

# **SOME THOUGHTS ON THE MEANING OF THE CONCEPTS “SCHOOL” AND “PUBLIC SCHOOL” FOR THE PURPOSES OF THE PROHIBITION OF CORPORAL PUNISHMENT AND UNLAWFUL INITIATION PRACTICES**

## *1 Introduction*

The South African Schools Act 84 of 1996 (“Schools Act”) is generally intended to provide for a uniform system in respect of the organisation, governance and funding of schools. It should thus come as no surprise that the terms “school” and “public school” are used extensively in this legislation. The proper interpretation of these key concepts is obviously of particular importance for the correct application of the provisions of the Schools Act. This contribution analyses aspects of the terms “school” and “public school” as they are used in the Schools Act and, by way of illustration, examines some of the implications in regard to the important prohibitions of corporal punishment and unlawful initiation practices in schools.

## *2 General meaning of “school” and “public school”*

Section 1(1) of the Schools Act defines a “school” as a “public school or an independent school which enrolls learners in one or more grades from grade R (Reception) to grade twelve”. This is clearly not intended to be a comprehensive definition (the definition of “school” in s 1(1) of the National Education Policy Act 27 of 1996, namely a “pre-primary, primary, or secondary school”, is also of little assistance). The concept “public school” is defined as a “school contemplated in Chapter 3” of the Schools Act. This chapter covers a wide variety of matters relating to public schools such as the provision of public schools (s 12), the merger of public schools (s 12A), public schools “on state property” and “on private property” (ss 13 and 14 respectively), the status of private schools as juristic persons (s 15), the governance and professional

management of public schools (s 16), governing bodies serving two or more schools (s 17), other general matters relating to governing bodies and their functions (ss 18-32) as well as the "closure" of public schools.

Although chapter 3 of the Schools Act can be said to determine or indicate the "public" nature of a public school through, for example, section 12, which is to the effect that provincial authorities must "provide public schools for the education of learners out of the funds appropriated for this purpose by the provincial legislature", section 5(1) of the Schools Act, which is not part of chapter 3, is also highly relevant in this regard. This section is to the effect that a public school "must admit learners and serve their educational needs without any unfair discrimination". This is clearly one of the chief characteristics of a public school in a formal and in a substantive sense.

Section 15 of the Schools Act declares that a public school is a juristic person with legal capacity to perform its functions in terms of this legislation. It is thus a statutory juristic person the nature of which must be determined primarily with reference to the Schools Act, failing which, regard must be had to principles applicable to juristic persons in general to the extent that they are compatible with the Schools Act (see, eg, on aspects of legal personality Cronjé "Persons" in XX (1) *LAWSA* par 343). It must be noted that only a public school is described as a juristic person in the Schools Act. This obviously does not mean that an independent school cannot be a juristic person. The effect of the Schools Act is merely that such a school need not have juristic personality.

In practice a public school is, of course, much more than an abstract entity recognised as a juristic person. The visible elements or manifestations of a public school (eg its premises, buildings, facilities, staff and learners) forming the factual basis for its existence as a juristic person are usually closely identified with the concept "school". In order to ascertain the full meaning of a "public school" for the purposes of the Schools Act, attention must be given to the provisions in chapter 3 referred to above, which describe the establishment, nature, objects, characteristics, organisation, functioning and other aspects pertaining to such institutions. Legal personality is but one characteristic, albeit a vital one, of a public school. There are good reasons why the legislature has deemed it necessary to declare all public schools as juristic persons. For example, it allows the school to own property independently of the state or natural persons, to conclude legal transactions, to act as an employer of staff, to be governed in a prescribed manner by its governing body, and to sue or be sued in certain instances. In addition, it has been held that a public school is an organ of state in terms of the constitution since it is an institution performing a public function (see *Western Cape Minister of Education v Mikro Primary School* 2005 10 BCLR 973 (SCA) par 20; *Baloro v University of Bophuthatswana* 1995 4 SA 197 (B)). The implications of such status need not be considered for the purposes of this contribution.

The definitions of "school" and "public school" in section 1(1) of the Schools Act are qualified by the expression customary in such instances: "unless the context indicates otherwise" (see generally Du Plessis *Re-Interpretation of Statutes* (2002) 205 n 70; *Commissioner for Inland Revenue v Simpson* 1949 4 SA 678 (A) 692; *Monsanto Co v MDB Animal Health (Pty) Ltd* 2001 2 SA 887 (SCA) par 10).

In view of the little assistance derived from the definitions of "school" and "public school" in section 1(1) of the Schools Act, even if the latter definition is

read in conjunction with the wide-ranging provisions in chapter 3, the ordinary meaning of these concepts must be determined and applied. This must have been the intention of the legislature. The dictionary meaning of “school” emphasises the visible nature and characteristics that are normally associated with this concept. A school is said to be an institution for educating children (see *New Oxford Dictionary of English* (2001)). The expression “school” also refers to the buildings used by an educational institution, the pupils and staff active there, a day’s work at school, and the school lessons (*ibid*). In terms of the *Verklarende Handwoordeboek van die Afrikaanse Taal* (2005) the term *skool* includes the buildings used for education, the education process, learners and educators, and a place or opportunity where education is provided.

### 3 *The different meanings of “public school” in the Schools Act*

The term “public school” is often used in the Schools Act in the sense of a juristic person with certain functions, objects, rights and duties. For example, where the Schools Act provides for certain functions of the body governing the affairs of a public school such as the development of its mission statement or the appointment of its staff (ss 20 and 21), the funds and assets of a school (s 37), the employment of staff by the school (s 20(4)), or makes reference to the liability of the school to pay damages (s 60), it ostensibly refers to the school primarily in the sense of a juristic person. This is so given that the governance of a school as an institution with rights, powers and obligations primarily relates to the possibility of making decisions on behalf of an abstract entity and cannot merely relate to its factual substratum such as buildings, facilities, educational activities or the persons involved with the institution.

In certain other instances, however, the expression “public school” evidently means something different. For example, the provisions on admission to (s 5) and suspension or expulsion from a public school (s 9) can hardly refer to the school as a juristic person and have to be construed as admission to the educational activities and facilities of the institution and the exclusion from such functions and facilities, as the case may be. The provisions regarding schools on public or private property (s 13 and 14) do not make sense if “public school” is merely interpreted as a juristic person without regard to its physical manifestations and attributes or the presence and activities of learners and educators. The duty on the state to provide public schools (s 12) does not primarily refer to the establishment of juristic persons, but to the making available of physical facilities and the necessary staff required for conducting education. There are many other examples illustrating this meaning.

There are also cases where the Schools Act makes it clear what particular aspect of a “public school” is relevant. For example, section 41(7) deals with a learner’s right not to be deprived of his or her right to participate “in all aspects of the programme of a public school, despite the non-payment of school fees by his or her parent”.

The context and nature of a provision in the Schools Act is thus decisive for purposes of determining the meaning of the term public school.

### 4 *Prohibition of corporal punishment and initiation practices*

It is obviously crucial to proceed from the correct interpretation of “school” to

determine the scope of the statutory prohibitions of corporal punishment and of initiation practices in the school sector.

Section 10(1) of the Schools Act provides as follows: "No person may administer corporal punishment at a school to a learner." This provision is basically repeated in provincial education laws. In, for example, section 23(1) of the School Education Act 6 of 1995 (Gauteng) it is formulated as follows: "No person shall administer corporal punishment to a learner at any public school or private school."

Section 10A(1) of the Schools Act prohibits initiation practices in the following terms: "A person may not conduct or participate in any initiation practices against a learner at a school or in a hostel accommodating learners of a school." (See generally Visser "Some thoughts on corporal punishment (and the lawful use of force) at school" 1999 *THRHR* 435, and for aspects of section 10A, "Delictual liability in respect of unlawful initiation practices at a public school: When is the state liable?" 2004 *THRHR* 98.)

As referred to above, "school", in the sense of a "public school", may refer to the abstract juristic person in whose name education is provided and who is the bearer of certain rights and obligations, or to the visible substratum of a school, namely, the buildings and premises used for educational purposes or the education process (classes, assessment sessions, practical sessions, etc), or to learners and educators involved with the educational institution. The obvious question is what is included for the purposes of the prohibitions quoted above. It must be clear that to construe "school" merely as a juristic person is not helpful or correct in this context.

While the appropriate starting point is to ascertain the usual and general meaning of the words in question in the context of the Schools Act as a whole, regard must obviously be had to section 39(2) of the constitution. Here it is provided that in interpreting any legislation a court must promote the spirit, purport and objects of the bill of rights. This is not merely a vague guideline but a concrete principle. *In casu*, it would evidently inspire a reasonably wide interpretation of the relevant prohibitions since they give direct expression to fundamental rights such as the right to dignity (s 10 of the constitution), the right to freedom and security of the person (s 12) and certain rights of children (s 28(1)(d)).

Section 10 uses the expression "at a school", which could literally and correctly be understood as a reference to the physical facilities of the school such as buildings, premises or vehicles. However, I have previously argued for a wider interpretation going beyond the school premises used for the purposes of education. A sensible and practical interpretation should further include any occasion where the relationship educator-learner manifests itself or where the objects of school education are being pursued and where educators exercise control over learners – including a school hostel (see Visser 1999 *THRHR* 435 436). In *Christian Education South Africa v Minister of Education* (1999 2 SA 83 (CC) par 11) the constitutional court seems to adopt a reasonably wide view of section 10 of the Schools Act by referring to the "school context" in which corporal punishment is prohibited. While the matter is not thoroughly pursued in this case, "at a school" must thus be taken to mean "in the context of a school". There is, however, no direct guidance on the scope of this "context" and the quality of the link required between a situation involving learners and a school. The subsequent judgment in the ongoing dispute between the same

parties (see *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC); generally also 1999 4 SA 1092 (SE) for the judgment of the court *quo*), is not very precise on this point as Sachs J interchangeably refers to “in” a school and “at” a school (par 32). It is not really helpful to attempt to ascertain what the difference, if any, between these two modes of reference is since none was probably intended. However, there is some indirect confirmation for a wide interpretation of the phrase “at a school”:

“The present matter does not oblige us to decide whether corporal correction by parents in the home, if moderately applied, would amount to a form of violence from a private source. Whether or not the common law has to be developed so as further to regulate or even prohibit caning in the home, is not an issue before us. *The Schools Act does not purport to reach the home or practices in the home*. We cannot, however, forget that, on the facts as supplied by the appellant, corporal punishment administered by a teacher in the institutional environment of a school is quite different from corporal punishment in the home environment. Section 10 grants protection to schoolchildren by prohibiting teachers from administering corporal punishment. Such conduct happens not in the intimate and spontaneous atmosphere of the home, but in the detached and institutional environment of the school” (par 48-49 – emphasis provided).

This *dictum* contrasts the institutional environment with the home environment, without offering a clear demarcation of the two. However, the two appear to be mutually exclusive. “Home environment” should obviously not be literally understood as the home in a physical sense. In addition, it must be noted that “institutional environment” extends beyond the school premises. To restrict the prohibition in section 10 to school buildings or facilities (eg a school bus) cannot be correct in the circumstances (see, however, *Christian Education South Africa v Minister of Education* (2000) par 51 where perhaps too much emphasis is placed on school premises). This may have the strange and undesirable effect that when, for example, education takes place elsewhere in the context of an excursion, practical work or in regard to the extra-mural curriculum outside the usual school premises, the prohibition on corporal punishment would be inapplicable. This cannot be so. It would obviously be illogical for the legislature to prohibit corporal punishment in the buildings usually employed for education but not when education conducted by the school occurs somewhere else. It may be observed in passing that “at a school” would, even in the narrow sense of school premises, refer to the premises of any school whatsoever and not merely the school facilities that a learner regularly attends.

The above quoted *dictum* of the constitutional court cannot be interpreted to ban only corporal punishment by *educators* as section 10 is very clear that “no person” may administer such punishment “at a school”. Even a parent is prohibited from doing so. A parent may thus not, whether at the request of the school or on his or her own initiative, administer corporal punishment to his or her own child while that child is attending school (ie, participating in the school’s programme), finds himself or herself on the school’s premises or participates in an educational programme anywhere that is conducted in the name of the school. Where the educator of a learner is also a parent of that learner, section 10 still prohibits corporal punishment “at the school” and overrides any general authority that the educator may possess as parent. However, in view of the distinction made between the school environment and the home environment, a parent or educator-parent may probably administer corporal punishment lawfully to a learner in respect of events at the school. The same principle would be applicable in the case of a learner receiving education at

home (sometimes referred to as "home-schooling" – see s 51 of the Schools Act; Visser "Juridiese aspekte van tuisonderwys" 1998 *THRHR* 646-650) as no school as defined is involved. Corporal punishment of learners "at" a "school" that is not recognised in terms of the Schools Act would similarly not fall under the prohibition in section 10.

The conclusion is that "at a school", in the sense of a public school, should in the context of section 10 be construed in a wide sense as including the whole educational programme and all the activities conducted or sanctioned by the public school in question (as a juristic person and an organ of state). Wherever and whenever a learner is participating in an educational programme of a school, the prohibition would protect him or her from corporal punishment. However, it can probably also be argued that a learner may not be given corporal punishment while he or she is physically present on school premises, even though the learner is not participating in any educational activities. This is based on the literal meaning of section 10 and would not lead to any absurd results.

Section 10A of the Schools Act, which prohibits initiation practices, goes further than section 10 in certain respects and uses the expressions "at a school" as well as "in a hostel accommodating learners of a school". It is submitted that the same interpretation given to "at a school" above, should apply here. Section 10A is clearly intended to have a wide application. This is evidenced by the following words in section 10A(3) used to define "initiation practice": "[A]ny act which in the process of initiation, admission into, or affiliation with, or as a condition for continued membership of, a school, group, intramural or extramural activities, interschools sports team, or organisation . . ."

The phrase "in a hostel" in section 10A(1) may, however, cause complications. Does the express reference to a hostel here signify that section 10 dealing with corporal punishment, where there is no reference to hostels, should be interpreted as *excluding* hostels operated under the authority or in the name of a public school, or is the expression "at a school" wide enough to include more than the educational programme as referred to above and extend to institutions or facilities such as hostels operated by the school or closely associated with the school? If the latter suggestion is accepted (which should probably be the case – see also ss 12(2) and 20(1)(g) of the Schools Act which was written before section 10A was introduced), the specific reference to school hostels in section 10A is merely *ex abundanti cautela*. In any event, there is much to be said for keeping proper discipline at school hostels, where learners are not merely accommodated but also study and do homework. However, if corporal punishment is not lawful "at a school" there is little reason why it should be lawful at a hostel used or controlled by a school.

##### 5 *Evaluation and recommendation*

The above analysis demonstrates the importance of the correct interpretation of basic concepts such as "school" and "public school". While the principles contained in sections 10 and 10A are sound, there are aspects that could be improved when the Schools Act is overhauled. It is not necessary to refer to other issues involving corporal punishment and initiation practices. As far as the ambit of the prohibition in relation to "school" is concerned, it could be an

improvement if the legislature provides a more precise definition of “at a school” for the purposes of the prohibitions. The following could be considered:

“‘At a school’, for the purposes of the prohibition of corporal punishment and unlawful initiation practices, includes any building, premises or vehicle belonging to or used by a school, as well as any occasion or event where a learner participates in or attends any lesson, programme or activity in connection with the education of that learner conducted or controlled by a school or at the request of a school.”

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