were no longer conferred by this common-law principle but are listed in section 84 of the Constitution. However, this source is not used in this research.

- Common law

Common law can be used as a source of administrative law if there is no legislation to confer power to the administrator (Hoexter, 2007:36). Further attention is given to common law as a source of administrative law in Section 1.8.1.3.

- African customary law

Before 1994, there was doubt in respect of the position of customary law as a source of administrative law. *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC) and *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) clarified the current relationship between customary law and administrative law. In the *Alexkor Ltd* case, the court acknowledged the existence and distinctive nature of customary law as a source of administrative law. In the latter court case, it was emphasised that customary law should answer to the Constitution. Hoexter (2007:38) states that using customary law as a source of law proves to be problematic when establishing the existence and scope of administrative power.

1.8.2.2 The transformation of Administrative law

Hoexter (2009:10) states that in the pre-democratic era, law was used to racially divide and suppress the people of South Africa. Apartheid tainted South African public law, and

particularly administrative law. Within this period administrative law was barely recognised as a field of law. It was rather used as a tool of oppression. This was all authorised through the doctrine of parliamentary sovereignty (De Waal *et al.*, 2001:490; Hoexter, 2009:11). Parliament had the authority to decide what was lawful or not. Courts could be prevented by Parliament to review certain administrative actions (De Waal *et al.*, 2001:490).

The enactment of the Interim Constitution (1993) and the 'final' Constitution (1996) effected a new era in South African law. With these events, South Africa moved from the doctrine of parliamentary sovereignty to constitutional supremacy. They dramatically changed administrative law. Parliament could no longer interfere with the rights of the people (De Waal *et al.*, 2001:490). Hoexter (2007:15) mentions that the following provisions are of importance for administrative law in the Constitution:

- Section 32 – It contains the right of access to information held by the government.
- Section 34 – This section stipulates that all people have the right to have disputes settled by a court or other independent forum or tribunal.
- Section 38 – It deals with the enforcement of constitutional rights.

However, section 33 of the Constitution is the provision that has the most significance for administrative law (Hoexter, 2009:14). Section 33 of the Constitution (RSA, 1996a) reads as follows:

33. Just administrative action

1. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
2. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
3. National legislation must be enacted to give effect to these rights, and must
 - a. provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - b. impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - c. promote an efficient administration.

De Waal *et al.* (2001:494) state that section 33 (3) of the Constitution changed the status of constitutional rights. Section 33 (3) gave effect to the administrative action by the enactment of the PAJA. This Act elaborates on and thoroughly discusses the right to administrative action. It must be remembered that the PAJA does not replace section 33 of the Constitution. It has its own legitimacy by which it guarantees administrative action

that is lawful, reasonable and fair. This Act also provides for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal (Hoexter, 2007:114).

According to section 16 A (2)(d), (e) of the Schools Act, a principal (education manager and administrator) must assist the Governing Body and Provincial Head of Department with disciplinary issues pertaining to learners and educators. This section implies that the education manager should have the knowledge to apply just administrative action. Thus, it is important for education managers to familiarise themselves with the PAJA. It will enable education managers to provide administrative action that is lawful, reasonable and fair.

1.8.2.3 Administrative law and education

The question can be asked: “Is administrative law applicable to education?” Hoexter (2007:2) responds that administrative law regulates actions of bodies that exercise public power and functions. Schools are organs of the state that interact with the public by delivering a collective service in the form of education. Therefore, education falls within the domain of administrative law.

1.8.2.4 Administrative law, administrative action and decision making

The right to administrative action that is lawful, reasonable and fair can resort under administrative law. Administrative action is defined in section 1 of the PAJA, as follows:

Administrative action means any decision taken, or failure to take a decision, by -

- (a) An organ of the state ...
- (b) A natural or juristic person, other than an organ of the state, when exercising a public power and performing a public function ...

De Waal *et al.* (2001:501) state that the following criteria must be present before any action qualifies as an administrative action under the PAJA:

A ***decision of an administrative nature***, made under an ***empowering provision***, by an ***organ of the state***, that ***adversely affects rights*** [and] that has a ***direct external legal effect***. [Bold italics inserted by the researcher.]

One of the managerial tasks of an education manager is to make decisions on a daily basis, which will influence all stakeholders and the future of the school (Van Deventer, 2003:95). Administrative action is thus also part of the daily tasks of an education manager. De Waal *et al.* (2001:502) describe the process of decision making regarding the implementation of legislation and policy as an administrative matter.

Education managers make frequent decisions on the implementation of legislation and policy – these are decisions of an administrative nature. The concept of a decision made “under an empowering provision” does not mean that only decisions made to implement legislation are administrative in nature. When a decision is made by which any agreements, documents and instruments are implemented, the decision is also deemed to be administrative in nature. A school is considered to be an organ of the state where the education manager takes decisions to execute his/her public powers and functions. De Waal *et al.* (2001:507) note that a decision can qualify as an administrative action when a person is deprived of his or her rights. In the *Antonie* case, the education manager took a disciplinary decision to bring the 15-year-old Rastafarian girl before the School Governing Body for a formal hearing. This decision taken by the education manager is an example of the learners being deprived of the right of freedom of expression, thus making it an administrative action issue.

1.8.3 Decision making

Van Deventer (2003:96) defines a decision as:

a choice between two or more alternatives. It is a thought process directed at the achievement of the school's aims. It is the process of taking a decision related to a problem you have identified or a situation you have analysed.

Decision making is part of problem solving. It is a management task which is continuous in nature and vital to effective management (Van Deventer, 2003:96).

1.8.3.1 School discipline and decision making

The focus of the study is disciplinary decision making. Research has shown that learner discipline is an acute problem in South Africa (Steyn *et al.*, 2003:225). Bloch (2009:105) states that a “society of lawlessness” is creating disciplinary problems in our schools.

Badenhorst, Steyn and Beukes (2007:310) contend that disciplinary issues are also created by factors such as dysfunctional families and ever-changing policies and legislation. The complexity of the discipline issue, as well as the worldwide trend to decentralise decision making, places an enormous burden of responsibility on the shoulders of the education manager (Botha, 2004:239). It is imperative that an education manager takes efficient disciplinary decisions as effectively as possible. Education managers are appraised on the effectiveness of their decisions, since their decisions play a significant role in shaping the success of a school. Van Deventer (2003:96) states that decisions taken by the education manager are important because they can influence the learners, staff members and the future of the school.

1.8.3.2 The process of decision making

Decision making can never be investigated without commenting on the process it entails. Guo (2008:118) compares the basic components of military and political processes in decision making. Guo (2008:119) then describes an alternative decision-making model. Van Deventer (2003:97) proposes a decision-making model applicable to education:

Table 2: A comparison between the military and political models for decision making

Step	Military	Political
1	Define the objective	Establish need
2	Discuss available resources	Define outcome
3	Establish a plan of action	Conduct a stakeholder review
4	Make sure objectives are met	List the positives and negatives
5	Provide closure for accomplished objectives	Review the options
6		Formulate possible consequences
7		Stipulate an action plan
8		Examine achievements

Adopted from Guo (2008:119)

Guo (2008:119) states that the above models can be amalgamated into quick models that focus on making a decision in a short time. They are, however, not all-inclusive or well defined. He proposes an alternative decision-making model which will be compared with the model of Van Deventer (2003:97) for decision making applicable to education.

Table 3: A comparison between the "decide model" and an education-related model for decision making

Step	DECIDE model	Education model
1	D: Define the problem	Determine the importance of the problem
2	E: Establish the criteria	Identify the problem, outcomes and facts
3	C: Consider all alternatives	State the real problem and determine alternatives
4	I: Identify the best alternative	Evaluate and choose the best alternative
5	D: Develop and implement plan of action	Implement the chosen alternative
6	E: Evaluate and monitor the solution	
Adopted from Guo (2008:119) and Van Deventer (2003:97)		

It appears that the above-mentioned models are very similar, although they originated in different social fields, namely healthcare and education. In this study, I shall use the DECIDE Model because during step 6, the decision that was taken should be evaluated, which will lead to more effective decisions. It is a shortcoming of the education model, since education managers should reflect on and evaluate their own decisions. Guo (2008:119) and Van Deventer (2003:97) have mentioned a relationship between leadership and decision-making styles as well as the type of decisions that education managers can make. An in-depth analysis on the process of decision making is provided in Chapter 3.

1.8.4 Lawful

Hoexter (2007:224) defines lawfulness as follows:

Lawful administrative action means in essence that administrative actions and decisions must be duly authorised by law and that any statutory requirements or preconditions attached to the exercise of the power must be complied with.

The above definition implies that a law or statutory requirement must be taken into consideration by the authorised administrator when taking a decision or administrative action.

Although lawfulness is dealt with in Chapter 3 in detail, it is important to remember that administrative actions are constitutionalised and that the PAJA codifies the common-law principles of administrative law. Themes that are linked to lawfulness are legality, requirement of authority, the concept of jurisdiction, and abuse of discretion (see section 3.4). All these themes can be linked to the role of a principal as administrator.

1.8.5 Reasonable

Reasonableness, within the context of South African public law or administrative law, cannot be imbued with a single meaning (Hoexter, 2007:306). Pillay (2005:423) states that the first element of a reasonable administrative action is rationality, and the second proportionality. Rationality means that evidence and information must support a decision an administrator takes. In *S v Manamela* 2000 (3) SA 1 (CC), Madala, Sachs and Yacoob define proportionality as: “One ought not to use a sledge hammer to crack a nut.”

Hoexter (2007:309) explains that the purpose of rationality is to avoid an imbalance between the adverse and beneficial effects. Consider using less drastic means to achieve the desired goal. A short cryptic explanation of reasonableness does not give full insight into or understanding of this complex and controversial legal principle. This legal principle is explained in detail in Chapter 3.

1.8.6 Fair

The Constitution plays a significant part in administrative law, and underwrites administrative action that is procedurally fair. Hoexter (2007:326) states that procedural fairness is:

a principle of good administration that requires sensitive rather than heavy-handed application. Context is all important: the content of fairness is not static but must be tailored to the particular circumstances of each case. There is no longer room for the all-or-nothing approach to fairness that characterised our pre-democratic law, an approach that tended to produce results that were either burdensome for the administration or entirely unhelpful for the complainant.

It is important to note, for this study, that the approach to fairness has changed since the pre-democratic era. An education manager that deals with the fairness of disciplinary decisions must understand the change in the approach to fairness. The main components that are linked to fairness are the common-law principles of *audi alteram partem*, and *nemo iudex in sua causa*. These are considered in Chapter 3.

1.9 RESEARCH METHODOLOGY

Ontology refers to the “nature of reality” that is to be researched and what can be known about it (Terre Blanche & Durrheim, 2006:6). The ontology of this research is the nature of disciplinary decisions that education managers take and what can be known about the good practices being used by the participants. Epistemology identifies the relationship between the knower and the body of knowledge to be known (Terre Blanche & Durrheim, 2006:6). The epistemology of this research is how the education manager interprets the information available to him or her to take a disciplinary decision. Methodology is how the researcher performs the research (Terre Blanche & Durrheim 2006:6). The methodology followed comprised a qualitative approach. The interpretive paradigm was used in this research because people use norms and values which undergo constant change to interpret and respond to certain events. Interpretivism seeks to understand the interactions, and how choices are made between individuals (Burton & Bartlett, 2005:22). Interpretivist paradigm is characterised by a concern, for the individual in contrast to normative paradigm which indicates that the human behaviour is essentially rule governed and that it should be investigated by methods of natural science (Cohen, Manion and Morrison, 2000; 23). The interpretivism approach also emphasizes social interaction as the basis for knowledge. Interpretivist research studies tend to be small in scale because they focus on the detail of the phenomena. There are two focus areas in this study, namely legislation founded in administrative law and decision making.

1.9.1 Research methods

Russo (2005:42) is of the opinion that systematic enquiry into law involves interpretation and explanation of the law. It forms part of historical-legal research that is neither qualitative nor quantitative. Legal research makes use of a past, present and future

timeline to make sense of the dynamic reality called law. The aim of education law research is to inform policy makers and give direction for future research. It must be remembered that our law is also based on precedent. With this in mind, the researcher must look to the past to locate the authority to answer the research question. The past is important because law is reactive in nature and not proactive. Past events shape future policies.

A large part of the study falls within the discipline of social sciences. It is therefore necessary to choose either a quantitative or qualitative research approach. According to Burton and Bartlett (2005:22), the interpretivist paradigm links better with qualitative research because both are aimed at in-depth understanding and detailed description. Denzin and Lincoln (2005:3) define qualitative research as an activity that finds the researcher in the world. It consists of a set of interpretive actions that makes the world observable. These actions make the world visible through a set of representations. These representations include the field notes and interview recordings of the researcher. Qualitative researchers study things as they are in their own setting. They will try to make sense of them by interpreting the phenomena (Denzin & Lincoln, 2005:3).

The aim of this study is to establish how education managers make sense of, or interpret the disciplinary decision phenomena within their existence. The words 'their existence' can be defined as "perceptions, attitudes, understanding, knowledge, values, feelings and experiences" (Eberlein, 2009:5).

1.9.1.1 Sampling

Durrheim and Painter (2006:147) are of the opinion that the purpose and type of data of the study determine what type of sampling, data collection and data analysis the researcher will select in order to reach the goals of the study. Durrheim and Painter (2006:147) define sampling as participants that are selected from the population to answer the questions of the researcher.

Convenience and purposeful sampling were used in gathering data. Convenience sampling is used in studies where participants are selected without any prior rationale (Durrheim & Painter, 2006:148). The reason that convenience sampling was used is because the schools were conveniently located. These schools were visited a few times by the researcher, with a concomitant cost implication. Owing to the location of the schools, the cost implication was minimal.

Purposive sampling is where participants are selected because they can be linked to the phenomena that are under investigation. This sampling type is used in qualitative research (Durrheim & Painter; 2006:148). For this study, four secondary schools in Cape Town were chosen. The reason purposive sampling was used was that two of the four schools selected had to have a discipline coordinator. The reason for this choice was to establish what effect the presence or absence of a discipline coordinator would have on disciplinary decision making in the school. The schools were in close proximity to one another to keep variables to a minimum. They were also part of one education district to simplify the process of obtaining permission to conduct the research.

1.9.1.2 Data collection

Hittleman and Simon (2002:93) state that a research question dictates the method of collecting data. Durrheim and Painter (2006:148) state that interviews can be used to collect data. We can see that the nature of the study is two-fold. The main research question is:

What are the legal requirements that should be considered in making disciplinary decisions that are lawful, reasonable and fair and how can these disciplinary decisions be made more effectively?

To answer the first part of the question a literature study was conducted. The resources that were used regarding law are legislation, case law, common law, and secondary legal writings. Books, journals, dissertations, reports, media and the Internet were used to investigate and research the second part of the question.

The reason why semi-structured interviews were chosen in this research is because they enable the researcher to place more emphasis on the accounts of the participants (Burton & Bartlett, 2005:109). The education managers (principal and deputy principal) and discipline coordinators were the participants interviewed because:

- The legislation, such as the PAJA and Schools Act that was analysed, falls in the work environment of the principal, deputy principal and the discipline coordinator.
- The principal, the deputy principal and the discipline coordinator are the significant incumbents that deal with disciplinary decision making.

The aim of these interviews was to establish how education managers make their disciplinary decisions and what methods are used to do this effectively. The interview was tape recorded with the consent of the participants. A summary of the tape recordings was made. The interview guide was as follows:

Table 4: Interview guide

	Person interviewed	Time duration	Reason
First interview	Principal Deputy principal Discipline coordinator	20 min for each respondent	To meet and explain the research
Second interview	Principal Deputy principal Discipline coordinator	60 min for each respondent	Actual fieldwork and data collection
Third interview	Principal Deputy principal Discipline coordinator	20 min for each respondent	Follow up interview to clarify any misperceptions
Fourth interview	Principal Deputy principal Discipline coordinator	20 min for each respondent	Feedback

Burton and Barlett (2005:143) state that document analysis provides valuable data. There is a need to substantiate why document analysis is important. The first reason is triangulation. The validity and accuracy of the data given by the principal and/or deputy principal can be tested against the data derived from the documentation. Another reason is that the documents did show the participants' understanding of the legal concepts of lawfulness, reasonableness and fairness. The documents gave rich data that are linked to the concepts of substantive and procedural fairness. A request to analyse documents was

directed to the chairperson of the School Governing Body's and the principals for their consent. The documents that were obtained from the principals during the second interview were:

- The incident report from the educators handling the case
- Notice of hearing
- Minutes of disciplinary hearing
- All evidence that was heard
- Code of conduct
- School policy on discipline
- Records of all interventions

1.9.1.3 Data analysis

Terre Blanche, Durrheim and Kelly (2006:321) distinguish between two patterns of analysing qualitative research, namely interpretive analysis and social constructionism. It has already been stated that an interpretivist paradigm was used in this study. The aim of interpretive analysis is to create a thorough description of the phenomena studied and to put the phenomena into perspective in a real-life situation. According to Terre Blanche *et al.* (2006:322), interpretive analysis involves reading data repeatedly, breaking data down into themes and categories, and building data up by interpretation and elaboration.

The five steps or stages of data analysis proposed by Terre Blanche *et al.* (2006:322) were used in this research. It is important to realise that there were two sets of data, namely the interview data and document data. Each data set was analysed separately in stages 1 to 3.

In the first step, the researcher immersed himself in the data by reading it over and over. Notes were made, accompanied by drawings and diagrams. During the second stage, the data were broken down into themes. The language of the participants was used to label the different themes. The next step focused on coding the themes that came to the fore in the second stage. This step was used to break up data in an analytical way. Information like a sentence, a paragraph or any text was coded to fit with a specific theme. It must be understood that different themes can be allocated to a specific sentence, paragraph or

text. During steps 2 and 3, themes were created and coding took place for each set of data separately. In the fourth stage, different themes of different data sets were put together. Through the process of triangulation, meaningful conclusions and interpretations were made. Exploring the themes in this manner is called elaboration. In the last stage the data were interpreted.

1.9.1.4 Validity and triangulation

According to various authors, validity refers to the degree of 'truthfulness', 'correctness' and 'accuracy' of research data and the use of these concepts to reach sound conclusions. Validity focuses on the degree to which the researcher can produce believable observations for all cases (Burton & Bartlett, 2005:27; Van der Riet & Durrheim, 2006:90). Within the qualitative approach and the interpretive paradigm, detailed data can be gathered by researching only a few cases. The validity of the study does not lie in the size of the sample group but in the results that are generated (Durrheim & Painter, 2006:148). Burton and Bartlett (2005:27) are of the opinion that when the interpretivist paradigm is used, emphasis is placed on the interpretations the researcher makes from the data. The researcher must be able to show the evidence on which the interpretations are based.

To increase the validity of this research, the following measures were implemented to ensure that the interpretations were accurate the participants were asked if their accounts had been recorded accurately in a follow-up interview.

Triangulation is another process that can enhance the validity of data. Multiple perspectives such as different data sources are used to get to the essence of the data. The data derived from the literature study were linked to the data derived from interviews and from document analysis.

The triangulation of the data in this research is presented in the following figure:

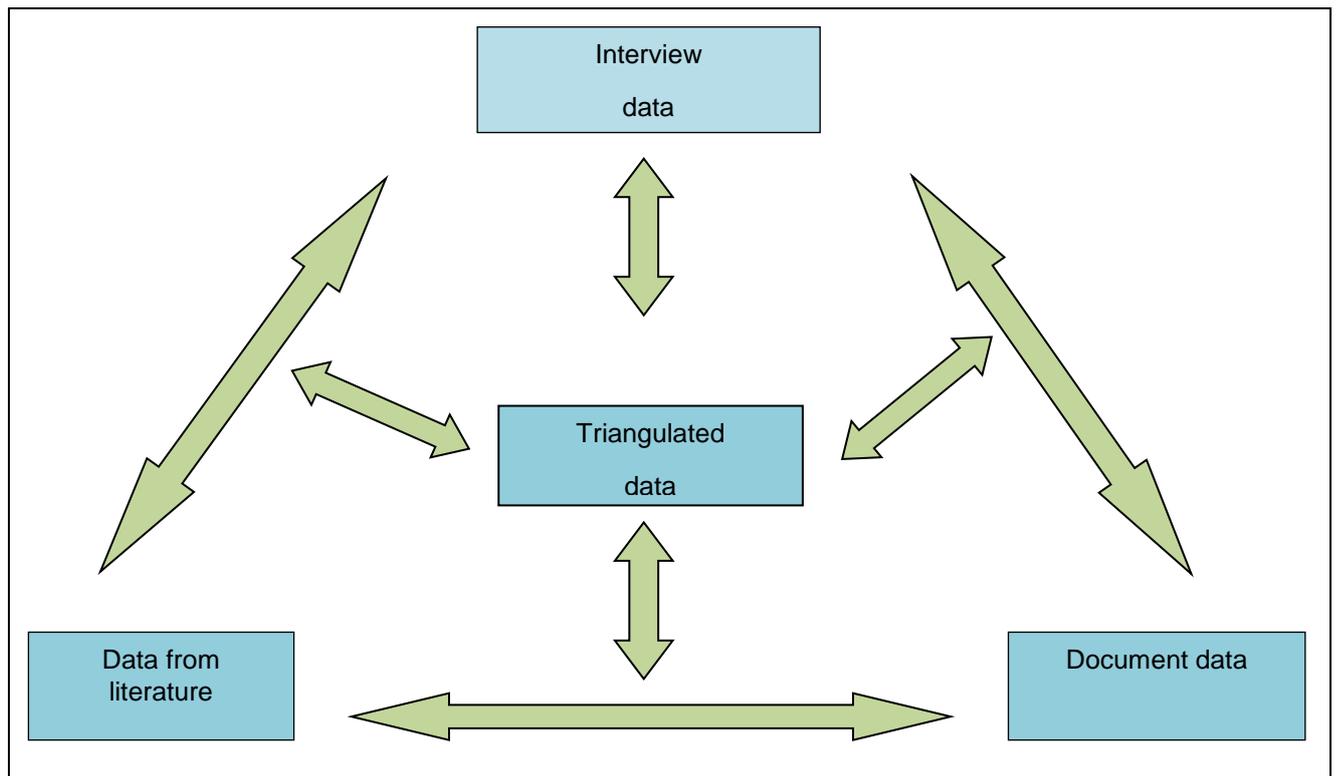


Figure 3: Triangulation of data

1.9.2 Ethical implications

The ethical issues that existed at the beginning of the study were:

- The principal, deputy principal and discipline coordinator could have felt that they were under investigation.
- As school documents are privileged information, the principal and School Governing Body could have felt that this research could undermine the image of the school.

None of the above-mentioned ethical issues manifested in the study.

It is important to understand that this research is focused on good practices. This point was emphasised in each encounter with the participants. Furthermore, attention was given to the following:

- Permission was sought from the head office of the Western Cape Education Department, principals and School Governing Bodies. The aim of the research was discussed in depth. The ‘focus on good practices’ principle was stressed.

- The success of this research depended on the cooperation of the participants. Therefore, the researcher had an open and honest approach to the participants.
- All participants remained anonymous and data retrieved is kept confidential.

1.10 OUTLINE OF CHAPTERS

This research consists of six chapters that can be presented in the following diagram:

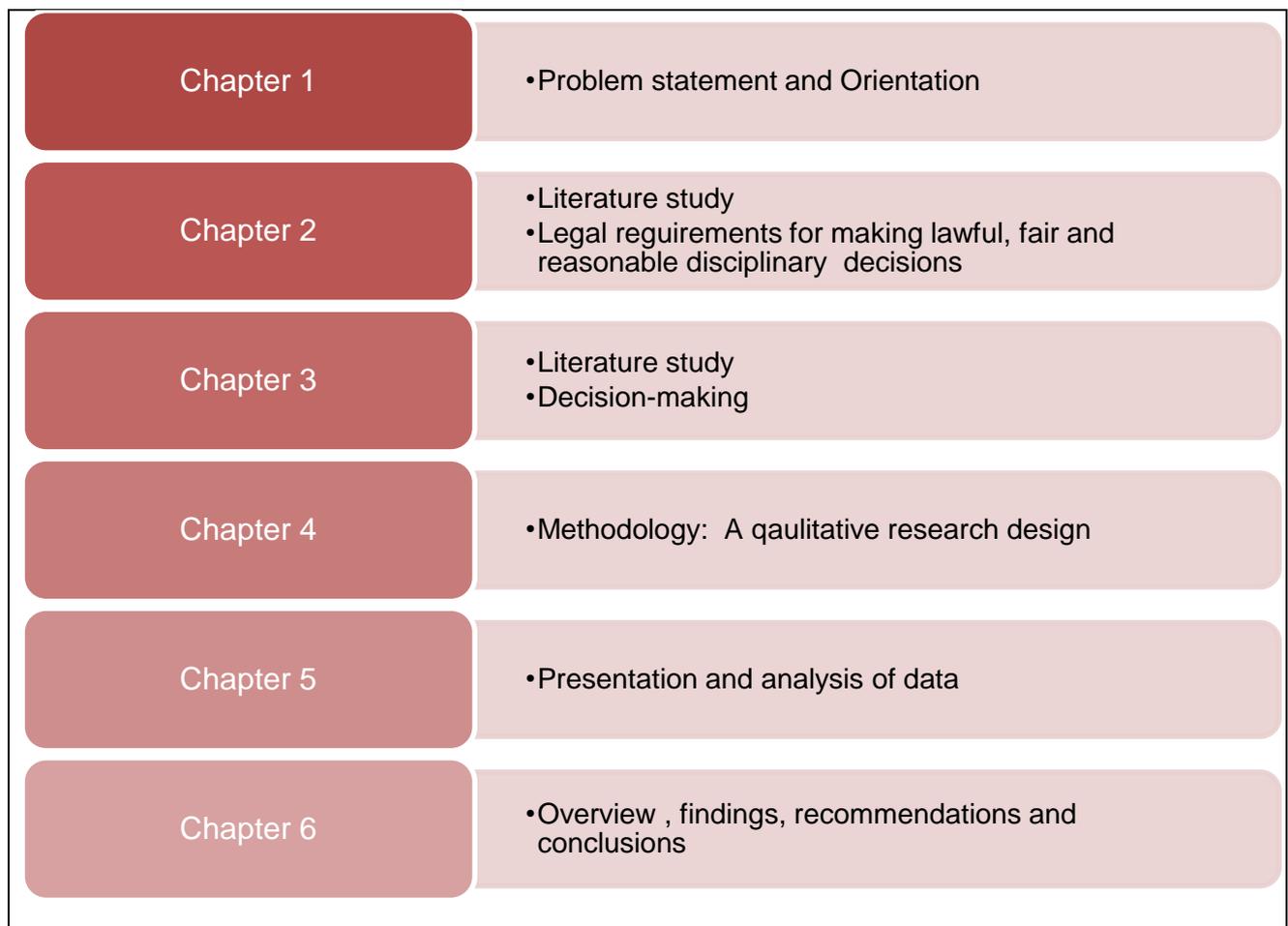


Figure 4: Outline of chapters

Chapter 1 probes the importance of lawful, reasonable and fair disciplinary decision making against the backdrop of change and transformation. The need to clarify the legal requirements for making disciplinary decisions is evident.

Chapter 2 contains a literature study of the decision-making process and how the skill of making disciplinary decisions can be improved.

Chapter 3 comprises a literature study of the legal requirements for making decisions that are lawful, reasonable and fair.

Chapter 4 is an in-depth study of the research methodology used in this study. The following concepts comprise this chapter:

- Theoretical and conceptual analysis
- Research design
- Sample selection
- Data collection
- Data analysis
- Validity and reliability
- Limitations

Chapter 5 is a presentation of all the data accumulated during the fieldwork. Analysis of the data is done in this chapter.

Chapter 6 gives an overview of the findings and a conclusion based on the findings. Recommendations are made to stakeholders and academics for future research.

1.11 SUMMARY

Decision making is a management skill. Education managers need to take daily disciplinary decisions that must be in line with the Constitution, the PAJA and the Schools Act. They must therefore adhere to legal requirements that are stipulated in relatively new legislation. This study is not about what a principal doesn't know (negative perspective), but about what he or she knows, and how we can improve this by clarifying concepts against the sources of law (positive perspective).

Chapter 2 comprises a literature study of the various decision-making models and how they can be used in making disciplinary decisions that are lawful, reasonable and fair.

CHAPTER 2

EFFECTIVE DISCIPLINARY DECISION MAKING

2.1 INTRODUCTION

Rossouw (2007:82) mentions that if an educator or principal unlawfully violates a learner's constitutional rights, the parent of that learner has the right to take legal action against such educator or principal. Principals and educators must have sufficient knowledge to be able to protect the constitutional rights of learners. In Chapter 3, a body of knowledge is established with regard to the constitutional right of just administrative action contained in section 33 of the Constitution (RSA, 1996a). Legal concepts of lawfulness, reasonableness and fairness are explored, as well as their influence on education, and more specifically, disciplinary decision making.

The research question that needs to be answered in this chapter is: "Which decision-making processes could assist the education manager in taking disciplinary decisions that are lawful, reasonable and fair?" It was stated in the previous chapter that the legal concepts of lawfulness, reasonableness and fairness can be viewed as the legal parameters between which principals can move in taking disciplinary decisions.

The importance for decision making cannot be over emphasised. Decision making forms part of educational administration and management and takes place on various levels of management (English, 2006:271; Guo, 2008:118; Miller, Fagley & Casella, 2009:398). Guo (2008:118) and English (2006:271) state that principals ought to have the requisite knowledge and understand the process of decision making, because decisions made by principals have an enormous impact on the school and affect a wide range of people. Van Deventer (2003:96) concurs that decisions taken by the principal are vitally important because they influence the learners, staff members and the future of the school. It is imperative that a principal makes effective disciplinary decisions as efficiently as possible within the legal parameters discussed in the next chapter.

2.2 DECISION MAKING: A CLARIFICATION OF THE CONCEPT

According to section 1 of the PAJA (RSA, 2000), administrative action is defined as “any decision taken, or any failure to take a decision”.

The above definition explains what an administrative action is but does not elaborate what a decision is. It is important to clarify and define the concept of a decision, before attention is given to the processes and different models of decision making.

According to Hastie and Dawes (2010:24) a decision can be defined as a: “a response in a situation that is composed of three parts. First, there is more than one possible course of action under consideration in the choice set. Second, the decision maker can form expectations concerning future events and outcomes following from each course of action, expectations that can be described in terms of degrees of belief or probabilities. Third, the consequences associated with the possible outcomes can be assessed on an evaluative continuum determined by current goals and personal values.” Lunenburg and Ornstein (2008:135), Guo (2008:118) and Chance and Chance (2002:176) agree that decision making is a linear and logical process to choose the best solution to achieve individual and organisational objectives. English (2006:271) and Van Deventer (2003:96) stressed that decision making is a rational activity with the purpose to maximize the achievement of the school’s aims. Van Deventer (2003:96) adds that decision making is a process related to a problem that has been identified or analysed.

The definitions correspond with one another, and for the purpose of this study the following definition will be used: “Decision making is a rational process with the purpose of finding the best alternative for the problem identified in order to achieve the school’s aims.”

Principals are confronted on daily basis with various problems and situations, and although the elements and merits of each problem are different, there are similarities within the decision-making processes. If knowledge of the decision-making process is part of the armour of the school manager, the effectiveness of decision making will increase (Lunenburg & Ornstein, 2008:136).

Knowledge of the different types of decision-making processes forms part of the decision-making sphere that a principal needs to acquire. Before the decision-making process is discussed, attention is given to the different types of decision making.

2.3 TYPES OF DECISIONS

On a daily basis, a principal is confronted by routine and non-routine problems which call for different types of decisions. The following are types of decisions a principal can encounter:

- Programmed, routine or structured decisions

These decisions are made based on standard information that is available to the education manager. Standard operating procedures are used to solve routine problems. Rules, procedures and policies form the basis of standard information. Educators, as first-level managers, usually make use of these types of decisions (Chance & Chance, 2002:179; Van Deventer, 2003:96; Griffith, Northcraft & Fuller, 2008:103; Lunenburg & Ornstein, 2008:136).

- Non-programmed or creative decisions

These decisions demand insight from the education manager because they deal with complex, extraordinary and unpredictable situations in which standard procedures are not applicable and where special attention is needed. Top-level managers, like principals and deputy principals, tend to make non-programmed decisions (Chance & Chance, 2002:179; Van Deventer, 2003:96; Lunenburg & Ornstein, 2008:137).

- Strategic decisions

Strategic decisions are made by committees of upper-level managers against the backdrop of the organisational philosophy and missions; these decisions guide the future of the organisations (Lunenburg & Ornstein, 2008:137; Nutt & Wilson, 2010:3).

- Participative or group decisions

This form of decision making can be used to satisfy the needs of stakeholders because it reduces conflict and increases the levels of expertise and knowledge which will result in more effective and beneficial education (Van Deventer, 2003:96; Griffith et al., 2008:104). Nutt and Wilson (2010:3) mention that in 1958, March and Simon, were of the opinion that “managing an organisation and decision making are virtually synonymous.”

Organisations are complex and managers need a deep understanding of the decision-making process (Nutt & Wilson, 2010:3). Lunenburg and Ornstein (2008:136) and Nutt and Wilson (2010:3) concur, and emphasise that it is important to research and understand the process of decision making.

2.4 DECISION-MAKING MODELS

It is important to dissect different decision-making models in order to answer the second part of the main research question and specifically sub-research question 3 of the research project, namely:

- a) Main question:

What are the legal requirements that should be considered in taking disciplinary decisions that are lawful, reasonable and fair, and *how can these disciplinary decisions be made more effectively?*

- b) Sub-research question 3:

Which decision-making processes could assist the education manager to take disciplinary decisions that are lawful, reasonable and fair?

A question that comes to the fore is: What is the aim of this research? What is needed from the research? To answer the questions the second part of the research question need to be dissected. The meaning for “made more effective” linked to this research is that a principal need a decision making model that can answer to an individual case but can at the same time promote school improvement and specifically aimed at improving academic performance.

Decision-making models offer guidelines and provide a framework to the principal for the procedural processes of decision making (Chance & Chance, 2002:175). These models show the impact that individual, organisational and other factors have on the decision-making process.

2.4.1 Rational model

Peterson (2007:120) refers to the rational model as “one of the most traditional approaches to decision making”. Lunenburg and Ornstein (2008:137) are of the opinion that the rational model is one of the most important models which has the concept of complete rationality as its foundation. The rational model defines decision making as a linear and logical process which has the focus of seeking the best possible solution (Chance & Chance, 2002:176).

Guo (2008:119) adds that it is a systematic model and includes a number of steps. Therefore, the rational model separates into different steps that are illustrated in the following diagram:

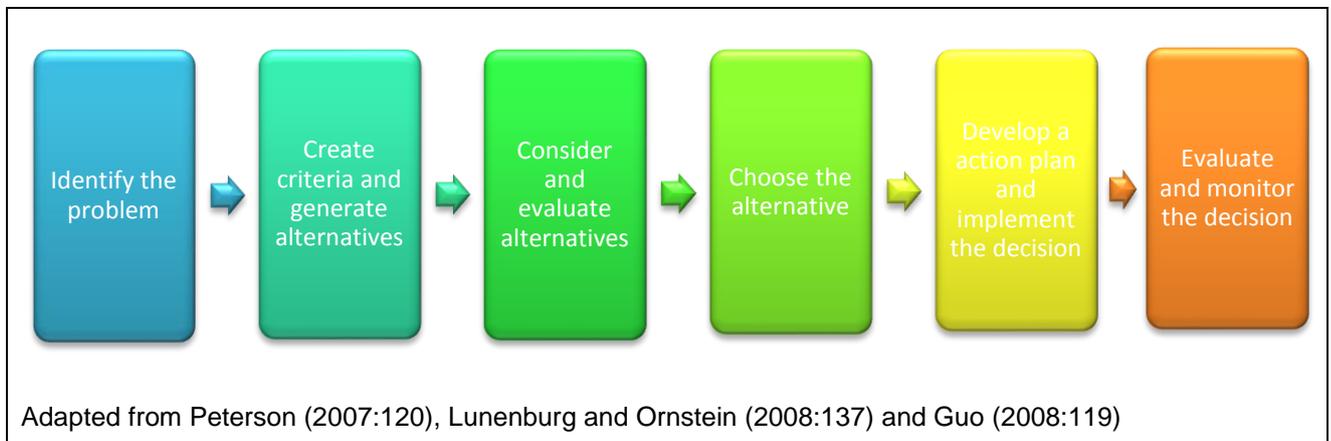


Figure 5: The rational decision-making process

Each step needs to be discussed in order to understand the rational decision-making model.

- Identifying the problem

The task of identifying a problem is not an easy matter. Lunenburg and Ornstein (2008:137) and Chance and Chance (2002:176) state that the perspective of the manager is of great importance because it outlines the alternatives. The manager needs to have a realistic approach to the problem and should view it within the settings and parameters of the organisation. Where there are complex decisions, a manager can dissect the problem into subordinate problems which will further help in identifying the problem.

- Create criteria and generate alternatives

The next course of action is to establish criteria and to generate as many as possible available alternatives (Guo, 2008:123; Lunenburg & Ornstein, 2008:138). According to Arnold, cited in Guo (2008:123), the following questions could assist the manager to establish criteria:

- i) What is to be achieved with the decision?
- ii) What needs to be preserved?
- iii) Which problems need to be avoided?

If the criteria are determined, the manager can go on to generate as many as possible alternatives. Lunenburg and Ornstein (2008:137) advise a manager not to neglect even one seemingly ridiculously alternative because it can contribute to the best solution to the problem. Chance and Chance (2002:177) note that the process of generating ideas can involve brainstorming sessions in order to get the maximum number of possible alternatives. It is also important to accumulate all relevant information and consider the consequences of each possible solution during the brainstorming sessions (Lunenburg & Ornstein, 2008:137), even though they are time consuming and principals will only deal with a limited number of solutions (Chance & Chance, 2002:177).

- Consider and evaluate alternatives

All alternative solutions should be evaluated in order to make decisions based on enough and relevant information. As part of the evaluation process, the manager ought to

compare all the solutions against the conditions of certainty, risk and uncertainty. Lunenburg and Ornstein (2008:137) define certainty as a situation where the manager knows exactly what the positive and negative consequences are of each alternative. Risk is associated with the fact that the manager is not completely certain of the outcome of each alternative, and this creates a situation where predictions must be made in order to evaluate the alternatives. On the other hand, uncertainty occurs when a manager does not know the successes or failures of a particular solution.

- Choosing an alternative

Lunenburg and Ornstein (2008:138) state that the manager should choose an alternative that will effectively solve the problem against the backdrop of the aims and objectives of the school. It can be argued that, if the aims and objectives of the school are used as parameters in which an alternative is chosen, the stakeholders of the school will support the decision (Guo, 2008:124); furthermore, the experience, intuition and experimentation will also influence the manager in choosing an alternative. The leading decision theorist, James March, distinguishes between five alternatives (Lunenburg & Ornstein, 2008:138):

- i) Good alternative

A solution can be deemed a *good alternative* if it has a high probability of positive valued outcome and a low probability of negative valued outcome.

- ii) Bland alternative

A solution can be deemed a *bland alternative* if it has a low probability of positive valued outcome as well as a low probability of negative valued outcome.

- iii) Mixed alternative

A solution can be deemed a *mixed alternative* if it has a high probability of positive valued outcome as well as a high probability of negative valued outcome.

- iv) Poor alternative

A solution can be deemed a *poor alternative* if it has a low probability of positive valued outcome and a high probability of negative valued outcome.

v) Uncertain alternative

If the manager can determine neither the probability of the positive valued outcome nor the probability of the negative valued outcome, the alternative is deemed uncertain. The following diagram can be helpful in determining the best alternative:

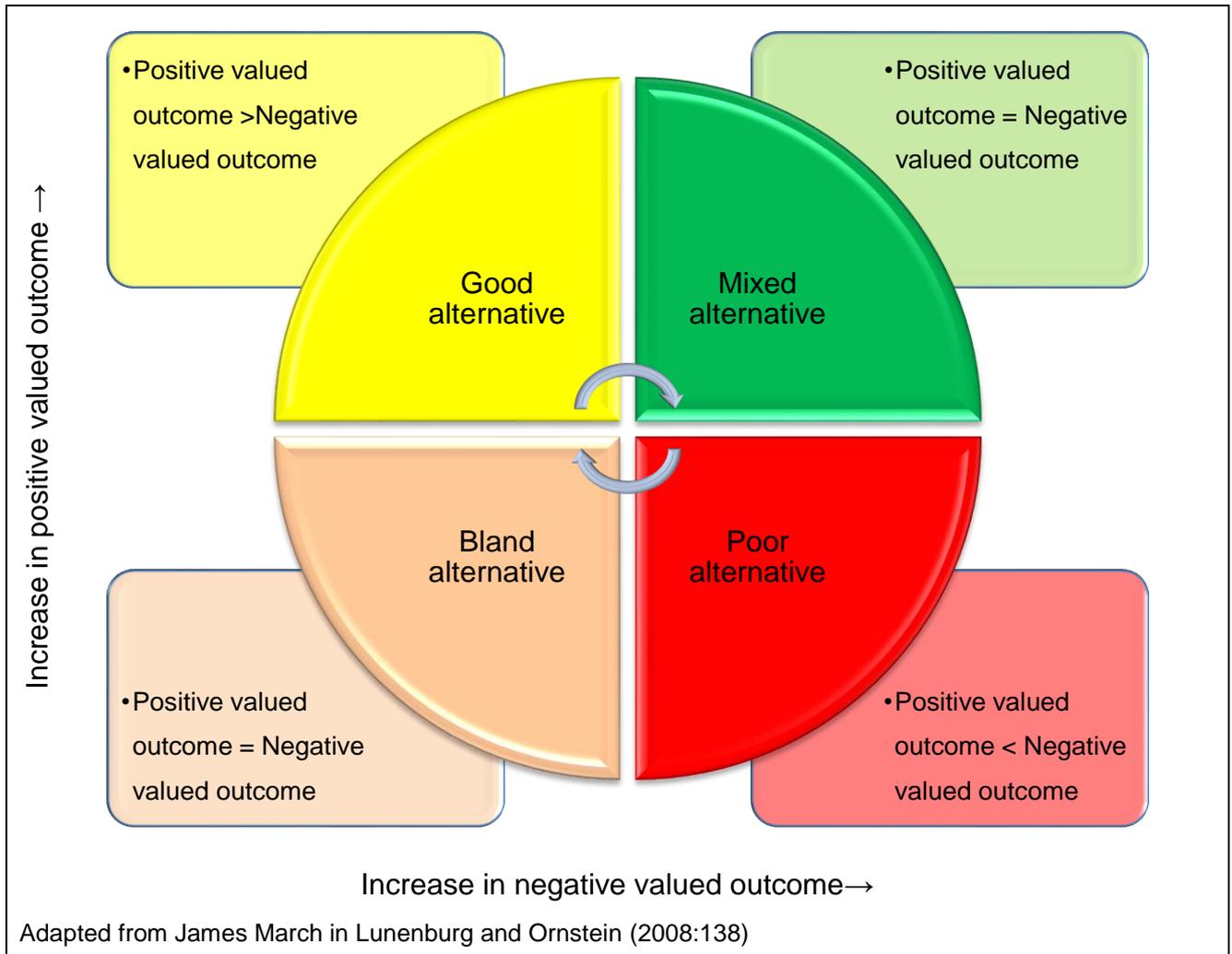


Figure 6: Schematic representation for a choice of best alternative

Figure 6 is self-explanatory in the sense that the best alternatives are those which have a high positive valued outcome. If principals have to choose an alternative from the bottom quadrants, it should be cause for concern.

- Develop an action plan and implement the decision

Guo (2008:125) states that planning is one of the fundamental functions of a manager and Chance and Chance (2002:178) add that planning includes what will be done, where it will take place, and who will be responsible for the various tasks. The result of proper

planning is that it gives well-defined direction, establishes control, anticipates change, and develops answers to uncertainty (Guo, 2008:125). Apart from planning, communication and coordination are needed to receive and implement the decision. Lunenburg and Ornstein (2008:138) agree that the buy-in of the stakeholders is important for the implementation of the decision to succeed.

- Evaluate and monitor the decision

Lunenburg and Ornstein (2008:139) state that implementing the decision is not the last step. They emphasise that a manager needs to evaluate the decision implemented against the aims and objectives of the school; if the decision did not reach the expected outcome, the principals must restart the decision-making process.

- Discussion and conclusion

It is of paramount importance that managers understand that there is no quick fix in the complex process of decision making. Owing to the complexity of the decision-making process, necessary skills must be gained and research undertaken to acquire the knowledge needed to understand the process (Guo, 2008:126). It is important to outline the shortcomings and establish the pitfalls of a particular decision-making model in order to assist the principal in making the correct decision.

Morçöl (2007:5) states that the rational model, as discussed above, retains a “ghostly existence” as a reference point in academic dialogue and notes that there are certain assumptions made in order for the model to work. The rational model is based on the assumptions that the decision maker:

- i) is completely rational and is dealing with perfect information;
- ii) has set the interests and preferences prior to when the actual decision is taken;
- iii) is aware of all the consequences involved in making the decision and will be able to evaluate these consequences against the backdrop of the value systems; and
- iv) is capable of identifying and ranking the alternatives in the context of the framework of the school’s aims and objectives.

Lunenburg and Ornstein (2008:139) show that, in most cases, a principal is not aware that a problem exists; they further argue that, even if the principal is aware of the problem, the approach to seek the best possible solution is not systematic. Factors such as time constraints, cost, and the ability to process information, limit principals to find the best suitable solution; therefore the consequence is that rationality is limited, because a partial list of solutions is drawn up based on experience, intuition and the advice of others (Lunenburg & Ornstein, 2008:139).

In conclusion, the rational model for decision making has its shortfalls as every other model has. The logical, linear approach to establish criteria, generate alternatives and create a plan of action to implement the decision, constitutes the strength of this model. Although it is not the perfect model, it can be used as a basis for disciplinary decision making.

2.4.2 Data-driven decision-making model

In South Africa, accountability of principals with regard to learner performance is determined by law. Section 16 A (1) (b) of the Schools Act (RSA, 1996c) states that:

- 1 (b) The *principal* must prepare and submit to the *Head of Department* an annual report in respect of—
- (i) the academic performance of that *school* in relation to minimum outcomes and standards and procedures for assessment determined by the *Minister* in terms of section 6A; and
 - (ii) the effective use of available resources.

The above-mentioned requirements place a statutory obligation on the principal to prepare and submit an annual report on the academic performance of the school. In terms of these reports, the Head of Department compiles a list of schools that are underperforming (RSA, 1996c: section 58 B (1)). The principals of these schools are held accountable for the academic performance of the learners and must prepare plans to improve the academic performance (RSA, 1996c: section 16 A (1)(c)(i)). The accountability of the principal with regard to educational programmes and curriculum delivery that are intertwined with learner performance is stipulated in section 16A (2)(a)(i) of the Schools Act (RSA, 1996c):

(2) The *principal* must—

(a) in undertaking the professional management of a *public school* as contemplated in section 16 (3), carry out duties which include, but are not limited to—

(i) the implementation of all the educational programmes and curriculum activities.

More evidence for the statement that the accountability of the principal with regard to learner performance has increased can be found within the following documents:

- The Integrated Quality Measurement System, and the School Improvement Plan.

Both documents form part of the Education Labour Relations Council: Collective Agreement Resolution Number 8 of 2003 (Collective Agreement No. 8, 2003:3). The preamble to this document states:

For the Department of Education – and for all educators – the main objective is to ensure quality public education for all and constantly improve the quality of learning and teaching, **and for this we are all accountable to the wider community ... (Own emphasis.)**

- The whole school evaluation

Whole school evaluation was declared as policy in terms of section 3(4)(l) of the *National Education Policy Act, Act No. 27 of 1996* (RSA, 1996b). Section 2.1.1 (c) of the *Policy on Whole School Evaluation* (DoE, 2001) states that the aim of the policy is as follows:

2.1.1 The principal aims of this Policy are also integral to the supporting documents, the guidelines and criteria. They are to:

(c) Increase the level of accountability within the education system.

All the above-mentioned documents place the accountability of the principal with regard to learner performance under the magnifying glass. Mandinach and Honey (2008:1) are of the same opinion, and state that the accountability of principals and educators has increased dramatically with regard to the improvement of the school as a whole and, more specifically, the improvement of the students' academic performance. With the above in mind, managers and educators need a decision-making model that can cater to the need/requirement for higher accountability in learner academic performance. Data-driven decision-making models seem to be the answer.

Mandinach and Honey (2008:1) state that data-driven decision making is not a new concept. What is new to data-driven decision making, is that data is inextricably linked to accountability (Mandinach & Honey, 2008:2). According to Marsh, Pane and Hamilton

(2006:1), there has been an increased interest in the education community towards data-driven decision making. The interest in data-driven decision making has not only come from school management, but also from educators in the classroom, because educators now have a wide range of data sources which assist them in decision making to improve learner performance (Marsh *et al.*, 2006:1; Mandinach & Honey, 2008:1). The wide range of data sources can also be used by principals in managerial and operational decisions. In order to grasp the positive influence of data-driven decision making, attention must first be given to defining the concept.

According to Salpeter, cited in Preuss (2007:1), the importance of data-driven decision making is outlined as follows: “There is no denying that an integral part of the business of education today is to collect, manage, analyse and learn from a wide array of data.”

Marsh *et al.* (2006:1) contend that data-driven decision making occurs when:

... Teachers, principals and administrators systematically [collect] and [analyse] various types of data, including input, process, outcome and satisfaction data, to guide a range of decisions to help improve the success of students and schools.

Preuss (2007:10) argues that the above-mentioned descriptions of data-driven decision making are inadequate, and defines it as follows:

Data-driven decision making is a system of deeply rooted beliefs, actions and processes that infuses organisational culture and regularly organises and transforms data to wisdom for the purpose of making organizational decisions.

2.4.2.1 Data-driven decision making, learner performance, disciplinary decision making, accountability

Earl and Katz (2006:17) note that the principal and educators are the primary users of data in making informed decisions, because they are accountable for school improvement. When the notion of accountability and using data becomes part of a principal’s organisational armour, it is possible to reconstruct knowledge and change current practices to improve the teaching and learning environment.

It could be asked how data-driven decision making, which is focused on learner academic performance, can be of any help in disciplinary decision making for a principal who is accountable for learners’ academic performance. Before this question can be answered, it

is of paramount importance that a link between data-driven decision making, learner performance, disciplinary decision making, and accountability is established.

Preuss (2007:10-11) explains that data-driven decision making is not singular, but must be seen as a “full-blown network” or a “web of interconnections” of processes that are linked across the organisation and operate every second of every day. Disciplinary decision making is part of the “web of interconnections” of processes that Preuss (2007:10-11) mentions. The following assumptions are made to clarify the link between data-driven decision making, learner performance, disciplinary decision making and accountability of a principal:

- Improving learners’ academic performance is one of the fundamental objectives of education.
- Data-driven decision making can be used as a tool to reach the above-mentioned objective because it focuses on improving learner academic performance.
- Principals are accountable for making disciplinary decisions that are lawful, reasonable and fair, in such a way that the objectives of improving learners’ academic performance are reached. The link can be shown by the following schematic diagram:

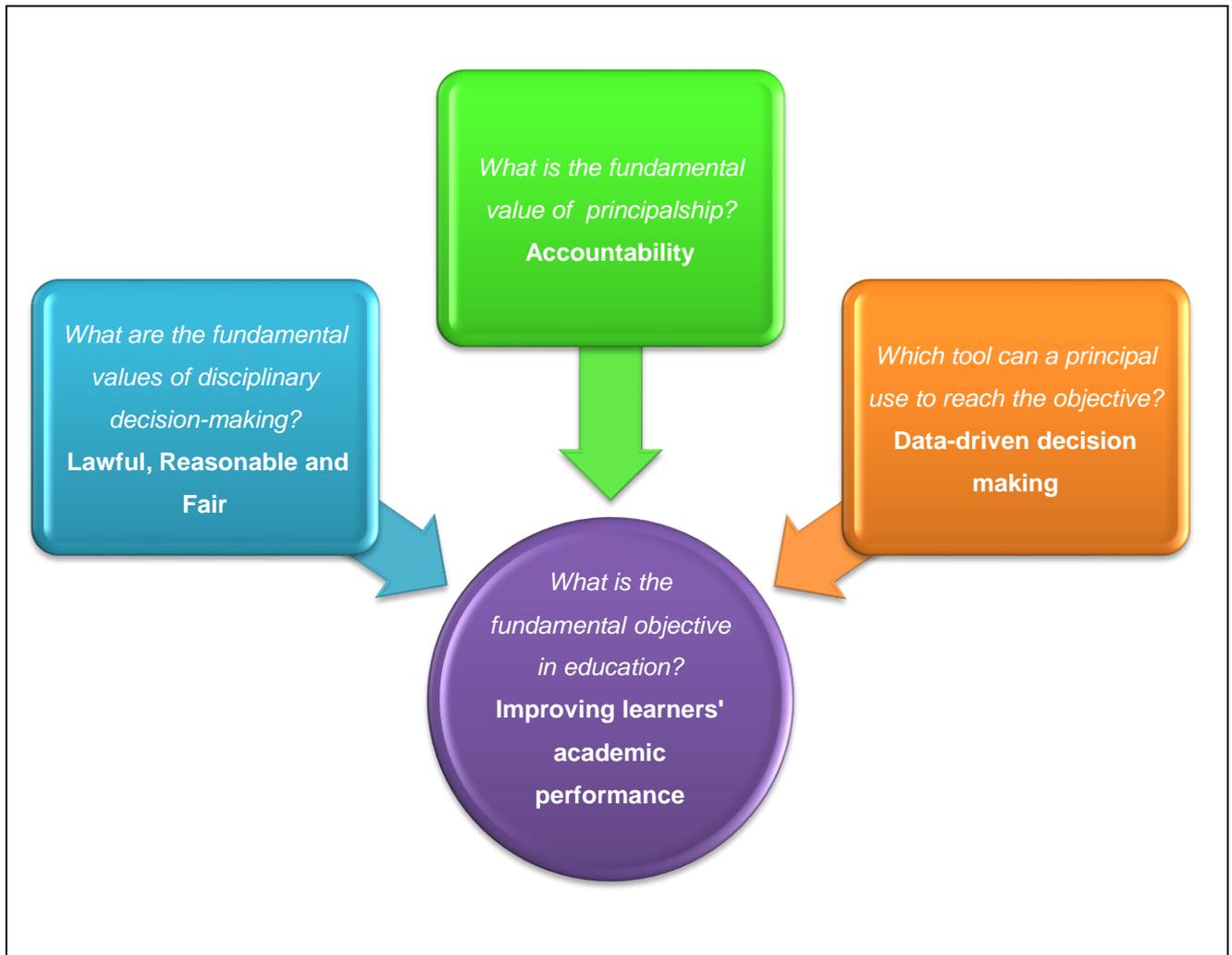


Figure 7: The link between data-driven decision making, learner performance, disciplinary decision making and accountability of a principal

Data-driven decision making is entrenched in an organisation through a network of processes that inform decision making in the whole of the organisation and is a positive force that focuses on the continuous improvement of the organisation (Preuss, 2007:10).

2.4.2.2 Types of data that can be used in data-driven decision making

Williamson and Blackburn (2009:20) distinguish, like Bernhardt (2003:10), between four types of data.

- Demographic data

This data physically describes a learner and is used to understand learner data. Examples of demographic data are age, gender, academic ability, socio-economic level and grade level.

- Achievement and learning data

This data delineates what a learner knows and what has been achieved. It also indicates what is taking place in the school. Examples of learning data include proficiency levels, progress levels and benchmarking.

- Instructional process data

This data assists in comprehending why learners reach their specific achievement levels. Examples of instructional process data include attendance, truancy, time on task and disciplinary issues.

- Perception data

This information includes the perceptions and feelings of the stakeholders with regard to any of the relevant issues.

How this data is used and processed to reach the decisions, must comply with the law and the organisation's goals.

2.4.2.3 Data-driven decision-making process

Williamson and Blackburn (2009:21) suggest that data-driven decision making consists of four steps:

- Determine what is known
- Decide how the data will be collected
- Analyze the data and results
- Set priorities and goals based on the analysis.

It is evident that this four-stage approach oversimplifies the decision-making process. Preuss (2007:12) proposes a more comprehensive approach to giving the relevant data the attention it deserves.

The following schematic representation illustrates the process of data-driven decision making:

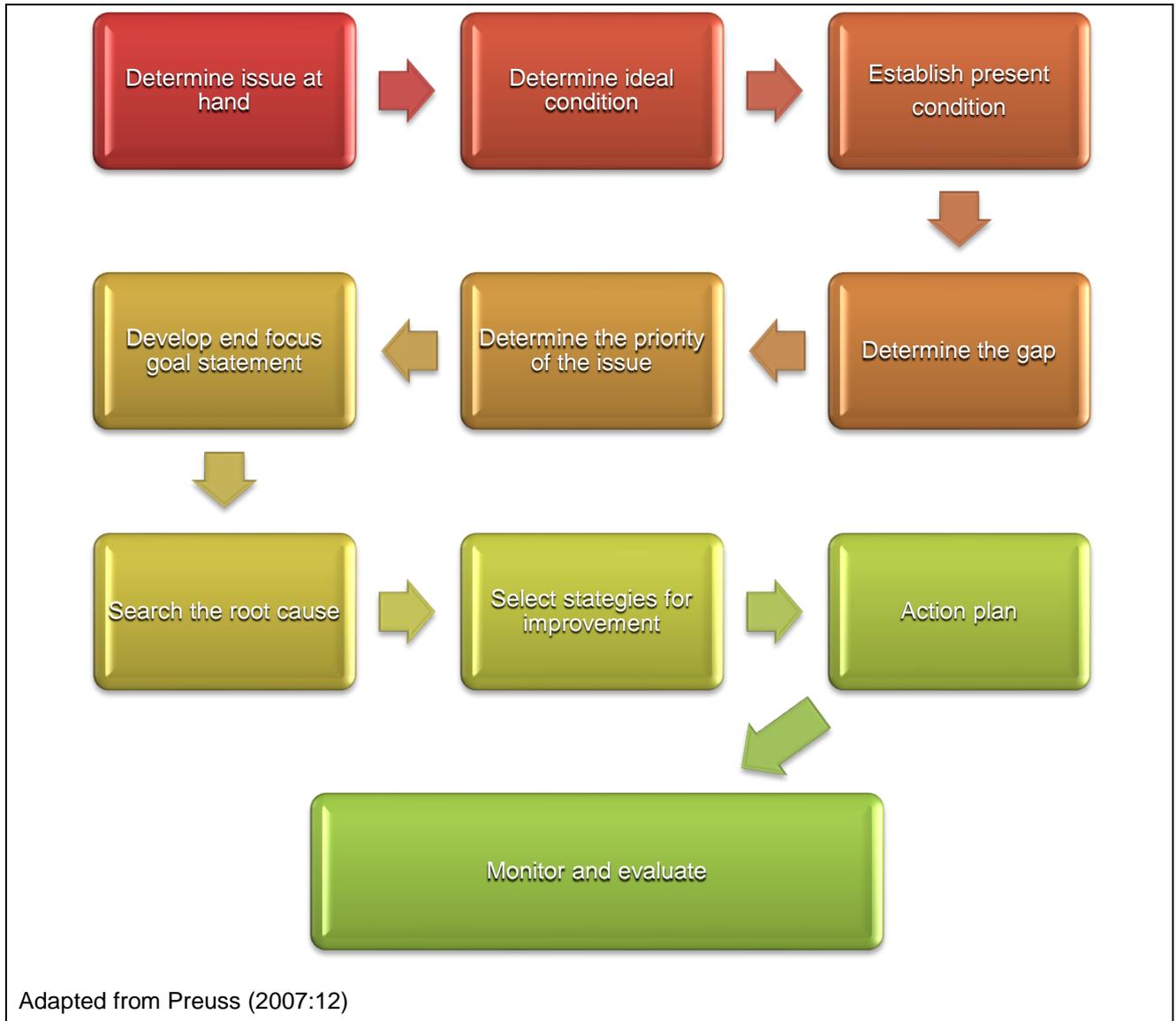


Figure 8: Schematic representation of the data-driven decision-making process

According to Preuss (2007:12), the data-driven decision-making process as portrayed in Figure 8 entails the following:

- Determine the issue at hand

This is the stage where you determine the problem that must be addressed.

- Determine ideal conditions

The managers must determine the measurement that will be used to consider what the ideal level is.

- Establish present condition

The same measurement set must be used to establish the current condition.

- Determine the gap

The gap between the current condition and the ideal condition must be analysed.

- Determine the priority of the issue

This is a value judgment and states that only if it is a priority, should the problem be tackled.

- Develop end-focus goal statement

The goal statement should elucidate how the data gained in stages 2, 3 and 4 will be used over a period of time. It is critical that a definitive time frame is used.

- Search the root cause

Data must be transformed information, knowledge and wisdom (Marsh *et al.*, 2006:3; Mandinach, Honey, Light & Brunner, 2008:21). This process will be discussed in detail under the next heading.

- Select strategies for improvement

When determining strategies, it must be kept in mind not to focus on the symptoms, but rather on identifying the cause of the problem. When the cause of the problem is the focus of the strategies, improvement of the organisation can become reality.

- Action plan

The task at hand is to develop an implementation plan for the strategies, bearing in mind the importance of the responsibilities and resources that must be linked to the predetermined time frame.

- Monitor and evaluate

It is important to determine whether the action plan has been followed as planned. Within this evaluation stage, it must be established what difference the implemented strategies have made.

With the above in mind, attention should be given to the relationship between data, information and knowledge.

2.4.2.4 The relationship between data, information and knowledge

Mandinach *et al.* (2008:21) state that data exists in the raw state and is deemed unusable for making a decision; therefore data must be transformed into information and ultimately into knowledge before it can be used in decision making. Before attention is given to the relationship between data, information and knowledge, the concepts are defined by Mandinach *et al.* (2008) as follows:

- Data

Statistics, facts, figures, numbers and records are synonyms for the word 'data', which has no meaning on its own. According to Kelly and Downey (2011:46), it is the responsibility of the principal to become an "expert consumer of data" and to turn it ultimately into knowledge. It is important to note that the understanding that a person has of the data will influence the process of the data's becoming information (Mandinach *et al.*, 2008:21).

- Information

Mandinach *et al.* (2008:21) define information as "data that is given meaning when connected to a context". Information is created when data is used to understand, organise the situation and unveil the relationship between data and context. Information cannot be used on its own in making a decision.

- Knowledge

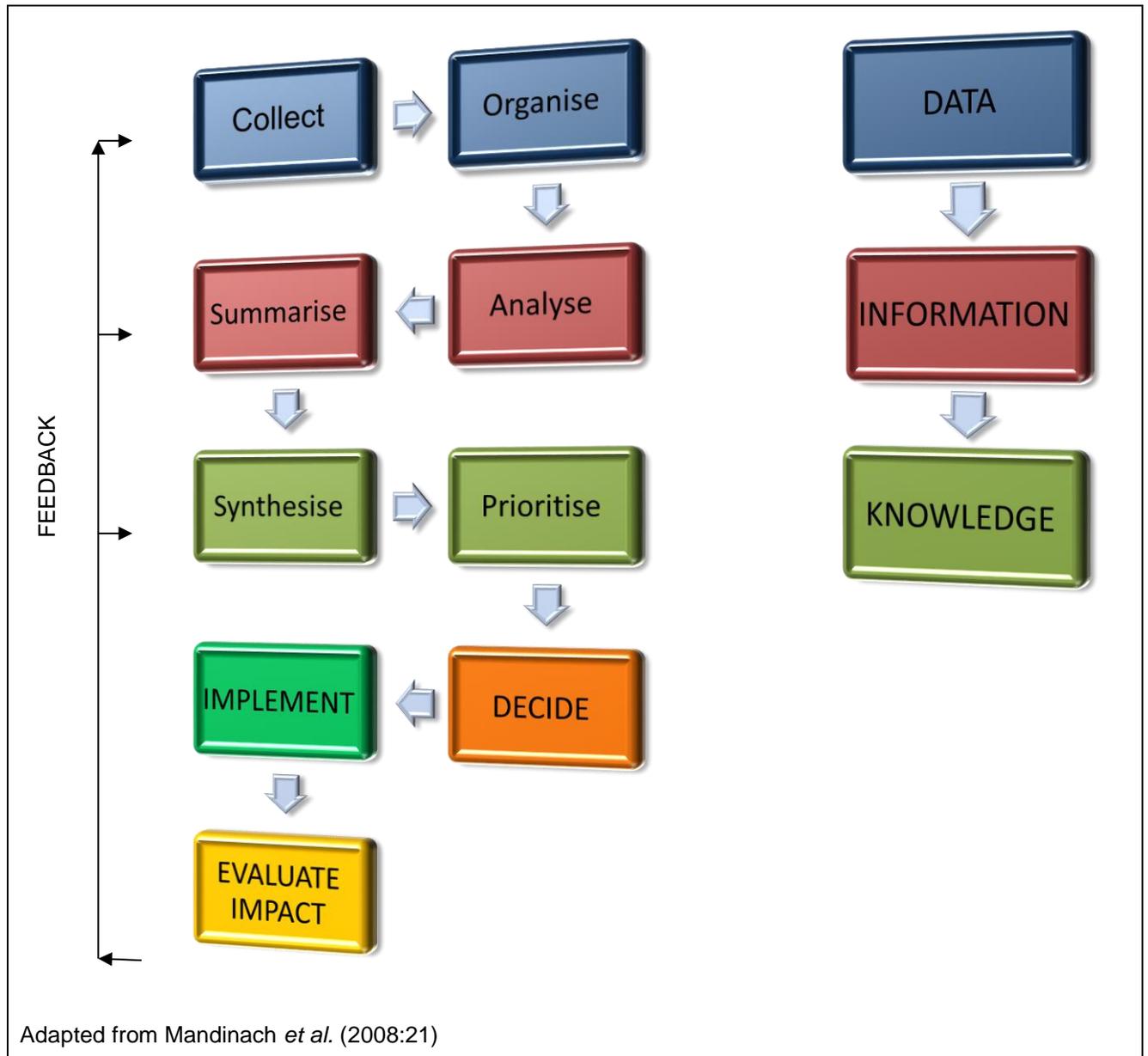
Mandinach *et al.* (2008:21) define knowledge as "the collection of information deemed useful and eventually used to guide actions". A chronological process is followed to create usable knowledge from raw data. Mandinach *et al.* (2008:21) call this process "data-to-knowledge continuum". Marsh *et al.* (2006:3), as well as Mandinach *et al.* (2008:21), distinguish between six different skills that form part of the data-to-knowledge continuum.

When the principals collect and organise the data, special attention is given to what is collected as well as the process followed to collect the data. When the data has been

accumulated, it must be organised systematically in order to make the extraction of information easier and more meaningful.

On the information level of the continuum, the manager must apply the skills of analysis and summary (Mandinach *et al.*, 2008:21). Raw data must be analysed to extract information. The process of analysis can be either broad or narrow, depending on what information is sought. Principals can be overwhelmed by the volume of information and therefore it must be summarised.

On the knowledge level, the information must be synthesised. This happens when a manager unifies or concatenates the massive volumes of information. Prioritising the knowledge is the final step that requires a principal to judge the value of the knowledge, as well as the importance thereof. Furthermore, he/she must determine actionable, relevant solutions (Mandinach *et al.*, 2008:21). The outcome of the data-to-knowledge process is the decision that must be taken. Implementing and assessing the impact of the decision will follow to finalise the whole process. The following can be seen as a schematic representation of the data-to-knowledge continuum:



Adapted from Mandinach *et al.* (2008:21)

Figure 9: Schematic representation of the data-to-knowledge continuum

2.4.2.5 The use of data-driven decision making to create a disciplined environment

Mandinach and Honey (2008:1) and Preuss (2007:7) state that the accountability of principals and educators has increased dramatically regarding the improvement of the school as a whole and, more specifically, the improvement of learners' academic performance on an international level. With the above in mind, the principal and educators need a decision-making model that can answer to the requirement for higher accountability in learner performance. Data-driven decision-making models seem to be part of the

answer. The reason is that disciplinary decisions must focus on learner improvement, but must also be participatory in nature. In disciplinary hearings, decisions are taken by various members of the tribunal; thus the assumption is that making a disciplinary decision with other people, will mitigate the chance of bias. Consequently, it will be important to focus on the group or participatory decision-making model as well.

2.4.3 Group decision making model

In 1973, Vroom and Yetton developed the “Five decision-making styles model” (Lunenburg & Ornstein, 2008:144). It is based on a continuum that ranges from highly autocratic to consultative to highly participatory. Vroom and Yetton, cited in Lunenburg and Ornstein (2008:144) are also of the opinion that the situation and circumstances dictate to a principal which decision-making style to use. Therefore it can be argued that a principal will not be confined to one decision-making style. A range of several styles can assist the principal to make decisions, depending on the circumstances and situations.

According to section 28 (2) of the Constitution (RSA, 1996a), the best interest of a child is of paramount importance in every matter concerning the child. Therefore, a principal needs to acquire as much input and information as possible in making a disciplinary decision because it can have a severe impact on the learner. English (2006:272) is of the opinion that group decision making not only enhances the development of the participant, but also ensures a better quality of decision making. The reason for the better quality of the decision is because there is a greater base of knowledge, information and expertise (Van Deventer, 2003:103).

Taking a group decision does not mean that all the stakeholders must be involved in all the decisions made (Van Deventer, 2003:103). Edwin Bridges developed the test of relevance and the test of expertise in 1967 to assist a principal in determining when participatory decision making should take place and who ought to be involved (Van Deventer, 2003:103; English, 2006:272). In 2004, Owens added the test of jurisdiction (English, 2006:272). The test of relevance refers to the person that has a high interest in the decision that must be taken (English, 2006:272). The test of expertise focuses on the training, interest and expertise a participant can bring to the table. The test of jurisdiction

is centred on the participant's ability to implement the decision. English (2006:272) contends:

Teachers should participate in decisions in which they have a high personal stake and are able to contribute effectively because of specialised knowledge and are able to implement.

Another question that comes to the fore is how the group decision-making process works. Lunenburg and Ornstein (2008:145) answer the question by stating that the group decision-making process does not differ from the rational model because it includes identifying the problem; creating criteria; generating, considering and evaluating alternatives; choosing the alternative; developing an action plan; implementing the decision; and evaluating and monitoring the decision. To understand the positive impact that group decision making can have attention should be paid to the advantages of group decision making.

2.4.3.1 Advantages of group decision making

Lunenburg and Ornstein (2008:146) and Van Deventer (2003:103) report the following advantages of group decision making:

- The quality of the decision increases

The amount of expertise, knowledge and information at the disposal of the group increases owing to the number of people giving their input.

- The decisions tend to be more creative

Creative thinking is the result of different perspectives and frames of reference the members have within the group. They also contribute their vast experience to seek a feasible solution.

- The decisions tend more acceptable

People tend to accept decisions more readily if they were part of that decision.

- A better understanding is created of the decision

The involvement of several members will result in a better understanding of the context in which the decision was made.

- A better judgment of alternatives is established

Owing to several viewpoints, expertise and knowledge, a group is subsequently better in judging the best alternatives.

- The accuracy of the decision tends to be greater

The thinking within the group and the various ideas are evaluated by the different members. Ideas are therefore distilled and tend to be more accurate.

The assumption that group decision making delivers the best possible solutions is not always true as this model also has its disadvantages and barriers. To use this model to create the best solution, a principal must take note of the disadvantages.

2.4.3.2 Problems, barriers and disadvantages of group decision making

Chance and Chance (2002:187) are of the opinion that principals should think carefully before involving others in decision making and should base the inclusion of individuals on their expertise and the information they possess. Furthermore, a principal must assess the group dynamics, since these can inhibit decision making. The following tendencies are problems that an administrator may encounter:

- Groupthink

In Hardman (2009:150), Janis defines groupthink as:

A quick and easy way to refer to a mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members striving for unanimity override their motivation to realistically appraise alternative courses of action.

Van Deventer (2003:103) explains that groupthink will happen in highly cohesive groups. The group is more focused on consensus than on evaluating all the alternatives realistically. An example of such a decision is to decide to go on strike. Hardman (2009:150) and Chance and Chance (2002:188) agree with the above and add that if the following antecedents exist, groupthink is likely to occur:

- a) The members making the decision constitute a cohesive group.
- b) Structural faults exist within the organisation.
- c) There is a “confrontational conditional context”.

If the above have manifested in prior circumstances, groupthink will be visible in several symptoms. Janis and Mann identify eight symptoms of groupthink (Chance & Chance, 2002:187; Hardman, 2009:150).

- a) Pressure to conform

The group has an overpowering pressure to conform and disagreement is not tolerated.

- b) Self-censorship of uncooperative ideas

Members are reluctant to convey their disagreement or raise concerns.

- c) Mind guards

This is the name given to members of the group who divert critical information from the group and will pressure individuals to withhold key information.

- d) Apparent unanimity

Consensus is reached early in the process before an in-depth investigation can be done into alternative solutions.

- e) Illusion of invulnerability

The group is over-confident and believe that their decisions could not be wrong.

- f) Illusion of morality

The members feel that their decision is morally grounded and they ignore obvious ethical questions and consequences.

- g) Negative stereotype

The group members will stereotype outsiders and perceive them as negative.

h) Collective rationalisation

Members will commit to their decision by maximising the data that are critical for their decision. However, they will minimise all data that will place their decision in a bad light.

- Risky shift

There is always risk involved in group decision making. According to Van Deventer (2003: 105), Stoner discovered in 1960 that group decision making is more risky than decisions taken by an individual. Stoner, cited in Van Deventer (2003:105), names the following as reasons for the “risky shift phenomena”.

- a) A diffusion of responsibilities occurs when decisions are made in a group.
- b) There is the belief that leaders of groups are more willing to take risks and can influence the group to do so.
- c) It is socially desirable to take risks and is more likely to happen in a group.

Although decision making is regarded as an orderly process, it does not detract from the complexity of the process. The complexity of the school environment adds to the complexity of the process. Hardman (2009:153) states that a principal can use brainstorming and the rule of the majority as techniques to improve the group-decision process. Group decision making is a powerful instrument only if it is used correctly.

2.4.4 Conclusion

Several pitfalls await the principal in making decisions that have an impact on learners’ lives. The scarcity of time and resources adds to the minefield managers face when making decisions. In addition, every model discussed has several disadvantages. The issue at hand is that a principal must be familiar with the pitfalls and disadvantages of each model and should capitalise on the advantages of each model. The aim of the study is to propose a decision-making model based on the literature study and field study. The question of which decision-making model a principal should use in making disciplinary decisions, needs to be answered. Apart from the appropriate decision-making model, it is critical for a principal to understand what legal requirements should be taken into consideration to make disciplinary decisions that are lawful, reasonable and fair. Chapter 3 sheds light on the above-mentioned requirements.

CHAPTER 3

ANALYSIS OF LEGISLATION RELEVANT TO THE ADMINISTRATIVE CONCEPTS OF WHAT IS LAWFUL, REASONABLE AND FAIR

3.1 INTRODUCTION

Hans Kelsen, an Austrian jurist, is credited with the development of a ‘positivist’ theory of law. This means when law is “analysed, it excludes ethical, political or historical considerations and focuses on the black letter of the law”. This structure of law is known as *Grundnorm* (Swarup, 2011:1). The validity and statements in the law are derived from the ground rule or *grundnorm*, and in all cases, the *grundnorm* must be obeyed. A political revolution is the only recourse to change the *grundnorm* of a country (Swarup, 2011:1).

After years of struggle and political revolution, apartheid came to an end in 1994 with the acceptance of the Interim Constitution. It created a new social, political and legal environment which was set in stone with the acceptance of the Constitution. According to Wiechers (2005:469), the constitutional *grundnorm* was undoubtedly the biggest change. The South African Law, and the application thereof, has changed considerably. Therefore, the focus of this study is on the change in legislation resulting from section 33 of the Constitution of South Africa (RSA, 1996a).

3.2 A DEMOCRATIC SOUTH AFRICA

According to Malherbe and Van Eck (2009:215), democracy is not a fixed concept. History, culture, norms and values influence democracy in any specific country. This means that a political system will be deemed democratic in one country, but not in another. Although democracy cannot be easily defined, there are certain principles that can determine if a country is democratic or not. The basic principles for democracy include:

- freedom;
- individual recognition;
- equality;
- citizen participation;
- accountability and transparency;
- free and fair elections;
- subjecting the state to the law; and

- restricting the power of the state.

(Malherbe & Van Eck, 2009:215; Smit & Oosthuizen, 2011:60).

South Africa can be deemed a democratic state according to the above-mentioned criteria and section 1 of the Constitution (RSA,1996a) that states: “The Republic of South Africa is one, sovereign, **democratic state**” (own emphasis).

The first six principles are self-explanatory. The principles of subjecting the state to the law and restricting the powers of the state need clarification.

South Africa diverged from the Westminster system, where parliament was the highest authority, to a system of constitutional supremacy. The change in the constitutional *grundnorm* was remarkable because the Constitution is proclaimed as the supreme law of the Republic of South Africa in section 2 of the Constitution (RSA, 1996a): “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

All people, organs of the state and parliament itself are subject to the Constitution (Malherbe & Van Eck, 2009). Because there is a risk that parliament and organs of the state can abuse their powers, various mechanisms of democracy are in place to ensure that the abuse of power does not happen. According to Malherbe and Van Eck (2009:209), the above-mentioned section gives an indisputable indication of the democracy that the Constitution envisages for South Africa. It implies that the state must comply thoroughly with every duty laid down by the Constitution. It is evident that the values that underpin the constitution, such as constitutional supremacy, the protection of human rights, the rule of law, and the *ultra vires* doctrine, limit the power of the state. The limitation of these powers results in lawful acts being made by parliament.

The doctrine of the separation of powers is a democratic principle that limits the powers of the state even more (Joubert, 2009a:3). This means that the power of the state is divided into three branches, namely:

- Executive (Cabinet)

- Legislature (Parliament)
- Judiciary (Courts of law)

The above can be summarised in the following table:

Table 5: Three branches of government

	Executive	Legislature	Judiciary
Consists of:	<ul style="list-style-type: none"> • President • Deputy President • Ministers 	<ul style="list-style-type: none"> • National legislature consists of two houses • National Assembly • National Council of Provinces • Elected people of SA 	<ul style="list-style-type: none"> • Constitutional Court • Supreme Court of Appeal • High courts • Magistrates' courts
Function:	<ul style="list-style-type: none"> • Develops policies • Initiates legislation 	<ul style="list-style-type: none"> • National Assembly chooses the president and passes laws • Overlooks work performance of the executive 	<ul style="list-style-type: none"> • Adjudicates cases before the court within its jurisdiction
Adapted from Our Constitution (www.parliament.gov.za/live/content.php) (Accessed March 2013)			

The executive and legislature have a special obligation to protect the judiciary. The reason is to ensure independence, impartiality, dignity, accessibility and effectiveness. As state is subjected to the supremacy of the Constitution and the power of the government is limited, lawful legislation can be passed by parliament. It is this concept of lawfulness that is the focus of the study.

3.3 SOURCES OF LAW RELEVANT TO THE STUDY

3.3.1 The Constitution of South Africa, 1996

Administrative law in the pre-democratic era deserves to be mentioned in order to understand the “drastic” development that occurred since administrative justice was constitutionalised in the Constitution (Hopkins, 2000:1). Hoexter (2009:10) notes that administrative law was hardly a separate field of law in the twentieth century. Seen against the backdrop of the humiliation that black South Africans suffered because of the poor administrative structures they were subjected to, it is clear that it was used as a tool

of oppression. The reason for this is that when government action was examined by the courts, the legal concept of *ultra vires* was used. This means that government action was statutorily authorised. Thus administrative action could only take place if statutes, proclamations, ordinances and regulations permitted such actions (De Waal *et al.*, 2001:490; Wiechers, 2005:469).

When the interim Constitution came into effect in 1994, and later the final Constitution in 1996, administrative law was catapulted into a new era. De Waal *et al.* (2001:491) point out that the Constitution protects three fundamental rights that are of great importance for administrative law:

- The right to settle disputes in a court, or before an administrative tribunal.
- The right to have access to information held by the government.
- The right to just administrative action.

It can be argued that administrative law was constitutionalised (De Waal *et al.*, 2001:492). The right to administrative action is no longer vested in common law, but is viewed as a fundamental right protected by the supremacy of the Constitution. The importance of section 33 of the Constitution (RSA, 1996a) comes to the fore in the *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) (para 135). In this judgment the Constitutional Court emphasises that section 33 of the Constitution is not a mere codification of common-law principles, but an entrenchment of the right to just administrative action.

If section 33 of the Constitution (RSA, 1996a) is analysed, the following important concepts need to be emphasised and discussed:

- i. An administrative action must be “**lawful, reasonable and fair**”.
- ii. “**Written reasons**” must be given if rights are “**adversely affected**”.
- iii. National legislation must be promulgated to “**give effect**” to the right of just administrative action.
- iv. The above-mentioned legislation must promote an efficient administration.

To clarify the content of section 33 of the Constitution, each concept shall be dealt with separately.

- **Administrative action**

De Waal *et al.* (2001:498) define administrative action as: “At its broadest and simplest, the conduct of the administration.”

The administration refers to all the organs of the state (De Ville, 2003:287). When discussing the PAJA (RSA, 2000), exceptions will be shown and administrative action will be defined according to this Act as ‘lawful, reasonable and fair’. These legal concepts are discussed in detail later in the thesis.

- **Adversely affected**

Burns (1998:125) notes that the individual is protected by the administrative just clause when administrative abuse adversely affected his/her rights. De Waal *et al.* (2001:506) are of the opinion that the verb ‘affect’ is confusing. It is therefore argued that ‘affect’ means, in a broader sense, ‘determine’. To have an adverse effect on a right of a person, the determination of the right must impose a burden. Therefore, a positive determination will not be deemed grounds for administrative action, but a negative determination will create grounds for such action. Deciding that a licence may be granted to a person, is an example of a positive determination. On the other hand, if it is decided that a licence will not be granted, a burden is placed on the right of a person (De Waal *et al.*, 2001:506). Therefore, this can result in administrative action.

- **Written reasons**

In the pre-democratic era, the courts, in most cases, did not require written reasons (Burns, 1998:125). According to De Waal *et al.* (2001:520), a significant new requirement of the Constitution is that written reasons must be given for administrative action. Hoexter (2007:416) quotes Lord Denning in *Breen v Amalgamated Engineering Union* [1971] 2 QB 175 (CA) at 191C which states: “The giving of reasons is one of the fundamentals of good administration.”

De Waal *et al.* (2001:520) state that the main principle for furnishing reasons is to justify the administrative action that has been taken; it adds to the fairness of the action taken if written reasons are given to the individual whose rights are affected. Burns (1998:125) further contends that the requirement to provide the affected party with written reasons, is to ensure transparency, accountability, and openness in government. This is a positive

mechanism because the administrator is accountable for the decision taken and it adds to a culture of justification (De Ville, 2003:287). It can be established whether, from the reasons given, the administrator has followed due process, the relevant considerations have been taken into account, and an error of law has not been made.

Areias and Kotze (2013:54) state that the standard of adequate reasons was laid down in *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* 2003 (6) SA 407, where the Federal Court of Australia was quoted in *Ansett Transport Industries Pty Ltd and Another v Wraith and others*:

The decision-maker should set out his understanding of the relevant law, any findings of the fact on which his conclusions depend (especially if those facts have been in dispute) and the reasoning process which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation.

Hoexter (2007:416) points out that furnishing written reasons has not only procedurally benefits, but substantive benefits as well. The reason is that the duty to give reasons improves the quality of the decision. Furthermore, the giving of written reasons can mitigate the need for appeal. The concepts of procedural and substantive fairness are discussed later in the study.

- **National legislation and give effect**

In section 33(3), the Constitution (RSA, 1996a) requires the legislature to promulgate an Act to give effect to the rights set out in section 33(3)(a), (b), (c) of the Constitution (RSA, 1996a). In response to this requirement, the PAJA was enacted. Van Heerden (2009: 183) states that the purpose of the PAJA is to give effect to the rights listed in section 33 of the Constitution. De Waal *et al.* (2001:495) view the meaning of to 'give effect' to be making the right to a just administrative action effective. By using this meaning for 'give effect', it is clear that the Act in question does not create new rights. The constitutional right to a just administrative action exists independently of the PAJA that makes the right effective. Van Heerden (2009:183) views the PAJA as a framework for the exercise of administrative power and a firm base to promote efficient and effective public administration.

- **Promote an efficient administration**

Administrative law as a whole is concerned with judicial and non-judicial protection against poor decision making. Hoexter (2007:9) believes that administrative law has a positive side in the sense that administrators must be empowered with mechanisms for good decision making. Devenish (1999:478) believes that the “promotion of efficient administration” is of fundamental importance. Devenish (1999:478) states that the legislature and courts need to take the provision “to promote an efficient administration” into consideration with the enactment of legislation. Born from section 33(3)(c) of the Constitution (RSA, 1996a), a number of state institutions were formed to promote lawfulness, efficient administration, and effective decision making.

Section 181(1)(a-f) of the Constitution (RSA, 1996a) lists the state institutions that strengthen democracy by effective administration:

181. Establishment and governing principles

1. The following state institutions strengthen constitutional democracy in the Republic:
 - a. The Public Protector.
 - b. The South African Human Rights Commission.
 - c. The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.
 - d. The Commission for Gender Equality.
 - e. The Auditor-General.
 - f. The Electoral Commission.

To further the positive influence on efficient administration and effective decision making, section 181(2)–(5) of the Constitution (RSA, 1996a) states the following:

2. These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.
3. Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.
4. No person or organ of state may interfere with the functioning of these institutions.
5. These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.

There is a need to explain the purpose of the PAJA (RSA, 2000) in order to understand the effect this Act has on the right to just administrative action.

3.3.2 The Promotion of the Administrative Justice Act, Act 3 of 2000

Currie (2007:2) is of the opinion that the PAJA forms the basis of South African administrative law. The most important purpose of the PAJA (RSA, 2000), is reflected in the long title of the Act:

To give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa, 1996; and to provide for matters incidental thereto.

The main purpose of the PAJA is to give effect to the rights listed in section 33 (1) and (2) of the Constitution. The long title of the Act not only gives effect to the right to just administrative action, but it also lists the conditions that must be met, which are:

- i) the administrative action must be lawful, reasonable and fair; and
- ii) written reasons must be given.

Currie (2007:2) adds by stating that another goal of the PAJA is to “state comprehensively the general rules and principles relating to the judicial control of administrative power”. In an educational setting, this means that the PAJA lays down the rules for administrative action, for example, a disciplinary hearing of a learner.

Beaton-Wells (2003:90) lists the following as objectives of the PAJA in the preamble:

- The promotion of administrative efficiency.
- The promotion of good governance (the legal concepts of lawful, reasonable, fair and written reasons given are the attributes of just administrative action and can be linked to good governance).
- The creation of a culture of accountability, openness and transparency that are linked to the democracy that the Constitution envisaged.

If an administration fulfils the requirements of procedural fairness and written reasons given, it can be accepted that the administration is open and accountable to the people it serves. Beaton-Wells (2003:90) acknowledges that although the objectives of this theoretical ideal are complementary, in practice the efficiency of administration could be

hampered because of resource constraints that can make it impossible to comply with the culture that the PAJA seeks to create.

3.3.2.1 The structure of PAJA

To further elucidate the PAJA, it will be meaningful to look into the structure of this Act. Section 1 deals with the definitions of concepts that is relevant to the Act. Section 2 states the application of the Act, which deals mainly with exemption in order to promote an efficient administration. Section 3 and 4 stipulate the fair procedure that administrators must adopt to have a positive impact on administrative decisions before and after they are taken. Section 5 deals with the right to receive written reasons for an administrative action taken. Sections 6 to 8 deal with the concept of judicial review and include grounds, procedures and remedies for judicial review. The Act concludes with sections 9, 10 and 11, which deal with time, relations and the short title of the Act, respectively.

3.3.2.2 Administrative action

There are certain prominent questions that come to the fore with regard to the PAJA within an educational context that need to be answered:

- What is administrative action?
- Which situations qualify as administrative actions?
- Where do administrative actions fit into the education milieu?

According to section 1(a)–(b) of the PAJA (RSA, 2000), administrative action relevant to this study is defined as:

‘administrative action’ means any decision taken, or any failure to take a decision, by—
(a) an organ of state, when—
(i) exercising a power in terms of the Constitution or a provincial constitution; or
(ii) exercising a public power or performing a public function in terms of any legislation; or
(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect.

Currie and Klaaren (2001:207) as well as De Waal *et al.* (2001:501) summarise the above and state that the following must be present before an action qualifies as an administrative action in terms of the PAJA:

- There must be a decision.
- The decision must be of an administrative nature.
- The decision must be made under the empowering provision.
- The decision must be made by an organ of the state or by a private person when exercising a public power.
- The rights of a person must be adversely affected.
- There is direct external legal effect.

To clarify the above, the concepts are discussed separately below.

- **Decision**

The PAJA does not focus on administrative conduct, but on the administrative decisions that an organ of the state makes or fails to make (De Waal *et al.*, 2001:93). The relevance to education is evident in the definition given of an administrator in section 1 of the PAJA (RSA, 2000): “**Administrator** means an organ of state or any natural or juristic person taking administrative action.”

According to section 29 of the Constitution (RSA, 1996a), everyone has the right to receive basic education. Section 7 of the Constitution (RSA, 1996a) determines that the Bill of Rights is the cornerstone of democracy and the State has the obligation to respect, protect, promote and fulfil these rights. Thus, the State has the enormous task to provide education. Serfontein (2010:94) mentions that in *Randpark Bpk. v Santam Versekeringsmaatskappy Bpk.* 1965 b(4) SA 363 (A), the State is legally liable for actions in public schools. Section 60 of the Schools Act (RSA, 1996c) underlines the above: the State can be held liable for wrongful actions that occurred in a state school. Schools can therefore be deemed organs of the state and the principal is the representative of the Head of Department (Serfontein, 2010:97). Therefore a principal can be seen as an administrator in terms of the PAJA.

Section 1(a), (d), and (e) of the PAJA (RSA, 2000) defines a decision relevant to this study as follows:

decision means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to—

- (a) to make an order, award or determination;
- (d) imposing a condition or restriction;
- (e) making a declaration, demand or requirement.

Beaton-Wells (2003:93) is of the opinion that the definition of ‘decision’ is similar in structure to comparable Australian legislation. Currie (2007:52) states that parts of the definition of ‘decision’ were taken from the Australia’s Administrative Decisions (Judicial Review) Act of 1977 (ADJR). Activities associated with a decision listed in the Act include making, suspending, revoking, refusing and issuing (Beaton-Wells, 2003:93). The definition is a broad description that encompasses administrative action or conduct (De Waal *et al.*, 2001:502). Currie (2007:56) clarifies the definition of a decision and states that conduct must be “decisive or determinative” in nature before it qualifies as a decision. To further explain the statement, the following example can be used: a principal takes the decision to suspend a learner from school because the learner had a dangerous weapon on him and threatened other learners. The principal refers the case to the disciplinary committee for a disciplinary hearing. The disciplinary committee recommends that the learner should be expelled, which is ratified by the School Governing Body. The HOD makes the decision to expel the learner. Currie (2007:56) is of the opinion that the decision to suspend and to expel has a “decisive or determinative” implication, and will therefore be deemed a decision according to the definition given in section 1(a), (d), and (e) of the PAJA (RSA, 2000). Although decisions are made at various stages of a case, this remains an administrative decision (De Ville, 2003:239). The definition of a decision the PAJA highlights indicates two limitations before an action can be deemed an administrative action, namely the decision must be of an administrative nature and it must be made under an empowering provision (De Waal *et al.*, 2001:502; De Ville, 2003:39; Currie, 2007:51).

- **The decisions must be of administrative nature**

Currie and Klaaren (2001:52) are of the opinion that expression of “administrative nature” does not add very much to the definition of an administrative action. It should be noted that there are differences between administrative actions and other actions taken by government. It is necessary to distinguish between the role of the government and what administrations do to understand actions of an administrative nature (De Waal *et al.*, 2001:502). One of the functions of government is to establish policy and give effect to policy by passing legislation. When the legislation is enacted, it is the function of administration to implement and administer this legislation. The problem with this oversimplification of the functions of government and administrations is the sense of ambiguity that is created into “something of a puzzle” (Hoexter, 2007:190). The reason for this statement is that administrators “make policy decisions and exercise discretionary powers on a daily basis” (De Waal *et al.*, 2001:502), and it is therefore complicated to differentiate between administration and policy making. De Waal *et al.* (2001:502) also warn that if decisions of an administrative nature are narrowly defined, the PAJA does not give effect to the constitutional rights.

Only decisions made by an administrator to fulfil the administrative functions and exercise administrative powers can be deemed administrative action (Currie, 2007:56). In an educational setting the principal makes decisions of an administrative nature when enforcing the code of conduct, thereby implementing a policy set out in section 16 A of the Schools Act. The principal does so by using his/her discretion. An example of decisions not being of an administrative nature is, for instance, the legislature of government that has the capacity to pass laws, bylaws and regulations (De Waal *et al.*, 2001:502).

- **The decision must be made under the empowering provision**

Section 1(vi) of the PAJA (RSA, 2000) states that:

‘**empowering provision**’ means a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken.

Beaton-Wells (2003:95) and Currie and Klaaren (2001:53) feel that this definition is too broad. Currie and Klaaren (2001:53) state that the “empowering provision refers to subject matter and not to a person”. De Waal *et al.* (2001:504) emphasise that administrative

functions must not only be seen as legislation-implementing, but rather law-implementing. Burns (2013:177) states that law includes original legislation as well as subordinate legislation which encompass regulations. In addition to subordinate legislation, agreements, instruments and other documents must be taken into account. In an educational setting, a principal must be empowered to make a decision. Section 16 A (d) of the Schools Act empowers a principal to maintain discipline in a school. This encompasses the function of making disciplinary decisions.

- **The decision must be made by an organ of the state**

Currie and Klaaren (2001:69) state that this determination focuses on the person and not on the subject matter. Owing to the focus of this study, attention will only be given to a decision made by an organ of the state. Section 239 (b) of the Constitution of South Africa defines an organ of the state as “any department of state or administration in the national, provincial or local sphere of government”.

As an organ of the state, the school’s decision, which is made under empowering provisions, amounts to administrative action. The school and School Governing Body are seen as an organ of the state as discussed in Section 3.3.3.1.

- **The rights of a person must be adversely affected**

The requirement of an administrative action to adversely affect the rights of a person is referred to by Du Plessis and Penfold (2005:91) as the most controversial element of the definition of administrative action. This statement correlates with the opinion of De Waal *et al.* (2001:506) that this requirement of the definition of administrative action is confusing. Currie (2007:78) states that the phrase “has the potential to be one of the most restrictive on the scope of the PAJA”. Several authors are of the opinion that this requirement narrows the scope of administrative action (Du Plessis & Penfold, 2005:91).

According to section 33 (1) of the Constitution (RSA, 1996a), everyone has the right to just administrative action. Du Plessis and Penfold (2005:91) are of the opinion that the confusion arises when section 33(2) of the Constitution (RSA, 1996a) limits a person’s rights only to when his/her rights have been adversely affected. *Grey’s Marine Hout Bay*

(Pty) Limited & Others v Minister of Public Works 2005 (6) SA 313 (SCA), 2005 (10) BCLR 1298 (para 23) gives an interpretation of the above-mentioned conundrum:

While PAJA's definition purports to restrict administrative action to decisions that, as a fact, "adversely affect the rights of any person", I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be inconsonant with s 3(1) [of PAJA], which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a "direct and external legal effect", was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals.

In taking a disciplinary decision, a principal must be aware of the consequences of his/her decision and what effect the decision has on all the role players. The principal must take section 33 of the Constitution into consideration as the ultimate goal to deliver lawful, reasonable and fair administrative action. Apart from section 33 of the Constitution, the principal needs to be aware not only of the rights of the learner who transgressed the code of conduct, but also the learner or educator whose rights were limited by the action of the guilty learner. Section 28(2) of the Constitution (RSA, 1996a) states that every decision taken with regard to a child, must be in the child's best interest. Section 29(1)(a) of the Constitution (RSA, 1996a) states that every child has the right to basic education. If a principal makes a decision limiting the education of a learner, that learner's right to education is adversely affected.

Beaton-Wells (2003:98), as well as Currie (2007:79), believes that this element is closely related to the element of direct, external, legal effect. Currie (2007:79) goes on to explain that this element consists of two parts: the rights of the person, and that such a person's rights are adversely affected. It appears that a 'right' means "an enforceable claim against a duty holder". It is not limited to Constitutional rights, but applies to rights in general, which can be in found statutory and private law.

- **Direct external legal effect**

It is apparent that there are three factors influencing the requirement of “direct external legal effect”. The first factor has relevance on the multi-stage, decision-making process, where it means that only the last decision taken will be linked to the PAJA (Currie & Klaaren, 2001:83; Beaton-Wells, 2003:100). De Ville (2003:239) contends that the expulsion of a learner is a multi-stage decision-making process.

The second factor, ‘external’, means that people outside the sphere of the administrator will be affected by the decision taken. Currie and Klaaren (2001:83) state that persons within the same institution as the administrator, who made the decision, will satisfy the requirement if the persons within the institution have individual rights that are affected. When a disciplinary decision is taken to suspend or expel a learner, the parents of the learner are also affected by the decision in that they have to make alternative arrangements to accommodate their child.

The third factor comes into play when the decision that is taken, is legally binding (Burns, 2013:189). If the HOD is of the opinion that a learner’s continued attendance at school threatens the safety of other learners, and enough evidence exists to endorse the opinion of the HOD, the learner will be expelled from the current school. This decision is legally binding.

3.3.2.3 Administrative action affecting any person

Section 3 of the PAJA (RSA, 2000) focuses on administrative action that affects any person. According to Beaton-Wells (2003:101), section 3 of the PAJA (RSA, 2000) is a mechanism to codify common-law principles such as procedural fairness. Section 3 of the PAJA (RSA, 2000) differs from section 1 of the PAJA (RSA, 2000) in relation to the definition of administrative action. Section 1 of the PAJA (RSA, 2000) uses the phrase “adversely affected rights” but in section 3 of the PAJA (RSA, 2000), the phrase “*materially and adversely affects the rights or legitimate expectations*”, is used. De Waal *et al.* (2001:511) are convinced that there is a wide range of administrative actions that can adversely affect the rights of a person, but only a few that will have a material effect on their rights. Only if rights or expectations have been materially and adversely affected,

does procedural fairness come into play. By adding the word ‘materially’, the right to just administrative action is narrowed, whereas the words ‘legitimate expectations’, broaden the scope of administrative action.

According to section 3(2)(a) of the PAJA (RSA, 2000), each case must be dealt with on its own merit. De Waal *et al.* (2001:512) explain that procedural fairness is “circumstance-specific”. Section 3(2)(b) of the PAJA (RSA, 2000) lists the core elements that an administrator must adhere to in order to be procedurally fair. De Waal *et al.* (2001:512) list the core elements as:

- adequate notice;
- opportunity to make representations;
- clear statement of the administrative action;
- notice of any right of review or internal appeal; and
- notice of the right to request reasons.

The above core elements that exist in section 3(2)(b) of the PAJA (RSA, 2000) correlate with measure 5 of the regulations relating to disciplining, suspension and expulsion of learners at public schools in the Western Cape (Province of the Western Cape, 2011). If a learner is called for a disciplinary hearing, the following elements must be present in the written notice to the parents:

- The notice must be given at least five days prior to the hearing.
- The right to make representation, for example, ask questions, cross examine, call witnesses and lead evidence.
- The parents, as well as the learner, must be informed that disciplinary action will be taken against the learner.
- The appeal process must be explained to the parents and they have the right to request reasons for the decision.

Section 3(3) of the PAJA (RSA, 2000) lists the non-core elements that may be provided by the administrator:

- legal representation;
- presenting and disputing information and arguments; and
- appearing in person.

The non-core elements fall in the domain of the administrator, who can make discretionary decisions as long as they are lawful and reasonable (De Waal *et al.*, 2001:512; Beaton-Wells, 2003:101). According to section 3(4)(a) and (b) of the PAJA (RSA, 2000), an administrator may deviate from the core elements set out in section 3(2) if they are reasonable and justifiable. Section 3(5) of the PAJA (RSA, 2000) focuses on procedures prescribed in an empowering provision in legislation. Although this prescribed procedure may be different as recommended by the PAJA, it will be deemed fair because of the empowering provision.

3.3.2.4 Administrative action affecting the public

The PAJA establishes procedures which an administrator must adhere to in dealing with administrative action affecting the public. Administrative action affecting the public is not relevant to the study and therefore needs no discussion.

3.3.2.5 Reasons for administrative action

The giving of reasons as a general duty is a significant new facet in South African administrative law (De Waal *et al.*, 2001:520). It became a duty with the enactment of the Interim Constitution of 1994 for administrators to justify their decisions by providing reasons for every decision taken (De Ville, 2003:287). The right to receive written reasons is endorsed in section 33(2) of the Constitution (RSA, 1996a), and section 5 of the PAJA (RSA, 2000), gives effect to this right.

The primary purpose for furnishing reasons is not to provide information, but to justify the administrative action. An administrator explains him/herself in the reasons given and therefore safeguards him/herself against unreasonable and unfair administrative action. An assumption can be made that, since written reasons must be given, more thought will go into the decision-making process (De Waal *et al.*, 2001:520). De Ville (2003:287) agrees and adds that the giving of reasons creates openness in administrative decision making. Apart from the administrative openness that exists, the giving of reasons creates a sense of fairness for the parties involved.

It must be understood that not everyone is entitled to written reasons (Burns, 2013:285). Only persons whose rights have been materially and adversely affected, and who requested reasons prior to the administrative action, are entitled to written reasons. De Waal *et al.* (2001:521) list the following obvious disadvantages to giving written reasons:

- The giving of reasons can be costly and time-consuming. Time and money are the commodities that are necessary in giving reasons. These resources are not always available.
- The reasons will not always achieve the desired purpose effectively.
- Reasons tend to restrict administrative options in similar cases because they create consistency which in turn reduces flexibility.

In section 33 of the Constitution (RSA, 1996a) it is formulated that a person has the right to written reasons if his right has been adversely affected. When the word 'materially' was added to section 33 of the Constitution (RSA, 1996a), the right of people to request reasons was limited (De Waal *et al.*, 2001:522). They further state that this limitation is justifiable because it is impossible to give reasons for every action or decision an administrator takes. This limitation alleviates the burden on administrators and ensures efficiency in administration.

Section 5(2) and (3) differ from section 5(1) of the PAJA (RSA, 2000) in the sense that the word 'adequate' is added in the latter sub-sections. De Ville (2003:292) is of the opinion that it is impossible to create a general rule that can determine if the given reasons are adequate. Beaton-Wells (2003:103) notes that the giving of 'adequate' reasons is up to the discretion of the administrator. In *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* 2003 (6) SA 407 (para 40), Judge Schutz states that the following can be seen as 'adequate' reasons:

This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement. Often those factors may suggest a brief statement of one or two pages only.

Hoexter (2007:429) states that this remark is a rich source of information for South African administrators and the following have emerged from the above remark:

- The reasons must be specific, presented in clear language which is appropriate to the situation.
- The nature and importance of the decision are factors that must be taken into consideration. Furthermore, the complexity of the case and the time the administrator has available, plays a significant role.
- Reasons cannot only consist of plain conclusions.
- Relevant law and facts that influence the decision-making process must be included.

The case of *Moletsane v Premier of the Free State* 1996 (2) SA 95 (O), cited in Currie and Klaaren (2001:145), underscores the above approach in Judge Hankce's statement:

The more drastic the action taken, the more detailed the reasons should be. The degree of seriousness of the administrative Act should therefore determine the particularity of the reasons furnished.

According to De Waal *et al.* (2001:523) and Hoexter (2007:431) this approach is linked to the consequences of administrative action. Currie and Klaaren (2001:41-46) criticise this approach by pointing out that there is no relation between the reasons required and the degree of seriousness of the decision. They are of the opinion that if a straightforward decision can be explained in a single-line statement, it can be deemed adequate. The assessment of complex decisions and facts requires lengthy explanation and does not focus on the consequences of the administrative action.

Section 5(4)(a) of the PAJA (RSA, 2000) determines that an administrator may deviate from the requirements to give reasons, if reasonable and justifiable. In section 5(4)(b) of the PAJA (RSA, 2000), factors are listed that must be taken into account to determine if the deviation is reasonable and justifiable. Section 5(6) of the PAJA (RSA, 2000) determines that the minister can publish a list where certain groups of administrative actions need not request reasons because they will receive them automatically.

It has already been stated that the primary purpose for giving reasons is not to provide information, but to justify the administrative action. The giving of reasons creates

openness in administrative decision making (De Ville, 2003:287). To sustain a reputation for open communication, a school, through the School Governing Body, is obliged to give reasons to create a sense of fairness for the parties involved.

An administrator explains him/herself in the reasons given and therefore safeguards him/herself against unreasonable and unfair administrative action. An assumption can be made that, since written reasons must be given, more thought will go into the decision-making process (De Waal *et al.*, 2001:520).

3.3.2.6 Judicial review for administrative action

According to section 33 (3) of the Constitution (RSA, 1996a), legislation must be enacted to give effect to the right of just administrative action. It should be understood that the PAJA did not in any way replace or amend section 33 of the Constitution (Hoexter, 2007:114). The main purpose of the PAJA (RSA, 2000) is to give effect to Section 33 of the Constitution (RSA, 1996a). According to Hoexter (2007:114), section 6 of the PAJA (RSA, 2000) achieves mainly this purpose and therefore it is known as the primary pathway for judicial review.

Any person has the constitutional right to lawful administrative action. Section 6 of the PAJA (RSA, 2000) provides for judicial review where administrative action is alleged to be unlawful. According to De Waal *et al.* (2001:515), administrators have an obligation to obey the law and make decisions within the authority bestowed on them by the law. De Waal *et al.* (2001:516) explain that if an administrator makes a decision that is not permitted by law, such a decision will be deemed unlawful and therefore invalid. It should be remembered that legislation cannot take away the review functions of the courts, which have the obligation to ensure lawful administrative action.

A question that comes to the fore is: What is judicial review? Currie and Klaaren (2001:222) state that if a person for example feels unfairly treated with a decision taken by an administrator, that person is entitled to contest the decision in the Equality court. One example of where the Constitutional court can be approached is when original legislation is challenged. However, the “rule of exhaustion of internal remedies” must not be out of sight. It means that the procedures that are captured in legislation with regard to review or

appeal must be exhausted before a person can take the matter to court. An example of such an appeal procedure is that the decision of the HOD to expel a learner can be taken to the MEC for Education for appeal. If this measure has been exhausted, a person can argue in court how the decision that was taken by the administrator violated his/her right to a lawful, reasonable and fair administrative action.

Currie and Klaaren (2001:222) state that the court can make a number of orders to remedy the situation, for example:

- Declare the decision of the administrator null and void.
- The administrator can be ordered to reassess the decision.
- The court can make a decision and replace the decision of the administrator.
- The court can order that damages must be paid to the affected party.

An example of an administrative decision that was contested is found in the *De Kock* case. The disciplinary committee found Floris guilty of having dagga on the school grounds. Subsequently, a recommendation was made to the HOD to expel Floris from the school. Floris's father contested the decision in court. (The case is thoroughly discussed in Section 3.2.6.)

Section 6(2) and (3) of the PAJA (RSA, 2000) lists 20 grounds for review of an administrative action (Currie & Klaaren, 2001:152; Burns, 2013:318). Burns (2013:318) states that the 20 grounds for review can be listed in nine basic categories, namely:

- i. The action taken by the administrator.
- ii. Non-compliance with formal requirements relating to administrative action.
- iii. Procedurally unfair administrative action.
- iv. Action materially influenced by error of law.
- v. The manner in which the action was taken.
- vi. Grounds for review that relate to the action itself.
- vii. The failure to take a decision.
- viii. The unreasonableness of the action.
- ix. Action that is otherwise unconstitutional or unlawful.

Apart from the grounds for review listed in section 6(2), courts take the following common-law principles into account which can also be grounds for review. The principles can be linked to lawfulness (see Section 3.4) and are as follows:

- The law must authorise administrative actions and decisions.
- In the decision-making process there cannot be any errors in fact or law.
- The discretion of the administrator must be flawless in the sense that he or she did not act in bad faith with ulterior motives or fail to consider the issues properly.
- The power of the administrator is therefore controlled by the courts in the sense that they interpret and identify the scope of authority and check if the administrator did not abuse his or her discretion, make an error in law or fail to consider the facts at hand. The power to determine if an administrator has acted lawfully is reserved for the courts (De Waal *et al.*, 2001:516; Burns, 2013:319).

3.3.2.7 Procedure and remedies for judicial review

Section 7 of the PAJA (RSA, 2000) is generous with regard to time limits to commence with judicial reviews. Similar Australian legislation allows 28 days, but the PAJA allocates 180 days for proceedings to start (Beaton-Wells, 2003:104). According to section 9(1)(b), the time period can be extended by a court order or by agreement. Hoexter (2007:465) deems section 8 of the PAJA “as the first stop” for any pursuer in search of a judicial remedy. According to section 8(1) of the PAJA (RSA, 2000), a court or tribunal has the power to grant any order that is just and equitable.

The PAJA gives effect to the constitutional right of lawful, reasonable and fair administrative action (Van Heerden, 2009:183). Of important to this study, is the relationship between the PAJA and education legislation. To understand this relationship, relevant education legislation must be dissected in order to find common points in this case it would be the Schools Act.

3.3.3 The South African Schools Act, Act 84 of 1996

The Schools Act is departure point for matters pertaining education. Common points between PAJA and the Schools Act must be established to see how PAJA and the

Schools Act relate. In the next paragraph administrative action in an educational setting will be discussed.

3.3.3.1 Administrative action in an educational setting

A question that comes to the fore is whether an administrative action can exist in an educational setting. In the following discussion it will be shown that an administrative action can exist in an educational setting. Attention will be given to the following criteria:

- The primary function of a school.
- The principal's responsibility for curriculum delivery.
- The obligation to have a code of conduct and to implement such a code of conduct.
- Examples of administrative action in an educational setting.

Oosthuizen (2003a:73) states that the primary function of a school is to create an environment where optimal teaching and learning can take place. A teacher must employ suitable planning, teaching strategies and resources to create such an environment where teaching and learning can take place effectively. The principal, on the other hand, has the task to manage teaching and learning in a school in accordance with section 16 A of the Schools Act. Joubert (2010:1) is of the opinion that managing teaching and learning is the most important function of the principal. It can be argued that the responsibility of managing the process of teaching and learning is derived from section 16(3) of the Schools Act (RSA, 1996c) which states:

(3) Subject to *this Act* and any applicable provincial law, the professional management of a *public school* must be undertaken by the *principal* under the authority of the *Head of Department*.

Section 16 A(2)(a)(i-iii) of the Schools Act further illuminates the professional management carried out by the principal by listing duties related to curriculum delivery as follows:

The *principal* must—

- (a) in undertaking the professional management of a *public school* as contemplated in section 16 (3), carry out duties which include, but are not limited to—
- (i) the implementation of all the educational programmes and curriculum activities;
 - (ii) the management of all educators and support staff;
 - (iii) the management of the use of learning support material and other equipment.

Joubert (2010:9) is of the opinion, with the above in mind, that it is required of principals to carry the fundamental responsibility for managing teaching and learning. The principal therefore has this obligation to learners to enable them to perform to the highest standards. As part of the management of teaching and learning, the principal also has the obligation in terms of section 16 A(2)(d) of the Schools Act (RSA, 1996c) to assist the School Governing Body in handling disciplinary matters related to learners. The duty to instil discipline in a school forms an integral part of this study.

The responsibility of the principal and school management team is to ensure that the correct structures and procedures related to all disciplinary measures fall within the parameters advanced in the Schools Act (Mestry, Moloi & Mahomed, 2007:179). Section 16 A(2)(d) of the Schools Act (RSA, 1996c) states that a principal must assist the School Governing Body in disciplinary matters related to the learners. According to section 8(1) and section 20(1)(d) of the Schools Act (RSA, 1996c), the School Governing Body is primarily responsible to draft a code of conduct. In addition to section 8 of the Schools Act (RSA, 1996c), the Minister of Education published guidelines which the School Governing Body may consider in drafting the code of conduct (DoE, 1998). It must be understood that these guidelines do not carry the same authority as the Schools Act, but can assist a governing body to draft a code of conduct that are in line with the Constitution and other relevant legislation. It is of the utmost importance that a code of conduct is drafted within the legal framework provided by the Constitution. Rossouw (2007:80) claims that the code of conduct is a form of subordinate legislation. Bray (2005:134) adds that the code of conduct is similar to the law in the broader society, because it consists of norms, values and rules. As in a society where people obey the law, the learners have the responsibility and obligation to obey the rules set out in the code of conduct. The aim of a code of conduct is to promote, enforce and maintain discipline in a school setting. If a learner disobeys the rules set out in the code of conduct, legal measures must be enforced to restore order and legal equilibrium.

The critical question of whether the making of school rules and implementing of disciplinary measures can be classified as administrative actions needs to be answered. Malherbe (2001:66) illuminates it by stating:

An administrative action can be described as any action where rules of law are applied to an individual instance. Administrative actions include the general rules made by an administrative body under powers delegated by a legislature.

The “administrative body” that Malherbe (2001:66) refers to in the above definition is, in terms of the school environment, the School Governing Body. This brings the question to the fore whether a governing body, principal or educator can be deemed an organ of the state. In *Western Cape Minister of Education v the Governing Body of Mikro Primary School* 2005 (10) BCLR 9739 (SCA), it was verified that a public school, together with its agent, the governing body is indeed an organ of the state. In addition to this, Malherbe (2001:66) states that all education departments, principals and educators are organs of the state. It is thus correct to argue that the making of school rules as part of the code of conduct and enforcing disciplinary measures, constitutes an administrative action (Roos, 2003:516; Bray, 2005:134). Section 33 of the Constitution and the PAJA binds all public schools in lawful, reasonable and fair administrative action (Malherbe, 2001:66; Rossouw, 2007:80). The concepts of *lawful*, *reasonable* and *fair* are discussed in detail in Sections 3.4, 3.5 and 3.6. However, it is critical to discuss them briefly to understand section 8 and 9 of the Schools Act and how these concepts fit into an educational environment.

Another example of administrative action is when a principal decides to suspend a learner (Currie, 2007:56). De Ville (2003:239) contends that administrative decisions take place at various levels in a school. If a learner has transgressed the code of conduct, the principal will take the administrative decision to refer the case to the disciplinary committee, who will in turn take the administrative decision to recommend expulsion to the HOD. The HOD also takes an administrative decision which culminates in an administrative action.

- **Lawful administrative action in schools**

In order to deliver a valid lawful administrative action, Bray (2005:136) states that it is crucial that the authorised administrative body devotes its full attention to the legal requirements of the case at hand. In other words, the administrator must apply his or her mind. To fulfil the requirements of lawfulness, an administrator cannot only focus on the school rules, but has to take common-law principles, case law, provincial legislation, national legislation and the Constitution into account (Bray, 2005:136; Müller, 2012:382).

Lawfulness covers the whole of the administrative action, from the beginning to the end of such action. Bray (2005:136) states that lawfulness is influenced by the following aspects:

- The capacity of the governing body or principal as administrator who takes the decision.
- Authority cannot be delegated.
- The administrator does not act *ultra vires* but within his/her authority.
- The time-frame in which the hearing is held and the decision is taken must be reasonable.

- **Fair administrative action in schools**

Fairness relates to the procedures that are followed by the disciplinary committee. The goal of fair procedures is to facilitate accurate and informed decision making (Bray, 2005:136). Section 33 of the Constitution encompasses the common-law principle of rules of natural justice (Rossouw, 2007:80). The rules of natural justice ensure that justice will prevail between two subjects. According to Wiechers (2005:470), the rules of natural justice constitute the most important instrument in seeking administrative justice. Peach (2003:2) states that rules of natural justice can be seen as rules of procedure. The rules of natural justice are founded in common law, which was influenced by Roman-Dutch Law. Colyn (2009:37) states that these rules precipitate into the legal principles of:

- *Audi alteram partem* [hear the other side].

This implies that all parties must have the opportunity to be heard. The learner must have an opportunity to state his or her case, as well as be informed if there are considerations that count against him or her. This will enable the learner to prepare properly for his/her defence. After a decision is taken, the learner must be furnished with the reasons for such a decision.

- *Nemo iudex in sua causa* [no one must be a judge in his own cause].

This principle is known as the rule against bias. The administrator must be impartial and perceived to be impartial for the hearing to be deemed a fair, administrative action.

- **Reasonable administrative action**

Bray (2005:136) postulates that if a decision is taken to expel or suspend a learner, that decision and its consequences must be reasonable and thus justifiable. Reasonableness also entails discretionary decision making and it is important to note that an administrator cannot act outside the boundaries of reasonableness and what is justifiable. Bray (2005:136) lists the following as crucial steps to balance and counterbalance facts and circumstances to determine what is reasonable and justifiable:

- After fair procedures have been followed and proper attention has been given to the relevant sources of law, it is expected of the administrator to consider section 36 of the Constitution (RSA, 1996a) that deals with limitations. According to section 36 (1) (a-e) of the Constitution (RSA, 1996a), the following relevant factors must be taken into consideration when a learner's rights are limited:
 - i) the nature of the right that is limited,
 - ii) the importance of the purpose of the limitation,
 - iii) the nature and extent of the limitation,
 - iv) the relation between the limitation and its purpose,
 - v) whether there are fewer restrictive means to achieve the purpose.
- The administrator must answer the question whether the decision, as well as the consequences to the learner, is reasonable. According to Bray (2005:137), the punishment must fit the offence.
- Adequate written reasons must be given to the learner. The aim of giving reasons is for the learner to determine whether the facts, argument, rules and punishment correlate. Furthermore, it strengthens the requirement for reasonableness because the administrator must show that only facts rationally linked to the offence were taken into account in reaching a decision. By giving written reasons, the learner can prepare in a suitable manner for the appeal if he/she chooses to do so.

Sections 8 and 9 of the Schools Act need to be investigated in order to find a correlation between section 33 of the Constitution, the PAJA, and rules of natural justice, as well as the legal concepts of *lawful*, *reasonable* and *fair*. It is critical for this study to find common ground between the above-mentioned points and education.

3.3.3.2 The relationship between section 33 of the Constitution, the PAJA and rules of natural justice and section 8 and 9 of the Schools Act

The rule of natural justice encompasses the common-law principles of *audi alteram partem* and *nemo iudex in sua causa* which bring to the fore a number of aspects that can be linked to a particular section in the PAJA and the Schools Act (Oosthuizen & Roos, 2003: 51). Because section 33 of the Constitution (RSA, 1996a) is the backdrop to the legal framework and envelops all legal principles, it is not referred to in particular. It can be summarised in the following table.

Table 6: Comparison between rules of natural justice, PAJA and Schools Act

Rules of natural Justice	PAJA	School Act
Opportunity to be heard	Section 3(2)(b)	Section 8(5)(a)(b)
Notice of intended action	Section 3(2)(b)(a)	Section 8(5)(a)
Timeous notice	No provision	Section 9(1)(d)
Opportunity to state his/her case	Section 3(2)(b)(b) Section 3(3)(a)	Section 8(6)
Personal appearance	Section 3(3)(c)	Section 8(6)
Legal representation	Section 3(3)(a)	Section 8(6)
Cross-examination	Section 3(3)(b)	Section 8(8)
Not clearly defined in common law	Section 3(2)(b)(d) Notice of internal appeal	No provision
No duty to provide written reasons Constitution brought about change	Section 3(2)(b)(d) Section 5 Section 6(2)(f) (ii) (dd): Section 6(2)(f) (i):	No provision
Rule against bias	Section 6(2)(a) (iii):	No provision
Due consideration	Section 6(2)(d) Section 6(2)(e)(i) – (vi)	No provision

- **The Constitution and the code of conduct of a school**

The code of conduct is a legal document, made under an empowering provision which can be found in sections 8(1) and 20(1) (d) of the Schools Act (RSA, 1996c). The drafting process of the code of conduct is characterised by participation of learners, parents, educators and non-educators. It is important to note that the code of conduct is regarded as a consensus document, therefore it is envisaged that it should increase lawfulness and

adherence to rules. The code of conduct must be in line with the Constitution and support the values of human dignity, equality, and freedom. Therefore, the code of conduct should reveal a positive, preventative and constructional approach whereby learners can be assisted by making resources and opportunities such as counselling (section (5)(b)) available to change behaviour. In order to explain Table 6, each of the common-law elements will be discussed separately with relation to the PAJA and the Schools Act.

- **The opportunity to be heard**

Oosthuizen and Roos (2003:52) emphasise that the opportunity to be heard is a common-law principle which means that a person must be allowed to present his/her case. This includes notice of intended action, timeous notice, opportunity to state the case, personal appearance, legal representation and cross-examination.

Section 8(5)(a) of the Schools Act (RSA, 1996c) affirms that the code of conduct must contain provisions of due process to safeguard learners against any unlawful act or decision that can be taken during disciplinary procedures. The concept of due process is a link to the concept of procedural fairness (RSA, 1996c). According to section 3(2)(b) of the PAJA (RSA, 2000), an administrator must give effect to the right to procedural fair administrative action. One element is to give reasonable opportunity to make representations.

- **Notice of intended action**

The Schools Act does not refer to any requirement for giving notice to the learner for intended action; however, section 8(5)(a) of the Schools Act only refers to the concept of due process which implies giving notice to a learner of intended action. Section 3(2)(b)(a) of the PAJA states that adequate notice of the nature and purpose of administrative action must be given. Hoexter (2007:332) says the word 'adequate' means that a person must be able to have sufficient information in order to exercise his or her right to make a representation. The learner must know which rule of the code of conduct he/she has transgressed. Thus the nature and purpose of the administrative action ought to be sufficiently described in order for the learner to prepare for his/her hearing. Hoexter (2007:334) points out that common law also require that the notice should include time and place where the hearing will be held.

- **Timeous reaction**

Time, in an administrative action, is of the essence (Oosthuizen, 2007:197). In *Maritzburg College v C.R. Dlamini, Mafu, T. & Konza, T.W.* (High Court of South Africa: Natal Provincial Division), the opinion of the court was that the time the Head of Department took to decide whether to expel a learner or not, was too long. Oosthuizen (2007:197) states that owing to the above-mentioned case, the Schools Act was amended in 2005 by the Education Laws Amendment Act, Act 24 Of 2005. After the amendment was made, section 9 (1D) of the Schools Act (RSA, 1996c), determine that the Head of the Department of Education (HOD) has 14 days to decide to expel a learner. This meant that the HOD has the obligation to make his decision whether to expel a learner within 14 days.

- **Opportunity to state his/her case and legal representation**

According to section 3(2)(b)(b) of the PAJA (RSA, 2000), a person is allowed a reasonable opportunity to make representations. Section 3(3)(a) of the PAJA (RSA, 2000) allows the administrator to use his or her discretion to decide whether a person can be assisted in such representation. This provision is valuable within the education environment because a parent may represent his child's case if the learner is too young to do so. It is interesting to notice that section 8(6) (RSA, 1996c) of the Schools Act states that a learner must be accompanied by his/her parent at a disciplinary hearing, but nothing is said with regard to the parent's being able to state the learner's case. Oosthuizen and Roos (2003:54) note that the right to legal representation does not form part of the *audi alteram partem* rule. Hoexter (2007:340) is of the same opinion, and states that there is no general right to legal representation in common law unless legislation or a contract requires it. It is left to the discretion of the administrator to decide if legal representation should be allowed or not. The complexity of the case and the seriousness of the consequences are factors that the administrator has to take into consideration when making this discretionary decision.

- **Personal appearance**

Hoexter (2007:341) believes that personal appearance entails an oral hearing. Common law does not include an absolute right to appear in person or to state a case orally, because a hearing on paper is quicker and cheaper. Section 3(3)(c) of the PAJA (RSA, 2000) lists personal appearance as a discretionary element which the administrator can allow to be permissible. Oosthuizen and Roos (2003:54) hold that the complexity of the

case and the seriousness of the consequences will determine an administrator's decision to allow an oral hearing. Hoexter (2007:342) states that some authors believe that having an oral hearing is more efficient, as an illiterate person will struggle to express him or herself in writing. This argument is applicable when learners in an educational setting are dealt with.

- **Cross-examination**

The right to cross-examine does not form part of common law and section 3(3)(b) of the PAJA (RSA, 2000) also lists the right to cross-examine as a discretionary element. Hoexter (2007:340) mentions that an opportunity to present and dispute information and arguments must be read in conjunction with the requirement of a reasonable opportunity to make representations. In some cases, it is essential to ensure a fair hearing. Section 8(8) of the Schools Act (RSA, 1996c) only mentions cross-examination with regard to an intermediary who will assist a learner in giving evidence.

- **Rule against bias**

The common law principle of *nemo iudex in sua causa* [nobody is fit to act as judge of his own case] expresses the concept of impartiality for decision makers (Hoexter, 2007:404). According to Section 6(2)(a) (iii) of the PAJA (RSA, 2000), the court can review an administrative action if it is found that the administrator is biased or suspected to be biased. The courts use the following test to determine whether an administrator is biased or not:

- i) There must be a suspicion that the administrator might be biased.
- li) Either the accused or the litigant must have the suspicion as a reasonable person.
- lii) There must be reasonable grounds for the suspicion.
- lv) A reasonable person would have such a suspicion (Hoexter, 2007:406).

Hoexter (2007:407) mentions that in most cases where bias has been established, it has been because of financial or personal interest. Bias on subject matter and institutional bias are seen as sources of bias. There is no reference to bias in the Schools Act.

- **Due consideration**

The administrator as the decision maker is forced by law to apply his mind and give sufficient attention to the relevant issues when dealing with a case (Oosthuizen & Roos, 2003:58). In several issue the administrator must use his discretion. Oosthuizen and Roos (2003:58) clearly state that only facts relevant to the case must be considered. Section 6(2)(d), Section 6(2)(e)(i-vi) and section 6(2)(f)–(i) of the PAJA (RSA, 2000) list the grounds on which a case can be reviewed.

- **Other provisions**

Oosthuizen and Roos (2003:54) state that the following provisions are important in an educational setting, although not founded in common law:

- i) If, for example it is decided to expel a learner after all procedures have been followed, it must be clearly communicated to the affected learner (RSA, 2000: section 3(2)(b)(c)).
- ii) Adequate notice for appeal must be given to the affected party (RSA, 2000: section 3(2)(b)(d)).
- iii) The learner must be informed of his rights to receive reasons for the decision taken (RSA, 2000: section 3(2)(b)(e)).

In the above it was noted where the principles of lawfulness, reasonableness and fairness are used in legislation and common law. It is important to this study, not only to know where to find the concepts in legislation, but to know what is implied and what the concepts mean for a principal in an educational setting. According to section 33(1) of the Constitution (RSA, 1996a), every person has the right to just administrative action that is lawful, reasonable and fair. A public school, as organ of the state, has the obligation to give effect to the right to lawful, reasonable and fair administrative action. According to section 16 A(3) of the Schools Act (RSA, 1996c) a principal must assist the governing body in disciplinary cases that relate to learners. At the risk of stating the obvious, being competent and able to assist in this capacity, implies that the individual has the necessary knowledge and skill to do so. It means that the principal needs to familiarise him or herself with the concepts of lawfulness, reasonableness and fairness.

3.4 **LAWFUL**

The rule of law can be defined, in its simplest form, as the principle that nobody is above the law (Currie & Klaaren, 2001:201). The principle of legality is an aspect of the rule of law which is one of the founding values of the Constitution (RSA, 1996a; section 9). The principle of legality, seen against the backdrop of the Constitution, refers not only to administrative action that governs the use of all public power (Hoexter, 2007:117), but also to the use of public power which can only be legitimate when it is lawful. An administrative action or decision can be deemed lawful if it has been properly authorised by law (De Ville, 2003:89). Furthermore, the action must comply with all statutory requirements that are attached to the exercise of power. De Waal *et al.* (2001:505) affirm the above by stating that an administrator must obey the law and can only take a decision if authorised by law. Should an administrator not take a decision within the boundaries of the law, the decision can be reviewed. This means that the affected person is entitled to “challenge the decision in court” after all internal remedies have been exhausted (Currie & Klaaren, 2001:222). The fact that an administrator was not authorised by law to make a decision means that there are grounds for the decision to be reviewed via internal remedies or in court.

De Ville (2003:89) states that it is not easy to distinguish between the different grounds for review for lawfulness. De Ville (2003:89) and Currie and Klaaren (2001:224) categorise the grounds for review in terms of section 6 of PAJA. Hoexter (2007:225) is of the opinion that grounds for review give content to the concept of lawfulness, and agrees with De Waal *et al.* (2001:516) who classify the grounds for review in three categories:

- The requirement of authority
- The concept of jurisdiction
- Abuse of discretion

Special attention will be given to the relevance of the above in an educational setting.

- **The requirement of authority**

Hoexter (2007:226) states that the first principle of administrative law and the rule of law is that an administrator can only exercise power if it is authorised by law. In *Minister of Education v Harris* 2001 (4) SA 1297 (CC), the Constitutional court underscored the

requirement of authority. In this case, Talja Harris, who had been attending pre-primary school for three years, turned six in early January in 2001, when her parents decided to enrol her at the independent King David Primary School. However, in order to bring the school starting age of independent schools more in line with that of public schools, the Minister of Education published a notice in January 2000, stating that learners may only be admitted to primary school in the year in which they turn seven.

Talja's parents approached the High Court in 2001 to test the validity of the notice on various grounds. Judge Coetzee declared the notice invalid and unconstitutional because Talja's right to equality (RSA, 1996a; section 9) had been violated and the Minister's actions were seen as unfair discrimination on grounds of age. The judge held that the Minister did not act in the best interests of the child as required by section 28(2) of the Constitution. The most important reason, for the purpose of this study, is that the Minister acted *ultra vires* when he published the notice. According to section 3(4) of the *National Education Policy Act, Act 27 of 1996* (RSA, 1996b), the Minister had the authority to determine national policy on a wide range of issues but was not empowered to make a/the law (para 8–11). The court ruled in favour of Talja's parents and authorised King David Primary School to admit Talja to Grade 1. In August of 2001 the Minister of Education appealed to the Constitutional Court. In judgment, Judge Sachs held that the court had to decide whether the Minister was authorised to issue the notice under the National Education Policy Act (para 11). It was determined that the Minister only had the authority to determine policy and not to impose binding law. The appeal was therefore dismissed with costs (para 20).

In *Hoërskool Ermelo v The Head of Department of Education: Mpumalanga* (219/08) [2009] ZASCA 22 (media summary), the School Governing Body of Hoërskool Ermelo appealed to the Supreme Court of Appeal to set aside the judgment made by the Pretoria High Court. In January 2007, the Head of Department instructed the principal to admit learners to be taught in English in the 2007 academic year. This was contrary to the language policy of the school. On 10 January 2007, officials from the Education Department, parents and learners were at the school for enrolment. The principal, who acted on a written instruction of the chairman of the governing body, did not enrol the learners. On 25 January 2007, the Head of Department appointed an interim committee

and requested the members to change the language policy to accommodate learners who wished to be taught in English. On that same day the school received a letter that stated that the Head of Department had withdrawn the functions of the governing body to determine the language policy of the school and the interim committee had changed the medium of instruction to Afrikaans and English. The appellants sought the assistance of the court to set aside the three decisions the Head of Department had made with regard to Hoërskool Ermelo. The governing body's function to determine the language policy was withdrawn by the Head of Department and he appointed an interim committee to change the language policy of the school, which it did, from Afrikaans medium to parallel medium. At first glance, the case seemed to revolve around the use of a particular language as medium of instruction, but it was rather about the proper exercise of administrative power and the principle of legality. The court held that the Head of Department had not complied with the principle of legality and was not authorised by the Schools Act to invalidate the function of the governing body to determine the language policy of the school. The court further contended that the Head of Department did not apply the values set out in the PAJA. The decision of the Head of Department to nullify the function of the governing body was deemed to be unlawful. The judgment of the High Court of Pretoria was overturned.

Quinot (2008:260) states that in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC), the Constitutional Court set the principle of legality as a primary constitutional condition for the exercise of public power. The judgment in *Minister of Education v Harris* 2001 (4) SA 1297 (CC), aligned the principle of legality with lawfulness, which required that administrative action may not be in conflict with any law and had to be authorised under an empowering provision (Quinot, 2008:260).

The following example summarises the above and illustrates the requirement of authority. Measure 4 of the regulations relating to disciplining, suspension and expulsion of learners at public schools in the Western Cape states:

4. Suspension of Learner

- (1) The governing body may only suspend a learner—
 - (a) as a precautionary measure and in the manner contemplated in regulation 2(2) for a period not longer than seven school days.

Under the requirement of authority, a principal, in liaison with the School Governing Body, can suspend a learner “as a precautionary measure” if the learner threatens the safety of others. The decision is an administrative action but fulfils the requirement of authority.

- **The concept of jurisdiction**

An administrator is required to remain within the boundaries of his/her powers and pay attention not to misinterpret these powers when dealing with rules of administrative law or the principle of legality. Courts have the power to determine whether an administrator has acted beyond the bounds of his/her authority or misconstrued his/her power; before passing judgment, a court will interpret the legislation in question. However, according to Hoexter (2007:251), the interpretation of legislation is not *exclusively* done by the courts. On a daily basis, an administrator is confronted with the interpretation of legislation to work out his or her boundaries of authority and jurisdiction; therefore, errors of law, in fact, are problems which administrators can encounter when interpreting legislation (Hoexter, 2007:251).

An error of law can be defined as a wrong or mistaken interpretation of a legislative provision. This means that the administrator does not understand “what the law requires” and can make a wrong decision (Currie & Klaaren, 2001:226). Prior to the enactment of the PAJA, common-law principles were used to establish whether there were grounds for review. Quinot (2008:370) states that in *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A), the court determined through analysis of common law that there were grounds for review if an error in interpretation of the empowering provision materially affected the outcome of the decision. According to section 6(2)(d) of the PAJA (RSA, 2000), a court can judicially review an administrative action if “the action was materially influenced by an error of law”. “Materially” is defined in *Liberty Life Association of Africa Ltd v Kachelhoffer NO and Others* 2005 (3) SA 69 (C) (para 47–48) as the error in law that has influenced the outcome of the decision.

According to Hoexter (2007:259), section 6(2)(d) of the PAJA has only been used in a few cases. She cites *Governing Body, Mikro Primary School v Minister of Education, Western Cape* 2005 (3) SA 504 (C) as most significant. On 2 December 2004, the Head of the

Western Cape Education Department instructed the principal of Mikro Primary School as follows:

You are consequently instructed under my authority to admit and accommodate the learners listed in the document attached to this letter at Mikro Primary School. I will provide the relevant number of educators to ensure that effective learning and teaching takes place ... I must advise you that failure to implement this directive may constitute grounds for disciplinary action (p. 3 of judgment).

The document that was attached contained the names of 40 learners who wished to be enrolled at the school and instructed in English. The attorneys acting on behalf of Mikro Primary School lodged an appeal on 17 December 2004 with the Minister of Education of the Western Cape, but on 19 January 2005, the Minister dismissed the appeal. Two senior officials of the office of the Minister attended the school on the same day to participate in the enrolment process of 21 of the listed 40 learners. On 20 January 2005, the applicant turned to the High Court of South Africa (Cape of Good Hope Provincial Division). The case went to court on 7 February 2005.

Judge Thring held that the constitution of the governing body and the language policy of the school were in line with the Constitution and the Schools Act. It is interesting to note that Judge Thring found that a governing body is not an organ of the state and there is no machinery in the Schools Act for state control of the governing body (para 45). He continued that the governing body functions outside the sphere of government and the argument of the participants that the issue can be categorised as an intergovernmental dispute, does not hold water. Judge Thring found that the directive of 2 December 2004 was unlawful. As this directive was unlawful, the decision to issue the directive and to put it into operation on 19 January 2005, was also deemed to be unlawful. Furthermore, it was held that the Minister made an error in law that materially influenced his decision not to grant the appeal that was requested on 17 December 2004 (p. 40 of judgment). The legal error that occurred was that the Minister thought that the Head of Department was entitled to issue the directive on 2 December 2004. Another error that influenced the decision of the Minister was that he did not give the attorneys of Mikro Primary School the opportunity to state their case. They sought certain information and were of the opinion that the information would strengthen their appeal. The department furnished them with a large volume (1500 pages) of information between 13 January 2005 and 17 January 2005

(para 65). The applicants requested adequate time to consider all information given in order to prepare suitably for their appeal to the Minister. This request was ignored, and without any notice, the Minister dismissed the appeal on 19 January 2005. The fact that the Minister refused that the attorneys of Mikro Primary School submit further information to him, could have changed the outcome of his decision of the appeal and could therefore be argued to have been procedurally unfair. Judge Thring stated that the Minister's decision therefore was set aside.

An interesting issue emerged from the events that took place on 19 January 2005 when the school reopened. Two officials arrived at the school and insisted that the learners and their parents join the rest of the school in the hall for assembly. Mr Wolf, governing body chairperson, was of the opinion that the learners could not attend assembly because they had not been admitted to the school, and Mr Walters, principal of Mikro Primary School, could not process the application forms. Mr Caroline, an official of the Education Department, informed Mr Wolf that he had taken over the management of the school and that he had admitted the learners (par 67). It was deemed by the court that the official of the department had interfered in the professional management of the school and had appropriated the function of the principal. Although the principal is under the authority of the Head of Department, he does not become the lackey of the HOD.

Judge Thring made the following ruling:

- i. The directive the Head of Department issued on 2 December 2004 was set aside.
- ii. The decision of the Head of Department to set the directive into effect on 19 January 2005 was set aside.
- iii. The decision of the Minister to dismiss the appeal by the participants was set aside.
- iv. The Minister and Head of Department were prohibited from compelling the principal to enrol learners to be taught in English.
- v. The court declared the conduct of the officials of the Western Cape Department of Education on 19 January 2005 unlawful.
- vi. The Minister and the Head of Department were prohibited from instructing or permitting their officials to interfere in the governance or professional management of the school.

- vii. The Minister and Head of Department had to place the 21 learners at an alternative suitable school.
- viii. The Minister and Head of Department had to pay the costs of the applicants (pp. 59 – 61 of judgment).

On appeal, in *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another* 2006 (1) SA 1 (SCA), the Supreme Court of Appeal upheld the reasoning of the High Court and dismissed the appeal with costs.

Section 16 A(2)(a) of the Schools Act (RSA, 1996c) states that the principal must implement legislation and policy and advise the School Governing Body on legislation and policy (Section 16 A (2) (f); RSA, 1996c). It can therefore be argued that a principal, as administrator, is confronted with the interpretation of law on a daily basis. If mistakes are made in the interpretation of legislation and are used to make decisions that can adversely affect others, an error of law exists which means that the decision can be reviewed by a court.

The concept of jurisdiction not only entails errors of law, but also mistakes of fact. According to Hoexter (2007:261), jurisdictional and non-jurisdictional facts are distinguishable in South African common law; however, one seldom hears of the latter category. The importance of jurisdictional facts cannot be over-emphasised. The general rule with regard to jurisdictional facts is that if an administrator does not take into account or observe such jurisdictional facts, then the exercise of power is deemed unlawful. The courts will reason that the administrator inflated his jurisdiction if jurisdictional facts are not observed (Wakwa-Mandlana & Plasket, 2004:84).

Jurisdictional facts can be further divided into substantive jurisdictional facts and procedural jurisdictional facts (Burns, 2013:390). Substantive jurisdictional facts can be defined as the preconditions that exist and formalities that must be observed before an administrator can exercise his power (Burns, 2013:390). The existence of a state of affairs determines the jurisdiction of an administrator. Hoexter (2007:264) uses the following example to explain the state of affairs that must exist: If a police officer has *reason to believe* that someone has committed a crime, legislation enables the police officer to arrest

the person. The '*reason to believe*' forms the prerequisite to make the arrest lawful. The problem here is who can determine whether the prerequisite was met if the arrest is challenged. On the one hand, the police officer must make the decision whether he had the jurisdiction to arrest the person and that the prerequisite was met. On the other hand, the police officer as administrator is capable of making mistakes and the courts can decide whether there were grounds for the arrest. Various views exist on the argument that some jurisdictional decisions should be subjected to judicial scrutiny, while others be left to the administrator.

Hoexter (2007:265) and Burns (2013:391) agree that there are two categories for substantive jurisdictional facts. The first category is referred to as objective jurisdictional facts where the state of affairs or type of act must exist in an objective sense. Only then can power be validly exercised. In reviewing the decision, the court will ask about the objective existence of the state of affairs or facts. In other words, it will be determined if the facts gave reasonable grounds for the police officer to make the arrest. Subjective jurisdictional facts form the second category. Here the courts are only entitled to determine if the police officer was of the opinion that a crime had been committed. The decision is not whether objective facts exist, but whether the police officer believed that there were valid reasons that a crime had been committed. Before the court can interfere, it must be shown that the police officer or administrator failed to apply his mind, did not take specific statutory requirements into consideration, and acted *mala fide* or with an ulterior motive.

Procedural jurisdictional facts are categorised by the procedural requirements and formalities that must be observed (Burns, 2013:393). These procedural requirements are often imposed by the empowering legislation. Hoexter (2007:261) explains the above by stating that a licensing officer, before issuing a transport licence to an operator, may be required to consider the proposed route. It will be required from the operator to issue the licensing officer with a map of the proposed route that will be serviced.

The question that can be asked is: what will happen if an administrator does not comply with the procedural requirement? Burns (2013:393) notes that not meeting the procedural requirements imposed by legislation does not automatically make the administrative

procedure invalid. It must be established if the requirements are mandatory or directory. According to section 6(2)(b) of the PAJA (RSA, 2000), an administrative action can be reviewed if mandatory requirements are not met. If there is no compliance with the directory provision, the administrative action cannot be automatically deemed invalid. The use of authoritative language like 'shall and must' indicates a mandatory provision.

Hoexter (2007:262) states that distinguishing between mandatory and directory requirements is not the key issue. Whether mandatory requirements must be met according to the letter of the law to entail validity without neglecting directory requirements, is not clear cut. In various cases the view of the courts was that substantial or adequate compliance may be sufficient. Driver and Plaskett (2003:86) note that *Observatory Girls Primary School and Another v Head of Department of Education: Gauteng* 2003 (4) SA 246 (W) (paras 45 -52) is an example where the court held that substantial compliance with an interview procedure was deemed to be sufficient. Observatory Girls Primary School needed a Mathematics teacher for Grade 5 and 6. The Personnel Administrative Measures (GN R22 of 1999) was enacted by the Minister of Education in terms of section 4 of the *Employment of Educators Act 76 of 1998* (Driver & Plasket, 2003:86). According to section 3.4 of the Personnel Administrative Measures, the Head of Department could decline to appoint the candidate that the governing body had recommended if it could be proved that proper procedure for appointment had not been followed. The court held that the procedure the governing body had followed was fair and transparent and achieved the purpose of the legislation (Driver & Plasket, 2003:86) and the court was of the opinion that the substantive compliance with provisional provisions was sufficient. The slight deviation from prescribed procedure did not validate the action of the Head of Department not to appoint the recommended candidate.

- **Abuse of discretion**

The concept of lawfulness is a potential minefield for an educational manager who has to fulfil the role of administrator in disciplinary decisions. It is of the utmost importance that a principal, as administrator, observes and understands section 6(2)(a)–(i) of the PAJA (RSA, 2000) to ensure that disciplinary decisions are lawful and taken in the best interests of the child. Hoexter (2007:275) is of the opinion that the law can impose constraints on the exercise of discretionary powers. Abuse of discretion is established in common law and

assumed statutory form with the enactment of the PAJA in 2000. It includes ulterior purpose or motive, *mala fides*, and failure to apply one's mind (Burns, 2013:397).

Hoexter (2009:49) states that ulterior purpose is well established in common law, but ulterior motive is not. Therefore it can be assumed that the words 'purpose' and 'motive' are not synonymous. 'Purpose' can be explained as an objective concept, but when 'motive' is used in conjunction with the word 'ulterior', it implies the hidden presence of ominous intentions. In section 6(2)(e)(ii) of the PAJA (RSA, 2000), the word 'or' is used; this implies that either of the concepts can be present for the administrative action to be reviewed.

It must be understood that legislation empowers an organ of the state to exercise power with a specific purpose in mind. Administrative action can be deemed as unlawful if it is taken for ulterior or partly ulterior purposes. In *Van Eck NO & Van Rensburg NO v Etna Stores* 1947 (2) SA 984 (A) (paras 997, 1000), the purpose of a war measure regulation and how the official of the Director of Food Supplies and Distribution interpreted the purpose, were under scrutiny. The purpose of the regulations was to obtain evidence of failure to comply with any requirement imposed by this regulation. The officials of the Director seized bags of rice from the participants to supplement the food distribution effort. Judge Davis reported that the motive to seize the rice to further the feeding scheme was exceptional and the purpose was unauthorised. It was held that the officials were restricted to the purpose of the regulation and that the seizure of the rice was unlawful, although it was in the best interests of the public.

Section 6(2)(e)(ii) and (v) of the PAJA (RSA, 2000) explicitly says that an administrative action is reviewable if the decision was taken with an ulterior motive or purpose and in bad faith. *Mala fides* can be translated as 'in bad faith'. *Mala fides* occurs when an administrator knowingly and consciously uses power that is not authorised by law (Hoexter, 2007:278). Burns (2013:412) explains *mala fides* in an example of an administrator that acted "fraudulently or dishonestly" and was aware "that the action was unlawful".

Failure to apply one's mind can mean almost anything. De Ville (2003:189) refers to the phrase as "an umbrella phrase referring to all grounds of review". Hoexter (2007:280) is of the opinion that the phrase covers all aspects of bad decision making. The phrase 'failure to apply the mind' does not specifically feature in the PAJA. As attested by Hoexter (2007:281), failure to apply one's mind can be divided into categories:

a) Failure to decide or to consider

The empowering provisions within legislation conferring power upon an administrator also imply that there is a duty to exercise these powers (Hoexter, 2007:281). According to section 1(i) of the PAJA (RSA, 2000), an administrative action is when an administrator makes a decision or fails to make a decision. Section 6(2)(g) of the PAJA (RSA, 2000) recognises that if an administrator fails to make a decision, that action can then be taken on judicial review. For example, if parents apply for their child to be admitted to a public school, the principal is compelled to grant or refuse the application, but is not entitled to ignore the application.

In *Vumazonke v MEC for Social Development, Eastern Cape, and Three Similar Cases* 2005 (6) SA 229 (SE) (para 35), the applicants applied for a disability grant in terms of the *Social Assistance Act 59 of 1992*. Three months after the application, they enquired about the grants but were unsuccessful in spite of an attorney's letter of demand on their behalf; hence, they turned to the court to compel the respondent to make a decision. Judge Plasket was of the opinion that, although no law dictates the time period in which such a decision should be taken, the delay of a period of longer than three months was unreasonable. Quinot (2008:376) states that the *Vumazonke* case showed that an administrator has the obligation to make a decision where the endorsement amounts to a duty to act. An administrative action will be deemed unlawful if an administrator fails to make a decision within a prescribed timeframe or within a reasonable time period.

b) Failure to act within reasonable time

In section 6(2)(g) and section 6(3) of the PAJA, Hoexter (2007:282) clarifies failure to act within reasonable time as existing in common law. De Ville (2003:185) states that there will be grounds for review if an administrator has the responsibility to make a decision but refuses to make it, and where a decision is not made within the prescribed timeframe.

In *Cape Furniture Workers' Union v McGregor NO 1930 TPD 682* (paras 685, 686), the court was of the opinion that if legislation required an administrator to make a decision within a set time period or within a reasonable timeframe, but neglected to do so, the court could order him to exercise his duty. Section 6(2)(g) of the PAJA (RSA, 2000) states that failure to make a decision is grounds for review. Section 6(3) of the PAJA (RSA, 2000) refers to the timeframe within which an administrator needs to make his decision. This section mentions that an administrator must adhere to prescribed timeframes, and where timeframes are not set in the letter of the law, is required to make the decision within a reasonable time.

In *Laerskool Gaffie Maree & another v Member of the Executive Council for Education, Training, Arts and Culture, Northern Cape & Others 2003 (5) SA 367 (NC)* (para 13), the applicants approached the court to compel the second respondent to appoint a candidate who was recommended by the governing body of Laerskool Gaffie Maree, as headmaster. This case was challenged in terms of section 6(3) of the PAJA. According to section 6(3) (b) of the *Educators Employment Act 76 of 1998*, there was a statutory duty imposed on the second respondent to make a decision on this matter; the court ordered the second respondent to make a decision within the stipulated period.

In *Maritzburg College v C.R. Dlamini, Mafu, T. & Konza, T.W.* (High Court of South Africa: Natal Provincial Division), case no. 2089/2004, three learners allegedly smashed the window of a bus. A bottle of brandy was found in one of the learner's bags and two of the learners smelt of alcohol. They were found guilty of misconduct and the governing body recommended to the HOD that two of the learners should be expelled. In the beginning of the school year in January 2004, the learners were not re-admitted to the school. In order to finalise the matter, the school had to consult with the HOD, which they did on numerous occasions without any success. Finally, on 24 February 2004, a delegation of the governing body who had undertaken to study and respond to the documentation, met with the HOD. The governing body wrote a letter to the HOD on 17 March 2004 to inform him that his failure to contact them was in conflict with the provisions of the Schools Act and that they had to turn to the court if no decision was made. On 24 March 2004, the HOD replied, amongst other issues, that the learners' suspension was unlawful and that they

should be reinstated in school pending their expulsion. On 1 April 2004, the school launched an urgent court application.

They asked the court to:

- set aside the decision of the HOD to reject the governing body's recommendations;
- direct the HOD to consult with the governing body and make a decision on the suspension of the learners not later than 14 April 2004;
- order the HOD to support this decision with reasons; and
- communicate before 14 April 2004 that the HOD must be ordered to pay all the costs incurred by the applicants. The recommendation of the governing body was upheld by the HOD on 5 April 2004. There was no longer a need to seek relief, but the school sought a declaratory order to confirm that the school had not acted unlawfully. In his letter the HOD made a shocking statement: "To have expected of me to decide the issue within two months was utterly unreasonable."

The court cited three cases where the Department of Education had not responded to the recommendations of the governing body within a reasonable timeframe and was of the opinion that the HOD had failed dismally in the execution of his duties. The court declared the decision of the governing body to expel the learners lawful and ordered the HOD to pay the costs of the applicants. In 2005, The Education Laws Amendment Act was inserted into section 9(1D) of the Schools Act, and stipulated that an HOD must decide within 14 days whether to expel a learner or not. Although the case was not decided based on section 6(2)(g) and section 6(3) of the PAJA, it served as an example that decisions must be made within a reasonable timeframe to be deemed to be lawful.

c) Relevant and irrelevant considerations

According to section 6(2)(e)(iii) of the PAJA (RSA, 2000), a judicial review can be instituted when an administrator makes a decision that has been based on irrelevant considerations, and relevant considerations were not considered. If an administrator considered irrelevant and relevant facts, there will be grounds for review due to irrelevant considerations the decision was based on. In the exercising of discretionary powers, an administrator has an obligation by law to base a decision on relevant facts. In *Dawood v Minister of Home Affairs* 2000 (3) SA (CC) (paras 48–54), the Constitutional Court was of the opinion that it

is unacceptable for the legislature to bestow a wide range of discretionary powers on an administrator without giving the necessary guidelines. If the legislature does not furnish the administrator with guidelines and the decision goes to judicial review, the court has the authority to decide which considerations are relevant.

d) Fettering

The word 'fettering' is best replaced with the word 'impeding' (Hoexter, 2007:285). Administrators may not act in a manner that impedes their discretionary powers. According to Burns (2013:408), fettering can also be linked to acting under dictation, which means that the administrator rigidly follows policies or promises to act in a certain way, and by acting in this way an administrator limits his/her own discretion. The PAJA does not specifically mention fettering as grounds for review, but it can be covered by section 6(2)(i) of the PAJA where it uses the words 'unconstitutional or unlawful' (Hoexter, 2007:283). The following examples show how fettering exists in a school:

- If the different roles of a principal and School Governing Body are not understood, a School Governing Body can influence the principal in such a manner that impedes his/her ability to make lawful decisions.
- If a principal is friendly with a parent of the school and the parent's child is guilty of a serious misconduct, the principal's decision to make a lawful decision can be impeded.
- Rigid policies leave little or no room for the principal to make discretionary decisions. An example of fettering existed in the *Antonie* case, where the principal applied the code of conduct in a rigid manner as stated by the judge.

3.5 REASONABLE

In the pre-democratic era, reasonableness fell under common law where the type of administrative action dictated the requirement of reasonableness within the administrative action (Quinot, 2008:401). *Union Government (Minister of Mines and Industries) v Union Steel Corporation Ltd* 1928 AD 220 (para 237) held that the mere presence of unreasonableness does not authorise the court to interfere with a purely administrative decision. A court can only interfere where the decision taken by the administrator was grossly unreasonable. Quinot (2008:402) states that this saying influenced the South

African law on reasonableness considerably, and it became the classical approach when unreasonableness was cited as grounds for review.

The decision on what is reasonable or unreasonable, measured against the backdrop of section 33(1) of the Constitution, remains a substantive undertaking (Hoexter, 2007:293). De Ville (2003:195) contends that reasonableness is a controversial area in administrative law. Reasonableness remains the most controversial grounds for review and the most controversial requirement of section 33(1) of the Constitution. Pillay (2005:420) is of the opinion that the courts' approach to reasonableness is somewhat incoherent. Hoexter (2007:293) believes that reasonableness exposes the tension between encroaching on the function of the executive arm of government in dealing with the merits of administrative decisions, and the aspiration for sufficient control over the decisions made by administrative authorities.

The focus of this study is to establish the meaning of reasonableness and how it influences the decision making of the administrator. Reasonableness does not have a single meaning within South African administrative law and various authors list that reasonableness consists of two elements, namely rationality and proportionality (Driver & Plasket, 2003:91; Wakwa-Mandlala & Plasket, 2004:86; Pillay, 2005:423; Quinot, 2008:410). In the following section, attention is given to rationality as an element of reasonableness.

3.5.1 Rationality

In *Pharmaceutical Manufacturers Association of SA; Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC), the court had to determine whether the decision of the President to bring an act into operation amounted to administrative action (Pillay, 2005:424) and found that the President was bound to exercise his power "lawfully and consistently with the provisions of the Constitution in so far as they may be applicable to the exercise of such power."

In order to meet the requirements of the rule of law, the court went on to state: “That decision must be rationally related to the purpose for which the power was given; otherwise they are [*sic*] in effect arbitrary and inconsistent with this requirement.”

Hoexter (2007:307) adds that the essence of rationality is that the evidence and information before the administrator, as well as the reasons given, must support the decision taken by the administrator. The decision must further the purpose for which the power was given and for which the decision was allegedly taken.

In *Carephone (Pty) Ltd v Marcus NO and Others* 1999 (3) SA 304 (LAC) (para 30-35), the court was of opinion that section 33 of the Constitution broadens the scope for judicial review of administrative action (Pillay, 2005:426). The reason for the extended scope of judicial review is the constitutional provision that administrative action must be justifiable in relation to the reasons given. Judge Froneman holds that this constitutional provision establishes rationality as a requirement in the outcome of an administrative decision. In judgment, Judge Froneman stated that the Constitution requires administrative action to be justifiable in relation to the reasons that an administrator gives. By adhering to this requirement, an administrator gives expression to the fundamental values of accountability, responsiveness and openness. Quinot (2008:422) points out that the *Carephone case* set justifiability as a rational standard and formulated the standard as follows in the form of a question:

Is there a rational objective basis justifying the conclusion made by the administrative decision-maker between the material properly available to him and the conclusion he or she arrived at?

In *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* 2004 (3) SA 346 (SCA) (para 21) and *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) (para 25), the Supreme Court of Appeal approved and applied the above-mentioned formulation in the context of the PAJA. According to Quinot (2008:422), section 6(2)(f)(ii) of the PAJA gives the scope of rationality, by referring to the action that:

- (ii) is not rationally connected to—
 - (aa) the purpose for which it was taken;
 - (bb) the purpose of the empowering provision;
 - (cc) the information before the administrator; or
 - (dd) the reasons given for it by the administrator.

In the *Trinity Broadcasting* case, it was found that certain conditions in renewing a broadcasting licence were not rationally connected to the purpose of the empowering provision and the information before the administrator. In *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) (paras 236-237), the CCMA commissioner reinstated an employee although there was evidence that there was a profound failure in respect of the employee's job functions. The court held that the information before the commissioner and the reasons given were not rationally connected to the reinstatement of the employee. Judge Cameron stated that the reasons given were preponderantly bad and therefore they could not provide a rational connection. Hoexter (2007:309) and Burns (2013:416) are of the opinion that section 6(2)(f)(ii) of the PAJA serves as a thorough ground for review and that a crucial feature of this section demands a rational connection and not an ideal rationality.

In *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC) (para 41), the four education departments within the Western Cape amalgamated into one department, namely, the Western Cape Education Department (WCED). Several schools within the province, as well as the appellants, employed general assistants to assist the learners with special needs. Owing to restructuring, an inevitable rationalisation programme came into effect which entailed the redeployment of personnel to vacant positions with priority given to the general assistants' posts. Many of the schools could no longer afford to pay the general assistants, so the appellants challenged the rationalisation programme, arguing that the right to equality under section 9 of the Constitution had been infringed. The court held that, owing to the impact on their fundamental rights and the severity of the action on those affected, more cogent reasons were needed to justify the respondent's exercise of power (Quinot, 2010:41). The court went on to find that there was a weak factual basis for the decision, that the reasons given were not adequate and held that the decision was irrational. Quinot (2010:58) and Pillay (2005:427) state that the court required a stronger factual basis to justify the excessive scope of the decision taken.

3.5.2 Proportionality

The concept of proportionality in the South African administrative law is derived from German, European and British administrative law (De Ville, 2003:203). Since the British case of *Kruse v Johnson* [1889] 2 QB 91, proportionality is recognised as a crucial requirement in South African administrative law making (Hoexter, 2007:310). Burns (2013:444) is of the opinion that proportionality is closely linked to justifiability, rationality and reasonableness, which control the discretionary power of an administrator. In the *Bel Porto* case the court stated the following regarding proportionality: “The right to administrative action that is justifiable in relation to the reasons given incorporates the principle of proportionality fundamental to the constitutional regime.”

Pillay (2005:429) concedes that proportionality forms the second component to reasonable administrative action as declared in section 33(1) of the Constitution. In *S v Manamela* 2000 (3) SA 1 (CC) (para 34), Madala, Sachs and Yacoob illustrate proportionality in the phrase “one ought not to use a sledge hammer to crack a nut”.

According to Hoexter (2007:309), the purpose of proportionality is to balance the adverse and beneficial effects of a decision taken. In the *Bel Porto* case (para 165), the court mentioned factors that could be considered to find less restrictive means to achieve the purpose and balance the adverse and beneficial effects of a decision. The factors to be considered are:

- the nature of the right or interest involved;
- the importance of the purpose sought to be achieved by the decision;
- the nature of the power being exercised;
- the circumstances of its use;
- the intensity of its impact on the liberty, property, livelihood or other rights of the persons affected; and
- the broad public interest involved.

Although the concept of proportionality has gained judicial support significantly, it was not enacted as part of the PAJA. According to Hoexter (2007:311), the drafters of the PAJA have replaced proportionality as grounds for review with section 6(2)(h) that deals with

unreasonable effects. According to Section 6(2)(h), a court or tribunal has the power to review administrative action if

The exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.

Pillay (2005:427) contends that the insertion of section 6(2)(h) of the PAJA (RSA, 2000) has confused the matter rather than clarified it. Various authors are of the opinion that the standard of gross reasonableness seems to be reinstated as put forward in the British case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 A11 ER 680 (C) (Wakwa-Mandlana & Plasket, 2004:87; Pillay, 2005:427).

The *Wednesbury test* (para 683E) for unreasonableness, as put by Lord Greene is: "... a decision so unreasonable that no reasonable authority could ever have come to it". Hoexter (2007:311) states that the *Wednesbury test* is unhelpful because it sets a low standard for administrative decision making and is only of value as a last resort.

The reasonableness standard of review was recently applied by the Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) (para 44) when the fishing quota allocation for 2002–2005 was challenged by the applicant. The applicant believed that the Chief Director in the Department of Environmental Affairs and Tourism had not met the objectives identified in section 2(j) of the *Marine Living Resources Act 18 of 1998*. The *Wednesbury* unreasonableness formulation was criticised in a unanimous judgment by the court when O'Regan J stated that section 6(2)(h) of the PAJA must be read in compliance with section 33 of the Constitution which calls for a simple standard of reasonableness and not some exaggerated version of it. Judge O'Regan states that:

Even if it may be thought that the language of section 6(2)(h), if taken literally, might set a standard such that a decision would rarely, if ever, be found unreasonable, that is not the proper constitutional meaning which should be attached to the subsection. The subsection must be construed consistently with the Constitution and in particular section 33 which requires administrative action to be "reasonable". Section 6(2)(h) should then be understood to require a simple test, namely, that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach.

Judge O'Regan continues and lists factors that must be taken into consideration when deciding if a decision is reasonable (para 45). The factors are:

- the nature of the decision,
- the identity and expertise of the decision-maker,
- the range of factors relevant to the decision,
- the reasons given for the decision,
- the nature of the competing interests involved, and
- the impact of the decision on the lives and well-being of those affected.

The above-mentioned list was welcomed because it gave a frame of reference for reasonableness and confirmed that reasonableness had an inherent variability (Hoexter, 2007:315).

3.6 FAIR

According to section 8(1) and section 20(1)(d) of the Schools Act (RSA, 1996c), the governing body has an obligatory duty to adopt a code of conduct for the learners.

Section 8(5)(a) of the Schools Act (RSA, 1996c) states that:

- (5) (a) A code of conduct must contain provisions of **due process** safe-guarding the interests of the learner and any other party involved in disciplinary proceedings. (Own emphasis.)

It is important at this stage to explore the meaning of due process, natural justice and procedural fairness. Hoexter (2007:326-397) is of opinion that natural justice and procedural fairness are synonymous. Malan (2005:69) states that procedural fairness is the same as natural justice and due process, although the latter is an American term. Burns (1998:165) states that procedural fairness is a constitutionally protected right, whereas rules of natural justice form part of common law.

In *Van Huysteen NO v Minister of Environmental Affairs and Tourism* 1996 1 SA 283 (C) (paras 304, 305), the court held that the rules of natural justice and procedural fairness have the same scope, content and application but the right to procedural fairness cannot be seen as a codification of the principles of natural justice. The court was of the opinion that the right to procedural fairness from a constitutional perspective was more comprehensive than the rules of natural justice. According to Joubert (2009b:130), due

process means fair process which meets the standards of fundamental fairness; therefore, due process and natural justice are not synonyms, although both encompass the principles of procedural fairness.

It is also important to note that not only procedural fairness is protected in the Constitution, but that section 33(1) of the Constitution also makes provision for substantive fairness (Burns, 1998:167). If a court must decide on substantive fairness regarding a decision that was taken, it will take into consideration whether the decision was reasonable, in line with governmental policies and whether the effect on the individual was reasonable and just (Burns, 1998:167). Hoexter (2007:205, 325) opposes the view held by Burns because section 33(1) of the Constitution (RSA, 1996a) only makes provision for procedural fairness, and he argues that:

Section 33(1) of the Constitution gives everyone a right to administrative action that is 'procedurally fair'. The 'procedural' qualification is significant, since the administrative-law notion of fairness is not substantive in nature.

Hoexter (2007:325) goes on to say "that under the Constitution 'fairness' does not promise rightness in a substantive sense".

The above-mentioned statement was affirmed in the *Bel Porto* case (para 88) where Judge Chaskalson indicated:

The setting of substantive fairness as a standard would drag courts into matters which, according to the separation of powers, should be dealt with at a political or administrative level and not a judicial level.

Due to the fact that the statement was tested in the *Bel Porto* case, the conclusion can be made that section 3 of the Constitution do not protect substantive fairness.

Although there are different views on whether substantive fairness is implied and protected within section 33(1) of the Constitution or not, substantive fairness remains an integral part of the legal concept of fairness and therefore an administrator should take note of these views (Rossouw & Oosthuizen, 2004:42; Prinsloo, 2009:212). It is evident that fairness can be divided into substantive fairness and procedural fairness. Both of these concepts are discussed separately in the following sections.

3.6.1 Substantive fairness

Van Kerken (2003: 153) and Prinsloo (2009:213) list the following factors that are considered in labour disputes regarding substantive fairness:

- Was the person aware of the rule broken?
- Was there a valid reason for disciplinary action?
- Were the expectations to conform to the rule lawful and reasonable?
- Was the rule or standard consistently applied?
- Was there consideration of mitigating and aggravating factors?
- Was there sufficient proof of the misconduct?
- Was the sanction imposed on the learner appropriate and suitable in the light of the proven reason?

Although the abovementioned factors are used in labour disputes, it can serve as a helpful tool for a principal to ensure that disciplinary decision making is substantively fair regarding learners. The following question ought to be asked and answered affirmatively to be deemed substantively fair (Adapted from Van Kerken, 2003:153; Prinsloo, 2009:213; Rossouw & Oosthuizen, 2004:42):

- Was the person aware of the rule broken?

It is important that the principal ensures that the learners are aware of the code of conduct of the school. Although ignorance of the rules is not an excuse, extra effort needs to be made when children are involved.

- Was there a valid reason for disciplinary action?

Before taking disciplinary action against a learner, the valid reason for taking this action must be established in law, where school rules can be viewed as part thereof (Prinsloo, 2009:213).

- Were the expectations to conform to the rule lawful and reasonable?

In the *Antonie* case (para 16) it was held that the school rules, as part of the code of conduct, had to conform to the Constitution and other legislation. In order for learners to conform to school rules, expectations must be lawful and reasonable.

- Was the rule or standard consistently applied?

Van Kerken (2003:153) distinguishes between historical consistency and contemporary consistency. Historical consistency refers to the disciplinary procedures and decisions made in the past when a specific rule was transgressed. A principal as administrator must be aware that past practice, for the same rule that was transgressed, dictates future practice to ensure consistency. If a rule has not been enforced in the past, it creates the impression that the rule is invalid. An administrator can deviate from this past practice if notice has been given that the policy has been changed (Van Kerken, 2003:153). Contemporary consistency refers to the disciplinary procedures and decisions made when two or more learners have transgressed the same rule. An administrator must ensure that every involved learner is dealt with in a similar way if the merits of each case are the same. An inconsistent approach can be substantively fair if the merits of each case differ from one another. For example: If two learners smoked dagga on the school premises, the approach would be different if one learner was a repeat offender who had brought the substance to school, from the one who had smoked dagga for the first time.

- Was there consideration of mitigating and aggravating factors?

All the circumstances surrounding each case will differ and the mitigating and aggravating factors will have to be considered.

- Was there sufficient proof of the misconduct?

It is important for the school to have a comprehensive, professional record-keeping system so that the proof of misconduct is not based on vague oral recollections.

- Was the sanction imposed on the learner appropriate and suitable in the light of the proven reason?

According to Van Kerken (2003:153), the following factors can be used to determine if the imposed sanction was appropriate and suitable:

- a) The nature and seriousness of the infraction

The seriousness and nature of a transgressed rule will determine the sanction imposed. It is obvious that a learner found guilty of selling drugs on the school premises will receive a harsher punishment than that of a learner who stole a calculator from another learner.

b) The circumstances and the misconduct itself

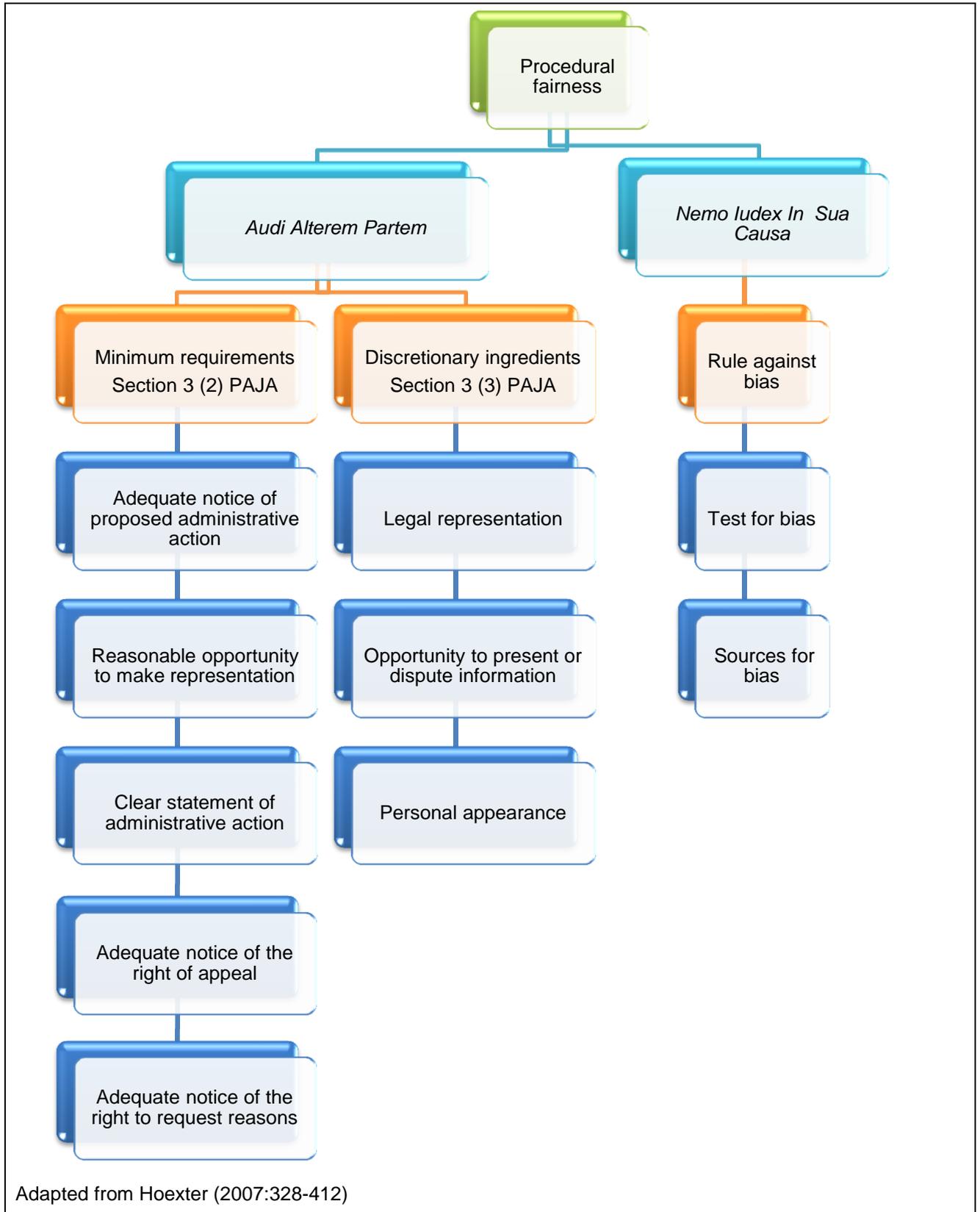
Extenuating circumstances always need to be taken into consideration. For example: When a learner is accused of assaulting another learner and the circumstances are taken into account, it may come to the fore that there was provocation or the learner acted in self-defence.

c) The nature of the job

There are certain expectations regarding a learner's conduct that differ from the behaviour required of a person that is not attending a school. The question that comes to the fore is: What behaviour does society require of a learner attending a school?

3.6.2 Procedural fairness

Hoexter (2007:327) states that procedural fairness has become the most vibrant and interesting field in South African administrative law. Burns (2013:352) states that the *audi alteram partem* principle is part of procedural fairness. The aim of this principle is to give a person the opportunity to contribute to the decision that will affect him and a chance to influence the result of the decisions taken. This can be summarised in the following diagram:



Adapted from Hoexter (2007:328-412)

Figure 10: Procedural fairness against the backdrop of PAJA

In *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) (para 101), Judge Ngcobo held that authorities that deal with administrative decisions must make decisions that are in line with the PAJA. He goes on to state that the PAJA must be read in conjunction with enabling legislation in order to supplement inadequate provisions. Thus, the PAJA, and more specifically, section 3(2) and (3) (RSA, 2000) thereof, cannot be ignored as the point of departure for procedural fairness. In the following sections the figure above will be discussed.

A. The minimum requirements set out section 3(2) of PAJA

i) Adequate notice of proposed administrative action

According to Currie and Klaaren (2001:96), adequate notice of proposed administrative action forms part of the core elements of procedural fairness. Section 3(2)(b)(a) of the PAJA (RSA, 2000) states: “(a) adequate notice of the nature and purpose of the proposed administrative action.”

Although the word ‘adequate’ is not defined in the above section, it implies that the affected person must receive enough information to exercise his right as stipulated in the Constitution (Burns, 1998:169; Oosthuizen & Roos, 2003:52). The details of the alleged offence, and notice of the time, date and venue of the intended hearing, must be included. The above information must be given in good time, depending on the circumstances and seriousness of the offence (Joubert, 2009b:130).

In April 2012, the regulations which stipulate the procedures for the disciplinary committee relating to discipline, suspension and expulsion of learners at public schools in the Western Cape came into effect. These regulations are relevant to the study because fieldwork for this research was done at schools within the Western Cape Education Department. The requirements that are stipulated in these regulations regarding adequate notice are detailed and correlate with the requirements as set out in the PAJA. In terms of measure 5 of the regulations relating to discipline, suspension and expulsion of learners at public schools in the Western Cape, the following information must be given:

- A notification in writing that a learner is called for a disciplinary hearing.
- The date, time, venue and “the alleged serious misconduct”.
- The date, time and venue of the hearing.
- The learner must be advised that he/she has the right to be represented by his parents or legal representative.
- Aside from the right to representation, the learner has a right to request to view the evidence of the school, to ask questions and to cross-examine.

The above-mentioned regulation leaves no grey areas as to the obligation of the principal to provide information to a learner who has allegedly transgressed the code of conduct and is called for a disciplinary hearing.

ii) A reasonable opportunity to make representations

According to Burns (2013:356), it is assumed that the opportunity to make representation implies that a person can do so orally and in person, although common law does not recognise it. The PAJA, on the other hand, distinguishes between these two elements. Section 3(2)(b)(b) and section 3(3)(c) of the PAJA (RSA, 2000) state:

(b) a reasonable opportunity to make representations; and to (c) appear in person.

The ‘representation’ that can be made includes oral, as well as written representation. Although written representation is cheaper than oral hearings, written representation is a disadvantage in cases where illiteracy is a factor (Hoexter, 2007:334).

iii) A clear statement of the administrative action

Section 3(2)(b)(c) of the PAJA (RSA, 2000) states:

(c) a clear statement of the administrative action.

This section is usually misread as part of the requirement of adequate notice and the proposed administrative action that will be taken. Hoexter (2007:337) mentions that the placement of this section is critical and must be seen as action already taken. A clear statement will put the affected person in a position to answer the following questions:

- What was the decision?
- When was the decision taken?
- By whom was this decision taken?
- What was the legal and factual basis upon which the decision was taken?

This information will enable the affected person to exert his right to appeal or review (Currie & Klaaren, 2001:99; Hoexter, 2007:337).

iv) Adequate notice of the right of review or appeal

Section 3(2)(b)(d) of the PAJA (RSA, 2000) states that notice must be given with regard to internal appeals. Section 9 (4) of the Schools Act gives learners the right to appeal and therefore it must be included in the code of conduct (Joubert, 2008:135). Currie and Klaaren (2001:99) refer to this component as “a positive duty”, which implies that “sufficient information” must be given on the right to appeal.

v) Adequate notice of the right to request reasons

Section 3(2)(b)(e) as well as Section 5 of the PAJA (RSA, 2000) gives effect to section 33(2) of the Constitution (RSA, 1996a). De Ville (2003:256) states that this element did not exist in common law. Hoexter (2007:339) notes that, although this right is applicable to persons whose rights have been adversely and materially affected, there is a trend to give reasons as part of the fairness to all people, even if their rights have not been adversely and materially affected.

B. The discretionary elements that are prescribed in section 3(3) of PAJA

i) Legal representation

No general right to have legal representation exists in common law (Burns, 2013:358). Allowing legal representation is left to the discretion of the administrator unless required by legislation. Section 3(3)(a) of the PAJA (RSA, 2000) stipulates that assistance may be used in serious and complex cases. Currie and Klaaren (2001:100) also mention that an administrator must take the complexity of the case and the seriousness of the consequences into consideration when deciding whether to allow legal representation or not.

ii) An opportunity to present and dispute information and arguments

Section 3(3)(b) of the PAJA (RSA, 2000) forms part of the requirement to have an opportunity to make representations. The right to present evidence that supports the case of a person and refutes the evidence against him is founded in common law (Burns, 1998:170). According to Hoexter (2007:340) and Currie (2007:11), giving evidence and

disputing arguments against the accused constitute the essence of a fair hearing. The right to have an opportunity to present and dispute information and arguments in disciplinary cases of learners is granted in regulation 5 (1) (e) (iii) of the regulations relating to discipline, suspension and expulsion of learners at public schools in the Western Cape. The learner has the right to:

- (iii) ask questions, cross-examine, lead evidence, call witnesses and produce documentary evidence to clarify issues pertaining to the allegation.

iii) Personal appearance

Personal appearance implies an oral hearing, where in terms of common law, it is not necessary to appear in person, unless legislation makes personal appearance mandatory Hoexter (2007:341). Currie (2007:111) is of the opinion that “hearings on paper are cheaper and quicker” but uneducated people could struggle to give evidence in writing. Burns (1998:169) also states that apart from mandatory legislation, the seriousness and complexity of the case will dictate personal appearance or not.

C. *Nemo iudex in Sua Causa*: The rule against bias

The common law principle of *nemo iudex in sua causa* is frequently described as the rule against bias, viz., impartiality (Hoexter, 2007:404). If translated it means ‘nobody is fit to act as judge in his own case’ (Oosthuizen & Roos, 2003:56).

i) The test for bias

Burns (2013:337) and De Ville (2003:271) distinguish between actual bias and perceived bias. *BRT Industries South Africa (Pty) Ltd v Metal and Allied Workers’ Union* 1992 (3) SA 673 (A) (paras 688–690) clarifies the stance of the court regarding the test for actual bias. The court held that the affected party did not have the obligation to prove the actual existence of bias; they simply had to prove evidence of partiality where the administrator was “not open for conviction”.

In *S v Roberts* 1999 (4) SA 915 (SCA) (para 36), the court set out key statements to clarify the position of bias with regard to South African law which Hoexter (2007:406) summarises as follows:

1. There must be a suspicion that the judicial officer might be biased.
2. The suspicion must be that of a reasonable person in the position of the accused or the litigant.
3. The suspicion must be based on reasonable grounds.
4. The suspicion is something that a reasonable person would have.

In *Rose v Johannesburg Local Road Transport Board* 1947 4 SA 272 (W) (para 290), the chairman of the local transport board was the director of a large taxi company in Johannesburg. The board refused an application for an exemption certificate for a car-hire service because it was claimed that he could benefit financially from the refusal of applications. The court held that because the chairman had a financial interest in the company, a reasonable person would perceive him to be biased; consequently, he was dismissed from the board. Hoexter (2007:408) posits that the *Rose* case shows the court's acceptance that the suspicion of bias arising from personal interest can be reviewed.

Although the courts have the viewpoint that only 'a suspicion' is enough to claim bias, section 6(2)(a)(iii) of the PAJA (RSA, 2000) states that the court can review an administrative action if proof of actual bias is found.

ii) Sources of bias

According to Hoexter (2007:407-412) and Burns (1998:172-173), the following sources of bias are the most important ones that exist in South African law:

➤ Financial interest

Burns (1998:172) mentions that if it is found that a person stands to gain financially or materially, and this results in bias, the administrative act will be deemed invalid even if no injustice has occurred. Hoexter (2007:4) states that there are multiple cases of legal evidence of bias that have occurred as a result of financial interest. In *Liebenberg v Brakpan Liquor Licensing Board* 1944 WLD 52 (para 35), the mayor of the town insisted that he had to be on the board when applications were being heard. During this time his brother applied for a liquor licence which was granted. Although the members of the board stated in an affidavit that they had not been influenced by the mayor, the court held that the relationship between the mayor and his brother had led to bias and set the decision aside.

➤ Personal interest

Personal interest is related to family relationships and friendship. Where a decision maker is part of such a relationship, the decision can be set aside. An example of such a case is the *Liebenberg* case mentioned previously. One of the most renowned cases in education related to the legal concept of procedural fairness is the *De Kock* case. Floris was a learner at Overberg High School. On 16 July 1998, the principal and deputy principal found a small plastic bag containing a substance resembling tobacco in Floris's possession. The assumption was that it was dagga. Floris was charged with the possession of dagga on the school premises which resulted in a disciplinary hearing on 30 July 1998. Floris was assisted by his father (applicant in court proceedings) and an attorney. The principal gave evidence in a written statement which was orally affirmed by him and his deputy. Floris gave oral evidence regarding the event on 16 July 1998 and answered questions put to him by the committee members and the principal. The governing body, principal, and deputy principal discussed the case and found Floris guilty of the possession of dagga on the school grounds. The governing body made the recommendation that Floris be expelled from the school.

In the judgment made by Judge Griesel, he ruled that there had been gross irregularity because the principal and deputy principal:

- i. had caught Floris with the alleged dagga and investigated the case;
- ii. had given evidence before the disciplinary committee;
- iii. had been cross-examined by Floris's attorney;
- iv. had taken part in cross-examining Floris;
- v. had been part of the governing body and had taken part in the deliberations and the decisions regarding the case.

Judge Griesel proclaimed that the principal and deputy principal had acted as witness, prosecutor and judge, which constituted gross irregularity. It was emphasised that one of the key requirements of any hearing should be impartiality. The principal's and deputy principal's actions did not constitute a fair hearing. The judge held that the decision to expel Floris be set aside and ordered that he be re-admitted.

3.7 CONCLUSION

Research has shown that learner discipline is an acute problem in South Africa (Steyn et al., 2003:3). Bloch (2009:105) is of opinion that a “society of lawlessness” is creating disciplinary problems in our schools. Rademeyer (2013:1) reports in *Beeld* on two incidents that shook South African education as a whole and emphasises the extent of the problem. In one incident, a Grade 8 learner assaulted a teacher with a broom at Glenvista High School. At Hoërskool Sasolburg, a learner shot a teacher in the leg after bringing a firearm to school (Rademeyer, 2013:1). Rademeyer (2013:1) interviewed Professor J.P. Rossouw, a lecturer at North-West University, who was of the opinion that bad and violent behaviour is repeating itself on a daily basis.

Joubert (2009b:106) states that effective teaching and learning cannot take place in a undisciplined and disruptive environment. Although some educators and principals struggle to maintain discipline according to new education legislation and regulations, the discipline issue in South Africa cries out for action to create an environment of order and lawfulness (Oosthuizen, 2003b:80; Joubert, 2009b:106).

Joubert (2009b:108) emphasises the supremacy of the Constitution of South Africa and states that alternative strategies in dealing with school discipline must be in line with the Constitution (RSA, 1996a). The protection of human rights outlined in section 33 of the Constitution (RSA, 1996a; section 33) must also be reflected in the alternative strategies in dealing with school discipline. It is inevitable that new legislation like the PAJA, which gave effect to section 33 of the Constitution, will be part of the strategies to create a lawful, reasonable, fair and just administrative action. Section 16 A2(d) of the Schools Act (RSA, 1996c) stipulates the role of the principal with regard to school discipline. The principal is therefore obligated by law to assist the School Governing Body with regard to school discipline. The question that comes to the fore is: What is the golden thread running through the concept of school discipline? The answer is that the principal needs to make decisions with regard to school discipline. Examples of such disciplinary decisions can be:

- decisions on the punishment of a learner
- decisions on how to handle a specific transgression
- decisions whether a specific case must be referred to the School Governing Body.

In this chapter the meanings of the legal concepts of *lawful*, *reasonable* and *fair* were established. The content of section 33 of the Constitution, The Promotion of the Administrative Justice Act, and section 16 A of the Schools Act as legal parameters for disciplinary decision making, was investigated. In laymen's terms the *what* that must be considered in disciplinary decision making was established. Chapter 2 answers *how* the decisions should be made. Chapter 4 discusses the research methodology and how the phenomenon was researched.

CHAPTER 4

RESEARCH METHODOLOGY

4.1 INTRODUCTION

The purpose of the study is to understand the context and content of section 33 of the Constitution, the PAJA and section 16 A of the Schools Act. In the previous two chapters an in-depth literature study was conducted to answer to the above-mentioned purpose. Another purpose of the study is to establish how principals make decisions and what good practices exist that will positively influence disciplinary decision making in South African education. The study explored the methods education managers use when making their decisions, as well as methods that could assist education managers in making disciplinary decisions that are lawful, reasonable and fair. The value of a disciplinary coordinator, in assisting the principal in making lawful, reasonable and fair disciplinary decisions, will also be researched thoroughly.

When conducting research, it is of the utmost importance to understand the workings and dynamics of the institution, for example a school, where the phenomenon exists (Lates, 2008:5). A researcher needs to understand that a school as social institution has specific systems and fundamentals in place to execute an essential function. Schools are bureaucratic systems that are governed within the parameters laid down by law. The Constitution, and legislation like the Schools Act and the Promotion of the Administrative Justice Act, sculpt the environment that principals must work in. This is an example where social sciences and law meet.

Research in social sciences that is linked to law is of immense importance. Research in which the social sciences and law are linked elucidates the effects of Acts made by the legislature and how effective those Acts are in reaching the attempted goal (Tremper *et al.*, 2010:242). The management task of decision making, linked to the legal requirements in taking a disciplinary decision, is the focus of the study. The processes needed for an education manager to make disciplinary decisions fall within the scope of social sciences and education management.

4.2 RESEARCH PARADIGM

The aim of research in education law is to inform policy makers and give direction to future research. Legal research makes use of past, present and future time lines to make sense of the dynamic reality of the law. Russo (2005:42) is of the opinion that systematic enquiry into law involves interpretation of the law.

The interpretivist paradigm lends itself to examining legal issues. Check and Schutt (2012:15) mention that the interpretive paradigm has become progressively more prominent in education in the last 20 years. Interpretive researchers focus on the “meaning people give to reality and how they use it to understand their world” (O’Donoghue, 2007:16; Check & Schutt, 2012:15). Interpretivists see that society and the social world are created through the interaction of individuals. Thus, society is not stagnant or hidden.

Law falls into this paradigm of being dynamic, public and about individuals that interact in society (Burton & Bartlett, 2005:22). People use norms and values which undergo constant change to interpret and respond to certain events. Interpretivism seeks to understand the interactions, and how choices are made between individuals (Burton & Bartlett, 2005:22). Interpretivist paradigm is characterised by a concern, for the individual in contrast to normative paradigm which indicates that the human behaviour is essentially rule governed and that it should be investigated by methods of natural science (Cohen, Manion and Morrison, 2000; 23). The interpretivism approach also emphasizes social interaction as the basis for knowledge. Interpretivist research studies tend to be small in scale because they focus on the detail of the phenomena.

The interpretivist paradigm best suits this study. The reason being is that legislation can be interpreted in detail by case law and secondary legal writings. The legislation that was interpreted is:

- Section 33 of the Constitution (RSA, 1996a).
- PAJA (RSA, 2000).
- Section 16 A of the Schools Act (RSA, 1996c).

Tremper *et al.* (2010:246) state that the change in law over time must be taken into consideration in legal research and this statement also correlates with the interpretivist paradigm that norms and values change. If the change in law over time is not taken into consideration in research, results will be misleading and this can result in poor public policy (Tremper *et al.*, 2010:243). Thus, this research focuses on certain concepts that have changed over the past 18 years.

4.3 ONTOLOGY, EPISTEMOLOGY AND METHODOLOGY

Ontology refers to the “nature of reality” that is to be researched and what can be known about it (Cohen, Manion & Morrison; 2000:4; Terre Blanche & Durrheim, 2006:6). Punch (2011:16) adds that the following ontological question must be asked by the researcher:

What is there that can be known about the nature of reality?

The ontology of this research is the nature of disciplinary decisions that principals take and what can be known about the good practices they are using.

Epistemology identifies the relationship between the knower and the body of knowledge to be known (Cohen *et al.*, 2000:4; Terre Blanche & Durrheim, 2006:6; Punch, 2011:16). The epistemology of this research is how the education manager interprets the information available to him or her to take a disciplinary decision.

Methodology comprises how the researcher performs the research about what the researcher can know (Cohen *et al.*, 2000:4; Terre Blanche & Durrheim, 2006:6; Punch, 2011:16). This research will use a qualitative methodology that is discussed below.

4.4 RESEARCH METHOD: A QUALITATIVE APPROACH

According to Burton and Barlett (2005:22), as well as McMillan (2012:12), the interpretivist paradigm links better with qualitative research because both are aimed at in-depth understanding and detailed description. Denzin and Lincoln (2005:3) define qualitative research as:

... a situated activity that locates the observer in the world. It consists of a set of **interpretive**, material practices that make the world visible. These practices transform the world. They turn the world into a series representations, including field notes, interviews, conversations,

photographs, recordings and memos to the self. At this level, qualitative research involves an **interpretative, naturalistic** approach to the world. This means that qualitative researchers study things in their natural setting, attempting to make sense of, or interpret **phenomena** in terms of the meanings people bring to them (Own emphasis).

McMillan (2012:12) emphasises that qualitative research focuses on studying things that “take place in naturally occurring situations”. Punch (2011:117) states that the most important characteristic of qualitative research is that it is naturalistic, and people and their actions in their natural setting are studied.

The following points outline the reasons for selecting the qualitative approach:

- Its systematic enquiry into law involves interpretation of the law (Russo, 2005:42). The interpretivist paradigm lends itself to examining legal issues.
- Qualitative research encompasses an interpretive approach (Denzin & Lincoln, 2005:3). Interviews, field notes, documentation and recordings are used to gather data. This data needs to be interpreted in the context of the research questions.
- Qualitative research encompasses a naturalistic approach (Denzin & Lincoln, 2005:3; Punch, 2011:117; McMillan, 2012:12). The study is focused on how disciplinary decisions are made in secondary schools. Therefore, the naturalistic setting where people’s abilities to take disciplinary decisions are investigated, is the backdrop of a school.
- The aim of qualitative research is to interpret a phenomenon (Denzin & Lincoln, 2005:3). McMillan (2012:14) designates a phenomenological study as one type of qualitative research. The aim of a phenomenological study is to understand “the essence of some phenomena” (McMillan, 2012:14). The phenomenon under investigation is the essence of the disciplinary decision-making process and how principals in their natural settings handle disciplinary decision making.

McMillan (2012:15) believes that the purpose of the study and the research question dictate which research method will be used, and with the above reasons in mind, the qualitative research approach is the most appropriate. Denzin and Lincoln (2005:3) state that interviews, field notes, documentation and recordings are used to gather data as part of qualitative research. Attention will be given to how sampling was done, and data collected and analysed.

4.4.1 Data collection

Hittleman and Simon (2002:93) state that a research question dictates the method of collecting data. The main research question is two-fold:

What are the legal requirements that should be considered in making disciplinary decisions that are lawful, reasonable and fair and how can these disciplinary decisions be made more effectively?

To answer the first part of the question, a literature study was conducted. The resources used regarding law are legislation, case law, common law and secondary legal writings. Books, journals, dissertations, reports, the media and the Internet were used to investigate and research the second part of the question.

In the second part of the question, participants were selected and interviewed with the goal of extracting rich data. The interview is the most powerful tool for data collection in qualitative research (Punch, 2011:145). The perceptions and views individuals have about the phenomena investigated can be assessed in an interview which is recorded for later analysis.

Punch (2011:145) and McMillan (2012:167) distinguish between three types of interviews, namely, structured, semi-structured and unstructured interviews. A structured interview is mainly used in quantitative research and has fixed questions as well as responses (McMillan, 2012:105). Unstructured interviews have general questions with open-ended answers. A semi-structured interview has open-ended answers but specifically generated questions are asked. The semi-structured interview was selected for this study is because it enabled the researcher to place more emphasis on the views of the participants (Burton & Bartlett, 2005:109) to ascertain the participants' perceptions on the specific questions.

The principals were interviewed because legislation like the PAJA and Schools Act falls within the work environment and job requirements of the principal. Principals are the officials who deal with disciplinary decision making in schools. The aim of these interviews was to establish how the education manager makes his or her disciplinary decisions and what methods are used to do so effectively. The interviews were tape recorded with the consent of the participants.

Apart from semi-structured interviews, a document analysis was conducted which provided valuable data. McMillan (2012:167) is of the opinion that documentation constitutes primary sources that provide a wealth of first-hand information. The first reason for the analysis of the documentation, is for triangulation. The validity and accuracy of the data given by the principal can be tested against the data derived from the documentation. A further reason is that the documents indicated the participants' understanding of the legal concepts of lawfulness, reasonableness and fairness. The documents furnished rich data linked to the concepts of substantive and procedural fairness. A request to examine these documents was directed to the chairperson of the School Governing Body and the principal for their consent. The documents that were requested from the principal during the second interview were:

- the incident report from the teachers handling the case;
- notice of hearing;
- minutes of the disciplinary hearing;
- all the evidence that was gathered;
- code of conduct; and
- school policy on discipline.

4.4.2 Sampling

It is impossible to do research on all people, or cover all the issues all the time (Punch, 2011:162). There is a need to select participants and a sample of people that can become the “source of evidence”. Durrheim and Painter (2006:147) define sampling as a group of participants that are selected from the population to answer the questions of the researcher.

Durrheim and Painter (2006:147) state that the purpose and type of data of the study determine what type of sampling, data collection and data analysis the researcher will select to reach the goals of the study. McMillan (2012:94) focuses on the importance of identifying a specific sampling procedure and the characteristics of the group of participants. Cohen *et al.* (2000:93) hold that the following factors and elements must be kept in mind in determining the sample that will be used:

- sample size
- representativeness and parameters of the sample
- access of the sample
- sample strategy to be used

Convenience and purposive sampling were used in gathering the data in this study. Convenience sampling is used in studies where participants are selected without any prior rationale (Durrheim & Painter, 2006:148) and is referred to by Cohen *et al.* (2000:102) as opportunity sampling where the nearest, most easily accessible individuals are selected as participants. The reasons why convenience sampling was used were:

- the schools were conveniently located and needed to be visited a few times by the researcher;
- due to the location of the schools, costs were reduced.

Purposive sampling is where participants are selected because they can be linked to the phenomena that are under investigation (Durrheim & Painter, 2006:148). According to Cohen *et al.* (2000:103), the participants are “handpicked” because they will serve a specific purpose and they are deemed to be “information-rich” (McMillan, 2012:105). For this research, four secondary schools in the northern suburbs of Cape Town were chosen. The reasons for selecting purposive sampling were:

- Two of the four schools that were selected had a discipline coordinator; the reason for this choice was to establish what effect the presence or absence of a discipline coordinator might have on disciplinary decision making in the school.
- The schools were in close proximity to one another to minimise the number of variables. They were also part of one education district, thereby simplifying the logistics of conducting the research.

Two officials from the Western Cape Education Department were also selected. Official A was a Circuit Manager stationed at the district office of Metro North. Official B was stationed at Head Office and dealt with recommendations for expulsion. They were deemed to be information-rich participants who would illuminate the problems schools experience in dealing with disciplinary decision making.

4.4.3 Data analysis

Terre Blanche *et al.* (2006:321) distinguish between two patterns of analysing qualitative research, namely interpretive analysis and social constructionism. It has already been stated that an interpretivist paradigm was used in this study. The aim of interpretive analysis is to create a thorough description of the phenomena that are studied and to put the phenomena into perspective in real-life situations. According to Terre Blanche *et al.* (2006:322), interpretive analysis involves reading data repeatedly, breaking data down into themes and categories, and building data up by interpretation and elaboration.

The five stages of data analysis proposed by Terre Blanche *et al.* (2006:322) were used in this research for both the interview and document analysis data. Each data set was analysed separately in stages 1 to 3.

During the first stage the researcher familiarised himself with the data by reading several times. Notes were made, accompanied by drawings and diagrams. During the second stage, the data were broken down into themes. No themes were hand selected. The language of the participants was used to label the various themes. The next step focused on coding the themes that came to the fore in the second stage. This step was used to break up data in an analytical way. Information like a sentence, a paragraph or any piece of text was coded to fit with a specific theme. It should be understood that different themes were allocated to a specific sentence, paragraph or text. During steps 2 and 3, themes were created and coding took place for each set of data separately. In the fourth stage, different themes of different data sets were put together. Through the process of triangulation, meaningful conclusions and interpretations were reached. Exploring the themes in this manner is called elaboration. In the last stage data was interpreted.

4.4.4 Trustworthiness and triangulation

According to various authors, validity refers to the degree of 'truthfulness', 'correctness' and 'accuracy' of research data and the use of these concepts to make sound conclusions. Validity focuses on the degree to which the researcher can produce believable observations for all cases (Burton & Bartlett, 2005:27; Van der Riet & Durrheim, 2006:90).

Within the qualitative approach and interpretive paradigm, detailed data can be gathered by researching only a few cases. The validity of the study does not lie in the size of the sample group, but in the results that are generated (Durrheim & Painter, 2006:148). Burton and Bartlett (2005:27) are of the opinion that when the interpretivist paradigm is used, emphasis is placed on the interpretations the researcher makes from the data. The researcher must be able to show the evidence on which the interpretations are based.

To increase the validity of this research, the following measures were implemented to ensure that the interpretations were accurate the participants were asked if their accounts had been recorded accurately in a follow-up interview.

Triangulation is another process that can enhance the validity of data. Multiple perspectives such as different data sources are used to get to the essence of the data. Thus, the aim of the research was to approach the data from different angles. The data was divided into two sets, namely:

- Data derived from interviews
- Data derived from document analysis

4.4.5 Ethical implications

It was important that this research focused on good practices; this point was emphasised with each encounter with the participants. Furthermore, attention was given to the following:

- Permission was sought from the Department of Education, Western Cape Head Office, principals and School Governing Bodies. The aim of the research was discussed in depth and the “focus on good practices” principle emphasised. It was clearly indicated to the participants that they were not under investigation.
- The success of this research depends on the cooperation of the participants; therefore, the researcher maintained an open and honest approach towards the participants.
- This was also evident in communicating the findings to the participants. Feedback strengthens the validity of the research.
- All the participants remained anonymous and data retrieved was confidential.

4.5 CONCLUSION

In Chapter 4 the research methodology was thoroughly researched and analysed. Attention was given to the reasons why a qualitative approach was chosen. The four schools that were selected in the northern suburbs of Cape Town were purposively and conveniently selected. The choosing these sampling techniques and the choice of schools were discussed. In Chapter 5 the data collected from the interviews was analysed against the data retrieved from the literature study.

CHAPTER 5

PRESENTATION AND ANALYSIS OF DATA

5.1 INTRODUCTION

It is important to present and analyse data against the backdrop of the following main research question:

What are the legal requirements that should be considered in taking disciplinary decisions that are lawful, reasonable and fair, and how can these disciplinary decisions be made more effectively?

The first part of the main question was divided into the following sub-questions:

- 1. What is the meaning of the legal concepts of lawful, reasonable and fair in disciplinary decision making?*
- 2. What are the context and content of Section 33 of the Constitution, the PAJA and Section 16A of the Schools Act?*

The above questions were answered by a thorough and in-depth literature study. These legal principles were discussed in the context of South African Law. It was critical to establish how principals perceive and understands these legal concepts and how they apply those when making disciplinary decisions. It had to be determined where the most errors occur. The manner in which principals deal with the legal concepts of lawfulness, fairness, and reasonableness was researched in the semi-structured interview which is discussed in Section 5.2.

The second part of the main research question was also divided in two questions, namely:

- 3. Which decision-making processes could assist the principal to take disciplinary decisions that are lawful, reasonable and fair?*
- 4. What are the advantages of having a disciplinary coordinator in assisting principal in making disciplinary decisions that are lawful, reasonable and fair?*

Sub-question 3 was answered in a literature study. The way in which principals make disciplinary decisions was investigated through semi-structured interviews with principals.

The questions related to decision making and how principals can make more effective decisions are discussed in the next section.

5.2 ANALYSIS OF DATA COLLECTED BY MEANS OF SEMI-STRUCTURED INTERVIEW

A semi-structured interview has specific questions that elicit open-ended responses. This form of interview enables the researcher to concentrate on and highlight the participants' views and perceptions. One advantage of the semi-structured interview is that the same question on specific concepts can be asked of all the participants.

Four principals of secondary schools were chosen as participants to obtain a perspective of disciplinary decision making within their schools. Two officials of the Western Cape Education Department (WCED) were also interviewed because of their expertise in the field and to give the perspective of the WCED. The same questions were posed to the four principals. The departmental officials answered the same questions as the principals with slight variations because their frames of reference were different. The responses to each set of questions were analysed and are discussed below.

5.2.1 Interviews with principals

The first part of the interview determined the demographic information of each participant. The rest of the interview was divided into six sections which answered different parts of the main research question. The following diagram serves as an illustration of how the main research question was ultimately answered in the semi-structured interview.

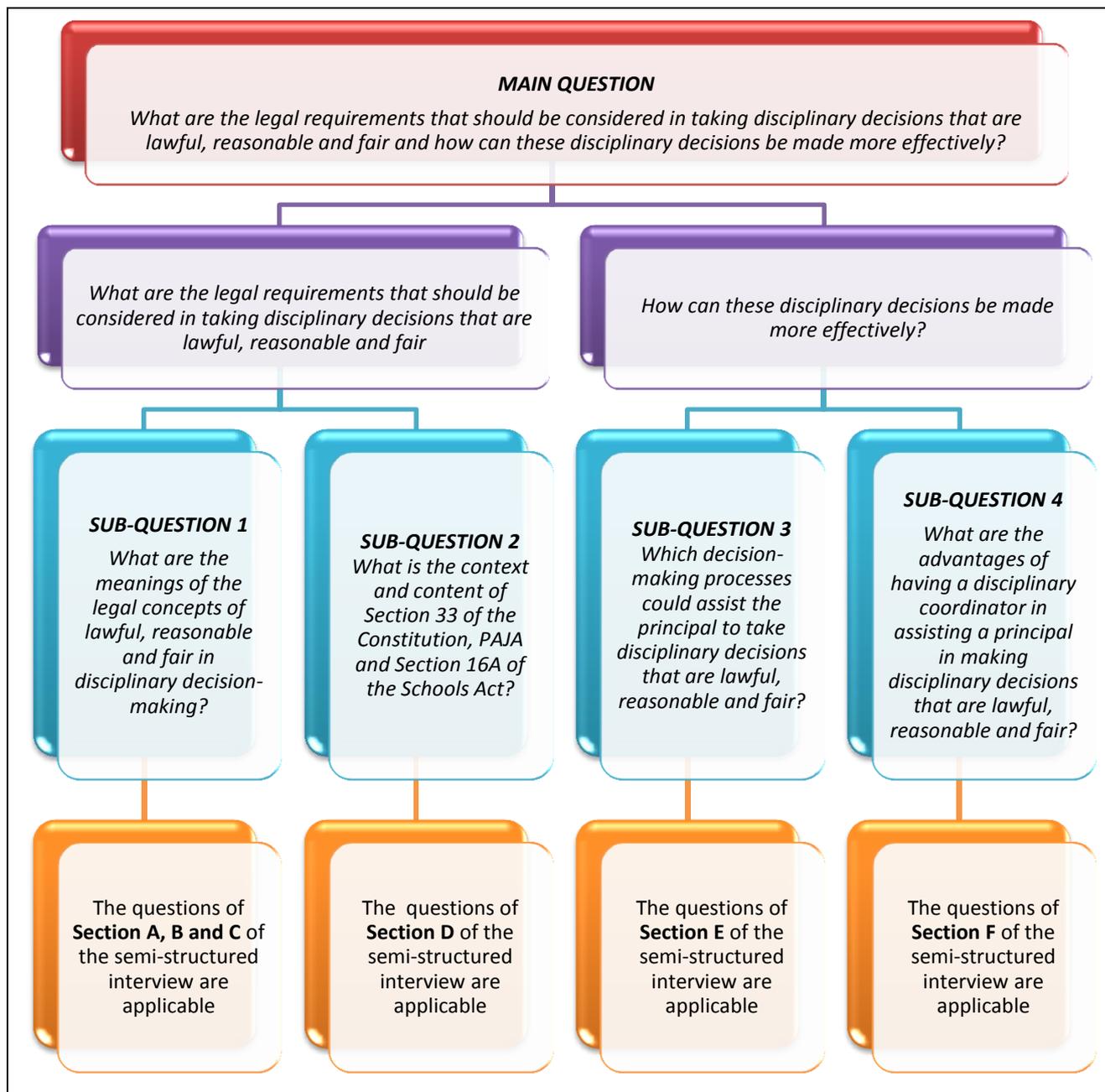


Figure 11: An illustration of how the main research question was answered in the semi-structured interview

5.2.2 Interviews with District and Head Office officials

The aim of interviewing the officials of the Western Cape Education Department (WCED) was to understand their perspectives on disciplinary decision making in schools. The assumption was that the officials had the knowledge, qualifications and experience to support principals with valuable information regarding disciplinary decision making. The semi-structured interviews conducted with the officials of the WCED were divided into

seven sections. In the first part of the interview, officials' biographical information, their qualifications relating to education law and management, as well as their experience were established.

The rest of the questions were divided in a similar fashion as those asked in the principals' interviews. Some questions were slightly altered to accommodate the different role the officials play in education.

5.3 ANALYSIS OF PARTICIPANT INTERVIEWS

The study focused on good practices, and therefore data received from the participants was valuable in assisting principals in making disciplinary decisions. A thorough analysis of the data was done in order to distil the good practices that principals used. The analysis was done based on the seven sections of the semi-structured interview guide. Data uncovered in Chapter 2 and 3 were incorporated in order to make a comprehensive analysis of the literature study and the data received from the semi-structured interviews.

5.3.1 Demographic and biographical information of participants

In School A, the deputy principal is responsible for handling learner discipline. The principal of School A, as well as the deputy principal, was interviewed. Principal A has 28 years' experience in education and was appointed as principal three years ago. He has a master's degree in education management. The deputy principal has been in this post for eight years and has a total of 30 years' experience in education. He has a BComm degree and a diploma in higher education. He has no formal training in either education management or education law.

Principal B has 35 years' experience in education and has been the principal of the school for ten years. She has a BSc (Honours) degree and a diploma in higher education, but has no formal training in education management or education law.

Principal C, who has a total of 30 years' experience in education, has a BSc degree and a diploma in higher education. He has no formal training in education management or education law.

Principal D has five years' experience as a principal and 39 years' experience in education. He holds a BComm degree, as well as a diploma in higher education. He has completed short courses in education management and education law.

Departmental Official A completed a diploma in primary education in 1981. He has 31 years' experience in education. He completed a BA degree which was followed by an honours degree in psychology and later, a master's degree in education management. Official A has attended short courses in education law. He has 10 years' experience as a principal and seven years as circuit team manager.

Departmental Official B has a matriculation certificate and has attended short legal courses. He has been employed by the WCED for the past 26 years and works at Head Office. For the past 14 years he has been working exclusively at the office of the Head of Department on recommendations for the expulsion of learners.

Interpreting and implementing Education Law could be a potential minefield. Some of the responsibilities of a principal are highlighted in section 16A of the Schools Act (amended in 2007). According to section 16 A(1)(d), (e) and (f) of the Schools Act, a principal **must**:

- d) assist the governing body in handling **disciplinary** matters pertaining to **learners**;
- e) assist the Head of Department in handling **disciplinary** matters pertaining to **educators** and **support staff** employed by the Head of Department;
- f) inform the governing body about policy and legislation. (Own emphasis.)

Section 16 A(1)(d), (e) and (f) assumes that a principal as education manager has specialised knowledge in dealing with disciplinary matters pertaining to learners, educators and support staff. Therefore, principals are obliged to accumulate specialised knowledge and understanding of the field of Education Law. Furthermore, decisions taken by education managers are important because they can influence the lives of learners, staff members and the future of the school (Van Deventer, 2003:96). In order to make

meaningful decisions, a principal needs specialised knowledge with regard to education management theory.

Although it is not a focus of the study, concerns could be raised that none of the participants have had any formal training in Education Law and it can be assumed that their knowledge base is anchored in their experience. Two participants have formal qualifications in Education Management. A recommendation could be that the Department of Education, trade unions, tertiary institutions and the South African Council for Educators could intervene and set up programmes where principals could academically empower themselves with regard to Education Law and Management.

5.3.2 Lawfulness

It was established in Section 2.4 that a principal's decision can be reviewed on grounds of the following three categories (De Waal *et al.*, 2001:516):

- the requirement of authority;
- the concept of jurisdiction; and
- the abuse of discretion.

The questionnaire set out to establish how the participants dealt with each aspect of lawfulness.

- **The requirement of authority**

As stated in Chapter 2, the principle of legality is an aspect of the rule of law which is one of the founding values of the Constitution (sec 9; RSA,1996a). De Waal *et al.* (2001:505) affirm the above by stating that an administrator must obey the law and can only take a decision if authorised by law.

An alarming comment was made by one of the respondents when asked what his understanding of the rule of law was: "*I don't understand it ...*" (freely translated). The rest of the responses can be divided into the following approaches:

- a) A person needs to obey the laws of the country; and
- b) The Schools Act, which serves as framework for all the responsibilities that a principal has, is seen as the rule of law.

The reason for the question was to establish whether the participants understood the concept that principal must obey the law and can only take a decision if authorised by law. It was obvious that the respondents were not totally correct in their interpretation of “the rule of law”. They only referred to the Schools Act as a framework that authorises a principal to do his/her work. No mention was made of any other legislation. It could be argued that the participants believe that the content of the Schools Act is sufficient for doing their work.

- **The concept of jurisdiction**

Administrators are required to remain within the boundaries of their powers and not misinterpret their powers when dealing with rules of administrative law or the principle of legality. An administrator is confronted on a daily basis with the interpretation of legislation to work out his/her boundaries of authority and jurisdiction. Errors of law can arise in interpreting legislation, which will ultimately compromise the legality of a process such as a disciplinary hearing. An error of law can be defined as a wrong or mistaken interpretation of a legislative provision (Hoexter, 2007:252).

The interview data elicited several good practices with regard to the principals’ ability to understand their boundaries and to interpret legislation. Questions were put to the participants about their involvement in disciplinary hearings and how their disciplinary committees were constituted.

Two principals stated that they were involved with disciplinary hearings where they played the role of the prosecutor. They did not, however, also play the role of witness or take part in the deliberation of the case. It was evident that they understood their particular role in the disciplinary hearing and knew that they could not be the judge, jury and executioner. An interesting remark one of the respondents made was that she was not involved in any disciplinary hearing, solely because she wanted to remain impartial if an appeal was lodged. Although it can be seen as good practice, the practicality, as well as the impartiality, was questionable as the principal is often the one to investigate the case and has the background information on the accused learner.

According to section 9(3)(b) of the Schools Act, the Member of the Executive Council (MEC) must determine in a *Provincial Gazette* the disciplinary procedure to be followed. According to Official B, the WCED developed the Regulations relating to the disciplining, suspension and expulsion of learners at public schools in the Western Cape. It was published in the *Extraordinary Provincial Gazette* (Notice 365) in 2011 (Province of the Western Cape, 2011) and communicated to schools via Circular 22/2012. Official B stated that the above regulations gave a clear indication of how a disciplinary committee should be constituted.

Regulation 6 of the Regulations relating to the disciplining, suspension and expulsion of learners at public schools in the Western Cape stipulates the following with regard to the composition of a disciplinary committee:

6 Appointment and composition of disciplinary committee

- (1) The governing body must preside over the disciplinary proceedings or must appoint a disciplinary committee to do so.
- (2) The disciplinary committee must comprise at least five persons, at least three whom must be governing body members.
- (3) The disciplinary committee must be chaired by a member of the governing body, designated by the governing body, who is not an employee or member of staff of the school.
- (4) The disciplinary committee must be impartial, fair and act without favour or prejudice.
- (5) The principal, learners at the school or persons having a conflict of interest are not eligible to be members of the disciplinary committee and may not be present when the governing body discusses the report or recommendations of the disciplinary committee.

A good practice that came to the fore was that the disciplinary committee in three participant schools conducts internal hearings where only the principal, deputy principal, grade head and learner are present. This was only done in less serious cases of misconduct and it is not solely the principal who is involved in the decision-making process. This heightens the perception of impartiality and objectivity. A principal mentioned that he didn't allow learners to be part of such a committee because the accused learner could intimidate the learners on the committee.

The officials were asked which common mistakes were made by schools with regard to establishing a disciplinary committee and the following most common mistakes were mentioned:

- a) Principals were the chairpersons of the disciplinary committees.
- b) Principals acted as prosecutor and witness and took part in deliberations.
- c) School Governing Bodies did not co-opt parents with expertise in the field of law.
- d) Some schools made use of members of the representative council of learners.

The official felt that the learners that sat on the committee could be intimidated by the accused and therefore the learners' safety was compromised.

On prompting Official B about what other mistakes schools made with regard to disciplinary hearings in general, he mentioned the following:

- a) The disciplinary committee makes a recommendation to the School Governing Body which has to ratify the recommendation. Some schools do not call a School Governing Body meeting to ratify the recommendation. They do it via email. Official B stated that that was an unreasonable practice and was of the opinion that the recommendations were steamrolled through.
- b) The minutes of disciplinary hearings were not up to standard and the committee that was supposed to make recommendations to the Head of Department could not establish the guilt of the learner based on the minutes they had received.
- c) In some schools the learner was not given an opportunity to plead, thereby compromising the right to state his/her case objectively.

- **Abuse of discretion**

Hoexter (2007:275) is of the opinion that the law can impose constraints on the exercise of discretionary powers. Abuse of discretion is established in common law and assumed statutory form with the enactment of the PAJA in 2000. It must be understood that legislation empowers an organ of the state to exercise power with a specific purpose in mind. Administrative action can be deemed as unlawful if it is taken for ulterior or partly ulterior purposes and therefore it is important to establish whether principals understand the concept of discretion.

The participants were of the opinion that the code of conduct and the Schools Act serve as guidelines for principals in making disciplinary decisions. The challenge a principal faces, is that not every situation is depicted in the code of conduct and it is left to the discretion of the principal to make a disciplinary decision. The principal uses discretion and bases the disciplinary decisions on the information acquired in the investigation of the case.

An interesting response was received from Principal B who was of the opinion that every case had to be evaluated against the code of conduct. It was interesting to note that the learners of School B have written a code of conduct which they have called: “Handves van Skool B Regte” (Translation: *Bill of School Rights*). The principal mentioned that discretion meant ‘sound judgment’ and was of the opinion that every case had to be handled on its own merits. She gave an example of a learner who had been transgressing the code of conduct on a continual basis. None of the punitive measures that the code of conduct prescribed had altered the behaviour of the learner. On investigation, it was found that the learner lived in a children’s home. The principal called the learner in and discussed the matter of her ill behaviour and then used her own discretion and placed the learner on parole after explaining the concept to the learner. The principal told the learner that all the detentions and other punitive measures she had acquired would be annulled if her behaviour improved. The learner changed her behaviour. The principal used her discretion by taking the merits of the case into consideration. This emphasises that a principal should know the learners and focus on positive incentives.

It is not only the principals that need to understand the concept of discretion. The committee, on which Official B serves, determines the seriousness of the transgression and lists the merits of the case. This is weighed against the possible procedural mistakes the school has made. For example: After a disciplinary hearing, a learner was found guilty of stabbing another learner. The school made some procedural mistakes. The mistakes were listed, but because the transgression was very serious, the committee used their discretion and recommended that the Head of Department expel the learner. The committee furnished the Head of Department with all the relevant information and pointed out the mistakes of the school. According to Official B, the Head of Department will handle the case in the usual manner and use discretion to expel the learner or not.

When Official B was asked which mistakes were made by schools with regard to discretion, objectivity and impartiality, he stated that principals at some schools acted as judge, jury and executioner and that that compromised the objectivity and impartiality of a disciplinary hearing. Official B quoted regulation 2 of the Regulation that relates to the disciplining, suspension and expulsion of learners at public schools in the Western Cape as a reason why this cannot be done in respect of the investigation of possible serious misconduct:

2 Investigation of possible serious misconduct

(1) Where it is alleged that the conduct of a learner may constitute serious misconduct in terms of regulation 3(1), **the allegation must be brought to the attention of the principal who must—**

- (a) **investigate** or cause an investigation to be carried out to determine whether there are grounds for a disciplinary hearing;
- (b) **decide** whether there is sufficient evidence to institute disciplinary action against the learner in respect of the serious misconduct and whether or not to report the matter to the governing body. (Own emphasis.)

Official B argued that the objectivity of the principal is compromised if the case is brought to his attention and he investigates the case. Even if he delegates the investigation, the principal must make a decision, based on the evidence, to institute a disciplinary hearing.

5.3.3 Reasonable

The focus of this study is to establish the meaning of reasonableness and how it influences the decision making of the administrator. The reasonableness standard of review was applied by the Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC). Judge O'Regan listed factors that must be taken into consideration when deciding if a decision is reasonable:

- the nature of the decision,
- the identity and expertise of the decision-maker,
- the range of factors relevant to the decision,
- the reasons given for the decision,
- the nature of the competing interests involved and
- the impact of the decision on the lives and well-being of those affected.

Various authors list that reasonableness consists of two elements: rationality and proportionality (Driver & Plasket, 2003:91; Wakwa-Mandlala & Plasket, 2004:86; Pillay, 2005:423; Hoexter, 2007:307; Quinot 2008:410).

- **Rationality**

The crux of rationality as based on case law, legislation and literature (as discussed in Section 2.5) can be summarised as follows:

- a) In *Carephone (Pty) Ltd v Marcus NO and Others* 1999 (3) SA 304 (LAC), as pointed out by Quinot (2008:422), justifiability is a rational standard and the standard has been formulated below in the form of a question:

Is there a rational, objective basis justifying the conclusion made by the administrative decision-maker between the material properly available to him and the conclusion he or she arrived at?

- b) In *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* 2004 (3) SA 346 (SCA) and *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA), the Supreme Court of Appeal approved and applied the above formulation in context of the PAJA. According to Hoexter (2007:308) and Quinot (2008:422), Section 6 (2) (f) (ii) of the PAJA gives the scope of rationality by referring to the action that:

(ii) is not rationally connected to—

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator.

- c) In *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC), the court required a stronger factual basis to justify the excessive scope of the decision taken (Pillay, 2005:427; Quinot, 2010:58).
- d) Hoexter (2007:307) adds that the essence of rationality is that the evidence and information before the administrator, as well as the reasons given, must support the decision taken by the administrator. The decision must further the purpose for which the power was given and for which the decision was allegedly taken.

- **Proportionality**

In the *Bel Porto* case, the court mentioned factors that could be considered to find less restrictive means to achieve the purpose, and balance the adverse and beneficial effects of a decision. The factors that are to be considered are:

- the nature of the right or interest involved;
- the importance of the purpose sought to be achieved by the decision;
- the nature of the power being exercised;
- the circumstances of its use;
- the intensity of its impact on the liberty, property, livelihood or other rights of the persons affected; and
- the broad public interest involved.

Based on the above information, a principal needs to ask and answer the following questions to ensure that the disciplinary decision is reasonable:

- a) How does the abovementioned fit into the milieu of education with specific reference to disciplinary decision making?
- b) What is the nature of the right at stake and the nature of the decision?
- c) What is the expertise of the principal making a disciplinary decision?
- d) What is the range of factors relevant to the situation?
- e) What is the nature of the right of the learners that transgressed the code of conduct measured against the competing rights of the other learners?
- f) What will the impact of the decision be on the lives and wellbeing of the learners affected by the disciplinary decision of the principal?
- g) Is the evidence rationally related to the final decision of a particular punishment?
- h) What is the purpose of the decision that was made?
- i) Is the decision maker empowered to make the particular decision?
- j) Are the reasons given to the learner and the parents rationally and logically linked to the transgression the learner made?
- k) What is the importance of the purpose sought to be achieved by the disciplinary decision made by the principal?

Questions were put to the participants to establish their understanding of the concept of reasonableness and to make good practices known. The principals rely heavily on the code of conduct as guidelines to ensure that the punishment meted out to a learner has

been reasonable. According to Official A, the success of matching the punishment to the transgression, lies in the compilation of the code of conduct of a school. As many of the role players as possible must be part of the process to ensure that the punishment fits the transgression. It is important to co-opt parents with expertise in law in compiling the code of conduct.

The officials added that the Bill of Rights and the Regulation relating to the disciplining, suspension and expulsion of learners at public schools in the Western Cape, could serve as guidelines to ensure reasonableness in meting out punishment. A remark was also made that the *audi alteram partem* principle must be applied before a decision is taken on what the punishment will be. According to principal B, it should be kept in mind that it could be your own child, and what is positive for the school and the learner should be paramount. Official B agreed, stating that one must be guided by the preamble of the Policy framework for the management of drug abuse by learners in schools and in public further education and training institutions where Section 3 stipulates that:

The Ministry differentiates between habitual abuse of drugs and drug dealing, which should be condemned and punished; and experimentation or peer-group abuse which should be dealt with in the context of **restorative justice**. (Own emphasis.)

Official B states that the WCED follows the restorative justice approach. Therefore, if a learner is a first-time offender and the Governing Body of the school has recommended expulsion, the Head of Department will, in the most cases, depending on the seriousness of the case, refer the case back to the Governing Body to reconsider another but more reasonable punishment.

The rational standard for reasonableness was formulated in the *Carephone* case which questioned if there was an objective basis justifying the decision reached with the information available to the decision maker. It is thus appropriate for the principal to determine what the range of relevant factors in the situation is. The participants stated that it was important to investigate the following factors to justify the decision:

- a) A learner profile is drawn up that consists of:
 - i) the academic profile and progress of the learner;
 - ii) the absence and school attendance record; and
 - iii) the social skills of the learner.

- b) When the profile is available, the input of the school psychologist will also be taken into consideration.
- c) It is important for the principal to be consistent in every case and to hear the parents' side of the story.
- d) It important to establish if the learner knows which rule was broken.
- e) The learner must be given the opportunity to tell his/her side of the story.
- f) The personal circumstances must also be taken into consideration. For example: a learner was found guilty of bullying other learners. On investigation, it was found that the learner was a victim of bullying at home which could explain why he resorted to bullying when he felt intimidated or powerless at school.
- g) Establish whether the learner has a medical condition, and consider whether he/she is taking chronic medication.
- h) Establish whether the learner is a first-time offender or repeat offender.

Official A was of the opinion that disciplinary decisions should be taken within the parameters of the code of conduct and the Schools Act. The approach must be restorative in nature without setting a precedent. As part of the restorative justice approach of discipline, it is critical for a principal to base disciplinary decision on values. In the judgment of the *Carephone* case, Froneman J stated that an administrator must give expression to the fundamental values of accountability, responsiveness and openness. Curiosity develops with regard to what principles, values or goals principals have at the back of their minds in the process of disciplinary decision making. The following values were mentioned by the participants:

- a) Is it of service to others?
- b) Is human dignity upheld?
- c) Does the drive for excellence exist?
- d) Has the integrity of all parties been honoured?
- e) Has the process been consistent?
- f) Have the safety and rights of other learners been considered?
- g) Has the process been just and fair?
- h) Has the process been restorative in nature in order to remediate behaviour?
- i) Has the process been reasonable?

These values also came to the fore in the document analysis of the intervention policy of school B and its code of conduct that is known as the *Bill of Rights* of School B. The focus of these documents is to change behaviour with the help of the parents. The policy is followed to the letter with each learner in order to be consistent and fair to all. Learners are therefore encouraged to attain the higher standards of behaviour and excellence that the ethos of the school requires. A focus on human dignity and parental involvement is the key to their success. All communication with the parents is noted and forms a paper trail of interventions that have been made in order to change behaviour. Although the administrative process is cumbersome, the information stored for future disciplinary hearings is valuable and indispensable. If a recommendation for expulsion is made to the Head of Department, the information about which interventions have been made is readily available and ensures just administrative action which complies with the legal concept of reasonableness.

5.3.4 Fair

Section 8(5)(a) of the Schools Act mentions the legal concept of due process as discussed in Section 2.6. Due process means fair process which meets the standards of fundamental fairness (Joubert, 2009b:130). It is also important to note that not only procedural fairness is protected in the Constitution, but that section 33(1) also makes provision for substantive fairness (Burns, 1998:167).

- **Substantive fairness**

In order to ensure that disciplinary decision making is substantively fair, the following questions (as discussed in Section 3.6.1) ought to be asked and answered affirmatively (Adapted from Van Kerken, 2003:153; Prinsloo, 2009:213; Rossouw & Oosthuizen, 2004:42):

- Was the person aware of the rule broken?
- Was there a valid reason for disciplinary action?
- Were the expectations to conform to the rule lawful and reasonable?
- Was the rule or standard consistently applied?
- Was there consideration of mitigating and aggravating circumstances?
- Was there sufficient proof of the misconduct?

- Was the sanction imposed on the learner appropriate and suitable in the light of the proven reason?

The concept of substantive fairness did not come to the fore in the interviews with the participants. Although it seemed that the participants were not aware of the legal concept of substantive fairness, they gave variables that they considered before making a disciplinary decision. This seems to correlate with the factors that Van Kerken (2003:153) mentions must be taken into consideration when imposing a sanction:

- a) the nature and seriousness of the infraction;
- b) the circumstances and the misconduct itself; and
- c) the nature of the job.

The participants agreed with the above and added that a principal needed to take the following into consideration when making a disciplinary decision:

- a) The social circumstances and background of the learner.
- b) Whether the learner was provoked.
- c) Possible reasons why the learner behaved in such a manner.
- d) The impact the behaviour of the learner may have on other learners.

- **Procedural fairness**

As discussed in Section 3.6.2 and in Figure 10, procedural fairness is linked to the common law principles of *audi alteram partem* principle and *nemo iudex in sua causa*. The common law principle of *nemo iudex in sua causa* is frequently described as the rule against bias that expresses the idea of impartiality (Hoexter, 2007:404). The *audi alteram partem* principle, as shown in 2.3.2, encompasses the following:

- a) Adequate notice of proposed administrative action.
- b) A reasonable opportunity to make representations.
- c) A clear statement of the administrative action.
- d) Adequate notice of the right of review or appeal.
- e) Adequate notice of the right to request reasons.
- f) Adequate notice to obtain legal representation.
- g) An opportunity to present and dispute information and arguments.
- h) Personal appearance.

In order to establish whether, and how procedural fairness is handled at the participant schools, a document analysis was done and the following findings were recorded:

a) Adequate notice of proposed administrative action

In the documentation that was analysed, it was established that the practice within the schools was to give sufficient time to prepare for a disciplinary hearing, which constitutes adequate notice. There was one case where five days' notice was given and not the required seven days. Although this was contrary to the regulation, the recommendation for expulsion was approved.

b) A reasonable opportunity to make representations

In every case that was analysed, sufficient opportunity had been given to make representations on behalf of the learner.

c) A clear statement of the administrative action

The schools gave clear statements of the administrative actions that they planned to take in the form of the notice of the disciplinary hearing.

d) Adequate notice of the right of review or appeal

According to the analysis, only one school had given notice of the right to appeal against the School Governing Body's decision in a disciplinary hearing. In the notice, the period which parents were given to appeal, was four days. Another school had only given notice of the right to appeal against the decision of the Head of Department.

e) Adequate notice of the right to request reasons

Not one of the schools had given notice to the parents that they had a right to ask for the reasons on which the School Governing Body had based its decision. School A sent a letter to the parents after a disciplinary hearing, giving reasons for the decision reached by the School Governing Body. The learner was accused of victimisation, theft, being in possession of stolen goods, being in possession of drugs and of dealing in drugs. The reasons that were given were as follows:

- i. Victimising and threatening other learners.
- ii. Stealing and selling other learners' cellular phones.

- iii. Being in possession of dagga (cannabis) and selling it on school grounds.

If the reasons that were given is measured against the requirements that was discussed in Section 3.3.2.5 it can be deemed insufficient. De Ville (2003:287) state that the giving of reasons create a sense of fairness. Hoexter (2007:429) is of the opinion that reasons cannot merely consist of plain conclusions. The reasons given by the above mentioned school are merely conclusions. Another reason why the reasons given can be deemed insufficient is because relevant law and facts that influence the decision-making process must be included (Hoexter, 2007:429).

- f) Legal representation

One of the four schools participating in the study did not indicate to the parents that they were allowed to bring legal representation to the disciplinary hearing.

- g) An opportunity to present and dispute information and arguments

Only one school mentioned that the representatives of the accused learner would have the opportunity to cross-examine the witnesses called by the school.

- h) Personal appearance

All schools required the accused learners to be present at their disciplinary hearings.

It is evident that the participants do not apply the concept of procedural fairness to the letter of the law. On the other hand, the participants mentioned numerous times that they listened to both sides of the case. All schools have a positive approach to discipline and do not want to focus on punitive measures, but aim to alter behaviour through parental involvement. Numerous opportunities for intervention are used and recorded for future referral. According to Principal B, it is of utmost importance to have a paper trail in disciplinary procedures and a series of intervention programmes. It is a good practice that the principal receives a weekly merit and demerit report regarding the individual learners and in so doing, establishes which learners need intervention and what tendencies there are in learner behaviour. Electronic records are kept for easy access. The principal of School B stated that, although the intervention programme and the administration process seemed cumbersome, the information was invaluable. Other participants added that consistency, transparency and fairness in procedure could make or break the integrity of a

principal as disciplinary decision maker. Another good practice that emerged, mentioned by Principal D, was that they believe in being non-confrontational and fair in the processes of a disciplinary hearing. There cannot be a fair and impartial disciplinary hearing if the school has a confrontational approach to a learner in a disciplinary hearing.

To add to the concept of impartiality, the participants were asked how they would guarantee an objective disciplinary committee. This question linked to the common law principle of *nemo iudex in sua causa* that is frequently described as the rule against bias that expresses the idea of impartiality (Hoexter, 2007:404). When translated, it means 'nobody is fit to act as judge in his own case' (Oosthuizen & Roos, 2003:56). None of the participants made definite mention of the legal principle of *nemo iudex in sua causa*; however, the participants are firmly aware that bias cannot be tolerated and an objective, impartial disciplinary hearing must be guaranteed for every learner.

The deputy principal of School A mentioned that if he investigates an incident that, according to the code of conduct, must be heard by the principal at an internal disciplinary hearing, he would not give any information, or discuss the incident with the principal beforehand. The same *modus operandi* will be followed if the case were referred to the School Governing Body for a disciplinary hearing. This is to ensure that those that have to make the disciplinary decision are not influenced when they are confronted with one side of the case.

Another participant stated that it was important that the disciplinary committee members had sound judgment and were sympathetic towards the learners. It was an advantage if some of the members had a legal background. Objectivity was also increased if roles like prosecutor and witness were well defined. The principal is not part of the disciplinary proceedings because he/she must ensure objectivity in an appeal hearing where he/she will then form part of the disciplinary committee. Principal A felt that the members of the disciplinary committee had to have integrity. When a member of the disciplinary committee is a family member or friend of the parent of the accused learner, that member is withdrawn from the disciplinary hearing to ensure objectivity.

5.3.5 Applicable legislation in an education context

The participants agreed that every educator is responsible for discipline in a school; senior educators especially have the task of managing school discipline and can be of help to junior educators. The register educators are the first line of defence and grade heads will assist first if the problem escalates. One of the participants stated that the educator set the example but that class monitors, prefects and representative council members could assist with discipline in the school. Another participant stated that she was in two minds about the fact that learner leaders are used to enforce discipline because these learners could rather be used to give information about learners who transgressed the code of conduct. Although the participants emphasised the importance of the role players at the school in upholding discipline in the school, a participant added that parents and the School Governing Body also have a responsibility.

When asked what the role of the principal was with regard to school discipline, a participant stated that he/she gave direction in a school but that “the buck stopped with him/her” as the principal. Another participant agreed that the principal is ultimately responsible and added that it was important to have knowledge and information as the foundation for disciplinary decision making. A good practice that came to the fore was that the principal is part of the grade head meetings where problems regarding learner discipline are discussed. The grade heads would supply printouts of the merit and demerit reports of the learners to the principal on a weekly basis. The effect of this positive approach was visible where the principal made a point of it to praise the learners that had received merits. It is evident that the principal surrounds him/herself with competent staff with the necessary skills and knowledge. Furthermore, the officials stated that they were public servants that were there to give advice to principals, district officials and parents.

A question that needed to be answered was which laws or legal framework principals used to guide them with learner discipline. It is necessary to list the following responses of the individual participants in order to show the level of expertise in Education Law:

- Principal A mentioned that they used the Schools Act as the framework for learner discipline.

- Principal B stated that although she was not a legal expert, she would refer to the Schools Act as framework for learner discipline. She mentioned that organisations like the Suid-Afrikaanse Onderwysers Unie (SAOU) and the Federation of Governing Bodies of South African Schools (FEDSAS) provided valuable information regarding the legal framework. School B has an attorney on the School Governing Body who assists the principal.
- Principal C stated that the Schools Act served as the legal framework for learner discipline and the knowledge and expertise of the SAOU and FEDSAS was also utilised.
- Principal D stated: “I make use of the *Government Gazette* and memoranda sent by the Department of Education.” (Freely translated.) He did not mention what type of documents are contained in the *Government Gazette*.

From the above, it is obvious that the participants do not fully understand the legal framework wherein they are working. Section 16 A(1)(d), (e) and (f) of the Schools Act presumes principals have specialised knowledge of dealing with disciplinary matters pertaining to learners, educators and support staff. Not only has education legislation (Section 16 A of the Schools Act) changed over the last 17 years, but Acts like the PAJA have also influenced education, without principals realising it (Joubert & Prinsloo, 2009:171). It was stated by participants that updated information and knowledge were necessary since these affected disciplinary decision making. Although this study focuses on good practices, it must be noted that the lack of knowledge in the field of Education Law can have serious effects on the management of schools. The officials stated that principals needed to work within the following legal framework:

- a) the Constitution of the Republic of South Africa.
- b) Common Law principles.
- c) Regulation relating to the disciplining, suspension and expulsion of learners at public schools in the WCED.
- d) Policy framework for the management of drug abuse by learners in schools and in public further education and training institutions.
- e) It must be noted that the officials did not mentioned the *Guidelines for the consideration of governing bodies in accepting a code of conduct for learners* that are a critical and important document with regard to learner discipline.

In order to ensure that the participants understood the question on what legal framework was applicable in dealing with school discipline, the follow-up questions were asked:

- *To what extent do you make use of the following when making disciplinary decisions?*
 - a. *Section 33 of the Constitution of the Republic of South Africa, 1996.*
 - b. *The Promotion of the Administrative Justice Act, Act 3 of 2000*
 - c. *Section 16 A of the Schools Act, Act 84 of 1996.*

The following responses were given:

- Principal A stated that he had “no knowledge” of the sections and Acts mentioned in the question.
- Principal B stated that she was familiar with section 16 A of the Schools Act and had heard about the Promotion of the Administrative Justice Act.
- Principal C stated that he had no knowledge of section 33 of the Constitution and the Promotion of the Administrative Justice Act. He added that school C followed the instructions and regulations of the WCED with regard to suspension and expulsion.
- Principal D mentioned that he had heard about the Promotion of the Administrative Justice Act and section 16 A of the Schools Act, but stated that he used the Constitution as a guideline.
- The officials stated that section 33 of the Constitution and The Promotion of the Administrative Justice Act were not frequently used.

It is safe to make the assumption, based on the above, that the participants do not know and implement section 33 of the Constitution which gives everybody the right to a just administrative action, the provisions in the PAJA, and Section 16 A of the Schools Act. It must be emphasised that a principal has to have specialised knowledge in dealing with disciplinary matters pertaining to learners, educators and support staff as pointed out in section 16 A (1) (d), (e) and (f) of the Schools Act. Therefore, because of a lack of knowledge, the above legislation is not used.

Apart from legislation, case law is an important source of valuable knowledge for a principal to keep in mind in disciplinary decision making. A question was put to the participants to establish whether they were informed about court cases relevant to school discipline. All the participants stated that they were familiar with some of the cases and had received information on these cases mainly through newspapers. A good practice that emerged was that one participant stated that he studied the information given on court cases by legal experts affiliated to the SAOU and FEDSAS. Another principal stated that she attended the South African Education Law Association conference where valuable information was gathered for future use in disciplinary decision making. It is therefore critical that principals acquire knowledge of relevant education cases to improve the information needed to make meaningful decisions.

During the interviews with the officials, they were prompted to explain how they used case law to support them in their decision making when dealing with learner discipline. Official A stated that he placed great emphasis on case law because it created consistency and a rule that had to be followed. The assumption can be made that the official did not understand the question or that he did not know how case law could assist him in his work. Official B answered the question excellently and stated that case law was very important. He mentioned and discussed the case of *Governing Body Tafelberg School v Head of WCED 2000 (1) SA 1209 (C)* which served as an example of how important case law was to the WCED. A learner of Tafelberg Special Needs School was charged with theft after he had taken a part from a computer that was not used at school. He was found guilty and a recommendation for expulsion was made to the Head of Department. When the case was handled by the HOD, the parents wrote a letter to the Director of Special Schools, pleading their child's case. The Head of Department decided not to expel the learner without reading the letter of the parents. The school approached the court and was of the opinion that the HOD had information of which they had no knowledge. The court decided that the case had to be referred back to the school. The school heard the case again and recommended expulsion to the HOD, who decided not to expel the learner. This is an excellent example of how case law can improve disciplinary decision-making processes, which in this instance, was taken up in a letter from the WCED.

It has already been stated that principals tend to view the Schools Act as the only guiding document when making decisions about learner discipline. In Section 9 (3) of the Schools Act, it is mentioned that the provincial Minister of Education must publish the regulations pertaining to the expulsion and suspension of learners in a *Provincial Gazette*. Regulations relating to the disciplining, suspension and expulsion of learners at public schools in the Western Cape, constitute such an example. A question was put to the participants on what mistakes were made by schools and used as reasons by the Head of Department *not* to expel a learner. The answers are listed as follows:

- There was insufficient intervention.
- Procedures were not followed.
- During the deliberation of the committee, reports were put forward by the school for the first time that had not been put to the parents and the learner in the hearing.
- The learner was a first-time offender.
- Objectivity was compromised and a learner was found guilty before a disciplinary hearing had taken place.
- The prescribed annexures within the Regulation relating to the disciplining, suspension and expulsion of learners at public schools in the Western Cape, had not been used.
- The minutes of the disciplinary hearing were inadequate.
- The procedure that stipulated what had to be done if a learner did not attend the disciplinary hearing for the first time was not followed.

Form these answers it can be concluded that principals forget the detail listed in the regulations published in the *Provincial Gazette*. The *Regulation relating to the disciplining, suspension and expulsion of learners at public schools in the Western Cape* is a set of regulations that is not followed to the letter of the law. It can therefore be concluded that Education Law knowledge is the key to obtaining correct, reliable information on which a principal can base disciplinary decisions.

All the participants agreed that many demands were placed on a principal, as discussed in section 1.2. A question was put to the principals about how the WCED assisted principals to overcome the obstacles faced in the demands of their work. The answers that the participants gave were more negative than positive. The principal of School B stated that

their school received good and sufficient support from the WCED and she could not complain about their support. However, the other participants totally disagreed. Principal D was of the opinion that the WCED was out of touch with what was happening in schools. It was expected of the principal to be able to handle everything in a school. This principal mentioned that he did not phone the WCED at provincial level because it could not furnish the answers that were needed. The principal of School A was of the opinion that the WCED would do everything in its power *not* to approve a decision for expulsion by the School Governing Body. The principal gave an example where the WCED did not approve a recommendation for expulsion, since the WCED held that there was one member of the School Governing Body short on the disciplinary committee that heard the case. The principal of School A was of the opinion that the WCED was on a fault-finding mission because they looked at the 'small print' and minor details of every case. This approach by the WCED discouraged schools from acquiring recommendations for expulsion from the Head of Department. The principal of School A principal was adamant that the WCED needed to respect the decision of the School Governing Body in recommending expulsion. By this action, the WCED would strengthen the hands of the School Governing Body in making disciplinary decisions.

It was clear from the responses of the participants, that there was a level of animosity between three of the schools and the WCED. A participant made a pertinent remark that could be the solution to the abovementioned problem: There is an absolute need for the WCED to train principals in making disciplinary decisions and handling disciplinary cases. The principal of School A felt that the WCED had to tell principals exactly what they required in disciplinary hearings. However, training was not the only solution. Communication between the WCED and principals is critical in order to change the perception that the WCED is on a fault-finding mission and does not want to support the recommendation of the School Governing Body for the expulsion of a learner. In the comment made by the principal of School A that the WCED needed to respect the decision of the School Governing Body in recommending expulsion, it was clear that the principal did not understand the impact of section 9(2)(a) of the Schools Act (RSA, 1996c) which stated that a learner of a school could only be expelled by the Head of Department. It is fair to assume that on agreeing or disagreeing with the recommendation of the School Governing Body, the HOD makes a disciplinary decision. In order to make that decision,

she had to acquire and scrutinise all relevant information to make a lawful, reasonable and fair disciplinary decision. Furthermore, section 9(3)(c) states that the Minister of Education has to determine “provisions of due process” in order to “safe-guard the interests of the learner and any other party involved in disciplinary proceedings”.

The HOD, in scrutinising the recommendation of the School Governing Body to expel a learner, must comply with the law to ensure that due process has been followed. The HOD can be seen as the person ultimately responsible for making a disciplinary decision that is in the best interest of all parties involved. Therefore, communication between the WCED and principals is of the utmost importance to ensure that lawful, reasonable and fair decision making takes place at every level in education.

Official A mentioned that training should be provided to principals by the WCED. Although the Regulations relating to the disciplining, suspension and expulsion of learners at public schools in the Western Cape were published in December 2011, no training was provided to principals in this regard.

5.3.6 Decision making in an educational setting

This section relates to which good practices exist that could assist a principal in making lawful, reasonable and fair disciplinary decisions. The participants were asked if they had a specific method of making a disciplinary decision. The reason for the question was to establish whether the participants had theoretical knowledge of decision making which could assist them in making lawful, reasonable and fair disciplinary decisions. None of the participants specifically mentioned a particular decision-making model, and the assumption can be made that they do not have theoretical knowledge of decision-making processes, but acquire their knowledge through past experiences.

The participants were asked to give a step-by-step account of how they took a disciplinary decision. This was done to establish how they made a decision and what was important to the participant in the decision-making process. All the participants’ answers were evaluated and a step-by-step account of the amalgamated decision-making process is recorded as follows:

- a) The case is reported
The case is reported to the principal.
- b) Information is acquired
All relevant information is submitted in written and oral reports from the learners and educators involved.
- c) More information is acquired
In serious misconduct cases, the principal will call the parents in to obtain more information.
- d) Analysis of information
The information is analysed and evaluated against the code of conduct.
- e) Alternatives are listed
Various alternatives are put forward.
- f) Decision is made
In less serious misconduct cases, the participants will make the decision on their own; but in more serious cases, consensus is reached in a group and a decision is made.

The above steps that the participants put forward as the step-by step account of their decision-making processes, correlate with the rational decision-making model as discussed in Section 2.4.1. The similarities and divergences are listed in the table below:

Table 7: A comparison between the Rational Model and steps that the participants use

The Rational Model	The steps followed by the participants	Researcher's comments
Identify the problem	The case is reported	This means that a problem has been identified when the matter is reported to the principal.
Create criteria and generate alternatives	Information is acquired	Criteria can only be created and alternatives generated if information is available.
	More information is acquired	The participants seem to emphasise the importance of acquiring relevant information. A good practice is to involve the parents during the whole process.
	Analysis of information	A considerable amount time is used in order to analyse all the relevant information.
Consider and evaluate alternatives	Alternatives are listed	Alternatives are put forward based on the code of conduct.
Choose an alternative		
Develop an action plan and implement the decision	Decision is made	Participants state that in serious misconduct cases, the decision is made by the disciplinary committee by reaching consensus. However, it is not stated that an action plan is developed, but it can be assumed that there is a plan of action. The reason for the assumption is that such a decision leads to disciplinary action which can be a hearing.
Evaluate and monitor the decision		A good practice that came from the literature study was that principals must evaluate and monitor the disciplinary decision made, not only with regard to the one learner, but for future use in other cases as well.
Adapted from Peterson (2007:120), Lunenburg and Ornstein (2008:137) and Guo (2008:119)		

One of the main concerns that arose from this study was what happened to the learner after the disciplinary hearing. The question that comes to the fore is: what is the goal of the disciplinary decision? At this stage it seems that that every decision is taken in isolation with specific reference to a particular learner. It has already been stated that the participants tended to have a restorative approach to making disciplinary decisions because they wanted to change negative behaviour. However, it still lacks an element of developing the learner and does not state the goal that principals work towards when making disciplinary decisions. The ultimate goal of a school is to ensure that effective teaching and learning take place. The argument can be taken further in that a principal makes disciplinary decisions, not only to change behaviour, but with a crucial goal in mind: to better the academic performance of each learner.

All the participants whole-heartedly agreed when asked if there was a link between a learner's conduct and the learner's academic performance. The participants based their answers on the learner's academic reports that formed part of the learner profile compiled when a case was brought to the principal. Principal B was of the opinion that the 20 learners with the lowest scores on the academic merit list were also the top 20 learners on the behavioural demerit list. Principal B stated that in her opinion the result of continuous poor academic performance could make a learner feel inferior. Principal A agreed and contended that poor academic performance could be a possible reason for the learners' bad behaviour. It resulted in learners feeling frustrated in the academic milieu and the learners' actions could be the result of their frustrations. Two of the participants were of the opinion that an enormous problem was that the troublesome learners who performed poorly in academic work, often made it difficult for other learners to excel academically. Official A stated that this had an effect on teaching and learning because the focus of the educator was on disciplining the learner and not on delivering the curriculum. Official B stated that some schools added the most recent academic records of the learners to the documentation when recommending expulsion and this had proved to be insightful.

It was established that there was a link between poor academic performance and bad behaviour. The question that needs to be answered is how schools address the problem of bad behaviour and poor academic performance. School A follows a good practice in the manner in which it addresses a learner's conduct and the learner's academic performance:

i. Learner reports

Reports are obtained from educators and a holistic profile is drawn up. The reports are analysed and interpreted by the grade head and principal. The link between behaviour and academic performance is noted. Learners with poor academic performance and/or behaviour problems are referred to the school psychologist.

ii. Yellow card

The yellow card is a cycle roster on which the educator writes comments about the learner's behaviour and attitude towards learning; the parent is required to sign the card every day.

iii. Grade discussions

Grade discussions are held with grade heads and register teachers to determine which learners have academic and/or behavioural problems. These learners are referred to the school psychologist with the purpose of diagnosing problems and motivating learners.

iv. School psychologist

Each learner with academic and/or behavioural problems is interviewed by the school psychologist as part of an intervention programme. The school psychologist, together with the principal, will determine a recommended plan of action that could be implemented. The parents are also interviewed and recommendations are made, for example: When a learner has been underperforming academically, he/she will be tested to determine learning problems. Alternative assessment is part of the intervention that the school will recommend to the parents.

The participants were asked whether they could share success stories where the focus was initially to change behaviour, but ultimately to alter academic performance. The following are such success stories:

- a) The deputy principal of School A mentioned that a boy had contravened the code of conduct by having pornographic material in his possession, and his academic performance was poor. He underwent the intervention programme as suggested by the school psychologist: his behaviour changed and his academic performance improved.

- b) Principal B reported the incident of a female learner who lived in a children's home and displayed serious behavioural problems. After all avenues had been explored with little success, the principal placed her on 'parole', which meant that all detentions and demerits were rescinded. The principal engaged in a positive manner with the learner over a period of time. Her behaviour changed and she even received an academic prize for the best learner in the drama class.
- c) The principal of School C related the incident of a female learner who was performing poorly in her academic work and had behavioural problems. An educator interviewed the parents and recommended that the learner be referred to a psychologist, which the parents did. The learner's behaviour, as well as her academic performance, improved.
- d) Principal D related the event of a male learner who had serious behavioural problems. The principal addressed him several times and he was brought before the School Governing Body disciplinary committee for a hearing for several behavioural transgressions. Ultimately, the principal elected him as a school prefect and this changed his attitude dramatically. This had a permanent positive effect on the behaviour and academic performance of the learner.
- e) Official B related the successful case of a Grade 8 boy who was recommended for expulsion. The Head of Department decided not to expel the learner and the school was furious about the decision. Four years later the principal phoned Official B telling him that the learner had totally reformed. He became deputy head boy and hockey captain.

It is possible that learners' behaviour can change and that their academic performance can improve if that is the goal of the disciplinary decision from the onset. A question was put to the participants whether the decision differed if the seriousness of the transgression differed. Two participants were of the opinion that the method of the decision would differ, but did not state to what extent or in which manner it would differ. The rest of the participants agreed that the way in which a decision was reached for less serious misconduct and more serious misconduct, was similar in method, but the sanction would differ. One participant stated that she would make a decision "on the spur of the moment" with regard to less serious instances of misconduct. In cases where learners were guilty of serious misconduct, she would apply her mind "not to put a foot wrong". Official B

agreed that every case should be treated consistently. An important remark made by one of the participants was that emotions and anger should not be part of the decision-making process and each case should be heard in a calm state of mind.

Before recommendations can be made on a disciplinary decision-making model that can be used in schools, all relevant pitfalls must be shown in order to create a solution. The principals were asked what frustrations they had experienced with regard to disciplinary decisions. Their answers can be summarised as follows:

- a) Parents offer excuses for their child's behaviour and do not listen or realise that there is a problem. Some parents are scared to punish their children.
- b) Some parents question the motives of the principal.
- c) The WCED does not support the school sufficiently with regard to disciplinary decision making.
- d) Educators do not apply the code of conduct consistently.
- e) Educators make decisions when they are in an emotional frame of mind. They insist that the learner must be immediately and severely punished.
- f) Some educators are angry with the principal if the punishment she has decided on is not severe enough.
- g) When some educators make a disciplinary decision, the objective is to take revenge on a learner.
- h) Some educators overreact and take uninformed decisions. They make comments on the disciplinary decisions the principal has made, although they don't have all the information or the background.
- i) Some educators want to be popular and do treat learners equally.

It can be seen that the frustrations principals have with regard to disciplinary decision making can be divided into three categories. Their frustrations are linked to the actions of parents, the WCED and teachers. An assumption can be made that there will be always parents finding fault and offering excuses for their children's' behaviour. The frustrations linked to the actions of the WCED have been discussed. There is an definite need for training of principals and for clear communication between principals and the WCED with regard to disciplinary decision making. As seen in the list of frustrations that the principals gave, the prevalent frustrations are about the conduct, omission and attitudes of educators

related to disciplinary decision making. As stipulated before, it is highly unlikely that anything will be achieved, unless there are set goals to work towards. Educators must support and contribute to setting these goals.

The same question was put to the officials to establish what their frustrations were regarding disciplinary decision making. These can be listed as follows:

- a) Official A was frustrated in cases where principals were unfair and unwilling to listen to a parent with regard to the situation. He mentioned an example where a principal sent a learner home after he had transgressed the code of conduct. The parent was not called in to take the learner home. The learner had to leave school by himself. When the parent wanted to speak to the principal, he ignored him.
- b) Official B was frustrated when schools did not apply the correct procedures. He stated that schools recommended expelling learners because they were guilty of very serious misconduct, but their processes and documentation were riddled with mistakes. It was difficult to support the school if the minutes of the disciplinary hearings did not make sense.

Communication and training are as important for principals as for educators. Based on the demographic information of the participants, the information given by the participants, and the discussion in Section 5.3.1, it can be assumed that principals and educators tend to base their decisions on experience, rather than on information received through training. Again, the solution is knowledge that can be acquired through communication and training.

Questions were put to the participants to establish to what extent they received support from the WCED and their School Governing Bodies. The reason for the questions was to establish whether the principals had a support system and if a communication channel existed between principals and the WCED. Three of the four principals noted that they received tremendous support from the district office but not from the WCED head office. One of the participants contended that when a recommendation for expulsion was sent to the head office of the WCED, a decision was reached based on the written documents of the disciplinary committee. The question was: “Why can’t the school be heard again? Why can’t the principal be part of that decision?” It is clear that the participant did not understand the *audi alteram partem* principle. If the school were allowed to state its case,

an equal opportunity would have to be given to the learner. The feasibility of each school to be heard is impracticable.

Principal B was of a different opinion and indicated the reason why the support of the WCED had changed. She mentioned that when she started as principal, the school struggled with difficult learners, but the WCED gave little support to the school in authorising recommendations for expulsion. However, this support systematically changed. The principal felt that the reason for this change was because the school did their homework. The school focused on keeping a paper trail and developing an intervention programme. The principal was of the opinion that because their homework was done, the paper trail was in place and the intervention programme was followed, the support of the WCED had increased.

In response to a question how the School Governing Bodies supported principals in making disciplinary decisions, three of the participants stated that the School Governing Body did not have a role to play in disciplinary decisions outside a disciplinary hearing. In this regard the School Governing Body brought a sense of objectivity to a disciplinary decision. The principal of School D felt that the School Governing Body was involved in disciplinary decision making at all levels and assisted where they could. The disciplinary coordinator is an employee, paid by the School Governing Body, and is expected to inform them on disciplinary issues and decisions. A good practice is where the School Governing Body has a lawyer member or makes use of a law expert that can assist the principal.

5.3.7 Is a disciplinary coordinator part of the solution?

It has been stated that knowledge is the key to successful decision making. Apart from the knowledge issue, there is the problem of the time that dealing with a disciplinary case takes. As part of a solution to alleviate the burden that rests on the principal, the possibility of using a discipline coordinator was investigated. Schools A and D make use of a discipline coordinator with great success. According to principal D, the discipline coordinator takes considerable pressure off the educators. The discipline coordinator is employed by the School Governing Body. School B and C would like to appoint such a person but do not have the necessary funds available.

Principal C stated that he had heard of schools that employed such a person and mentioned that this could enhance the overall discipline of the school. However, it is critical to have the right person in the post, preferably somebody that has experience in education. Principal B thought it a good idea to have such a person on board but raised the concern that one person was not enough to do the work. Official B felt that it would be a good thing, because one person would coordinate all the responsibilities related to learner discipline and one could rely on that person for assistance regarding learner discipline.

The participants were asked what responsibilities the discipline coordinator would have on a daily basis. The following responsibilities were mentioned as part of this position.

- a) The discipline coordinator works within the broader picture of school discipline.
- b) His or her role includes dealing with learners that arrive late at school and learners that have to leave early.
- c) The discipline coordinator handles daily absenteeism as well as absenteeism during class periods. He/she will contact parents regarding absenteeism.
- d) The discipline coordinator organises disciplinary hearings in conjunction with the principal or School Governing Body.
- e) The discipline coordinator handles detention classes and the capturing of learners' demerits.
- f) The discipline coordinator is the person to whom all serious disciplinary cases are reported.
- g) The discipline coordinator coordinates the intervention programmes.
- h) The discipline coordinator keeps the paper trail up to date.
- i) The discipline coordinator liaises with the WCED, parents and social workers, psychologists and counsellors.
- j) The discipline coordinator compiles statistics on learner transgressions and disciplinary hearings in order to establish trends in learner behaviour.

During the interview the participants were asked what the advantages and disadvantages of having a disciplinary coordinator at school were. The participants felt that the discipline coordinator could assist educators a great deal. The time wasted by educators on disciplinary issues would be reduced and they could focus on teaching/academic work. A

very important point that was made was that the correct person should be appointed in the position of discipline coordinator for it to be a success. A participant stated that a disadvantage could be that some educators might think that no aspect of discipline was their responsibility any longer and they would “bombard” the discipline coordinator with insignificant issues. This would lead to the disempowerment of some educators. A further disadvantage is that there could be a conflict of interest if the discipline coordinator has family ties in the school.

CHAPTER 6

OVERVIEW, FINDINGS AND CONCLUSION

6.1 INTRODUCTION

An enormous burden of responsibility is placed on the shoulders of the principal since discipline issues are complex (Botha, 2004:239). Sufficient knowledge of and experience in the field of disciplinary decision making is the key to a principal's ability to take disciplinary decisions that are lawful, reasonable and fair. The context and content needed by the principal to make meaningful disciplinary decisions was investigated. A summary of the findings from a theoretical viewpoint, as well as in-depth field research, should equip a principal to make lawful, reasonable and fair disciplinary decisions.

6.2 THE RESEARCH PROCESS

The aim of the research was to establish:

- what the legal requirements are that should be considered in taking disciplinary decisions that are lawful, reasonable and fair; and
- how these disciplinary decisions can be made more effectively?

The following schematic diagram serves as a mind-map to illustrate the process of research.

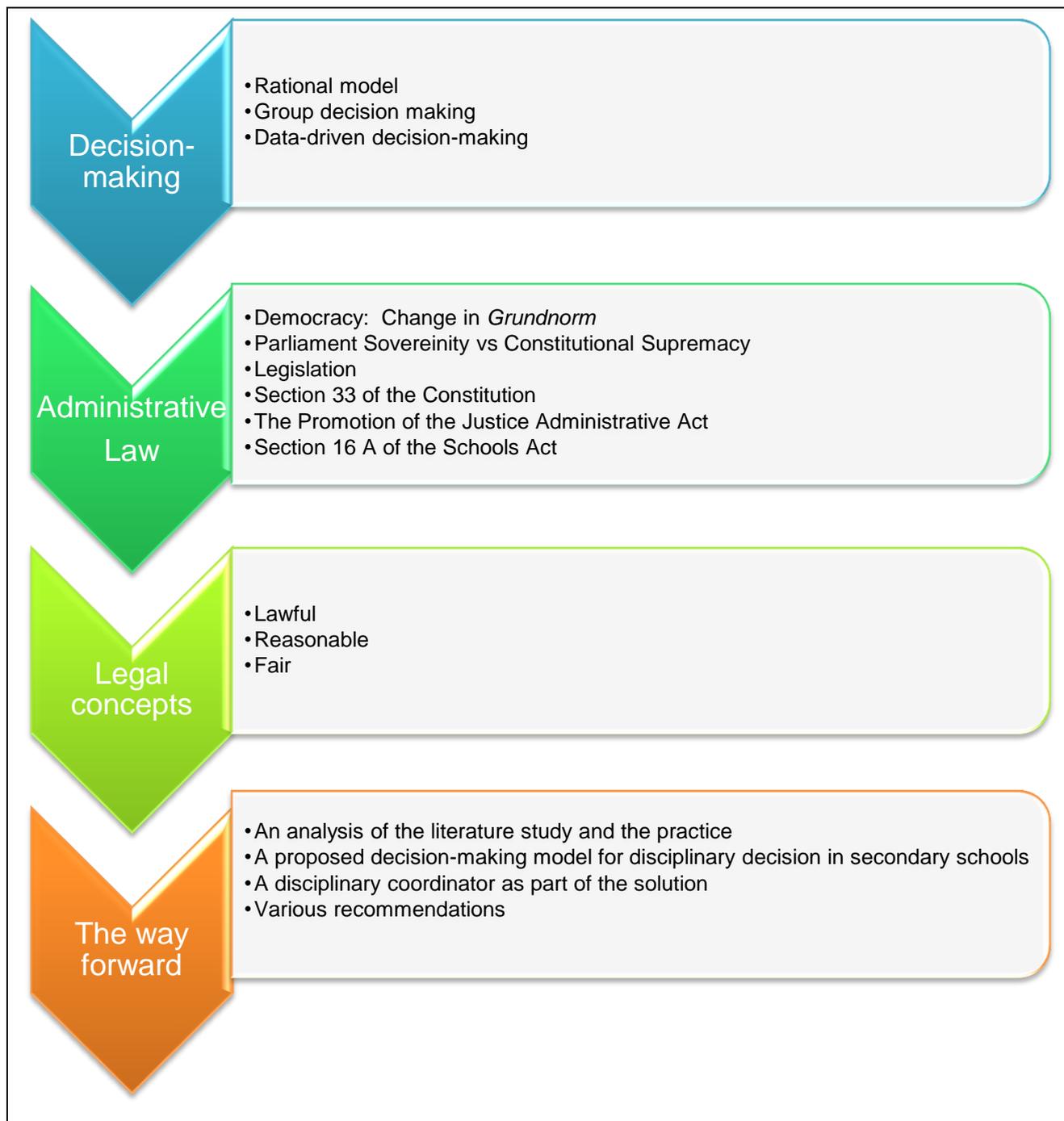


Figure 12: The research focus

Rational and group decision making was investigated because the assumption exists that these models are used in an educational setting (Guo2008:119). It was contended that the accountability of the principal with regard to learner performance is under the magnifying glass. The principal therefore needs a decision-making model that can cater to the need/requirement for higher accountability in learners' academic performance. All decisions taken in a school need to be in accordance with a comprehensive goal in mind.

A comprehensive goal, with regards to the purpose of this research, is to improve teaching and learning which will lead to better academic performance of all learners and specifically those learners who regularly transgressed the code of conduct. With this comprehensive goal in mind the school as a whole entity will improve. A data-driven decision-making model can address such a goal. In Chapter 2 the data-driven decision-making model was researched. In Chapter 5 the participants' perspectives on decision making were discussed. Recommendations are made in Section 6.5.1.

It was stated that the purpose of the study was to understand the context and content of section 33 of the Constitution, the PAJA and section 16 A of the Schools Act against the backdrop of Administrative Law. In order to understand this particular legislation, concepts of democracy, parliamentary sovereignty and constitutional supremacy were investigated. This led to a thorough investigation of the legal concepts of *lawful*, *reasonable* and *fair*. Primary sources, articles and case law formed the foundation of the research for the researcher to understand the relevant concepts and to establish what important information was needed by a principal to make a lawful, reasonable and fair decision. The literature study was compared with the information given by the participants in Chapter 5. Recommendations and the crux of each concept are given later in this chapter.

6.3 SUMMARY OF FINDINGS

The structure the study can be summarised in the following figure:

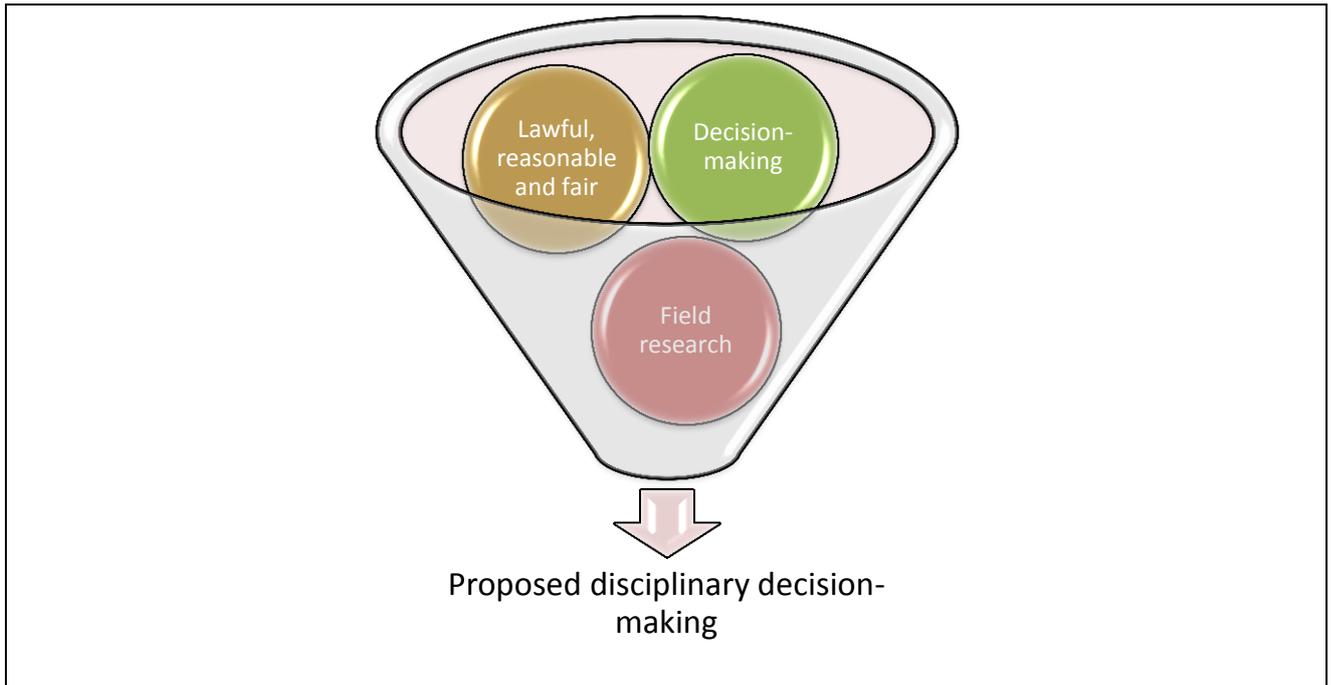


Figure 13: Summary of research concepts

Decision making, lawfulness, reasonableness and fairness were combined with field research with the aim of establishing the legal requirements that should be considered in taking disciplinary decisions that are lawful, reasonable and fair, and how these disciplinary decisions can be made more effectively. To achieve the abovementioned aim, findings are listed in relation to every sub-aim as discussed in Section 5.1.

6.3.1 Findings based on research question 1

What is the meaning of the legal concepts of lawful, reasonable and fair in disciplinary decision making?

6.3.1.1 Lawful

The following information is critical for a principal to make a decision that is lawful. An administrative decision that a principal makes can be reviewed in the following circumstances:

- **The requirement of authority**

A principal must obey the law and can only take a decision if authorised by law. It is therefore important for a principal to establish the authority under which a decision is

taken. It must be stated that the Schools Act is not the only legislation that guides a principal. Section 16 A(2)(f) of the Schools Act states that the principal has to inform the School Governing Body on policy and legislation (RSA, 1996c). The word 'legislation' for the purpose of this research implies all legislation relevant to education. The legislature presupposes that a principal has sufficient knowledge of legislation to be able to take sound decisions and with correct information.

- **The concept of jurisdiction**

A principal is confronted on a daily basis with the interpretation of legislation to establish his or her boundaries of authority and jurisdiction. An error of law can be defined as a wrong or mistaken interpretation of a legislative provision (as discussed in Section 3.4). It was established that the following are common mistakes related to the interpretation of legislation or applicable regulations dealing with appointment and composition of disciplinary committees:

- a) principals are the chairpersons of disciplinary committees;
- b) principals act as prosecutors and witnesses and take part in deliberations;
- c) School Governing Bodies fail to co-opt experts, such as parents with expertise in the field of law;
- d) Some schools make use of members of the representative council of learners.

It was found that principals are not familiar with the content of applicable provincial regulations relating to the disciplinary procedures to be followed. In the case of the Western Cape, the *Regulation relating to the disciplining, suspension and expulsion of learners at public schools in the Western Cape* (Province of the Western Cape, 2011), serves as a tool to assist a principal to remain within the jurisdiction of the position.

Internal hearings conducted by the disciplinary committee in less serious cases constitute good practice, provided the procedures and other relevant information are written as part of the code of conduct of a school. Impartiality and objectivity are increased because it is not only the principal that makes the decision, but a committee. However, the principal should be aware of the disadvantages of group decision making as discussed in Section 2.4.3.3.

There is also a need to take cognisance of the following practices:

- a) Learners must be given an opportunity to plead because they have a right to state their case.
- b) An actual School Governing Body meeting must be held in person to endorse the recommendation made by the disciplinary committee. It is unreasonable towards the learner to ratify the recommendation via an email.
- c) The minutes of the disciplinary hearing constitute the only document that the Head of Department has to make a life-altering decision with regard to a learner. Therefore, it is critical to ensure that the minutes of the disciplinary hearing are up to standard.

- **Abuse of discretion**

There are several disciplinary decisions that a principal needs to take on a daily basis that require the use of discretion. The participants agreed that the code of conduct and the Schools Act serve as guidelines for principals in making disciplinary decisions. This opinion of the participants needs to be addressed as follows:

- a) It was established that the participants rely heavily on the code of conduct and the Schools Act as guidelines in making discretionary decisions. Other legislation and regulations exist that have a direct impact on disciplinary decision making and principals should be alerted to this legislation and these regulations.
- b) In the code of conduct of the different schools it became evident that not all situations are covered in the code of conduct.
- c) It was found that the different schools accommodate the input of learners in their buy-in on the code of conduct. It is commendable that the learners of one school wrote their own Bill of Rights; this is an example of good practice.

6.3.1.2 Reasonable

In order to guarantee consistency in reasonableness, a principal needs to take cognisance of the following to set standards of reasonableness with regard to disciplinary decision making:

- a) All four schools use information of previous cases as guidelines for new cases to set or create a standard of reasonableness.

- b) Principals need to be aware of the legal concepts of rationality and proportionality. In respect of rationality and proportionality, the following questions must be asked by the principal to ensure reasonableness in disciplinary decision making:
- i. What is the nature of the right at stake and the decision?
 - ii. What is the expertise of the principal making a disciplinary decision?
 - iii. What is the range of factors relevant to the situation?
 - iv. What is the nature of the right of the learners who transgressed the code of conduct measured against the competing rights of the other learners?
 - v. What will the impact of the decision be on the lives and wellbeing of the learners affected by the disciplinary decision of the principal?
 - vi. Is the evidence rationally related to the final decision of a particular punishment?
 - vii. What is the purpose for which the decision was made?
 - viii. Is the decision maker empowered to make the particular decision?
 - ix. Do the reasons given to the learner and the parents rationally and logically link to the transgression of the learner?
 - x. What is the importance of the purpose sought to be achieved by the disciplinary decision made by the principal?
- c) In the interviews it clearly emerged that principals relied heavily on the school's code of conduct.
- d) As already stated the principals rely on a code of conduct alone.
- e) It is crucial for the principal to acquire the following information in order to make the right decision:
- i. a learner profile that consists of
 - an academic profile and progress report of the learner,
 - an absence and school attendance record, and
 - a social skills report of the learner.
 - ii. the input of the school psychologist;
 - iii. the parents' side of the story;
 - iv. the learner's knowledge of which rule was broken;

- v. the learner's side of the story;
 - vi. the personal circumstances of the learner;
 - vii. possible medical conditions of the learner and whether he/she is medicated or not; and
 - viii. whether or not the learner is a first-time offender.
- f) A good practice that emerged from the interviews is that the schools applied the restorative justice approach. As part of the restorative justice approach to discipline, it is critical for a principal to base disciplinary decisions on values. The following values need to be taken into consideration:
- i. Is it of service to others?
 - ii. Is human dignity upheld?
 - iii. Do you strive for excellence?
 - iv. Has the integrity of all parties been honoured?
 - v. Has the process been consistent?
 - vi. Have the safety and rights of other learners been considered?
 - vii. Has the process been just and fair?
 - viii. Has the process been restorative in nature in order to remediate behaviour?
 - ix. Has the process been reasonable?
- j) A paper trail of all interventions must be kept. Although the administrative process is cumbersome, the information stored for future disciplinary hearings of a specific learner are valuable and indispensable. If recommendation for expulsion is made to the Head of Department, the information on which the intervention was based is readily available and ensures just administrative action which complies with the legal concept of reasonableness.

6.3.1.3 Fair

Knowledge of the legal concepts of substantive and procedural fairness is fundamental in the outcome of every recommendation that is made for expulsion to the Head of Department.

- a) The following questions must be asked to establish substantive fairness: (Adapted from Van Kerken, 2003:153; Rossouw & Oosthuizen, 2004:42; Prinsloo, 2009:213):
- i. Was the person aware of the rule broken?
 - ii. Was there a valid reason for disciplinary action?
 - iii. Were the expectations to conform to the rule lawful and reasonable?
 - iv. Was the rule or standard consistently applied?
 - v. Was there consideration of mitigating and aggravating factors?
 - vi. Was there sufficient proof of the misconduct?
 - vii. Was the sanction imposed on the learner appropriate and suitable in the light of the proven reason?
- b) The concept of substantive fairness did not come to the fore in the interviews with the participants. The participants added the following that a principal needs to take into consideration when making a disciplinary decision:
- i. the social circumstances and background of the learner;
 - ii. whether the learner was provoked;
 - iii. the reason/s why the learner behaved in such a manner; and
 - iv. the impact the behaviour of the learner had on other learners.
- c) Procedural fairness is linked to the *audi alteram partem* principle and to the common law principle of *nemo iudex in sua causa*. The common law principle of *nemo iudex in sua causa* is frequently described as the rule against bias, therefore guaranteeing impartiality (Hoexter, 2007:404). The *audi alteram partem* principle, as shown in 3.3.2, encompasses the following:
- i. adequate notice of the proposed administrative action;
 - ii. a reasonable opportunity to make representations;
 - iii. a clear statement of the administrative action;
 - iv. adequate notice of the right of review or appeal;
 - v. adequate notice of the right to request reasons for the decision made;
 - vi. legal representation;
 - vii. an opportunity to present and dispute information and arguments; and

- viii. personal appearance.
- d) A good practice is to analyse the merit and demerit list on a weekly basis in order to establish trends in learner behaviour. By analysing learner behaviour, a principal can develop and implement strategies before learner behaviour gets out of hand.
- e) A good practice that emerged was that schools have a non-confrontational approach in a disciplinary hearing to ensure impartiality and fairness.
- f) Impartiality is crucial in a disciplinary hearing in order to be deemed fair. All the participants should be commended in the manner how they ensure impartiality within a hearing.
- g) Objectivity and fairness are also increased if the roles of the prosecutor and witness are well defined as with regard to Schools A, B and C.
- h) It is good practice to have internal hearings also for less serious misconduct, provided that the necessary attention is paid to impartiality and fairness.

6.3.2 Findings based on research question 2

What are the context and content of Section 33 of the Constitution, the PAJA and Section 16 A of the Schools Act?

- a) Principals tend to use only the Schools Act as a legal framework for disciplinary decision making. Although section 16 A(1)(d), (e) and (f) of the Schools Act presuppose that a principal has specialised knowledge in dealing with disciplinary matters pertaining to learners, educators and support staff, it appears that principals are not familiar with the legal documents that form the framework for disciplinary decision making. The following can be seen to form part of the legal framework for disciplinary decision making:
- *The Constitution of Republic of South Africa, Act 108 of 1996;*

- Common Law principles;
 - Case Law;
 - Regulation relating to the disciplining, suspension and expulsion of learners at public schools in the Western Cape; and
 - Policy framework for the management of drug abuse by learners in schools and in public further education and training institutions.
- b) It was found that the principals do not make sufficient use of section 33 of the Constitution, the PAJA and section 16 A of the Schools Act. It was established that principals do not know that legislation like the PAJA influences education.
- c) The importance of case law can never be over emphasised and it was found that the principals of the participating school focus only on cases that are communicated in the media.
- d) Identifying the roles that need to be played in disciplinary decision making is critical for maintaining discipline in a school. The principal is ultimately responsible for disciplinary decision making in a school. In order to carry this responsibility, the principal needs to surround him/herself with dedicated, capable and knowledgeable persons in order to make decisions that are lawful, reasonable and fair. Grade heads, senior staff members and deputy principals are valuable human assets to a principal.
- e) Common mistakes that occur in disciplinary decision making are:
- i. there is insufficient intervention;
 - ii. procedures are not followed;
 - iii. reports/documents are put forward by the school for the first time at the deliberation of the committee without the learner or parents having seen it;
 - iv. the learner is a first-time offender;
 - v. Objectivity is compromised and a learner is found guilty before a disciplinary hearing takes place;
 - vi. The prescribed annexures within the Regulation relating to the disciplining, suspension and expulsion of learners at public schools in the Western Cape, are not used;

- vii. The minutes of the disciplinary hearing are inadequate;
 - viii. The procedure that stipulates what must be done if a learner does not attend the disciplinary hearing for the first time, is not followed.
- f) It was found that there is a level of animosity between some schools and the WCED. A perception exists that the WCED is on a fault-finding mission and that the School Governing Body's recommendation to expel a learner is not respected. Some principals felt that the WCED is out of feeling with what is happening in schools. Communication between the WCED and principals is critical in order to change these perceptions. It was thought that the WCED should approach the principals, but a good practice is for the principals to make an appointment with the committee handling the recommendation for expulsion at the WCED. Perceptions can only be altered through dialogue and acquiring the necessary knowledge and information.
- g) It was mentioned in Section 5.3.5 that some principals do not understand the authority of the Head of Department in deciding on the expulsion of a learner or the concept of due process that is mentioned in section 9(3)(c) of the Schools Act (RSA, 1996c). Principals need to respect the authority that is invested in the Head of Department by legislation, as well as the fact that each learner has a right to due process. A sense of trust must be instilled between principals and the WCED in order to address to the call of section 28(2) of the Constitution (RSA, 1996a) which states that the "best interest of a child is of paramount importance".

6.3.3 Findings based on research question 3

Which decision-making processes could assist the principal to take disciplinary decisions that are lawful, reasonable and fair?

- a) As discussed in Section 5.3.6, it is evident that principals made decisions based on knowledge acquired through experience and not based on theoretical knowledge.

- b) A basic decision-making model is used by the principals, which is very similar to the rational decision-making one. It consists of the following steps:
- i. the case is reported;
 - ii. information is acquired;
 - iii. more information is acquired
 - iv. information is analysed;
 - v. alternatives are listed; and
 - vi. a decision is made.
- c) As illustrated in Table 8, a good practice emerged from the literature study which indicated that principals need to evaluate and monitor the disciplinary decision made, not only with regard to the one learner, but for future use in other cases as well.
- d) Principals need to answer the following questions:
- i. What is the goal of the disciplinary decision?
 - ii. What needs to be accomplished with the disciplinary decision?
 - iii. Which strategies do the school employ in order to change behaviour and ultimately develop the learner to perform and excel academically?
- e) There seems to be a large discrepancy between the decision-making model that is currently used and the one that needs to be used. The ultimate goal of a school is to ensure that effective teaching and learning takes place and the academic performance of every learner is of the utmost importance in every decision that is made. There is a need for a decision-making model that addresses the abovementioned goals in relation to disciplinary decision making.
- f) It was found that the participants focus on strategies to address the link between ill-behaviour and poor academic performance. The following good practices can form part of such strategies:
- i. Holistic learner reports can be analysed in order to dictate a plan of action.

- ii. A learner carries a cycle roster card on which the educator writes comments about the learner's behaviour and attitude towards learning and the parent is required to sign the card every day.
 - iii. Grade heads and register teachers need to have regular grade discussions to determine trends in learner behaviour and to discuss particular learners in order to address their behaviour and academic performance.
 - iv. Every learner with academic and/or behavioural problems is interviewed by the school psychologist as part of an intervention programme. The participants are asked whether they could share success stories where the focus has been to change behaviour, but ultimately alter academic performance.
 - v. Based on the success stories related by the participants, it is possible to alter behaviour and improve academic performance. Schools need to network and communicate with one another in order to establish good practices that work.
- g) The frustrations that principals experience in disciplinary decision making can be divided into three categories, namely frustrations related to Department of Education, parents, and educators. The crux of the solution as already discussed in Section 5.3.6 is knowledge that can be acquired through dialogue and communication with all parties involved.

6.3.4 Findings based on research question 4

What are the advantages of having a disciplinary coordinator in assisting the principal in making disciplinary decisions that are lawful, reasonable and fair?

- a) A discipline coordinator can assist the principal with regard to maintaining discipline, investigating transgressions, organising disciplinary hearings and disciplinary decision making.
- b) A discipline coordinator can enhance the overall discipline of a school, provided the correct individual, who has experience in education, fills the position.
- c) The responsibilities of the discipline coordinator can consist of the following:

- i. Working within the broader picture of school discipline and its organisational nature.
- ii. Dealing with learners that come late for school and learners that have to leave early.
- iii. Handling daily absenteeism as well as class attendance, and contacting parents regarding absenteeism.
- iv. Organising disciplinary hearings in conjunction with the principal.
- v. Handling weekly detention and the capturing of learners' demerits.
- vi. Recording all new disciplinary cases.
- vii. Coordinating the intervention programme.
- viii. Keeping the administration and paper trail updated.
- ix. Supporting the learners.
- x. Liaising with the WCED, parents, social worker and psychologist for help or counselling.
- xi. Compiling statistics for better planning and establishing trends in learner behaviour.

In Section 5.3.7 (f) the principal of School A mentioned that the discipline coordinator is the person to whom all serious disciplinary cases are reported. Section 13.2 of the Guidelines for the consideration of governing bodies in accepting a code of conduct for learners state:

Any learner alleged to have violated any rule that may require suspension or expulsion, must be brought to the principal. The principal shall hear the evidence and then decide on the action to be taken. Such action must include that the principal must inform the parents in writing of the proposed action and arrange for a fair hearing by a small disciplinary committee (tribunal) consisting of members designated by the governing body.

Section 13.2 of the Guidelines for the consideration of governing bodies in accepting a code of conduct for learners clearly indicate that if a learner violated any rule the matter must be brought to the attention of the principal. The *delegatus delegare non potest* principle prevent this function to be delegated to the coordinator. The authority and decision-making power has been, in terms of Section 13.2 of the Guidelines for the consideration of governing bodies in accepting a code of conduct for learners, delegated to the principal. The regulation doesn't specifically authorise the principal to delegate the function to the discipline coordinator that was delegated to him/her.

6.4 CONCLUSION

Disciplinary decision making is a complex phenomenon, which is sometimes done intuitively and with limited personal experience. Legislation in general, and specifically section 16 A of the Schools Act (RSA, 1996c), presuppose that principals have knowledge of the law in exercising their power and assuming the responsibilities accorded to them by all stakeholders. It is important to focus on good practices, but the crux remains that principals need training in all relevant education law issues.

6.5 RECOMMENDATIONS

The most important question a principal needs to ask is: What is the reason for the decision? Although the reason for a disciplinary decision is to alter bad behaviour, the decision should go a step further. The question must be: What must the decision be in order to change behaviour and to increase the academic performance of a learner? Principals and educators need a decision-making model that can cater to the requirement of greater accountability in learner academic performance.

6.5.1 A new method of disciplinary decision making

In order to propose a disciplinary decision-making model based on good practices and on the literature study, there is the need to reiterate the definitions of an administrative action, a decision and data-driven decisions.

- **Administrative action**

According to the PAJA, an action qualifies as an administrative action if the following requirements are present:

- there must be a decision;
- the decision must be of an administrative nature;
- the decision must be made under the empowering provision;
- the decision must be made by an organ of the state or by a private person when exercising a public power;

- the rights of a person must be adversely affected; and
- there is direct external legal effect.

- **Decision**

The definition of a decision was thoroughly discussed in Section 2.2 and was clarified for the purpose of the study as: Decision making is a rational process with the purpose of finding the best alternative for the problem identified in order to achieve the school's aims.

- **Data-driven decision making**

Preuss (2007:10) defines data-driven decision making as follows:

Data-driven decision making is a system of deeply rooted beliefs, actions and processes that infuses organizational culture and regularly organizes and transforms data to wisdom for the purpose of making organisational decisions.

The abovementioned concepts are separate but need to be interwoven to contribute to the body of knowledge that exists on disciplinary decision making. The aim of the following diagram is to show the logical thought process and the relationship between the concepts, ultimately resulting in a lawful, reasonable and fair disciplinary decision (see Figure 14) .

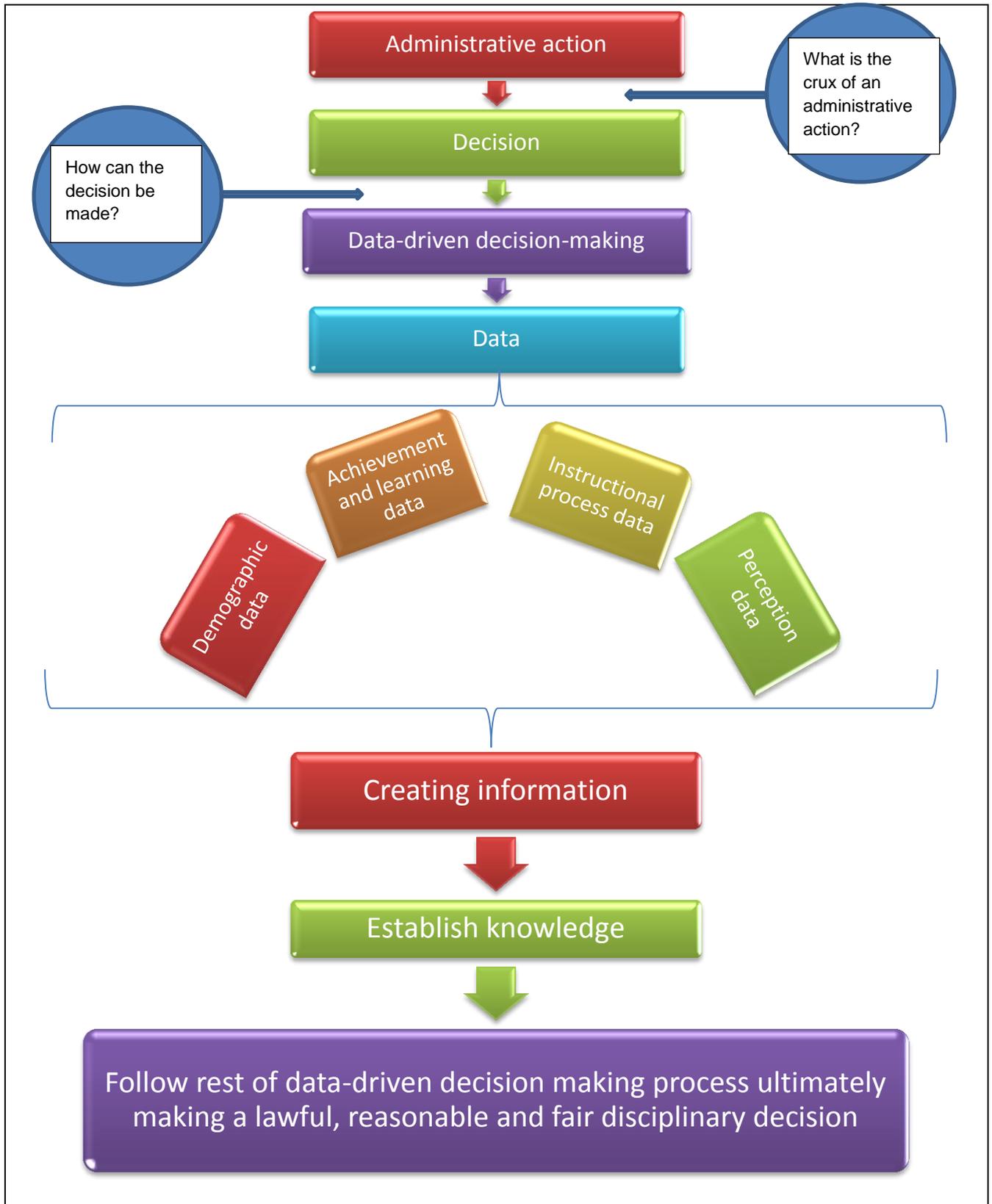


Figure 14: Relation between administrative action, decision and data-driven decision making

A question that arises is whether a disciplinary decision can be seen as an administrative action. The requirements proposed by the PAJA need to be compared with the phenomena of a disciplinary decision. In Table 8, such a comparison is made:

Table 8: A comparison between an administrative action and a disciplinary decision

Requirements for administrative action	Disciplinary decision
“There must be a decision”	A disciplinary decision is made by a principal either to refer the case to the School Governing Body, or to deal with the case in terms of the code of conduct.
“The decision must be of an administrative nature”	A disciplinary decision is of administrative nature because, when a principal is making a decision, he/she is implementing policy that was made by various role players.
“The decision must be made under the empowering provision”	A principal is empowered under section 16 A(1)(d) of the Schools Act (RSA, 1996c) to assist the School Governing Body in maintaining discipline pertaining to learners.
“The decision must be made by an organ of the state or by a private person when exercising a public power”	A principal exercises public power and a school, as well as the School Governing Body, is seen as an organ of the state as discussed in Section 2.3.3.1.
“The rights of a person must be adversely affected”	An example where a learner’s right to education is adversely affected is when he/she is suspended or expelled.
“There is direct external legal effect”	Disciplinary decisions are linked to section 9 of the Schools Act (RSA, 1996c) in order to suspend or expel a learner. Not only the learner or the school is affected by the decision, but also the whole family of a learner who is suspended or expelled. Suspension and expulsion, which are part of the decision taken according to prescribed processes, are legally binding.

With Figure 14 in mind, Table 8 shows that an administrative action is basically a decision (the what); that disciplinary decision can be seen as an administrative action. The data-driven decision model can be seen as the ‘how’ to make the disciplinary decision which is to transform raw data into knowledge that is critical to making disciplinary decisions that are lawful, reasonable and fair. The ultimate aim of data-driven decision making is to inform decision making in the whole of the organisation: it is a positive force that focuses

on the continuous improvement of the organisation (Preuss, 2007:10). Data is critical in making disciplinary decisions that will continue to improve a school. The question that arises is: what data can be accumulated in order to create enough knowledge to be the basis for a disciplinary decision?

6.5.1.1 Types of data linked to data needed for a disciplinary decision

The following document (Table 9) can double as a learner profile which can be used to accumulate raw data that can assist a principal to ultimately make a disciplinary decision based on knowledge.

Table 9: A basic learner profile which can serve as a tool to collect and organise relevant data

Name of learner	
<i>Demographic data</i>	Age
	Gender
	Grade level
	Socio-economic circumstances
	Social skills of the learner
	Personal circumstances
	Parent involvement
	Medical condition
	Medication taken?
<i>Achievement and learning data</i>	Proficiency levels
	Progress levels
	Academic profile with recent report card

<i>Instructional process data</i>	Attendance
	Truancy
	Absence
	Disciplinary issues
	Merits
	Demerits
<i>Perception data</i>	Input of the school psychologist
	Parents' side of the story
	Learner's knowledge of the broken rule
	Learner's side of the story
Adapted from information received from participants	

6.5.1.2 The transition from data to information to knowledge

In order to create knowledge from raw data, the following chronological process needs to be followed:

- A principal collects and organises the data with the proposed learner profile discussed in Table 9.
- The principal needs to analyse and summarise the data in order to become familiar with the information.
- The concepts of *lawful*, *reasonable* and *fair*, that are summarised in Section 6.3.1, as well as the summary in Section 6.3.2 on section 33 of the Constitution, the PAJA and section 16 A of the Schools Act, become standard information that needs to be interwoven with the learner's profile in order to create knowledge for a particular instance or case. The massive volumes of information are unified and concatenated in a process of synthesising which becomes knowledge. The

principal has the responsibility to prioritise and judge the value and importance of the knowledge. At this stage, the principal follows the steps in the data-driven decision-making model.

6.5.1.3 The steps a principal needs to take in a data-driven disciplinary decision

The steps of a data-driven disciplinary-decision will be discussed with the following scenario in mind:

Scenario 1: Liam is a grade 9 learner in a suburban school, who lives with his biological parents. His academic performance is below average, and he has been placed in detention several times for minor transgressions like not doing homework and disrupting classes.*

In the Western Cape, learners need to be at school during the June examinations until 13:00. Examination papers are written in the last part of the session. Liam and three other friends left the school just after register period and went to a friend's house. They watched a video and start drinking whisky. After a few hours, they went back to school to write the exam. One of the learners that had gone with Liam vomited in the exam venue. Mrs Ritz reported the case to Mr Green*, the deputy principal. After Liam and his three friends had written the exam, the deputy principal investigated the situation and the boys cooperated and told the story. The case was reported to the principal who used the rational model and decided to refer the case to the disciplinary committee for a formal hearing. The disciplinary committee recommended to the School Governing Body that Liam and his friends should be suspended for seven days and should receive professional help regarding the problem. The disciplinary committee also made it clear that should Liam be called for a disciplinary hearing again, expulsion would be recommended to the Head of Department. The School Governing Body agreed with the sanction.*

Three months later, Liam was accused of stealing a cellular phone from Albert. Albert told his parents that Liam had stolen his phone and threatened him by stating that his gangster friends would "take care of him" if he told anybody. Albert did not want to go to school. Albert's parents approached the principal, Mr Kriek*, with the story. Mr Kriek gave*

*instructions to the deputy principal to investigate the allegations. On investigation of the case, the deputy principal, Mr Green, was informed by another learner that Liam had stolen and sold the cellular phone in order to pay a debt to a local gangster who had allegedly sold dagga to Liam. Mr Green received information that Liam was using dagga on the school grounds with other learners. Liam tested positive for the use of dagga and when Mr Green confronted Liam, he admitted to using the drug on school grounds during school time. Feedback was given to the principal, who could make his disciplinary decision either by using the rational model as the participants used, or the data-driven decision-making model. (*All names have been changed to protect the identity of the individuals.)*

- **Decision made by rational model**

The steps that are used in the rational model would be as follows:

- i. The case is reported

Albert's parents made the principal aware of the case.

- ii. Information is acquired

On request of the principal, the deputy principal investigated the case. Information was received and written statements were made by witnesses.

- iii. More information is acquired

The deputy principal had a meeting with Liam's parents in order to get their side of the story.

- iv. Analysis of information

Both the principal and the deputy principal analysed the information.

- v. Alternatives are listed

Based on all the information, the principal and the deputy principal listed alternatives which were limited to the code of conduct.

vi. Decision is made

The principal made a disciplinary decision to be referred to the disciplinary committee for a disciplinary hearing.

- **Decision made by the data-driven decision-making model**

According to Preuss (2007:12), the data-driven decision-making process has the following steps:

i. Determine the issue at hand

If the scenario is analysed, the following issues need to be addressed:

- Liam transgressed the code of conduct which dictates that he must be called for a disciplinary hearing.
- There is a possibility that there is alcohol addiction among the learners.
- There is likely to be a problem with gangsters operating within schools.
- It seems that some of the learners feel that the school is not a safe environment because of the prevalence of gangsters.
- There is seemingly a problem of theft within the school.
- Based on the evidence, it seems that there might be other drug use on school premises.

ii. Determine ideal conditions

The Constitution, education legislation, other relevant legislation, common law and the school's code of conduct dictate what an ideal condition within a school needs to be. The following are the ideal conditions in a school:

- learners are not addicted to alcohol or drugs;
- gangsters do not compromise the safety of learners;
- a school is not affected by theft.

iii. Establish present condition

- There are learners involved in alcohol abuse and addiction. Further investigation is needed in order to establish the extent of alcohol abuse and addiction in the school. The principal needs to gather data that can indicate which, and how many learners are possibly involved in unlawful acts of alcohol use.

- There are learners involved in gangsterism which makes the school an unsafe environment for other learners, to the extent that they are afraid to go to school. Further investigation is also needed on the extent of gangsterism and drug use on school grounds.
- Theft occurs in schools. Further investigation is needed to establish the extent to which theft occurs in the school. The assumption is that mainly cellular phones and money are stolen, but further investigation is necessary.

iv. Determine the gap

The ideal conditions need to be compared with the present conditions which then need further investigation. It is a known fact that learners will not furnish data if the possibility exists that it can become known that they have given the data. Therefore, the secret of success lies in collecting the data by guaranteeing the anonymity of each informant. In order to establish the true extent of a phenomenon, questionnaires can be used to collect the data from a large portion of the learners. Such questionnaires can also be given to the parents to obtain their perceptions on the issues.

v. *Determine the priority of the issue*

Based on the existing data, the issues can be prioritised as follows:

- Liam must be called for a disciplinary decision.
- Create a safe, drug/alcohol-free environment where gangsterism and theft are not threats. This will enable the school to create an environment that is conducive to teaching and learning.

vi. *Develop end-focus goal statement*

- Goal 1: Liam needs to appear before a disciplinary committee for a hearing in order to state his case.
- Goal 2: Create a safe environment where the learners are free from drug and alcohol addiction, gangsterism, and theft, and where learners are free to excel academically. The goal needs to be reached within six months to a year.

vii. Search the root cause

At this stage data must be transformed into information and knowledge. The process was discussed thoroughly in Section 3.4.2.5 and 6.5.1.2.

- Data needed for Goal 1: Liam needs to appear before a disciplinary committee for a hearing in order to state his case. (see Table 10):

Table 10: Learner profile according to scenario

Name of learner	<i>Liam Sagro</i>
<i>Demographic data</i>	Age: 16 years
	Gender: Male
	Grade level: Grade 9
	Socio-economic circumstances: <i>Liam stays with his parents in a flat that they rent. Only Mr Sagro is currently employed.</i>
	Social skills of the learner: <i>Liam is apathetic to his school work. He tends to be reserved and only has a few friends.</i>
	Personal circumstances: <i>Liam has a good relationship with his mother, but not with his father. His mother mentioned in a meeting with the deputy principal that she and her husband have considered divorce.</i>
	Parent involvement: <i>Liam's mother is more involved with him because his father works long hours.</i>
	Medical condition: <i>None</i>
	Medication record: <i>Not applicable</i>
<i>Achievement and learning data</i>	Proficiency levels: <i>Liam has the potential to excel academically but is not doing his homework or studying for his exams.</i>
	Progress levels: <i>Liam had a good report card in primary school but failed grade 8.</i>
	Academic profile with recent report card: <i>Attached</i>
<i>Instructional process data</i>	Attendance: <i>Liam tends to be absent on a regular basis.</i>

	<p>Truancy: <i>On analysing his attendance profile, a trend of missing several Fridays was noticed.</i></p>
	<p>Absence <i>No medical certificates were submitted.</i></p>
	<p>Disciplinary issues: <i>There are several disciplinary issues. Liam does not do his homework and disrupts classes. He was suspended for being under the influence of alcohol but he promised to seek help regarding his drinking.</i></p>
	<p>Merits: <i>Liam received no merits.</i></p>
	<p>Demerits: <i>Most of the demerits Liam received were for homework not done, and disrupting the class.</i></p>
Perception data	<p>The inputs of the school psychologist: <i>In the school psychologist's report, she mentioned that Liam got involved first in drinking and then in using dagga. The flats where Liam stays with his parents are associated with drugs and gangsterism.</i></p>
	<p>The parents' side of the story: <i>His mother mentioned that she didn't know how to handle Liam any longer. She said that there was an incident where gangsters living in the flats, threatened Liam that if he did not smoke dagga with them, he would no longer be part of their gang.</i></p>
	<p>Establish if the learner knows which rule was broken: <i>Liam stated that he knew it was wrong to smoke dagga on the school premises.</i></p>
	<p>The learner's side of the story: <i>In an interview with Liam, he made it clear that he smoked dagga on a regular basis. He did not want to cooperate with the school to establish the extent of dagga use on the school grounds. He did not answer the questions put to him by the deputy principal.</i></p>

- Data needed for Goal 2: Create a safe environment where the learners are free from drug and alcohol addiction, gangsterism, and theft, and where learners are free to excel academically. The goal needs to be reached within six months to a year.

The concepts of lawful, reasonable and fair, that were summarised in Section 6.3.1, as well as in Section 6.3.2 on section 33 of the Constitution, the PAJA and section 16 A of the

Schools Act, become standard information that needs to be interwoven with the learner's profile in order to create knowledge for a particular instance or case. Table 11 is an example of a list for a principal to establish whether the learner was treated lawful, reasonable and fair. It also show whether the principal applied section 33 of the Constitution, PAJA and section 16 A of the Schools Act.

Table 11: The concepts of lawful, reasonable, fair in relation with learner's profile

Concepts	Questions a principal needs to ask
Constitution	<p>Is the Constitution the point of departure for the schools code of conduct? Yes.</p> <p>Is the Constitution the point of departure for the conduct of the principal? Yes</p> <p>Is section 33 of the Constitution the point of departure for all administrative actions related to learners? Yes</p>
PAJA	<p>Do I take PAJA and other legislation into consideration when making disciplinary decisions? Yes</p>
Section 16 A(2)(d) and (2)(f) of the Schools Act	<p>Did the principal inform the School Governing Body on policy such as the regulation relating to disciplining, suspension and expulsion of learners at public schools in the Western Cape? <i>As principal, I am obligated by law to train and inform the School Governing Body on all relevant legislation and policies.</i></p> <p>Did the principal assist the School Governing Body on issues related to learner discipline? <i>As principal, you are obligated by law to assist the School Governing Body related to learner discipline.</i></p>
Lawful	<p>Am I authorised to make a decision regarding Liam's situation? <i>Section 16 A gave me the responsibility to make a decision how to handle Liam's situation. I also have a responsibility to make a decision to lessen the impact on the rest of the learners for the immediate and the future.</i></p> <p>Did I interpret the relevant legislation to establish my boundaries? Yes</p> <p>Is there a possibility I made an error in law? No</p> <p>Do I interpret legislation correctly with appointment and composition of a disciplinary committee? <i>The Regulation relating to disciplining, suspension and expulsion of learners at public schools in the Western Cape clearly states the composition of a disciplinary</i></p>

	<p><i>committee.</i></p> <p>Are the roles of the disciplinary committee clearly defined? Yes</p> <p>Are the relevant persons trained for their specific roles? <i>No. We have a shortcoming in the role as prosecutor.</i></p> <p>Does the School Governing Body need to co-opt a parent with expertise in the field of law? <i>Yes, we need to co-opt a person with expertise in the field of law who can serve as a prosecutor.</i></p> <p>Is an actual School Governing Body meeting scheduled in person to endorse the recommendation made by the disciplinary committee on Liam's situation? Yes</p> <p>Is the code of conduct of the school regularly updated? <i>Twice a year.</i></p> <p>Are all situations covered in the code of conduct? <i>No, The code of conduct is a dynamic document.</i></p> <p>How will the situation with Liam change the code of conduct? <i>We will put lessons learn from Liam's case in the School's Case Law file for future use.</i></p>
Rationality and proportionality	<p>What is the nature of the right at stake and the decision? <i>Liam stands the change to be expelled. His right to education is at stake. Will another school admit him in there school with his behavioural record?</i></p> <p>What is the range of factors relevant to the situation? <i>Liam is guilty of serious misconduct and through his actions he endangered other learners.</i></p> <p>What is the nature of the right of the learners who transgressed the code of conduct measured against the competing rights of the other learners? <i>Although Liam is in grade 9 and therefore compelled to be in school the safety of other learners weigh more than his right to education.</i></p> <p>Is the evidence rationally related to the final decision of a particular punishment? <i>This question can be answered after the disciplinary hearing but must be kept in mind.</i></p> <p>What is the purpose for which the decision was made? <i>To create a safe environment for all learners where effective teaching and learning can take place.</i></p>

<p>Substantive fairness</p> <p>These questions must be answered during the disciplinary hearing.</p>	<p>Was the person aware of the rule broken?</p> <p>Was there a valid reason for disciplinary action?</p> <p>Were the expectations to conform to the rule lawful and reasonable?</p> <p>Was the rule or standard consistently applied?</p> <p>Was there consideration of mitigating and aggravating factors?</p> <p>Was there sufficient proof of the misconduct?</p> <p>Was the sanction imposed on the learner appropriate and suitable in the light of the proven reason?</p>
<p>Procedural fairness</p>	<p>Was adequate notice of the proposed administrative action given? <i>Yes, at least 5 days.</i></p> <p>Was Liam given a reasonable opportunity to make representations? <i>Yes,</i></p> <p>Did the school make a clear statement of the administrative action that was intended? <i>It is the responsibility of the principal to call the parents for a meeting to make a clear statement of intended administrative action.</i></p> <p>Was adequate notice of the right of appeal given to Liam and his representative? <i>Yes. This would be included in the letter of notice for a disciplinary hearing.</i></p> <p>Was adequate notice of the right to request reasons for the decision made given to Liam and his representative? <i>Yes. This would be included in the letter of notice for a disciplinary hearing.</i></p> <p>Was adequate notice of the right to legal representation given to Liam and his representative? <i>Yes. This would be included in the letter of notice for a disciplinary hearing.</i></p> <p>Was an opportunity to present and dispute information and arguments given to Liam and his representative? <i>This can be answered after the hearing.</i></p> <p>Was an opportunity given to Liam to appear before the disciplinary committee in person? <i>This can be answered after the hearing.</i></p>
<p>Adapted from findings</p>	

viii. Select strategies for improvement

The crux is not to focus on the symptoms of the issue. The disciplinary decision made by the principal on Liam's drinking, was made by using the rational model and it was evident that it treated the symptoms and not the cause. The issues and the goal had to be put to

the School Management Team and the School Governing Body for assistance in developing a strategy to reach each goal that was set.

ix. *Action plan*

- Goal 1: The case is referred to the disciplinary committee for a disciplinary hearing.
- Goal 2: The knowledge gathered in the “*search the root cause*” stage is used as a basis for a decision that must be made in order to implement strategies and to create a plan of action to accomplish the set goal. In order to be successful in the implementation of the strategies, the importance of the responsibilities, resources and the predetermined timeframe must be taken into consideration.

Table 12: Action plan

Goal	Action plan
<p>Goal 1: The case is referred to the disciplinary committee for a disciplinary hearing</p>	<p>The principal needs to make sure that the following is in place before disciplinary hearing:</p> <ul style="list-style-type: none"> • adequate notice of the proposed administrative action given, • make a clear statement of the administrative action that is intended, • adequate notice of the right of appeal must be given to Liam and his representative, • adequate notice of the right to request reasons for the decision made must be given to Liam and his representative, • adequate notice of the right to legal representation must be given to Liam and his representative. <p>Furthermore, the principal needs to ensure that:</p> <ul style="list-style-type: none"> • the roles of the disciplinary committee are clearly defined, • that the relevant persons are trained for their specific roles, • a parent with expertise in the field of law is co-opted by the School Governing Body, <p>The chairperson of the disciplinary committee needs to make sure that the following is in place during disciplinary hearing:</p> <ul style="list-style-type: none"> • Was Liam given a reasonable opportunity to make representations? • Was an opportunity to present and dispute information and arguments given to Liam and his representative? • Was an opportunity given to Liam to appear before the disciplinary committee in person?

	<ul style="list-style-type: none"> • Was the person aware of the rule broken? • Was there a valid reason for disciplinary action? • Were the expectations to conform to the rule lawful and reasonable? • Was the rule or standard consistently applied? • Was there consideration of mitigating and aggravating factors? • Was there sufficient proof of the misconduct? • Was the sanction imposed on the learner appropriate and suitable in the light of the proven reason? <p>The principal needs to make sure that the following is in place after disciplinary hearing:</p> <ul style="list-style-type: none"> • Ensure that reasons are given to Liam for the decision reached. • schedule a School Governing Body in person to endorse the recommendation made by the disciplinary committee on Liam’s situation, • Update the code of conduct. • Organise counselling for Liam and his parents if needed.
<p>Goal 2: Create a safe environment where the learners are free from drug and alcohol addiction, gangsterism, and theft, and where learners are free to excel academically. The goal needs to be reached within six months to a year.</p>	<p>The following can serve as actions that a principal can take in order to put strategies in place to ensure that Goal 2 is reached within 6 months:</p> <ul style="list-style-type: none"> • Schedule a School management team meeting with the sole purpose to brainstorm several strategies. • Refine strategies by putting it to all staff members, the School governing Body and Representative Council of Learners (RCL). • Contact local Safe School Office for help and input. • Contact NGO’s, local police, neighbourhood watch, parents with expertise in the field for help and input. • Have brainstorming sessions to refine strategies even further. <p>Possible strategies can include:</p> <ul style="list-style-type: none"> • Create awareness in every facet of the school. • Linked curriculum themes to themes within the goal for example: the Chemistry educator will show the different compounds of drugs, the Visual Arts educator will run a poster campaign. • The RCL can host a Seminar with the theme: “Addicted to life”. The RCL’s of neighbouring schools can be invited to join. • Learners can be recruited to act as informants. • Police to conduct regular searches in school. • Extra classes for learners that struggle academically due to their drug addiction or involvement with gangs.

	<ul style="list-style-type: none"> • Host several community meetings with the theme: “Our community our school”. • Make use of the help offered by the WCED for learners with problems, related to the goal, to be counselled individually.
Own work	

x. *Monitor and evaluate*

Within this evaluation stage, it must be established what difference emerged when strategies were implemented. The ideal situation and present situation need to be monitored and evaluated on a regular basis.

6.5.1.4 Conclusion

It was stated that the accountability of principals and educators has increased dramatically regarding the improvement of the school as a whole (Section 2.4.2). The data-driven decision-making models focus on school improvement. When the principal made the decision to refer the first case to the disciplinary committee, and not search for the root cause of the problem, he lost an opportunity to improve his school. Using the data-driven decision-making model gives principals the opportunity to improve their schools.

6.5.2 Training in the art of disciplinary decision making

Section 16 A(2)(f) of the School Act (RSA, 1996b) presuppose that principals are equipped and trained to assist the School Governing Body in maintaining learner discipline. In the study it became evident that principals made disciplinary decisions based on experience, and not on training. Principals need training on the following aspects:

a) Legal concepts

Principals need to be trained in the legal concepts of the requirement of authority, the concept of jurisdiction and abuse of discretion.

b) Other legislation

Other legislation that is relevant to education as well as *the Regulation relating to the disciplining, suspension and expulsion of learners at public schools in the Western Cape* was published in December 2011.

c) Procedural fairness

The interviews revealed that principals struggle to implement procedural fairness. Principals need to remember that section 16 A(2)(f) of the Schools Act states that they must **assist** the School Governing Body in maintaining learner discipline; therefore, the responsibility rests on the principal, as organ of the state, to ensure procedural fairness.

d) The authority of the Head of Department

The fact that the Schools Act authorises the Head of Department to make a decision to expel, or not to expel the learner, was questioned by a participant. This shows that the participant did not understand due process.

e) Case law

Case law is a valuable tool which can assist principals in interpreting legislation that is relevant to education. Principals need to be trained in finding education-relevant case law and analysing it in order to apply the knowledge gained in their schools.

f) The art of investigation

Investigation of a case is a critical skill that principals need to acquire in order to collect relevant data which ultimately can be turned into knowledge that can be used. Apart from the data that needs to be collected, a skilful investigator will uncover evidence regularly overlooked in a case.

g) The taking of minutes in a disciplinary hearing

The principal needs to ensure that the secretary of the disciplinary committee receives training in minute taking of a disciplinary hearing.

Apart from the training that needs to take place, the communication between principals and the WCED needs to be addressed. As discussed in Section 5.3.5, it seems that there is a feeling of animosity among the principals towards the WCED. Serious dialogue between principals and the WCED on the perceptions they have about each other, is of the utmost importance.

6.5.3 The luxury of a discipline coordinator

As discussed in Section 6.5.4 it seems that there are more advantages than disadvantages in having a discipline coordinator. The main barriers for schools in appointing a discipline coordinator are the financial impact on a school and finding a suitable person for the position. The fact that a discipline coordinator can lighten the workload of educators and the principal in a highly skilled and knowledgeable setting like disciplinary decision making is a great advantage for any school. Investigation of a case is an art in itself and can be very time consuming. The maintenance of a paper trail, the management of intervention programmes and the amount of administrative work will resort under the job description of the skilled discipline coordinator who will contribute to the maintenance of discipline with lawfulness, reasonableness and fairness. The discipline coordinator focuses only on learner discipline. This will enable the discipline coordinator to specialise and improve him/herself in this important focus area. Every school and principal needs a discipline coordinator to assist in the maintenance of discipline.

6.5.4 Other recommendations

The following recommendations can be made based on the findings discussed in Section 6.3:

a) Share the goals of the school

The frustrations principals have with regard to disciplinary decision making can be divided into three categories namely frustrations linked to the actions of parents, the WCED and teachers. An assumption can be made that there will be always parents finding fault and offering excuses for their children's' behaviour. A solution to this category of frustration is highly unlikely unless the parents share the goals the school has set with regard to disciplinary decision making, provided that the goals are based on the legal concepts of lawfulness, reasonableness and fairness. Educators must support and contribute to setting these goals. As with principals, educators need to be trained in the legal concepts of lawfulness, reasonableness and fairness. This can be done via in-house training, informal discussions on the topic, formal discussions where experts lead the dialogue, training by the WCED and other organisations like workers' unions and tertiary institutions. The crux of

the solution is knowledge that can be acquired through dialogue and communication.

b) The Constitution is the supreme law

The code of conduct of a school needs to conform to the Constitution and other legislation.

c) Code of conduct

The principal and the School Governing Body need to ensure that every possible situation is covered in the code of conduct. It is a dynamic document that needs to be revised regularly to guarantee better disciplinary decision making.

d) Revision of the code of conduct

In respect of the revision of the code of conduct, the input of learners should be encouraged in order to obtain their buy-in on the code of conduct.

e) Getting knowledge from other schools

In the interviews it clearly emerged that principals relied heavily on the school's code of conduct. The manner of compilation of the code of conduct is very important and individuals who have experience in law need to be co-opted. Again, amalgamating knowledge from different schools can widen the scope of the code of conduct, which ensures a more comprehensive document.

f) Objectivity and fairness

Objectivity and fairness are also increased if the roles of the prosecutor and witness are well defined as with regard to Schools A, B and C. Principals can do in-house training at their schools to make educators more aware of their roles in a disciplinary hearing.

h) Identify roles

Identifying the roles that need to be played in disciplinary decision making is critical for maintaining discipline in a school. The principal is ultimately responsible for disciplinary decision making in a school. In order to carry this responsibility, the

principal needs to surround him/herself with dedicated, capable and knowledgeable persons in order to make decisions that are lawful, reasonable and fair. Grade heads, senior staff members and deputy principals are valuable human assets to a principal. A principal needs to define their roles within disciplinary decision making clearly. Job descriptions should clearly state everybody's responsibility; this will assist a principal in establishing trends that can influence discipline in schools. Although the principal is ultimately responsible for school discipline, every educator has an inherent responsibility for maintaining school discipline. The manner in which each educator needs to make disciplinary decisions must be managed by the principal. Again, grade heads, senior staff members and deputy principals should be of assistance. The crux of disciplinary decision making is defining the role of every stakeholder.

i) Common mistakes

Principals need to be aware of the common mistakes that occur in making disciplinary decisions.

j) School case law journal

A good practice is to create a "school case law journal" where the information of each disciplinary case is recorded in order to set a standard measured against previous cases (precedents). In creating such a "school case law journal", consistency is guaranteed. To enhance the "school case law journal", schools can cluster together and produce such a journal for a circuit. Although each school has its own ethos and character, amalgamating disciplinary information across the school district will set a standard for reasonableness. Good practices that exist in a school district will become known to all schools. However, it can be assumed that schools might not be willing to share the information because it could place them in a bad light. This can be overcome by using pseudonyms in order not to identify a specific school. The WCED can assist in creating such a "school case law journal" which can be used to advantage in training principals. The "school case law journal" can focus on good practice, but also inform all role players of common mistakes that are made.

6.6 POSSIBLE FUTURE RESEARCH

The following themes emerged that need to be researched in the future:

- What is the influence on the school climate and culture when a principal makes a disciplinary decision that is lawful, reasonable and fair according to the data-driven decision-model?
- How does the Promotion of the Administrative Justice Act (RSA, 2000) influence Section 16A(2)(e) in the event of the principal's having to assist the Head of Department in maintaining discipline regarding a staff member employed by the Department of Education, and how would this differ from maintaining discipline regarding School Governing Body appointed staff?

6.7 IN CONCLUSION OF THE RESEARCH JOURNEY

South Africa has enjoyed democracy for the past 20 years. The *grundnorm* changed from parliamentary sovereignty to constitutional supremacy. A post-1994 South Africa gave birth to the Constitution (RSA, 1996a) that give the right to all citizens to administrative action that is lawful, reasonable and fair. The Promotion of the Administrative Justice Act (RSA, 2000) gave effect to section 33 of the Constitution (RSA, 1996a) and has influenced disciplinary decision making in schools immensely. The tempo of change in Education Law is continually increasing, and so also is the responsibility placed on a principal.

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