Wittmann v Deutscher Schulverein, Pretoria and Others
1999 (1) BCLR 92 (T)

Division:	High Court, Transvaal Provincial Division
Date:	04/05/1998
Case No:	**95/10017**
Before:	K van Dijkhorst, Judge

Flynote

Association

freedom of association - section 17 of the interim Constitution and section 18 of the final Constitution - scope of ambit of the right - voluntary associations - freedom of association includes the right jointly with others to exclude those who are not prepared to conform to the group's requirements - it includes the right to require those who join an association to conform to its principles and rules - private school requiring attendance at religious instruction classes - parent having previously consented to be bound by school association's constitution and school's regulations - parent thereby waiving right of non-attendance which is ancillary to the right to freedom of religion, belief and opinion contained in section 14 of the interim Constitution - section 14 not entitling parent to exclude child from compulsory religious instruction classes at school - while the Constitutions make specific provision for State and State-aided schools to hold religious observances provided attendance is voluntary, this does not mean that private parochial schools may not hold such religious observances and make attendance compulsory.

Religion, freedom of

section 14 of the interim Constitution and section 15 of the final Constitution - nature of the right - the word "religion" in these provisions is not neutral but denotes a particular system of faith and worship - "religious observance" is an act of a religious character, a rite - "religious education" does not constitute "religious observance" - even if religious instruction did amount to religious observance, the Constitutions have conferred on State and State-aided educational institutions the right to conduct religious observances, provided that attendance at such is voluntary - that right cannot be nullified by those who have the right to abstain from them but choose not do so.

Editor's Summary

Plaintiff, the custodian parent of a minor child who had been admitted as a pupil in the German school at Pretoria, instituted an action against Defendants in which she sought an order declaring to be unconstitutional, unlawful and invalid the actions of First, Second and Third Defendants in compelling the minor child to attend the religious instruction classes and the school assembly/prayers, an order declaring the termination of Plaintiff's membership of First Defendant to be unconstitutional, and an order declaring that Plaintiff had the right to have the minor child excused from attendance at the religious instruction classes and the school assembly and prayers. First Defendant was a

voluntary association which had been formed to run the school. Second Defendant was the chairman of First Defendant. Third Defendant was the principal of the school. Fourth and Fifth Defendants, who did not oppose the action, were the national and provincial ministers of education respectively.

The relevance of the relief relating to Plaintiff's membership of First Defendant was that membership of First Defendant was a prerequisite for the continued admission of a member's child as a pupil at the school.

It emerged that a large portion of the budget of the school was provided by the Government of the Federal Republic of Germany which also seconded teachers and paid their salaries. Prior to the stage when the school became largely dependent upon the German government, its religious instruction had been presented confessionally by a pastor of the Lutheran Church. Children of other denominations could apply for exemption from this subject. In 1980 the association adopted a new constitution which laid down that religious instruction should thenceforth be supra-denominational. The reasoning underlying this was that the affiliations of pupils to denominations other than the Lutheran denomination would be taken into account as well as those of pupils who did not belong to any church or religious group. What would be conveyed to pupils would be general knowledge with regard to religion and the history of religion. After the implementation of the new religious instruction regime, it became the policy of the school that a personal view regarding religion or church or non-affiliation to a denomination would not be a valid reason for exemption of children from attendance at the religious instruction classes. When the minor child had been enrolled in the school in 1988 both parents had signed a form indicating that they accepted the provisions of the constitution and the school rules. At a later stage Plaintiff informed the school that she desired "to keep her daughter from morning prayer" and that she be exempted from attending the religious instruction classes. The school was not prepared to accommodate Plaintiff in this regard. It adopted the attitude that there was no valid justification for such an attitude. Morning prayers were a part of the school routine and religious instruction was an educational subject taught in such a manner as to leave pupils free to make up their own minds on religious questions. Plaintiff remained obdurate on the issue. Certain steps taken by Plaintiff were regarded by the school council as "seriously damaging the image/esteem and interests of the school association". Plaintiff was advised that the school council intended to deliberate about her possible expulsion from First Defendant. A hearing was held which was attended by Plaintiff. She was thereafter informed that it had been resolved to terminate her membership unless she confirmed in writing before a certain time that she would abide by the constitution of the association and certain other decisions made in an annual general meeting. Plaintiff gave a

written undertaking that she would do so. She did not, however, desist in maintaining her objections to her daughter's attendance at religious instruction classes. When approached by members of the press, she granted them an interview which resulted in the publication of articles that were generally condemnatory of the school. The school board thereupon resolved to expel Plaintiff from First Defendant and informed her that her membership was terminated forthwith by reason of her having "made comments in various media from which it follows that you do not feel bound any more to the agreement with (First Defendant)". She was also informed that her daughter would no longer be able to attend the school. Plaintiff then launched the instant action.

As to the termination of her membership of First Defendant the Court found that there was adequate reason to terminate her membership. She had voluntarily contracted with the school and subscribed to the constitution and rules which required attendance at religious instruction. Knowing this, she had nevertheless embarked on her course of action which had caused considerable embarrassment to First Defendant. However, the decision to expel Plaintiff was vitiated by the failure to afford her a hearing. The constitution of First Defendant gave her a right to a hearing. It had been contended on behalf

of First Defendant that the omission to afford her a hearing was immaterial as she would in any event not have had an answer to the charge and therefore had suffered no prejudice. The Court pointed out that the onus would be on Defendants to establish that Plaintiff had suffered no prejudice by way of the failure to afford her a hearing. Clearly the board was convinced that Plaintiff was waging a media campaign against the school and that this was a continuation of her previous efforts to whip up the feelings of the government and the German authorities. Nevertheless, is was not possible to say that had Plaintiff been given an opportunity to put her view across to the board, the board would still have resolved to terminate her membership. It had not been established that there was no prejudice. Because the hearing had not been held, the decision of the board had to be set aside.

The Court then turned to the constitutional question of whether the school was acting in conflict with the constitution in enforcing attendance at its religious instruction classes. The relief sought in the form of a declarator that compelling the minor child to attend the religious instruction classes was unconstitutional fell to be determined under the interim Constitution because it had been in force at the relevant dates. The question of whether Plaintiff had the right to have the child excused from attendance at religious classes related to a future situation and fell to be determined under the final Constitution. The Court considered the terms of and the construction to be placed on section 14 of the interim Constitution and section 15 of the final Constitution both of which guaranteed the right to freedom of religion, belief and opinion. The Court surveyed the comparative law emanating from other jurisdictions but found such to be unhelpful. The religious freedom guarantees found in other constitutions differed materially from those of the RSA Constitutions. Reference to the case law of those jurisdictions, however, served to illustrate the difficulties which the framers of the RSA Constitutions sought to avoid. Free societies were not all cast in one mould. Different institutions evolved from different historic circumstances. The word "religion" in those provisions was not neutral but denoted a particular system of faith and worship. "Religious observance" was an act of a religious character, a rite. "Religious education" did not constitute "religious observance". Even if religious instruction did amount to religious observance, the interim Constitution conferred on State and State-aided educational institutions the right to conduct religious observances, provided that attendance at such was voluntary. It was necessary to have regard to section 32 of the interim Constitution which conferred the right (a) to basic education and equal access to educational institutions, (b) to instruction in the language of choice where reasonably practical, and (c) to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there could be no race discrimination. Whereas both the interim Constitution and the final Constitution were specific about religious observances in State and State-aided school, they were silent about religious instruction. By implication, however, the right to freedom of thought, belief and opinion entailed that attendance could not be made compulsory. In the case of religious observance, the Constitutions expressly provided that attendance must be voluntary. This appeared from subsection (2) of both section 14 of the interim Constitution and section 15 of the final Constitution. The Constitutions accordingly granted the right expressly to those who found it appropriate to conduct religious observances at State and State-aided schools. That right could not be nullified by the sensitivities of those who had the right to abstain but chose not to do so. The Constitution could not protect a child against peer pressure when others joined in and he or she did not. The Constitution protected his or her right to be a dissenter, but did not confer the right to be protected from the embarrassment that necessarily attended non-conformity in any respect. The fact that the Constitutions made specific provision for State and State-aided schools to hold religious observances provided attendance was voluntary did not mean that a private parochial school which received no State assistance might not hold such religious observances and make attendance thereat compulsory. The freedom of association guarantee contained in section 17 of the interim Constitution and

<JL:Jump,"Act 108 of 1996 s 18">section 18<EL> of the final Constitution entitled it to do so. Freedom of association included the right jointly with others to exclude those who were not prepared to conform to the group's requirements. It included the right to require those who joined an association to conform to its principles and rules. While the right of non-attendance was an ancillary right of the right to freedom of religion, the right of non-attendance could validly be waived where, for example, one agreed in advance to subject oneself to the constitution of a school and its regulations. The question was not whether there could be a waiver of a fundamental right (*in casu*, the freedom of conscience, religion, thought, belief and opinion) but whether one could waive the right of abstention from attendance when others exercised their right in this regard. Such a waiver amounted to no more than saying, "I have a right to walk out but in deference to you I will not". There was no reason why effect should not be given to such a waiver. It followed that Plaintiff had waived her right of non-attendance by subjecting herself to First Defendant's constitution and the school's regulations. She had accordingly waived the right to rely

on section 14(2) of the interim Constitution.

Apart from the relief sought in regard to the termination of Plaintiff's membership of First Defendant, the application for the remainder of the relief fell to be dismissed.

Judgment

Van Dijkhorst J

Mrs Wittman a divorcee, in her personal capacity and her capacity as custodian mother and natural guardian of Tanja Wittmann a minor born in December 1981, sues the Deutscher Schulverein Pretoria (the association), its chairman (Prof Friedland), the principal of the Deutsche Schule at Pretoria and the National and Provincial Ministers of Education claiming:

"1. An order declaring the actions of the first, second and third defendants in compelling the minor child to attend the religious instruction classes and the school assembly/prayers (referred to in paragraphs 15 and 16 of the particulars of claim respectively) to be unconstitutional, unlawful and invalid.

2. An order declaring the purported termination of the plaintiff's membership of the first defendant by the second and third defendants to be unconstitutional, unlawful and invalid.

3. Declaring that the plaintiff has the right to have the minor excused from attendance at the religious instruction classes and school assembly/prayers conducted at the German school."

The fourth and fifth defendants do not oppose the matter. When I refer to the defendants herein I refer to the first three only. Upon an application in terms of rule 33(4) at the commencement of the trial I ruled that the issue whether the plaintiff is entitled to be restored to membership of the first defendant and the issue whether she was lawfully excluded from such membership be decided *ab initio*. I reserved the costs of that application.

Evidence was led by both sides on this issue only.

This issue is of importance as the continued membership of the plaintiff of the association is *de jure* a prerequisite for the continued admission of Tanja as a pupil at the German School. I say *de jure* because *de facto* the outcome of this case will not affect her schooling. The association has offered to extend the interim arrangement whereby she is permitted to attend school, until she has completed matric.

The scope of the proceedings under rule 33(4) was later somewhat widened to include legal argument pertaining to prayers 1 and 3 as well.

This is the second round of this saga. It started on motion and the extensive affidavits and their annexures were copiously referred to and incorporated by reference in the evidence before me. In fact, by agreement (exhibit A) a number of paragraphs of those proceedings were made common cause.

Some historical background to the founding of the German School and its history thereafter is apposite. The German School was founded in 1899 under the guidance of the pastor of the German Evangelical Lutheran Congregation in Pretoria. The funds came from an inheritance left by Friedrich Klinkenberg to the Congregation. The school was established under the direct supervision and as the direct responsibility of the Evangelical Lutheran Church in Pretoria. The first school constitution adopted in August 1898 provided in clause 8 that the school would be a German Evangelical Congregational School in which the children of the congregation will receive a sound education founded upon the principles of the Evangelical Church. Non-Germans and children belonging to other denominations would, however, be accepted as pupils and would not be expected to participate in religious instruction. Although the school rules (also called regulations) were amended from time to time, they did always provide that participation in the evangelical religious instruction given at the school was voluntary.

The association was founded in 1929. The school had become too large to be managed by the congregation and it was decided to found a society to run the school. Thus the association came into being. The school was a primary school from grade I to standard VI. In 1969 it commenced becoming a secondary school as well, the classes gradually being extended till matric. It was located in Visagie Street, Pretoria and moved to The Willows in 1977.

When the expansion to matric was undertaken the school could no longer be funded by the congregation and it became very dependent on support from the German Government. Not only did the Government of the Federal Republic of Germany thereafter provide a large portion of its budget, it also seconded teachers from Germany and paid their salaries. That is still the position.

The fact that the German Government became involved had a vital influence. The school had to present the views and cultural identity of the German population. Human rights had to be taken into account. This had an influence on the manner of teaching of the various subjects.

Prior to 1980, the subject Religious Instruction was presented confessionally by a pastor of the Lutheran Church. Children of other denominations could apply for exemption from this subject. There was an arrangement with the Catholic Church in terms whereof Catholic children could attend classes by the Catholic Priest. Prof Friedland was not aware of any other exemptions granted nor were any mentioned in court.

In 1980 a new constitution of the association came into being. Whereas before that date an unmanageable situation had prevailed in that all members of the congregation were members of the association automatically, this changed. The association became primarily a society of parents and the existing board was enlarged from ten to twelve, the additional two members being nominated by the congregation. In accordance with the German Constitution and the guidelines laid down by the German authorities the school had to acquire a secular and non-

denominational character.

Page 97 of 1999 (1) BCLR 92 (T)

In 1980 it was laid down that religious instruction should be *supra*-denominational. The Catholics expressed some concern as they felt that they had no input and they were not happy with the ruling that teachers were elected by the board. The board therefore reluctantly accepted that the Catholics could get an exemption from religious instruction as an interim measure and pleaded with both Catholics and Lutherans to get together and set up a *supra*-denominational curriculum that would be acceptable to all. In 1987 this was achieved. It was constructed in such a way that religion was presented in an historical sense as part of general knowledge. In that year a circular was sent to the parents of the school with caption "reform of religious instruction at the DSP". It is in German. I quote from the translation and the numbering of paragraphs has been added by myself.

> "Dear parents
>
> 1. The group of professional teachers for religious instruction at the DSP has in the past years always made sure that the religious lessons were taught as an inter-denominational subject. In this way the affiliations of our pupils to various denominations were taken into account as well as the inclusion of those pupils who did not belong to any church or who belonged to other religious groups.
> 2. Church lessons are not offered at the school but are given at the various parishes and communities.
> 3. The conveying and informational general knowledge with regard to the religion and history of religion and the ability to make up one's own mind about religious questions makes this a subject like any other educational subject.
> 4. The marks given for the subject do not express the pupil's faith or lack of it or an affiliation to a denomination but only the participation in the lesson and the test results.
> 5. The school's constitution provides for the non-participation from religious instruction only in the event of a well-justified written application, which must be approved, and addressed to the headmaster.
> 6. In terms of the above-mentioned comprehension of this subject the following criteria cannot be considered as sufficient reasons for non-participation: personal view regarding religion or church, non-affiliation to a denomination, affiliation to another church, parish or religion other than Catholic, Lutheran or Reformed Church; dislike of the teacher teaching the religious lessons. Insufficient command of the German language.
> 7. In 1988 from standard V onwards there will be no separate classes for Catholic lessons. Mr Stratmann and Mr Keding will be teaching in these classes and taking terms every half year.
> 8. Should you wish to view the syllabus from grade I to standard X kindly contact the relevant religious instructor."

It was signed by Prof Friedland as chairman and Mr K Keding head of the Department: Religious Instruction. I will refer to this document as the circular.

The circular contains an ostensible dichotomy. In paragraph 5 it provides for exemptions from religious instruction whereas the criteria in paragraph 6 are so all-embracing that no exemption is possible. Prof Friedland explained this by stating that in view of the fact that the curriculum had become inter-denominational and of a general knowledge nature there was no longer any reason for exemptions and he could think of no reasons which would qualify. Paragraph 5 was, however, retained because the constitution had that provision.

Page 98 of 1999 (1) BCLR 92 (T)

From 1987 onward it was therefore the policy of the school that a personal view regarding religion or church or non-affiliation to a denomination would not be a valid reason for exemption of children from attendance at the subject Religious Instruction.

Mr Dierks was principal from 1987 to 1990 and he was succeeded by Dr Dürr on 1 January 1991. All headmasters are seconded from Germany and both these gentlemen have returned to Germany. They were not available to give evidence.

Prof Friedland was adamant that should in 1988 a parent have applied to Mr Dierks for exemption from religious instruction he should either have refused exemption or reported the matter to the board as it touches the policy of the school. He could not accept that a matter as serious as this would have been kept from the board by Mr Dierks.

In 1988 the plaintiff's then husband applied for the enrolment of their children at the school and his and the plaintiff's admission as members of the association. This application was served before the board. Nothing was said in respect of exemption from religious instruction and they were admitted. Upon their admission they signed a form that the school rules and the constitution were accepted. The date was 15 June 1988.

The plaintiff testified that during the course of 1988 they moved to Pretoria. They had two children that had attended the German School in Johannesburg where they were at her request exempted from attendance of all religious activities. As she is German speaking she wanted her children to attend a German school in Pretoria. She spoke to Mr Dierks who granted her an oral exemption from the attendance of religious instruction. For more than two years her daughter did not attend classes in religious instruction but sat in a small room during those periods. She does not, however, have personal knowledge of this fact and this evidence is in conflict with the remarks on the report cards of Tanja during that period. Her report card for the last semester of 1988 has against the subject Religion the word "teilgenommen" (participated) which same word is inserted against sport, music, art, etc. In the first semester 1989 there is a horizontal dash next to the word religion indicating that she did not attend these classes but in the second semester of that year the word "teilgenommen" again appears. In both semesters of 1990 the reports indicate that Tanja did not participate in this subject, but in 1991 the word "teilgenommen" reoccurs in the reports for both semesters. In the report for the first semester of 1992 there is even a mark of 3 for

religion and for the second semester the mark is 4. On this report the plaintiff wrote a remark objecting to Tanja's attendance at these classes.

It is not necessary for the purpose of the point I have to decide to resolve the issue whether Mr Dierks granted an oral exemption to the plaintiff or not. His successor Dr Dürr was not prepared to do so. As indicated the report cards of 1992 show that Tanja did attend the subject Religious Instruction during that year. On 24 November 1992 the plaintiff wrote to the board of the association requesting exemption for Tanja from religious instruction stating as reasons that she did not belong to any confession and would like to have the right of religious freedom as it is practised in German schools. She stated that the religious instruction as offered at the German School Pretoria was not in accordance with

her views as guardian. On 9 December 1992 the principal Dr Dürr replied in writing that her request for exemption had been presented to a committee of the board on 1 December 1992, that they stood by their existing policy that her reasons for exemption were not valid and that Tanja could therefore could not be exempted.

The plaintiff replied on 13 January 1993 that her reasons were indeed valid and that she refused to have her daughter instructed in the Lutheran, Catholic or any other confession. After some disparaging remarks about Martin Luther and the Bible she stated "I also would like to keep my daughter from morning prayer". The report of the committee to which reference is made by the principal in his letter of 9 December 1992 had in fact been put before the board meeting on 1 December 1992 and adopted.

On 4 March 1993 the principal replied to the plaintiff's letter of 13 January 1993 stating that the committee of the school board involved in this matter had discussed it and that it had been decided that Tanja was not exempted from morning prayer or religious instruction. The (somewhat incoherent translation of the) letter continues:

> "The determining factor for this decision was the confession to the Christian, as it is found in the rules of the school board and your, according to our conception invalid reasons (see: *New order of the religious instruction*). Tanja has to attend morning prayer as well as religious instruction.
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> We are not forcing anybody into Christianity; but it belongs to the understanding of the subject Religious Instruction as an educational subject, to work on our cultural background and to provide the pupils with knowledge, with which they can decide on in religious questions."

The plaintiff did not lie down. In August 1993 she had a personal discussion with the ambassador of the German Republic and followed this up with a letter to the embassy. She complained that since March 1993 she had been threatened that her daughter would be expelled from school should she not participate in religious instruction. This threat was in writing dated 26 March 1993. She stated that after a lengthy discussion with the principal this threat was withdrawn for the time being provided Tanja would be physically present at religious instruction. She would, however, not be forced to participate. Since Monday 5 August 1993 the religious instruction teacher Mrs Volker was, however, threatening her with the words "if you don't get an exercise book now there will be trouble".

The German embassy referred the matter to the Foreign Affairs Department in Bonn and on 29 October 1993 replied that should the religious instruction at the German School Pretoria indeed be inter-denominational religious instruction or ethic instruction as is the case in other European countries that is part of the obligatory curriculum and no exemptions are possible. The letter referred to the circular of 1987 which indicated that this was in fact the position.

After March 1993 the plaintiff had a personal interview with Prof Friedland and was informed that her reasons for non-participation were invalid.

At the annual general meeting of the association on 7 June 1993 the plaintiff raised this matter and a full discussion ensued. Prof Friedland and Dr Dürr stated clearly that religious instruction were taught *supra*-denominational and that the lessons were not related to a church but imparted to pupils as general

knowledge of various faiths. Knowledge of the cultural background inclusive of religion was vital for the comprehension of the German language, literature and history. The plaintiff put forward a motion that pupils under the age of fourteen should be exempted from religious instruction on application of their parents, but the meeting by an overwhelming majority (only the plaintiff's vote in favour) rejected this motion. (There were about eighty members present of whom eleven abstained.)

The plaintiff did not let the matter rest. On 25 October 1993 she again in writing applied for exemption stating that her daughter was being subjected to a psychological and physical conflict through the participation in religious instruction. This letter was discussed at a meeting of the board on 9 November 1993 and on 7 December 1993 the chairman Prof Friedland replied to the plaintiff's letter stating that the school board adhered to its previous view that all pupils of the German School have to attend religious instruction, that this view was confirmed by the annual general meeting in June 1993 and that the matter was regarded as closed.

The plaintiff went to her attorneys and on 7 February 1994 Lawyers for Human Rights wrote to the principal submitting that the refusal to exempt Tanja from religious instruction was unreasonable, unlawful and illegal. They demanded that the matter be rectified within seven days and threatened to proceed with legal action should this not be done.

The principal replied on 18 February 1994 that the allegations of those attorneys were based on incorrect information. The letter continued:

> "The adherence to any religious doctrine is not a prerequisite for the compulsory instruction in religious lessons at the

Deutscher Schule. Religion is taught at the Deutsche Schule as a cultural enrichment and general knowledge subject. It is essential for the proper education of any child that it must have an understanding of the principal tenets of faith of the major religions of the world. This is particularly essential in a multi-faceted country like South Africa with its many cultures, churches, religious and spiritual communities. No religious instructor is allowed to proselytize during religious instruction. The Deutscher Schule's approach to religious instruction is in accordance with the principles and guidelines laid down not only by the South African Education Authorities, but also by the German School Authorities. Mrs Wittmann has repeatedly consulted not only the executive of the Deutsher Schulverein but also the German Embassy and the South African Education Authorities and has been met with the same response on each occasion, her daughter is obliged to attend religious instruction. At the recent annual general meeting of the Deutscher Schulverein, this policy was unanimously reaffirmed. Your client's motion to allow her daughter to absent herself from religious instruction did not even find a seconder. The constitution of the Deutscher Schulverein provided expressly that the school is rooted in the Christian tradition and is associated with the German Lutheran Church in Pretoria. Acceptance of the constitution is a prerequisite for the admission of any child to the school. Your client accepted this condition unequivocally and in writing when her daughter was admitted to the school. Your suggestion that the school's refusal to exempt Tanja Wittmann from religious instruction is unreasonable, unlawful and illegal is rejected as totally unfounded. The school is acting within the four corners of the constitution of the Deutscher Schulverein and in accordance with sound educational guidelines."

On 14 March 1994 Lawyers for Human Rights replied that the content of the religious instruction classes contained purely Christian material and that this

aspect concerned their client. They further stated that they had been instructed that Tanja had in fact not participated in the activities of the religious instruction classes for the first and second half of 1993 apparently by arrangement with the principal and that they could not see why that arrangement was never formalised. They stated that their client was adamant that she wanted the situation formalised and that after the forthcoming elections South Africa would have an enforceable bill of rights of which article 14 provided for the freedom of religion and that though religious observances may be conducted at State or State-aided institutions attendance at them would have to be free and voluntary. They stated that as the German School received state aid this article would clearly be applicable to the German School. The letter concluded:

"After taking advice from counsel we have decided to let the matter stand over until after the elections. We do, however, believe that in the meantime the matter can be settled amicably in the interests of Mrs Wittmann and the German School and more particularly in the interests of Tanja."

They add that it is Tanja's wishes not to attend the RI classes.

The allegations in this letter by Lawyers for Human Rights cannot be taken at face value. On 13 March 1994 Prof Friedland had written by registered mail to the plaintiff as follows:

"With indignation the school council has taken note that you in contradiction to the correspondent resolution of the last AGM have started or carried out various actions to keep your daughter Tanja away from the obligatory 'religious instruction'. Since it must be feared that your behaviour seriously damages the image/esteem and interests of the School Association the school council intends to confer about your expulsion as member of the School Association.

According to article 5.6 of the constitution of the School Association the member concerned must be given the possibility of an audience. Therefore I would like to invite you to the meeting of the school council on 22 March 1994 at 19:00 and would suggest that we meet in the principal's office at that time.

In this connection I have to draw your attention to the fact that according to article 5.3 of the constitution in cases of possible expulsion your daughter would not be allowed to attend the German School Pretoria (DSP) any more."

The meeting of 22 March 1994 was attended by the plaintiff and her counsel and it is common cause that the minutes thereof (at 280 *et seq*) are correct.

Both sides stated their cases fully and it was recorded that the school had given the plaintiff a fair hearing in the matter.

On 23 March 1994 the plaintiff was informed that the board had decided on 22 March 1994 to end her membership of the association as from 1 April 1994 unless she confirmed in writing before twelve noon on 31 March 1994 that she would abide by the constitution of the association and the "statutory" decisions of the annual general meeting and to obey the instruction of the principal which flow therefrom. This was delivered by hand and she had a full opportunity to discuss this with her attorneys, which she did. On 30 March 1993 she in fact signed a document reading:

"Confirmation

I confirm herewith that I acknowledge the statutes of the annual general meeting and statutory decisions of the annual general meeting and that I am prepared to obey the instruction of the principal which are a result of such meetings."

The plaintiff did not sign this undertaking without a fight, however. At the annual general meeting on 28 March 1994 the matter was again raised on her behalf and after a lengthy discussion the decision of the previous meeting of June 1993 was confirmed, again with an overwhelming majority.

Prof Friedland testified that had the plaintiff told them on 22 March that she would sign a qualified undertaking that would not have been acceptable.

Had one expected that the matter would now have come to rest, one would have been sadly disappointed. On 6 May 1994 the principal wrote to the plaintiff complaining that Tanja had not attended the religious instruction classes on 21 April 1994 and 5 May 1994 and threatened that should Tanja not attend the next religious instruction

classes on 19 May 1994 the board or school committee would adjudicate on "the now pending expulsion". The plaintiff says Tanja stayed away of her own accord from the one class and was sick and at home during the other period (this does not tally with her affidavit in the application proceedings paragraph 56). However, on 5 May 1994 the plaintiff wrote a letter to the class teacher:

> "The non-participation in the religious instruction class on Thursday 21 April 1994 was my daughter Tanja's own decision against my instruction to participate. However, I have decided not to put any pressure on her and shall therefore occupy Tanja today with another academic activity (teaching subject) during religious instruction."

It is clear from the above that the plaintiff was being obstructive and obstreperous. Her attitude clearly does not evidence an intention to bona fide abide by the school rules and see to it that her child attends religious instruction classes.

It is against this background that the final act in this drama has to be judged.

In July 1994 the plaintiff was approached by the Pretoria News who had got wind of the fact that her lawyers were already preparing papers for a court application against the school about these matters. She granted a telephonic interview and sent the newspaper copies of the relevant correspondence. In the *Pretoria News* of 5 July 1994 the following article appeared:

> "CITY MOTHER, SCHOOL IN BITTER BIBLE FIGHT
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> Staff reporter
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> A city mother plans to challenge in court the German School's decision to compel her daughter to do a subject without her consent. Ingrid Wittmann said her twelve year old daughter Tanja who is in standard 5 had been forced since 1990 to take religious education as one of her subjects. Mrs Wittmann an agnostic said she had originally entered her daughter at the German School on the condition she be exempted from religious education.
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> 'My son, now 22, was also exempted from religious education. He used to go the library during that subject and my daughter use to be able to do her homework', she said. Mrs Wittmann believes that bible could be harmful if forced down children's throats at an early age.
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> Her daughter was too afraid to tell her when the school started forcing her to go to religious education classes and she only realised this was happening when she saw her daughter's school report. Mrs Wittmann said she had on numerous occasions discussed the matter with the school's management committee. 'But nothing has come out of these discussions - instead they threatened to expel my daughter if she did not take religious education'. Mrs Wittmann said she had approached Lawyers for Human Rights (LHR) who were currently preparing papers to challenge the decision in court.

> The chairman of the school's management committee, Prof Erich Friedland, said no particular religion was being forced on Tanja, but the subject was rather an overview of the world's religions.
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> We feel this should be part of everybody's education. This is a private school and if Mrs Wittmann does not like our syllabus she can take her daughter elsewhere."

This opening salvo was followed by articles about this matter in the *Pretoria News* of 6 July 1994 and the *Sunday Times* of 10 July 1994. The latter contained a big photograph of the plaintiff and her daughter above the caption "angry parent". It *inter alia* contained the following: "Mrs Wittmann believes the school is infringing on her twelve year old daughter Tanja's constitutional rights by forcing her to attend Lutheran-based religious education classes".

The board thereupon resolved to expel the plaintiff from the association. In a letter dated 13 July 1994 its chairman Prof Friedland stated, after reference to their decision on 22 March 1994 and her undertaking of 30 March 1994 to abide by the decisions of the association and the board and to comply with the instruction of the principal: "In the past week you made comments in various media, from which it follows that you do not feel bound any more to the above agreement with the school association/Schulverein. I have therefore to inform you unfortunately that your membership to the association/Schulverein Pretoria is terminated forthwith. Your daughter Tanja will therefore not be able to attend the DSP (Deutscher Schule of Pretoria) anymore".

The application which had been in the making was then brought. It was later withdrawn (probably due to foreseeable factual conflicts) and the present action was instituted.

For present purposes the second prayer of the plaintiff's claims is relevant. The plaintiff's case is that the termination of her membership of the association is unconstitutional, unlawful, and invalid. At the hearing of argument there was a difference of opinion on whether the rule 33(4) ruling also left room for an argument on whether section 14(2) of the interim Constitution was applicable and whether even on the basis that the plaintiff's contentions that the content of the morning assembly and religious instruction was confessional she would have to be nonsuited. I ruled that the parties should agree on such evidence the plaintiff wanted to adduce on the aspect of "State-aided institutions" and granted leave to file further heads of argument. This was done.

The issues now to be decided by me are therefore:

1. Whether the membership of the plaintiff was unlawfully terminated as set out in prayer 2.
2. Whether if plaintiff succeeds on prayer 2 she fails in her contention that confessional religious instruction and prayer meetings at the German school (assuming that is the factual position) would be unconstitutional.
3. Whether attendance at such religious instruction and prayer meetings can be enforced by the association.

On the first issue the association pleaded that it was entitled to terminate the membership of the plaintiff as she had "continued" her media campaign and (by implication) that she had thereby breached the association's constitution which in clause 5.6.2 provides (I quote the Afrikaans version which is the only one before court):

> "Lede kan nadat hulle saak deur die bestuurskomitee aangehoor is, uitgesluit word, indien hulle deur hulle gedrag die

aansien of belange van die vereeniging benadeel . . ."

Page 104 of 1999 (1) BCLR 92 (T)

For the association it was argued that the fact that the plaintiff took her complaints to the press which presented the school in a negative light was adequate reason for her expulsion from membership and that despite the express provision in this clause of the constitution a hearing was not necessary as the plaintiff would have had no answer to the charge anyway.

I agree that the articles in the *Pretoria News* and *Sunday Times* caused embarrassment to the school and its governing body the association. The impression is created of an unfeeling body forcing the child to take religious education against the will of her parent after initially admitting the child on the condition set by her parent that she be exempted. The Bible was forced down the throat of the child upon threat of expulsion. Tanja's constitutional rights are infringed by forcing her to attend Lutheran-based religious education classes which could be harmful to the child. In addition the *Sunday Times* published a photo of an innocent little Tanja held protectively in the encircling arms of her angry parent (as she is described).

She omits to mention that she had voluntarily contracted with the school and subscribed to the constitution and rules thereof which clearly prescribe attendance at religious instruction. Whether the facts are correct or wrong is immaterial. She knew that the school contended that it complied with the directions of the German government for non-confessional religious instruction and that her statements to the contrary and the allegation that the school was reneging on an agreement that Tanja be exempted and was going to be embroiled in constitutional litigation over religious freedom would impact negatively on the image of the school and embarrass the association of which she was a member. All this came on top of her previous actions in involving the German embassy and the education authorities in the dispute - to the embarrassment of the association. There was in my view adequate reason to terminate her membership.

Should she have been afforded a hearing by the board? Clause 5.6.2 of the association's constitution says so.

On behalf of the association the following was argued. The board afforded her a full and fair hearing on 22 March 1994. Before that she had been overwhelmingly outvoted at the annual general meeting of June 1993. On 22 March 1994 the board had resolved that her membership be terminated unless she confirmed before twelve noon on 31 March 1994 that she submitted. Her undertaking of 30 March 1994 was not genuine and the resolution of 22 March 1994 was therefore in force.

This approach is incorrect. Some three and a half months passed after 22 March 1994. During that time the plaintiff was a member and was regarded as such. Her child Tanja was attending school on that basis. The letter of 13 July 1994 terminated her membership forthwith. It is clear that her membership was terminated by a decision of the board to put into operation its previous decision of 22 March 1994. That decision taken in July 1994 was a decision to terminate her membership and the plaintiff was entitled to be heard before it was taken.

On behalf of the association it was contended that their omission to afford her an opportunity to be heard is immaterial as she would in any event not have had an answer to the charge and therefore had suffered no prejudice. Reliance was

Page 105 of 1999 (1) BCLR 92 (T)

placed on *Jockey Club of South Africa and others v Feldman* 1942 AD 340, 359; *Le Roux and Another v Grigg-Spall* 1946 AD 244, 254 and *Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another* 1990 (3) SA 547 (A) 566.

It was contended that the defendants were and still are prepared to allow Tanja to continue her schooling at the Deutscher Schule. Plaintiff has not alleged that she was prejudiced and that was not argued either. In *Jockey Club of South Africa and Others v Feldman supra*, 359 Tindall JA said the following:

> "I am not prepared to accept, as a rule applicable to all cases of irregularity in the proceedings of private tribunals, the proposition that an irregularity which is calculated to prejudice a party entitles him to have the proceedings set aside. No doubt such irregularity *prima facie* gives him such right, but if it is clear that in the particular case the irregularity caused such party no prejudice, in my judgment he is not so entitled . . . If the irregularity complained of is calculated to prejudice a party he is entitled to have the proceedings set aside unless the court is satisfied that the irregularity did not prejudice him. This, in my judgment, is the correct test and we adopt it."

It is clear from the other cases mentioned by me that the onus would be on the defendants to indicate that the plaintiff has suffered no prejudice by any such irregularity.

I have a problem with the argument on behalf of the association. It is clear that the board was convinced that the plaintiff was waging a media campaign against the school and that this was a continuation of her previous efforts to whip up the feelings of the government and German authorities. The chairman of the board and, no doubt, the other members were convinced that she had initiated this campaign. Her evidence was that there was no campaign and that she was approached by the *Pretoria News* and thereafter by other newspapers and that she merely gave her version. I cannot out of hand reject this version and I cannot find that the board would have done so - especially not if it was supported by the journalist concerned. In the absence of a campaign, with the plaintiff contending at a hearing before the board that she had a constitutional right to put her view across, would the board necessarily have resolved to terminate her membership? I do not know. There is no evidence to that effect. The defendants have not convinced me that there was no prejudice. The provisions of clause 5.6.2 are imperative. A hearing is required. It was not held. The decision of the board must be set aside. The plaintiff must succeed on prayer 2.

This brings me to the difficult constitutional question whether the German school (on the assumption that the plaintiff's allegations are correct that the subject Religious Instruction is of a confessional nature) is acting in conflict

with our Constitution in enforcing attendance at its subject Religious Instruction.

The applicable date for the determination of the issue is of importance. Is the law as it stood prior to the interim Constitution to be applied or the law of the interim Constitution (Act 200 of 1993) itself or the law as it now stands under the new Constitution (Act 108 of 1996)? The defendants contended for the date 22 March 1994 as being the date of the initial resolution on expulsion, but I have as stated held against them on this aspect. The plaintiff contended for the law as at June 1994 when the application was brought. No party contended that the relevant date was that of the issue of summons on 23 May 1995. For the

plaintiff that would make no difference, however, as both June 1994 and May 1995 fall within the period of operation of the interim Constitution.

The matter is not so clear, however. The first prayer, for a declaratory order as to past conduct of the defendant deals with conduct pre-interim Constitution continuing till issue of summons on 23 May 1995. That must be dealt with in terms of the interim Constitution. The third prayer for a declaration that the plaintiff has the right to have the minor excused from attendance will only be relevant and effective should it be decided on the law as it now stands; that is under the new Constitution.

Section 14 of the interim Constitution dealt with religion, belief and opinion. It read:

> "14 (1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.
>
> (2) Without derogating from the generality of subsection (1), religious observances may be conducted at state or State-aided institutions under rules established by an appropriate authority for that purpose, provided that such religious observances are conducted on an equitable basis and attendance at them is free and voluntary.
>
> (3) Nothing in this Chapter shall preclude legislation recognising -
>
> (a) a system of personal and family law adhered to by persons professing a particular religion; and
>
> (b) the validity of marriages concluded under a system of religious law subject to specified procedures."

Section 15 of the Constitution of the Republic of South Africa 1996 bears the heading Freedom of Religion, Belief and Opinion and reads:

> "15 (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
>
> (2) Religious observances may be conducted at state or State-aided institutions, provided that -
>
> (a) those observances follow rules made by the appropriate public authorities;
>
> (b) they are conducted on an equitable basis; and
>
> (c) attendance at them is free and voluntary.
>
> (3) (a) This section does not prevent legislation recognising -
>
> (i) marriages concluded under any tradition, or a system of religious personal or family law; or
>
> (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
>
> (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution."

Although there is (in our context) no material difference in the texts set out above there is room for an argument that there is a wide difference in their application. The interim Constitution was held to have vertical effect only (except for the diffusive effect of its principles) (*Du Plessis and Another v De Klerk*[1] 1996 (3) SA 850 (CC)). As against that the Constitution now provides in section 8(2) that it also has horizontal effect.

Both provide, however, explicitly that the provisions are applicable in "State-aided institutions" and therefore the question whether the German school is a State-aided institution was hotly debated. I will revert to this aspect later.

As the interpretation of these sections on freedom of religion is as far as this Court is concerned *terra nova* I will deal more extensively with the background thereto as appears from comparative law at the time of the drafting thereof than I would otherwise have done.

I may in terms of article 35(1) of the interim Constitution take cognisance of foreign case law when interpreting chapter 3. The foreign law most relevant is that of the United States of America, Canada and Germany. The former because of its long constitutional history. The Canadian because its constitutional development is of more recent origin and as our courts have raised their eyes for guidance in that direction. The German constitutional model played an important role in the drafting of our Constitution.

In respect of the interpretation of the clause in our interim Constitution dealing with religion the constitutional law of these countries is singularly unhelpful and may lead the unwary astray. I say this without intending disrespect. The plain fact is that their constitutional development through the courts is, as ours will also be, guided by the particular wording of the clause interpreted by them. As I shall demonstrate the clauses dealing with religion in American, Canadian, German and other constitutions differ materially from ours. Our religious clause is a unique

vase carefully fashioned from South African clay.

Yet there is this benefit to be gained from reference to the constitutional law of those countries pertaining to religion: it illustrates the problems which were known to exist in this context with reference to various formulations of religious freedom principles. The conclusion is then inescapable that our different formulation seeks to attain a different end.

As stated by the High Court of Australia in *Attorney-General (Vict)*; Ex Rel *Black v The Commonwealth* (1981) 146 CLR 559, 579 paragraph 17 dealing with section 116 (the religious clause) of the Constitution of the Australian Commonwealth:

> "It can scarce be said with reason that the use of different, and as I think radically different, language in our Constitution, indicated an intention thereby to achieve what the American Courts had decided to be the result of the American text."

The American constitutional decisions have to be read against the backdrop of the "establishment clause" in the First Amendment (made applicable to the states by the Fourteenth Amendment). It reads:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The first portion of this amendment is known as the establishment clause and it has given rise to a continuing controversy and a plethora of court cases. To one not well versed in American law the result appears disharmonious. The "wall of separation between Church and State" which it is said was erected by this clause appears to the uninformed more like a porous membrane.

It seems that prior to 1947 the establishment clause was not understood as forbidding financial aid to church schools. It was seen as forbidding the setting up or recognition of a State Church or granting special advantages and favours to a specific church to the exclusion of others.

In *Everson v Board of Education* (1947) 330 US 1, 16 the majority judgment stated in sweeping terms:

> "The 'establishment of religion' clause of the first amendment means at least this: neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person (*sic*) to go to or to remain away from church against his will, or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the federal government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state'."

Yet, despite the wide wording the court declared the payment out of State funds of children's bus fares for attendance at Catholic schools constitutional.

Since that decision the Supreme Court evolved a test for the constitutionality of statutes which provide for State aid to church schools. It is set out in *Lemon v Kurtzman* (1971) 403 US 602, 612 as follows:

> "In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'Sponsorship, financial support, and active involvement of the sovereign in religious activity'. *Walz v Tax Commission*, 397 US 664, 668 (1970).
>
> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases.
>
> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v Allen* 392 US 236, 243 (1968); finally, the statue must not foster 'an excessive government entanglement with religion'. *Waltz*, *supra*, at 674."

In this case the court struck down a statute which provided for a 15% salary supplement to be paid to teachers in non-public schools who teach only secular courses offered in public schools and agree not to teach courses in religion, in order to bring their salaries more in line with that of teachers in public schools. The reason was that Catholic schools are an integral part of the religious mission of the Catholic Church and that there was therefore "excessive entanglement" between Church and State.

In *Walz v Tax Commission* 397 US 664, however, tax exemption for places of religious worship had been upheld (granting them an appreciable economic benefit).

In *McCollum v Board of Education* (1948) 333 US 203 a private inter-denominational religious group which *inter alia* included representatives of the Catholic, Protestant and Jewish faiths employed religious teachers at no cost to the State to give religious instruction in public school buildings for one period once a week to children who attended on a voluntary basis at the request of their parents. During this period children who did not wish to participate continued with their normal activities. This practice was held to be unconstitutional as it

was seen as the utilisation of the tax supported public school system and its machinery for compulsory public school attendance to enable sectarian groups to give religious instruction to public school pupils in public school buildings. In the American context the word "sectarian" must be seen as of very wide import. (The whole Christian religion would be described as sectarian.) About the fact that in England the outcome of this case would have been entirely

different Justice Black (for the majority) made the following remark, which is also apposite to our situation:

> "A totally different situation elsewhere, as illustrated for instance by the English provisions for religious education in state maintained schools, only serves to illustrate that free societies are not cast in one mould. See the Education Act of 1944, 7 and 8 GEO VI C 31. Different institutions evolve from different historic circumstances."

To avoid the effect of *McCollum v Board of Education*, *supra*, the parents and religious groups moved the children off the premises (but during school hours) for their religious instruction and devotion. In *Zorach v Clauson* 343 US 306 the statute and regulations authorising this were upheld. Of the three judges dissenting Justice Jackson remarked:

> ". . . today's judgment will be more interesting to students of psychology and of the judicial processes than to students of constitutional law."

In *Board of Education v Allen* (1968) 392 US 236 the Supreme Court (by a majority) refused to strike down New York's education law which required local public school authorities to lend textbooks free of charge to all students in grades VII to XII, including those in private (parochial) schools, for the purposes of secular education. The majority refused to hold that all teaching in a "sectarian" school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion.

In *Tilton v Richardson* (1971) 403 US 672 the Supreme Court upheld the constitutional validity of a statute providing for federal construction grants for college and university facilities not used for "sectarian instruction or as a place of religious worship" although the aid had gone to church related colleges. It distinguished *Lemon v Kurtzman*, *supra*, on the basis that the students were less impressionable than children in the lower grades where religion is more prone to permeate the area of secular education.

Meek v Pittinger (1975) 421 US 349 dealt with Pennsylvania Acts 194 and 195. The former provided for auxiliary services to non-public schools and the latter for the loan of textbooks to them "acceptable for use in" the public schools. It also provided for loans to the non-public schools of "instructional materials and equipment, useful to the education" of non-public school children. The auxiliary services included counselling, testing, psychological services, speech and hearing therapy, etc, for exceptional remedial and educationally disadvantaged students and other services as provided in public schools. The instructional material included periodicals, photographs, maps, recordings and films and the instructional equipment included projectors, recorders and laboratory paraphernalia. The Supreme Court struck all this down as unconstitutional (except the text book loan provisions) as establishing religion since 75% of the schools benefited were Church related. The fact that this left the schools far behind the public schools and penalised the handicapped children of non-public schools was of no moment to the majority of the court.

In *Roemer v Maryland Public Works Board* (1976) 426 US 736 a statute which authorised the payment of State funds to any private institution of higher learning which refrained from awarding "only seminarian or theological degrees" and which funds may not be utilised for sectarian purposes was upheld. The Supreme Court held that there was no necessity for state officials to investigate whether the conditions were complied with in Catholic institutions and there would thus not be "excessive entanglement".

School District of *Grand Rapids v Ball* (1985) 473 US 373 and *Aguilar v Felton* (1985) 473 US 402 went the other way. The use of federal funds to pay salaries of public school employees who conduct extra programmes in parochial schools to meet the needs of educationally deprived children from low income families was declared unconstitutional as violating the establishment clause. The reason was "excessive entanglement" of Church and State. The programmes were remedial reading (for dyslexic children), remedial mathematics, English as a second language and guidance services.

Some ten years later in *Agostini v Felton* number 96-552 decided by the Supreme Court on 23 June 1997 the same situation again came before the Supreme Court. New York City's programme had been stopped by *Aguilar v Felton* (*supra*). This led to exorbitant costs in providing the services, and a resultant decrease by some 35% in the number of private school children who could be served. The Supreme Court held that its establishment clause law had changed in the intervening ten years and that these programmes were no longer invalid. The result was certainly more satisfactory that ten years before, but one wonders whether the public might not be somewhat baffled by these legal somersaults. The last mentioned case had of course not been decided when our Constitution was drafted.

Under the establishment of religion clause the United States Supreme Court declared in *Engel v Vitale* (1962) 370 US 421 the following daily school prayer prescribed by the New York State Board of Regents unconstitutional: "Almighty God we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents and our Country". Pupils were not compelled to join in it. The fact that it was non-denominational was irrelevant. The nature of a prayer is religious and a religious programme carried on by the government is in conflict with the establishment clause. However minuscule the time spent on this prayer, it was still an official (the teacher) on the public payroll performing a religious exercise in a governmental institution.

In the light of this decision the result of *Abington School District v Schempp* (1963) 374 US 203 was inevitable. The reading of passages from the Bible or recital of the Lord's Prayer at the beginning of the school day in public schools was declared unconstitutional even though individual students could be excused from participating. In a dissenting judgment Justice Stewart made a statement which, in my opinion, is much nearer the thinking behind the religious clause in our Constitution than that of the majority based on the establishment clause:

> "It is this concept of constitutional protection embodied in our decisions which makes the cases before us such difficult ones for me. For there is involved in these cases a substantial free exercise claim on the part of those who affirmatively desire to have their children's school day open with the reading of passages from the Bible.
>
> It has become accepted that the decision in *Pierce v Society of Sisters* 269 US 510 upholding the right of parents to send

their children to non-public schools was ultimately

> based upon the recognition of the validity of the free exercise claim involved in that situation. It might be argued here that parents who wanted their children to be exposed to religious influences in school could, under *Pierce*, send their children to private or parochial schools. But the consideration which renders this contention too facile to be determinative has already been recognised by the Court: 'Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way' *Murdock v Pennsylvania* 319 US 105, 111.
>
> It might also be argued that parents who want their children exposed to religious influences can adequately fulfil that wish off school property and outside school time. With all its surface persuasiveness, however, this argument seriously misconceives the basic constitutional justification for permitting the exercises at issue in these cases. For a compulsory state educational system so structures a child's life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. Viewed in this light, permission of such exercises for those who want them is necessary if the schools are truly to be neutral in the matter of religion. And a refusal to permit religious exercises thus is seen, not as the realisation of state neutrality, but rather as the establishment of a religion of secularism, or at least, as government support of the beliefs of those who think that religious exercises should be conducted only in private.
>
> It is clear that the dangers of coercion involved in the holding of religious exercises in a school room differ qualitatively from those presented by the use of similar exercises or affirmations in ceremonies attended by adults.
>
> Even as to children, however, the duty laid upon government in connection with religious exercises in the public schools is that of refraining from so structuring the environment as to put any kind of pressure on a child to participate in those exercises; it is not that of providing an atmosphere in which children are kept scrupulously insulated from any awareness that some of their fellows may want to open the day with prayer, or of the fact that their exists in our pluralistic society differences of religious belief."

In *Stone v Graham* (1980) 449 US 39 a statute requiring posting of a copy of the Ten Commandments purchased with private contributions in the public school classrooms was struck down.

Wallace v Jaffree (1985) 472 US 38 went still further. The constitutionality of an Alabama statute authorising a one minute period of silence in all public schools "for meditation or voluntary prayer" was struck down as a law respecting the establishment of religion. Justice Rehnquist (dissenting) in the light of the conflicting decisions of the Supreme Court on the establishment clause summarised the perplexing state of the law on school services cases relating to Church-related schools as follows:

> "The results from our school services cases show the difficulty we have encountered in making the Lemon test yield principled results.
>
> For example, a State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, this rendering them non-reusable. A State may pay for bus transportation to religious schools but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip. A State may pay for diagnostic services conducted in the parochial school but the therapeutic services must be given in a different building; speech and hearing 'services' conducted by the State inside the sectarian school are forbidden . . . but the State may conduct speech and hearing diagnostic testing inside the sectarian

> school . . . Exceptional parochial school students may receive counselling, but it must take place outside of the parochial school, such as in a trailer parked down the street. A State may give cash to a parochial school to pay for the administration of state-written tests and state-ordered reporting services, but it may not provide funds for teacher-prepared tests on secular subjects. Religious instruction may not be given in public school, but the public school may release students during the day for religion classes elsewhere, and may enforce attendance at those classes with its truancy laws."

Lee v Weisman (1992) 505 US 577 held that to include a rabbi to offer a prayer as part of a public school graduation ceremony is forbidden by the establishment clause. Prayer exercises in elementary and secondary schools carry a particular risk of indirect coercion. There is subtle and indirect public and peer pressure on attending students to stand as a group or maintain respectful silence during the invocation and benediction. This brings about religious conformance compelled by the State.

The judgment of the four judges dissenting written by Justice Scalia, contains the following resounding passages:

> "The reader has been told much in this case about the personal interests of Mr Weisman and his daughter, and very little about the personal interests on the other side. They are not inconsequential. Church and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one's room. For most believers, it is not that, and has never been. Religious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not as individuals, because they believe in the 'protection of divine Providence' as the Declaration of Independence put it, not just for individuals but for societies; because they believe God to be, as Washington's first Thanksgiving Proclamation put it, the 'Great Lord and Ruler of Nations'. One can believe in the effectiveness of such public worship, or one can deprecate and deride it. But the long-standing American tradition of prayer at official ceremonies displays with unmistakable clarity that the Establishment Clause does not forbid the government to accommodate it.
>
> I must add one final observation: the Founders of our Republic knew the fearsome potential of sectarian religious belief

> to generate civil dissension and civil strife. And they also knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration - no, an affection - for one another than voluntarily joining in prayer together, to the God whom they all worship and seek. Needless to say, no one should be compelled to do that, but it is a shame to deprive our public culture of the opportunity, and indeed the encouragement, for people to do it voluntarily. The Baptist or Catholic who heard and joined in the simple and inspiring prayers of Rabbi Gutterman on this official and patriotic occasion was inoculated from religious bigotry and prejudice in a manner that cannot be replicated. To deprive our society of that important unifying mechanism in order to spare the non-believer what seems to me the minimal inconvenience of standing, or even sitting in respectful non-participation, is as senseless in policy as it is unsupported in law."

I have dealt with the United States constitutional law on their religious clause perhaps too extensively in view of my conclusion that it cannot be followed. My reason is that I thereby strive to demonstrate what the options were which confronted the drafters of our Constitution. Instead of taking the American option they unequivocally turned their back on it.

A comparison of the text of our religious freedom clause with the "three main evils" (see *Lemon v Kurtzman*, *supra*) against which the establishment clause in

the United States Constitution was intended to afford protection, immediately evidences that what was there regarded as an evil is not so regarded in our Constitution, in fact it is accommodated or actively promoted. Religious observances in State institutions are permitted and regulated by rules established by the appropriate authority. This entails the use of State facilities (schools) and State personnel (teachers) for religious purposes during time for which the State pays. The practice of these religious observances is regulated by the State. All of this would in the United States flaunt the three evils of *Lemon v Kurtzman* (*supra*) as it would amount to State sponsorship, financial support and active involvement (entanglement) of the State in religion.

It is clear therefore that the drafters of our Constitution steered our constitutional ship on a religious course diametrically opposed to that of the United States. This is not surprising. Our country has a long history of religious observance in public schools of all sectors of our population. Ours is not a society of atheists or agnostics. Those who profess their belief in a Supreme Being are an overwhelming majority. I doubt if any settlement could have been possible at the constitutional negotiations had the abolition of all religious observances in state schools and State-aided schools been on the table.

It would therefore be wrong to chip away at the clear wording of our religious clause with inappropriate dicta of the United States Supreme Court.

I turn now to the Canadian constitutional law.

Section 2(a) of the Canadian Charter of Rights Freedoms is relevant. It reads: "2. Everyone has the following rights and freedoms: (a) Freedom of conscience and religion".

There's no establishment clause as in the United States First Amendment. Neither does it contain anything resembling section 15(2) and (3) of our Constitution.

In *Zylberberg v Sudbury Board of Education* (1988) 34 CRR 1 the Ontario Court of Appeal held that prescribed religious exercises in non-denominational public schools infringed section 2(a) of the Charter. These consisted of "reading of the scriptures or other suitable readings and the repeating of the Lord's Prayer or other suitable prayers". Attendance and participation was voluntary. The majority of the court held that the provisions in the regulations dealing with exceptions from participation in religious exercises do not eliminate the coercion inherent in mandatory Christian religious exercises. The exemption imposes a penalty on students from religious minorities who are set apart from and stigmatised by their fellow students. Religious exercises are inconsistent with the multicultural nature of Canadian society and infringe section 2(a) of the Charter.

In *Canadian Civil Liberties Association v Ontario* (1990) 46 CRR 316 the Ontario Court of Appeal predictably held for the same reasons that a regulation (section 28(4)) which provided for religious education to be given by the teacher in public schools for two periods per week of thirty minutes each was unconstitutional despite the provision that "issues of controversial or sectarian nature shall be avoided" and that attendance was voluntary. In view of the conclusion above set out the *obiter dictum* later on in the reasons that section 2(a) of the Charter prohibits religious indoctrination and not education about

religion, must lead one to the conclusion that in the opinion of the court religious education is the equivalent of religious indoctrination, no matter how it is presented.

In *Adler v Ontario* (1996) 3 SCR 609 the appellants in the Canadian Supreme Court sought declarations that Jewish schools and independent Christian schools in Ontario were entitled to State funding as the Catholic schools are. The decision hinged on section 93 of the Constitution Act 1867 which granted Catholic schools preferential treatment and it is of no relevance in our context.

I conclude that as in the case of the United States constitutional law on this subject a study of the Canadian law teaches us what the drafters of our Constitution wanted to avoid, and not what they wanted to follow.

The German Basic Law (constitution) in article 4 proclaims freedom of faith inviolable. Due to the Christian influence in the community it provides in article 7, which placed the entire educational system under the provision of the State, that religious instruction shall form part of the ordinary curriculum in State and municipal schools except in secular (Bekenntnisfrei) schools. Religious instruction shall be given in accordance with the tenets of the religious communities. No teacher may be obliged against his will to give religious instruction.

The provisions of the German constitutional law relating to religion stand therefore much nearer to ours than those of the United States or Canada.

The Constitution of India prohibits State discrimination on grounds of religion (section 15(1)) and recognises the freedom of religion (section 25(1)) and the right to maintain institutions for religious purposes (section 26). Section 28 provides that no religious instruction shall be provided in any educational institution wholly maintained out of State funds, but this prohibition is not applicable where such institution is administered by the State but has been established under an endowment or trust which requires religious instruction. Section 28(3) recognises the right to impart religious instruction at educational institutions recognised by the State or receiving aid out of State funds but provides that attendance must be voluntary.

The Namibian Constitution protects freedom of belief in article 21(1)(b). It does not have the other provisions found in our Constitution.

Article 42 of the Constitution of the Irish Free State acknowledges the inalienable right and duty of parents to provide for the religious education of their children. The parents shall be free to provide this education in their homes, private schools or in schools recognised or established by the State. Article 44 grants freedom of religion and the State may not in its aid to schools discriminate between schools under the management of different religious denominations. Children have the right not to attend religious instruction at State-aided schools.

Article 11 of the Malaysian Constitution recognises the freedom of religion but the propagation of any religious doctrine or belief among persons professing the religion of Islam may by statute be restricted.

The 1989 Constitution of Nigeria provided in article 37 for the freedom of religion and the propagation thereof in worship, teaching, practice and observance. No person attending a place of education is required to receive religious

instruction or participate in or attend any religious ceremony or observance if it relates to a religion not his own.

The African Charter on Human and People's Rights recognises the right to freedom of religion in articles 2 and 8. It does not have the other provisions found in our Constitution.

The European Convention on Human Rights recognises in article 9 the freedom of religion which includes the right "either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance" subject of course to limitations prescribed by law to protect the rights and freedoms of others.

(The constitutions to which I refer are set out in the 1992 edition of *Human Rights: Documents That Paved The Way* by De Villiers, Van Vuuren and Wiechers. Possible later amendments have therefore not been taken into account.)

The above résumé of the contemporary international constitutional law evidences that each country has a constitution tailor-made for its own particular circumstances, cut from the fabric of its own social, ethnic and religious history and specially designed on the blueprint of its own vision of the future. It would therefore be unwise to transplant foreign constitutional material to South African soil without the utmost circumspection.

In the present case a transplant is not called for. The ship of interpretation can now set sail without hindrance of foreign barnacles.

The concept "religion" when used in section 14 of the interim Constitution and section 15 of the Constitution is not neutral. It is loaded with subjectivity. It is a particular system of faith and worship. It is the human recognition of super-human controlling power and especially of a personal God or gods entitled to obedience and worship (*Concise Oxford Dictionary*). It cannot include the concepts of atheism or agnosticism which are the very antithesis of religion. The atheist and agnostic is afforded his protection under the freedom of thought, belief and opinion part of this section. There is conceptually no room for him under the freedom of religion part. Freedom of religion does not mean freedom from religion. Remarks in United States constitutional case law which tend to describe atheism or agnosticism as religion are in our context inapplicable.

When therefore section 14(2) of the interim Constitution and 15(2) of the Constitution permit religious observances, this is a reference to the Jewish, Christian, Moslem, Buddhist and other faiths practising their religion at State and State-aided institutions. Religious observances (Afrikaans: godsdiens beoefening) does not mean a practice which neither Jew, Christian, Moslem, Buddhist, Hindu, nor other faiths recognise as such; where the Supreme Being is neither the God of Israel nor the Holy Trinity nor Allah the Merciful, etc, but a vague non-entity.

Religious observance is an act of religious character, a rite. The daily opening of a school by prayer, reading of the scripture (and possibly a sermon or religious message, and benediction) is such an observance. Religious education is not. Whereas the interim Constitution and Constitution both provide for religious observances, both are silent about religious instruction in state and State-aided institutions. A Bible period is not forbidden and neither is the study of the Koran. Of course the right of freedom of religion (in the case of religious

minorities) and the right to freedom of thought, belief and opinion (in the case of atheists and agnostics) entails that attendance may not be enforced. It must be voluntary. The right of non-attendance is expressly recognised in sections 14(2) of the interim Constitution and 15(2) of the Constitution. Attendance must be "free and voluntary". There may be no coercion, neither by rules nor by action on the part of the authorities.

In the United States in the minority opinion of Justice Brennan in *Abington School District v Schempp*, *supra*, 288 and in the judgment of the Ontario Court of Appeal in Canada in *Zylberberg v Sudbury Board of Education*, *supra*, the concept of coercion was extended to "peer pressure".

The first answer to this approach should be that of Justice Jackson in *McCollum v Board of Education*, *supra*, 232. He had this to say about an argument that the child who does not wish to participate is subjected to pressure which affects his freedom of choice:

> "The complaint is that when others join and he does not, it sets him apart as a dissenter, which is humiliating. Even admitting this to be true, it may be doubted whether the constitution which, of course protects the right to dissent, can be construed also to protect one from the embarrassment that always attends non-conformity, whether in religion, politics, behaviour or dress, since no legal compulsion is applied to complainant's son himself and no penalty is imposed or threatened from which we may relieve him, we can hardly base jurisdiction on this ground."

An even more cogent answer is that our Constitution (unlike those of the United States and Canada) expressly grants the right to those who find it appropriate to do so to conduct religious observances at State and State-aided institutions. That right cannot be nullified by the sensitivities of those who have the right to abstain but choose not to do so.

It follows from the above that neither the morning assembly and opening prayer session nor the religious instruction (education) classes at the German school would be unconstitutional even if they are of a confessional nature. This holds true whether the German school, which is a private school, is a State-aided institution or not.

The last question to be answered is whether the association by its constitution may enforce attendance at the morning assembly and religious instruction classes. This question presupposes that the morning assembly is a religious observance and that the religious instruction classes are of a confessional (as opposed to a merely informative general knowledge) nature. (Should that assumption be invalid the question falls away as any school may enforce attendance at its secular educational activities.)

In order to uphold the validity of its stance that the attendance at morning assembly and religious instruction classes is obligatory and not contrary to the clear provisions of section 14(2) of the interim Constitution and section 15(2) of the Constitution two arguments were advanced. Firstly, that as the expulsion of the plaintiff from the association had occurred prior to the advent of the interim Constitution neither was applicable. I have rejected this argument for reasons above set out. Secondly, that in terms of *Du Plessis and Others v De Klerk and Another*2 1996 (3) SA 850 (CC) the interim Constitution had vertical effect only

and was not applicable between a private school and its pupils and their parents and that the 1996 Constitution was not applicable when this case was commenced.

In order for this argument to succeed counsel for the association sought to convince me that the phrase "State-aided institution" in section 14(2) of the interim Constitution was not applicable to the German school. In view of the fact that the German school receives an annual subsidy from the South African Government which in 1994 was more than R1 million and in 1996 already nearly one and a half million rand, it could hardly be argued that no aid was received from the State.

The argument was that the reference in section 14(2) of the interim Constitution to State-aided institutions must in the context of education be read as referring to a State-aided school, which phrase has a special meaning namely what was colloquially known as the model C school, which the German school certainly was not as it was a private school. A full discussion of the State-aided schools (model C schools) is to be found in the judgment of the Industrial Court in *Association of Professional Teachers and Another v Minister of Education and Others* (1995) 16 *ILJ* 1048 (IC). The model C school was constituted by declaration by the Minister of Education and Culture in terms of section 29(2A) of the Education Affairs Act of 1998 in the *Gazette* that a public school was a "State-aided school". It was a juristic person with ownership of its movable and immovable assets and under control of its governing body. The salaries of staff were 100% subsidised and paid direct by the State, except of those extra teachers employed by the school. Model C schools were, however, only limited to the white section of the population as the Act under which they were constituted was an "own affairs" (House of Assembly) Act.

Here lies the flaw in the argument. It is inconceivable that not only the interim Constitution but also the Constitution itself would cater specifically for model C State-aided schools and leave out of reckoning all other State-aided schools. Surely one rule of non-coercion in matters of religion should apply to all State-aided schools.

Does this mean that private parochial schools which do not receive State aid may not prescribe obligatory attendance at their morning prayers and confessional religious instruction classes? The answer is negative. Section 17 of the interim Constitution and section 18 of the Constitution recognise the freedom of association. Section 14(1) and section 15(1) respectively recognise the freedom of religion which includes the right to join others in worship, propagation of the faith, etc. Freedom of association entails the right with others to exclude non-conformists. It also includes the right to require those who join the association to conform with its principles and rules.

The phrase State-aided schools antedates the model C schools by decades. It is a concept well known in educational circles of all population groups. The word "school" is too narrow because the definitions in all the acts to which I refer hereunder include not only primary and secondary schools but also other institutions like colleges, homes for handicapped children and certain classes. The correct description is therefore institutions, not schools.

In the Coloured Persons Education Act 47 of 1963 and the Indian Education Act 61 of 1965 a State-aided school means a college, school, home or class in

respect of which grants-in-aid are made or a loan was granted in terms of section 4. The latter section provides for the making of grants-in-aid and loans to the governing body of (private) colleges, schools, homes, continuation classes and hostels. Section 6 provides for the registration of private schools (which are not State-aided schools). Act 61 of 1965 adds the alternative of subsidies to grants-in-aid.

The Education and Training Act 90 of 1979 (for Blacks) defined private school as a school other than a public school or a State-aided school. School is defined as *inter alia* a school, institute or any other institution for the education of black persons. A State-aided school is defined as a school in respect of which grants-in-aid or subsidies were granted or a loan made in terms of section 9 and which the minister has by written notice declared to be a State-aided school. A subsidy included a provision of school furniture, equipment, stores, stationery, etc. Public schools, including colleges, were established in terms of section 5 but section 8 provided that any person who wished to provide education to a black person, except at a public school, must apply to the department for registration. The Minister could then in his discretion register a school as a State-aided school or a private school. Section 9 provided for grants-in-aid or subsidies and loans to the owner or governing body of State-aided schools.

The Private Schools Act (House of Assembly) 104 of 1986 defines a private school as any school other than:

"(a) (i) a public school;

(ii) a State-aided school;

(iii) a private school for specialised children;

(iv) a private pre-primary school as defined in section 1 of the Education Affairs Act (House of Assembly) 1988; and

(b) a church primary school or farm school mentioned in section 40 of that Act."

School means any educational institution.

Section 2 requires that private schools be registered. Section 6 requires that a registered private school may annually apply to the Head of Education for the prescribed subsidy. The grant or refusal thereof is discretionary.

This body of law about our educational institutions is as important if not more important than the Educational Affairs Act 1988 on which counsel for the defendants relies.

There were thus in existence when the interim Constitution was being drafted, for all sections of our population public schools (totally State-funded and State-controlled), State-aided public schools and independent private schools. The State-aided schools were funded by the State to an appreciable extent and the principle applied: he who pays the piper calls the tune. State-aided schools were subject to extensive State regulation. There seems to have been no provision for a state subsidy in respect of Coloureds and Indians, but as stated there was provision for a discretionary subsidy in respect of white private schools registered in terms of section 6 of the Private Schools Act (House of Assembly) 104 of 1986.

The German school was and is registered in terms of this Act and receives its subsidy thereunder.

Counsel for the plaintiff were granted an opportunity to place evidence before me indicating that there exist institutions which are State-aided and where the religion clause of section 14(2) of the interim Constitution would be relevant, apart from those in the educational field. No such evidence was forthcoming.

Even if private hospitals are State-aided, of which no evidence exists, one can hardly visualise patients *in extremis* being subjected to compulsory religious observances to such an extent that it merited the attention of the drafters at Kempton Park.

One must conclude therefore that the drafters of the interim Constitution who used the word "institution" in section 14(1) with reference to education, did so too when they used it in section 14(2). State-aided institution in that section is therefore the well-known "State-aided school" of all the education acts. ("School" in these acts is a misnomer, corrected by definition to include more educational institutions.)

Section 247(4) of the interim Constitution as one of its special provisions regarding existing educational institutions provides for funding to "departmental, community managed or State-aided primary or secondary schools on an equitable basis".

In the light of the existing legislation the word "State-aided" is clearly used here in its well known special sense. It is limited to primary and secondary "schools" only and does not include the wide meaning of "school" (that is also some colleges and other institutions) found in the legislation. It is likely that the phrase "State-aided" in section 14(2) was intended to have the same meaning.

A history of the provisions relating to religious instruction in schools and the conscience clause leads to the conclusion that the drafters wished to maintain the *status quo*.

Until 1953 school education was provided for in different provincial ordinances. In 1953 black education was removed from provincial control and became a national function in terms of the Black Education Act 47 of 1953. Separate provision was made for assistance to private schools and State-aided schools in sections 6 and 8. In terms of section 15(j) the Minister could only regulate religious instruction in respect of government schools and not for either State-aided, private or community schools. In terms of 34(f) of Act 47 of 1963 and section 33(f) of Act 61 of 1965 the respective Ministers could regulate instruction in both state and State-aided schools, but not in private schools, for Coloureds and Indians. In white education the provincial Ordinances provided for these matters. They were Cape Ordinance 20 of 1956; OFS Ordinance 16 of 1954; Natal Ordinance 46 of 1969; and Transvaal Ordinance 29 of 1953.

The Education Affairs Act (House of Assembly) 70 of 1988 controlled religious observances only for white public and State-aided (public) schools. Section 62 prescribed that in every public school the school day must begin with prayer and Bible reading and provided for religious (Bible) instruction which may not include doctrine or dogma peculiar to a particular religious denomination or sect. The freedom to abstain was recognised.

It was argued with reference to the provisions of section 22(3) of the Gauteng School Education Act 6 of 1995 that the above interpretation of section 14(2) of

the interim Constitution is incorrect as the first mentioned section goes much further and includes private subsided schools under its provisions relating to religious education and practises. The fact that the legislature expressly avoided the phrase "State-aided schools" but used the words "a private school which receives a subsidy" indicates that it was intended to spread the net wider than section 14(2) of the interim Constitution did. Obviously this was permissible as it was in accordance with section 14(1). But it is no *ex post facto* aid to the interpretation of section 14(2).

It has been held by the Constitutional Court in *Du Plessis and Others v De Klerk and Another*3 1996 (3) SA 850 (CC) that the interim Constitution has (apart from indirect application by diffusion) only vertical effect. This means that chapter 3 binds as stated in section 7 "all legislative and executive organs of State at all levels of government" and not private citizens *inter se*.

On behalf of the plaintiff it was contended that the German school, a private school registered in terms of section 2 of the Private Schools Act 104 of 1986, was an "organ of state" and therefore subject to chapter 3 of the interim Constitution. For this argument counsel relied on the fact that the school exercises a public function in educating children subject to compulsory education and that the State exercises control by virtue of criteria for registration and subsidising.

It was not argued that the criteria for an organ of state laid down in *Directory Advertising Cost Cutters CC v Minister for Posts, Telecommunications and Broadcasting and Others* 1996 (3) SA 800 (T) 808-811 were incorrect.

It was common cause that the persons controlling the association and the school are not appointed by the State. The State is not effectively in control in this school. The fact (if such it is) that the entry age of pupils, educational standards, standards in respect of buildings, qualifications of teachers, hours of schooling, the school calendar are determined by the State, that the constitution has to be approved and that annual financial statements have to be submitted upon sanction of deregistration, does not constitute that type of control as to render the school an organ of State. Just as one cannot declare a butchery an organ of state merely because health regulations, labour law, minimum wages provisions, restrictions on the hours of trading, etc, have to be complied with. It can hardly be argued that the State can be held vicariously liable for the delicts of private schools, despite the requirements above set out.

In my view the German school is clearly not an executive organ of state.

It follows that the German school is not subject to the provisions of section 14(2) of the interim Constitution.

I have referred to the provisions of section 22(3) of the Gauteng School Education Act 6 of 1995 above. It was not in force when this case commenced and cannot be utilised to affect its outcome.

Should I be wrong in my interpretation of 14(2) of the interim Constitution the question arises whether the plaintiff (on behalf of the minor) could waive the right to abstain from religious instruction and morning assembly (assuming both are of a confessional nature).

Section 32(c) of the interim Constitution provides that "every person shall have the right to establish where practicable educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race". It guarantees a freedom of individuals in association with one another to establish their own educational institutions based on their own values. The right to exclusivity on the ground of culture, language or religion includes the right to exclude non-users of that language and non-adherents of that culture or religion, or to require from them conformity (see *Ex Parte Gauteng Provincial Legislature: In re Gauteng School Education Bill of 1995*4 1995 (3) SA 165 (CC)).

Limited to the religious field section 32(c) recognises the freedom to establish parochial educational institutions with confessional religious observances and instruction. It goes without saying that attendance thereat may be made obligatory. The State is not constitutionally required to provide funding to these private institutions but neither is there a constitutional prohibition to subsidisation.

In respect of these educational institutions the fundamental freedom of religion of "outsiders" is limited to the freedom of non-joinder. Outsiders cannot join on their own terms and once they have joined cannot impose their own terms.

This indicates that the waiver of the freedom of religion (for the limited duration of one's membership and within the limits of the institution's constitution) is not contrary to the provisions of the constitution in the case of private educational institutions. Waiver *per se* of that freedom is therefore not unconstitutional. Is it unconstitutional where the institution is State-aided?

It should be borne in mind that the debate is not whether there can be waiver of a fundamental right (in this case the freedom of conscience, religion, thought, belief and opinion). The question is whether one can waive the right of abstention from attendance when others exercise their right in this regard. This is merely an ancillary right.

Its waiver amounts to no more than saying: I have a right to walk out but (in deference to you) I will not. Obviously one could renege on such an agreement. A court will not grant a *mandamus* in this respect. But why should such contract not be valid and the breach thereof not be the breach of contract?

I hold therefore that even if the German school is a State-aided institution and organ of state the right of non-attendance in section 14(2) of the interim Constitution can validly be waived and that the plaintiff did just that by subjecting herself to the association's constitution and the school's regulations.

Section 17 of schedule 6 of the Constitution of 1996 provides that pending cases are to be disposed of as if the new Constitution had not been enacted unless "the interests of justice require otherwise". This case was about the applicability of the interim Constitution or the law prior to its inception. In no way could in respect of prayers 1 and 2 it be argued that the (new) Constitution should be applicable. The only argument in favour of its applicability could be

in respect of prayer 3 where a continuing situation exists. If the new Constitution leads one to a different conclusion than the interim Constitution no rights of any of the parties are affected. They can litigate later on that basis. Justice demands that disputes be ventilated on the basis of the law which exists when they arise (and on which the parties receive their advice, make their decision to sue or oppose and base their pleadings). There is no reason to deviate from that sound principle in this case.

On the pleadings a dispute exists on the applicability of a so-called National Core Curriculum with compulsory parameters for subject programmes including the subject "religious instruction" also referred to as "Bible education" and whether the German school follows this curriculum. This dispute is, however, not material when a decision is reached that the German school is not subject to section 14(2) of the interim Constitution.

It follows from the above that the answers to the aspects which are dealt with in this judgment are conclusive to the case. I have found that:

1. The association's termination of the plaintiff's membership was irregular and must be set aside.
2. The matter must be resolved in terms of the provisions of the interim Constitution.
3. The interim Constitution and in particular section 14(2) is not applicable to the relationship between the plaintiff and the German school as the latter is not a "State-aided institution" and organ of state.
4. Even if it were, the plaintiff has waived the right to rely on section 14(2) of the interim Constitution.

The plaintiff is thus successful on one aspect but unsuccessful in the real dispute between the parties. In the circumstances a fair order will be that each party pays his own costs.

For the sake of clarity it is recorded that this judgment does not deal with the effect upon the relationship between the parties or the constitution of the association of section 22(3) of the Gauteng School Education Act 6 of 1995 or the Constitution of the Republic of South Africa 1996.

I make the following order:

1. The purported termination of the plaintiff's membership of the first defendant is declared invalid.
2. Prayers 1 and 3 are dismissed.
3. Each party is to pay his/her own costs of the action.

For the plaintiff:

HF Junod SC with *WPN Sceales* and *CR Jansen* instructed by *Moodliyar and Bedhesi*.

For the first, second and third defendants:

E Bertelsmann SC instructed by *Everingham and Partners Inc* (for first defendant) and *Maisels* (for second defendant)

Cases referred to

Southern Africa

Canada

Footnotes

1 Also reported at 1996 (5) BCLR 658 (CC) - Ed.
2 See n 1 above - Ed.
3 See n 1 above - Ed.
4 Also reported at 1996 (4) BCLR 537 (CC) - Ed.