

# AANTEKENINGE

## A NOTE ON SCHOOL SAFETY LAW

### 1 General

The electronic and printed media carry many reports on incidents where learners or other persons cause damage, injury or even death at public schools. There is also disturbing information on the possession and use of drugs by learners. During 2006 the Minister of Education announced a review of the current regulations providing for safety measures in schools. The minister hinted, *inter alia*, at greater powers of search. At the time of writing of this contribution (March 2007) no such regulations had been promulgated. The two existing sets of regulations, namely, “Regulations for safety measures at public schools” (GG 22754 dated 2001-10-12) and “Regulations relating to safety measures at independent schools” (GG 26663 dated 2004-08-20) are, to say the least, not models of drafting excellence and are clearly in need of thorough review. The two sets are basically identical – which also raises the question why a single instrument could not have been promulgated in which the few differences between public schools and independent schools could have been accommodated.

The purpose of this note is to evaluate aspects of the South African Schools Act 84 of 1996 (“the Schools Act”) and the regulations for safety measures in public schools referred to above (“the regulations”). In general, one could expect high-quality legal provisions on a matter of such importance where the safety of millions of children is involved. There is in any event a duty on the state to protect and promote the freedom and security of every person in the educational sector (s 12 of the Constitution). However, the creation of proper laws is only a part of the solution as proper implementation strategies and actions are, of course, equally necessary.

### 2 School safety in terms of the Schools Act

An appropriate code of conduct for learners as envisaged in section 8 of the Schools Act is a necessary starting point to ensure proper conduct by learners which would, *inter alia*, increase safety (see generally Visser “Some ideas on the legal aspects of a code of conduct for learners in public schools” 1999 *De Jure* 146–152). However, this can obviously not be the final word regarding measures to promote safety – leaving criminal law and public law enforcement out of consideration for the moment. Thus, section 61(a) of the Schools Act empowers the minister to make regulations “to provide for safety measures at public and independent schools”. The problem with this provision is that it is too narrowly formulated to provide for wide-ranging “policing” functions such as search, seizure, arrest and other necessary controls that would pass constitutional muster. The Schools Act should establish the basis for creating a comprehensive and

constitutionally acceptable body of law the implementation of which will lower the risk of violence, disorder and other irresponsible or dangerous behaviour at school.

It is recommended that the national Department of Education commences with the development of proper provisions in the new Schools Bill which is being prepared, instead of creating even more vague, unnecessary or virtually meaningless regulations. The new legislation on schools should expressly empower the Minister of Education to make regulations regarding search, seizure, arrest, etcetera and to criminalise most contraventions of the regulations (see generally on the conservative judicial approach regarding implied powers to make regulations *Private Security Industry Regulatory Authority v Anglo Platinum Management Services Ltd* [2006] 129 (RSA)). Suggestions regarding amendments to the Schools Act are contained in paragraph 4 below.

### 3 Regulations on school safety

A perusal of the regulations pertaining to safety in public schools compels the conclusion that they are worth little in practical terms. From a constitutional perspective, the regulations are inadequate to fully realise and protect the right to security of the person as required by section 12 of the Constitution. They lack proper enforcement mechanisms since the Schools Act does not go far enough in authorising drastic but reasonable measures to promote safety at schools. Furthermore, they do not refer sufficiently to the school governing body – which is unacceptable since the governing body has important statutory and policy-making powers impacting directly and indirectly on aspects of safety and security (see reg 9(4) for a brief reference to the school governing body).

In regulation 1 it is obvious that the crucial definition of “dangerous object” is questionable (see on the problems with interpreting a similar concept in the Dangerous Weapons Act 71 of 1968, Snyman *Criminal law* (2002) 412–414). For example, what is a “gas weapon”? The part of the definition stating that a dangerous object means any article or object which may be employed to cause bodily harm or to cause damage to property is so vague and includes so many objects that the definition is not sustainable. The proviso, namely that any of the listed objects (eg explosive material, any firearm or object to render a person temporarily paralysed) used for “educational purposes” is excluded, does not really avoid all problems. In any event, it is not understood how explosives can ever be used for educational purposes at a school attended by children or what “educational purposes” means in the context of the definition. Although the definition includes under dangerous object “any object” which the Minister of Education declares in the *Gazette* to be a dangerous object for the purposes of the regulations, the minister is apparently not given the legal power to make such a declaration. It is not enough to allude to such a power in a definition if the power is not specifically created. Equally questionable is the definition of “illegal drug” – it is merely said to be an “unlawful” intoxicating or stupefying substance – which begs the question of when a drug is “unlawful”. Dangerous substances at school obviously pose considerable risks and great care must be taken to have the best definition possible to identify and then ban these substances.

In regulation 3 it is stated, quite unnecessarily, that the provisions of the regulations do not exempt a public school from complying with any other applicable law. This raises the question of why the “no exemption” provision is only limited to the “school”. What about the staff members of and learners at a school (in the

sense of a physical place), or employed by or associated with a public school (as a juristic person)? In any event, no reasonable person would argue that anything in the regulations under discussion could lawfully contradict or detract from the provisions of any law already in existence.

In regulation 4(1) all public schools are declared to be “drug free” and “dangerous object” free zones. These are more in the nature of slogans than substantive legal provisions and are practically meaningless. In fact, in terms of the definition of “dangerous object” it is suggested that these objects are acceptable at school for “educational purposes” – the school is thus not a “dangerous object free zone” in absolute terms. The regulation then continues to prohibit “any person” from, for example, “allowing” or “carrying” any dangerous object “in the public school premises” – and not “carry into” the premises as one would have expected (reg 4(2)). In view of, *inter alia*, the wide meaning of “any person” and “dangerous object”, many learners and educators appear to contravene this provision on a daily basis – unless it could be correctly argued that they do so for “educational purposes”. This would in any event create problems concerning objects ostensibly possessed for educational purposes but which could serve dangerous purposes as well (the well-known problem of “dual use”). The word “allow” may have bizarre implications – indicating that the provision is either void for vagueness or will have to be interpreted in a particular way for it to make some sense.

Certain other provisions in regulation 4 appear to be merely an imperfect and superfluous restatement of existing criminal law provisions (eg that no person may “possess illegal drugs on public school premises”). A provision which is interesting, but legally flawed, is the duty to report, as soon as possible, the “sighting” or “presence” of a “dangerous” object to the “departmental authorities” (which is not defined) or to the police – it is not expressly stated where the “sighting” should have occurred (reg 4(2)(g)). One may cynically conclude that the provisions in regulation 4 are generally so unsound that they do not even merit serious scrutiny or analysis. An example is regulation 4(2)(h) declaring the following: “No person may . . . directly or indirectly cause harm to anyone, who exposes another person who makes an attempt to frustrate the prevention of the dangerous objects and activities.”

While one may have a vague idea of what the legislature probably intended, it is nevertheless disturbing to come across such a clumsily-worded provision in a ministerial regulation. In addition, it is not clear enough what is meant by “the prevention of . . . dangerous . . . activities”.

Regulation 4(3) provides as follows:

“A police official or in his absence, the principal or delegate may, without warrant –

- (a) search any public school premises if he or she has a reasonable suspicion that a dangerous object or illegal drugs may be present in the public school premises in contravention of the regulations;
- (b) search any person present on the public school premises; and
- (c) seize any dangerous object or illegal drugs present on public school premises or on the person in contravention of these regulations.”

Space does not allow a full analysis of this generally flawed provision and to assess whether it meets all the constitutional requirements for limiting, *inter alia*, the right to privacy (see generally *Bernstein v Bester* 1996 2 SA 751 (CC); *Mistry v Interim National Medical and Dental Council of SA* 1998 4 SA 1127

(CC); *Janse van Rensburg v Minister of Trade and Industry* 2001 1 SA 29 (CC)). First, there appears to be no legal authority to confer powers of search on the police in terms of these regulations – they are in any event entitled to use their existing legal powers in respect of public schools as well (which should generally be sufficient). Second, there is no provision authorising the principal to delegate any powers which he or she may have to anyone – and any provision in this regard should be as clear as possible (the expression “principal or delegate” is rather clumsy). In any event, it is puzzling why a school principal would need special powers to search the very premises of the school which is subject to his or her authority and control as principal.

There is a wide definition of “public school premises” in regulation 1 (which is of special significance to the application of reg 4) and it “includes” a building, structure, hall, room, office, convenience, land, enclosure, which is under the control of a public school, to which a member of the public has a right of access, or is usually admitted or to which he or she may be admitted. This is derived from section 1 of the Control of Access to Public Premises and Vehicles Act 53 of 1985 – although in the latter law the expression “includes” is not used. May a school principal in terms of this provision search, for example, cupboards and lockers in a school building? Probably not. May the principal search bags belonging to learners or educators? The clear answer appears to be “no”. There are too many other questions concerning the definition of public school premises in conjunction with powers of search and seizure to be addressed in this contribution.

While the search in regulation 4(3)(a) is based on reasonable suspicion, paragraph (b), which permits the search of any person on school premises, does not even include such an elementary provision and cannot be regarded as valid (see, for comparative purposes, the following cases from the United States in which it was held, in relation to drug cases, that while the American legal requirement of “probable cause” does not apply in these instances, officials must have reasonable suspicion to initiate searches of *students* (including a girl’s purse) and that the scope of the search similarly has to be reasonable: *New Jersey v TLO* 469 US 325 (1985); *Vernonia School District 47J v Acton* 515 US 646 (1995); *Board of Education of Independent School District No 92 of Pottawatomie County v Earls* 536 US 822 (2002)). It has also been confirmed in US law that it cannot be a requirement for school officials to obtain a search warrant before a search since it would unduly interfere with the maintenance of the swift and informal procedures needed in schools.

However, the notion of an arbitrary search of a person or of his or her property on school premises without even a suspicion as contemplated in regulation 4(3)(b), must be rejected as preposterous (the position may be different regarding a person *entering* school premises since routine checks and searches are usually unavoidable). It is not clear why a reasonable suspicion would apply in the case of school premises (reg 4(3)(a)) but not in respect to persons on school premises (reg 4(3)(b) – this is probably another example of a drafting error). Even though learners and others on public school premises probably have a diminished expectation of privacy in view of the important object of securing safety and order, there can be no justification for permitting searches at the whim of any “school official”. The provisions on seizure in the regulations will probably also not pass constitutional muster for reasons which need not be discussed here.

Regulation 5 deals with the important subject of access to public school premises and allows the head of provincial education and a school principal to take

steps which they may consider necessary for the safeguarding of these premises and the protection of people therein. It adds that all the provisions of the regulation are subject to the "Constitution, laws" and national and provincial policies. While the references to the Constitution and other laws are simply unnecessary, the references to policies merely create confusion regarding the implementation of a power that is already dangerously vague.

The provisions of regulation 5 regarding access are modelled on section 2 of the Control of Access to Public Premises and Vehicles Act. It is arguable that section 2 of this Act is in any event applicable in the context of public schools and that it was not necessary to re-enact it (with a few modifications to include references to the principal, the provincial head of education and public school premises, and to provide for a full search at the point of entrance). On the other hand, it may be expedient to have a comprehensive set of regulations dealing with all matters pertaining to safety and not to leave aspects such as access control to other laws. However, the re-enactment of some of the provisions in the Act in question may in any event be void in view of the minister's lack of express authority to authorise search and seizure through regulations. The principle of strictly regulating access, is, of course, a vital one and should be supported as it constitutes a basic precautionary mechanism to exercise proper control on school premises.

Regulation 6 exempts certain persons from access control measures when entering school premises on official business (eg police officials, members of the South African National Defence Force, the Minister of Education, the provincial MEC responsible for education, as well as education officials). It may be remarked in passing that it is not apparent why soldiers could be expected to enter school premises on official business. The exemption only applies where a person falling into one of the above categories can provide proof of identity to the satisfaction of the provincial head of department or the principal of the school. It appears that the identity details must thus be provided to these officials. While the head of the education department may still delegate his or her powers in this regard (reg 10), nothing permits the principal to do so. This obviously has strange practical results that could have been avoided by proper drafting and the inclusion of a valid provision on delegation.

Regulation 7 has interesting provisions allowing members of the public and political office bearers to visit public schools in the interests of "public accountability". It is added that this right must be "regulated" to ensure that schools are not disrupted (probably a reference to school programmes) and to avoid "politicisation" of such visits. First, it is not clear whether such provisions are covered by section 61(a) of the Schools Act since safety is not really the issue. Second, the general reference to the "regulation" of the visits merely adds more uncertainty. Third, it may be difficult to determine what constitutes "politicisation" and it is unrealistic to expect of political office bearers to visit a school in such capacity but not for political purposes. The question may also be asked whether this provision will ever be applied in respect of political office bearers of the government party or whether they are in practice only intended to make things more difficult for opposition politicians. The regulation requires prior written consent from the principal or head of the education department for a visit. However, it is unreasonable to require permission for a visit at least 30 days in advance (reg 7(2)). Why should it take so long to decide on a visit?

The position of parents, who are apparently not included as members of the public in terms of regulation 7, is dealt with in regulation 8. In sub-regulation (1)

parents are given the right to visit the public school where their children are admitted, but their visits may not disrupt any of the school activities. Regulation 8(2) covers visits to the school principal and provides that a personal appointment is required. The implication is that no appointment is required in respect of a visit to any other educator or officebearer at the school. In any event, the rights of parents regarding their involvement in the governance of schools are implied in the Schools Act and the regulations are thus not necessary to provide them with any further rights in this regard. Insofar as the regulations conflict with the rights that parents have in terms of the Schools Act, they are invalid.

Regulation 9 (headed “general”) contains a number of unclear and even bizarre provisions. For example, regulation 9(1) requires a sign at the “entrance” (it is not explained what an entrance is) that any person who enters the school may be subjected to a search. The purpose of this is not apparent. It is also not indicated what search this refers to, namely a search at the point of entry (which could be legitimate) and/or an arbitrary search in terms of the flawed regulation 4(3)(b) discussed above. Regulation 9(3) provides that public schools must co-operate with “police stations” to ensure that visible policing is present during all sporting and cultural events at the school. It is, however, clearly unnecessary or even ridiculous to oblige anyone to “ensure” visible policing at all such events irrespective of the circumstances. Would a visible police presence usually be required, for example, at a chess championship or an exhibition of school projects? Fortunately the prevalence of crime at schools is not that high. Regulation 9(7) requires public schools to engage in “advocacy campaigns” to communicate to the public the “status” of schools concerning the regulations and the right to protection against violence. It is inconceivable that most schools will even attempt to comply with such a vague directive of which the purpose is also unclear. In addition, it is inadvisable, for obvious reasons, to base any advocacy campaign on the weak, poorly-drafted and invalid regulations under discussion.

#### 4 Some recommendations

It must be evident from the above that the legal position regarding safety and security at public schools in terms of special measures is far from satisfactory. As stated above, a change should start with introducing new provisions in the Schools Act to provide a proper foundation for valid and adequate regulations to be made by the minister on matters of detail. The minister should make one set of regulations which may differentiate, where necessary, between public and independent schools.

The following could replace section 61(a) of the Schools Act:

“The Minister may make regulations . . . (a) to provide for the following to ensure or enhance safety and security at or in connection with schools:

- (i) the definition of school premises, which may include any premises or place used by learners and educators in regard to any programme conducted by or under the control of a school, as well as any public vehicle or vehicle used by a school to transport learners to or from school premises or any programme of the school;
- (ii) the definition of dangerous and undesirable objects, dangerous substances and substances having an intoxicating or narcotic effect;
- (iii) the persons and officials who may exercise powers or perform functions in terms of the regulations;
- (iv) the requirements and formalities regarding access and egress from school premises of any person or vehicle;

- (v) the reasonable search of any person entering school premises, as well as the search and examination of any container in his or her possession to establish the presence of any object or substance contemplated in sub-paragraph (ii);
- (vi) the search, without a warrant, on reasonable grounds of suspicion of having committed an offence or attempting to commit an offence, of any person and the property in his or her possession or under his or her control, on or in school premises, for the purpose contemplated in sub-paragraph (v);
- (vii) the seizure of any object or substance contemplated in paragraph (ii), as well as the further steps to be taken in connection with such object or substance;
- (viii) the arrest of any person on or in school premises, or at the entrance or at or close to the perimeter of school premises on reasonable grounds of suspicion of having committed an offence or attempting to commit an offence;
- (ix) declaring defined conduct on school premises or at or close to the entrance to or perimeter of school premises to be an offence and subjecting it to a period of imprisonment not exceeding two years and a fine, or to such imprisonment or a fine;
- (x) measures and plans of the head of department, principal and school governing body to promote the safety and security of persons or property on or in school premises or attending any programme of a school;
- (xi) the power to use reasonable force to remove persons from school premises or from the entrance or perimeter of school premises if there is a reasonable ground for such action;
- (xii) exemptions from these regulations if such exemptions will not unreasonably compromise safety and security at or in connection with schools;
- (xiii) generally any matter on which it is necessary or expedient to make regulations in order to promote the efficacy of such regulations or enhance safety and security at or in connection with schools.”

The drafting of regulations in terms of these provisions should also seek to avoid the errors in the current regulations discussed above. The regulations must naturally not contain any matter which is not authorised in terms of the minister’s powers. Most contraventions of the regulations should be criminalised to justify the use of arrest, search and seizure and permit criminal prosecution at the discretion of the prosecuting authority. Most matters pertaining to safety and security should not merely be regarded as of an internal or disciplinary nature, but be classified as substantive criminal offences.

The Department of Education should take particular care to prepare high-quality and sound regulations and submit the draft for close scrutiny by the state law advisers. In view of the general importance of the regulations, they should also be the subject of a notice and comment procedure as contemplated in section 4(3) of the Promotion of Administrative Justice Act 3 of 2000.

PJ VISSER  
*University of Pretoria*