

Public Schools v State Schools

Public schools are often, and mistakenly, referred to as ‘state schools’. This misconception is probably to be expected given the controversial history of education in South Africa. A model that now effectively places decision-making on issues such as school fees, admission and the recommendation of educators beyond state education departments’ control will certainly not meet with everyone’s approval. What is the current status of schools in South Africa? Are they state schools, state-aided schools or public schools?

In order to determine whether a school is a state institution, a state-aided school or a public school, one must determine what constitutes these respective structures.

State institutions are those that form part of the national and provincial governments. These will include, for example, Parliament, the national and provincial legislatures, municipalities as well as those institutions specifically listed as state institutions in section 181 of the Constitution.

The status of schools in South Africa has changed drastically over the last couple of years. Where schools were previously fully state-controlled, the position is no longer that simple.

The term ‘state school’ implies that the school is fully state-controlled and therefore functions as a state institution. However, upon closer inspection of the South African Schools Act (SASA), it is clear that the state is not the sole role-player in the governance and management of a public school.

The definition of ‘public school’ in SASA merely refers to “a school contemplated in Chapter 3”. The sections contained in chapter 3 of the Act confirm the assumption that schools cannot be regarded as state institutions, and thus aid in analysing and answering the question about the status of schools.

The first important section in this regard is section 15, which stipulates as follows:

“Every public school is a juristic person, with legal capacity to perform its functions in terms of this Act.”

This section clearly states that a public school is a separate legal entity with its own legal capacity to perform the functions determined by SASA. One legal entity (such as a public school) cannot exist within another legal entity (the state). The fact that public schools are state-aided institutions simply means that they are – and should be – supported by the state. It does not mean that they are owned by the state. A number of other provisions of SASA lend further weight to this argument.

Section 16(1) of SASA stipulates that the governance of a public school is vested in the school governing body. If these schools were deemed to be state schools, their governance would have vested in the state.

Furthermore, the functions and powers of governing bodies, as set out in SASA, are assigned to parents, educators (employed by the state and the governing body), non-educators (employed by the state and the governing body) and learners – not to state officials. These functions or powers are original functions and not delegated. They are therefore prescribed directly by legislation enacted by Parliament – in this instance, SASA. State officials cannot simply take them away.

Section 20 of SASA deals with governing body functions. Section 20(1)(c) provides that a governing body of a public school must develop the mission statement of the school. Through a mission statement, a particular community articulates its unique character, view on life and the world, and its sovereignty. Likewise, the mission statement of a school articulates the views of a particular school community. If a public school were regarded as a state institution, the mission statement of each and every school would have been the same – as determined and prescribed by the state.

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Any finding that schools should still be deemed state schools or state institutions presents the risk that the developments in South African education over the past 20 years, the sacrifices made by a great number of South Africans in order to secure equal access to basic education, and all the lessons that had to be learnt the hard way over many years to establish the best education system possible, will be rendered worthless. Should schools still be considered state schools, the state may still exercise autocratic control over education. Such a finding would defy the Constitution, SASA and everything it represents.

In a democratic state based on the principle of constitutional supremacy, the people wield the power. In essence, public schools are organs of civil society, and should therefore be governed by organs of civil society that are elected through a democratic process.

As compiled by

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