



Your thought leader
in school
governance

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Undercurrents

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ALCOHOL, CIGARETTES AND CANNABIS ON SCHOOL PROPERTY?

Schools have asked whether serving or selling alcohol (to adults) on school property is permitted in any circumstances and whether cigarette smoking (by adults) can be entirely prohibited on the property.

Related to this, schools have asked whether they can prohibit the possession of cigarettes by all learners, including the over 18s, in the Code of Conduct for Learners. Would schools be permitted to search a learner on suspicion that he/she might be carrying cigarettes in contravention of the Code?

The recent Constitutional Court judgment, in what is known as the “Cannabis Case”, did not pave the way for the general legalisation and decriminalising of cannabis but merely the exclusion of the use, possession and cultivation of cannabis in private for personal consumption by an adult (not in the presence of a child or non-consenting adult), from sections of various legislation that previously rendered such use illegal.

What is the relevance of this judgment for schools? It does create some difficulty for employment codes and practices. More importantly, the case interpreted two key rights under the Constitution which schools, and indeed all legislation must be mindful of, namely the right to privacy (section 14) and rights related to the limitation of rights (section 36).

LET’S BEGIN WITH ALCOHOL

This should be the easiest one to deal with because the Regulations for Safety Measures at Public Schools (in terms of the South African Schools Act (SASA)) specifically state in regulation 4(4) that “No educator, parent or learner, and no other person, may possess or use - (a) alcohol; ... during any school activity.”

The prohibition is clear but the definition of “school activity” is key to deciding whether the event at which alcohol is possessed or used is covered by the prohibition. A “school activity” is defined in section 1 of SASA as “any educational, cultural, sporting or social activity of the school within or outside the premises”.

This would mean, for example, that nobody attending a school matric dance (a school social activity) off the school premises at a venue licensed to sell alcohol would be able to possess or use alcohol.

What, however, would the position be regarding a group of teachers, parents and past students of the school drinking (not selling or buying) alcohol in a clubhouse, off-limits to learners, on the school property after a sporting activity? Is this considered a school social activity?

Where does the school stand when it wishes, for example, to raise funds for the school by having a beer tent in the school grounds while a sporting activity is happening? Would the beer tent be deemed to be part of the school sporting activity or if the sporting activity’s purpose was for fundraising would it be excluded from the alcohol prohibition?

How would the interpretation be different if the school held a fundraising fete with various stalls, including an adults only “beer tent” where alcohol was sold by a person with a mobile liquor licence? How would the proposed new Liquor Act respond to that as licences will not be granted to traders within 500 metres of a school?

Interestingly SASA does not include fundraising activities in this definition but the Western Cape Provincial School Education Act as amended does include them. The MEC in the Education Amendment Bill has proposed legalising the use and sale of alcohol at schools under certain conditions and subject to the applicable liquor law. The aim of the MEC was to allow alcohol at fundraising events and to limit the restrictive nature of the law related to alcohol possession and use at schools. The proposed amendment has, however, been widely condemned and has not been finalised.

The new Liquor Act which is apparently currently before Cabinet, includes a prohibition on granting liquor licences to persons who trade within 500 metres of a school. This would effectively exclude the sale of liquor at any activity at a school. How the Act will handle schools that have existing licences for their restaurants and clubs for past students is not known.

It would seem that in terms of the definition of “school activity” the possession and use of alcohol would be permissible if a school venue was hired by a third party to supplement school resources, for example, the school hall was used for a wedding on a Saturday and alcohol was provided but not sold.

An interesting, but unreported, High Court (Johannesburg) judgment dealing with liability for injury to a guest at a function at a public school interpreted “school activity” very narrowly. It declared a fashion show co-ordinated by the RCL for which an entrance fee was charged as not being a school activity defined in terms of SASA section 1 but an activity “in connection with any enterprise or business operated under the authority of a public school for the purposes of supplementing the resources of the public school as contemplated in section 36 ... (SASA s. 60(4))”. Because the court deemed the activity a fundraising event in terms of the RCL’s duty to assist the SGB in fundraising activities, it was an activity to supplement resources and not covered by SASA section 60(1)(a). This section provides for State liability only for “any delictual or contractual damages or loss ... in connection with any school activity (my emphasis) conducted by a public school”. The school, on the advice of its advocate who interprets the RCL event to be a “school activity” as defined, and not a fundraising one, has taken the case on appeal. Currently this judgment stands, and at least in Gauteng, it would be reasonable to exclude fundraising events from the definition of “school activity”.

Obviously, the school Code of Conduct would prohibit learners from being in possession of and using alcohol at school activities (or being under the influence of alcohol), including fundraising ones on or off school premises. The right to search a learner on a reasonable suspicion that he or she is in possession of alcohol needs to be handled carefully. The Guidelines for the Consideration of Governing Bodies Adopting a Code of Conduct for Learners section 4 deals with the rights of learners and issues of privacy, respect and dignity in the context of searching and/or confiscating possessions.

CIGARETTES

A new Tobacco Products and Electronic Delivery System Control Act is in the pipeline. The closing dates for comments on the Bill has passed. Much stricter regulations are anticipated with heavy fines for the offending “smoker” and even imprisonment for the owner of the establishment or person in charge of the it. Schools would do well to examine their policy on the use of tobacco products, including electronic devices (e-cigarettes) on school property. Designating any area on school property for smoking is going to be extremely difficult.

A school is required to have a policy on smoking. It must comply with the legislative framework of the Tobacco Products Control Act 83 of 1993 as amended and any regulations in terms of the Act. This framework relating to smoking in the workplace is contained in notice GNR975 of GG 21610 of 19 September 2000 which stipulates that an employer may designate a portion of a public place as a smoking area but also in item 9 of the schedule “Any employer, owner, licensee, lessee or person in control of any public place or part of a public place may totally prohibit smoking in that place”. Incidentally a school vehicle is deemed a workplace and therefore no person may smoke in it.

A school would be justified in placing a total ban on smoking (the use of tobacco in any form, including hookahs and electronic delivery devices) anywhere on the school property because tobacco smoking is regarded as “extremely injurious to health” meriting restrictive legislation and limiting of rights. Notices proclaiming the entire school property to be a no-tobacco zone would have to be displayed. This would be the easiest way to go.

If, however, the school wishes to permit smoking for adults on the premises, strict requirements have to met. The pending new act is even more restrictive. It is important to know what constitutes the workplace or public space. In fact, anywhere on the property falls into this definition and thus one cannot simply permit smoking anywhere outdoors in the school beyond the required distance from a window or door. Schools need to study the Act and its amendments as well as the regulations when drafting their policy. One of the requirements is that the designated smoking area be separated from the rest of the public place by a solid partition and an entrance door on which the sign "SMOKING AREA" is displayed, written in black letters, at least 2cm in height and 1,5 cm in breadth, on a white background as well as the message: “SMOKING OF TOBACCO PRODUCTS IS HARMFUL TO YOUR HEALTH AND TO THE HEALTH OF CHILDREN, PREGNANT OR BREASTFEEDING WOMEN AND NON-SMOKERS. FOR HELP TO QUIT PHONE (011) 720 3145”*. There must also be permanent notices and signs indicating areas where smoking is permitted and where it is not permitted which must carry the warning: “ANY PERSON WHO FAILS TO COMPLY WITH THIS NOTICE SHALL BE PROSECUTED AND MAY BE LIABLE TO A FINE”. (* This helpline actually works.)

What happens on Fun Days, Big Walks, sporting and cultural festivals when the general public are on the property? The laws applicable to all other public places such as restaurants, shopping centres and so on apply. The SGB would have to “police” observation of whatever the school policy states. Failure to do would make the school and individual offenders liable to stiff penalties.

It is reasonable and justifiable to include a ban on the possession and use of cigarettes on the school property and at school events off the property in the School Code of Conduct because of the provisions of the Tobacco Act and because it is in the interests of the child not to smoke. The tobacco laws are aimed at deterring youth from the use of tobacco. It is probably, however, an infringement on the rights of the learner to search and confiscate cigarettes and other tobacco devices because they are not illegal substances unless learners are using them. Searches are permitted on reasonable suspicion of an infringement of a law. It is not illegal to possess these substances. It is illegal to sell them at a school and to sell them to persons under 18. It would therefore be permissible to search if there were a suspicion that the products were in a learner’s possession for the purpose of selling or distributing them.

CANNABIS

The recent Constitutional Court judgement, in what is colloquially referred to as the “Cannabis Case”, confirmed part of a High Court’s finding to the extent that the use, possession and cultivation of cannabis for personal consumption by an adult in private is excluded from certain sections of laws relating to cannabis. Thus such possession, use and cultivation is not unlawful. The judgment does not mean that the possession, use, or cultivation of cannabis products have now been legalised or decriminalised.

The existing education law and policy is not altered by this judgment. Cannabis is an illegal drug and the Regulations for Safety Measures at Public Schools specifically state in regulation 4 that all schools are declared “drug-free”. In regulation 4(2) “No person may— ... (b) possess illegal drugs on public school premises” and “(e) enter public school premises while under the influence of an illegal drug or alcohol”. Regulation 3 provides for searching any person on the premises on reasonable suspicion that illegal drugs may be on the person or on the premises.

There is a small difficulty when it comes to adults, and even learners over 18, who are on the school premises and in possession of small amounts of cannabis hidden from sight. It is lawful to possess cannabis for personal consumption in private. There would be no right to search such a person for illegal substances unless there was a reasonable suspicion that the person was in possession of an amount of cannabis (more than reasonable for consumption in private) that indicated the intention to deal in the substance. The amount that would be deemed “for personal consumption” is still to be determined. Currently possession of more than 115 grams is deemed to be dealing in the cannabis. However, if the personal use in private results in the person being on the school premises under the influence of the effects of it, it is unlawful.

The use or cultivation of cannabis on school premises is still unlawful because there is no expectation of privacy. The school premises, including offices and school grounds, is public space. There are also labour laws applicable to employees that would prohibit use and being under the influence of an illegal substance in the workplace.

Schools should review their drug policy and Code of Conduct to ensure they comply with the Regulations for Safety Measures and law applicable to illegal drugs. The provisions in a school’s drug policy are applicable to all persons on the property, including members of the general public.