CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 294/18

In the matter between:

AB	First Applicant
CB	Second Applicant
and	
PRIDWIN PREPARATORY SCHOOL	First Respondent
SELWYN MARX N.O.	Second Respondent
BOARD OF PRIDWIN PREPARATORY SCHOOL	Third Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION, GAUTENG	Fourth Respondent
INDEPENDENT SCHOOLS ASSOCIATION OF SOUTHERN AFRICA	Fifth Respondent
and	
CENTRE FOR CHILD LAW	First Amicus Curiae
EQUAL EDUCATION	Second Amicus Curiae

Neutral citation: *AB and Another v Pridwin Preparatory School and Others* [2020] ZACC 12

Coram: Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ and Theron J

Judgments: Nicholls AJ (dissenting): [1] to [96]
Theron J (majority): [97] to [212]
Cameron J and Froneman J (concurring dissent): [213] to [219]
Khampepe J (concurring): [220] to [248]

Heard on: 16 May 2019

Decided on: 17 June 2020

Summary: best interests of the child — right to basic education — independent school contracts — fair process — appropriate justification — section 8(2)

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Local Division, Johannesburg), the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld and the order of the Supreme Court of Appeal is set aside.
3. It is declared that the decision by Pridwin Preparatory School to cancel the Parent Contract is invalid and set aside.
4. Each party is to pay its own costs in this Court, the High Court and the Supreme Court of Appeal.

JUDGMENT

NICHOLLS AJ (Mogoeng CJ, Cameron J and Froneman J concurring):

Introduction

[1] Education is central to every child's development. It is the key to a better life. It has been eloquently articulated that:

> "Literacy is a bridge from misery to hope. It is a tool for daily life in modern society. It is a bulwark against poverty and a building block of development, an essential complement to investments in roads, dams, clinics and factories. Literacy is a platform for democratisation, and a vehicle for the promotion of cultural and national identity. Especially for girls and women, it is an agent of family health and nutrition. For everyone, everywhere, literacy is, along with education in general, a basic human right."[1]

[2] As with all socio-economic rights in South Africa, there is an ever-widening chasm between the standard of education offered to those who are economically vulnerable and those who enjoy the pinnacle of privilege. At the one end of the spectrum are the children whose educational choices are defined by poverty. They have no option other than to attend poorly resourced public schools, some of which do not have the most basic infrastructure such as toilets. At the other end are the options of affluence enjoyed by the wealthy. They can attend a variety of world class, well-resourced independent schools provided they can afford the considerable cost. This case concerns the latter.

[3] Having said that, it is not insignificant that there is an increasing proliferation of low-fee independent schools as parents, acutely aware that a good education is a barometer of a child's success in adult life, make enormous sacrifices to keep their children out of the public education system.[2] These schools are subsidised by the state to varying degrees.

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[1] Kofi Annan's speech delivered on International Literacy Day 1997.

[2] I am indebted to the second *amicus curiae* (friend of the Court), Equal Education, for its submissions on the increase on low-paying independent schools.

[4] At the heart of this matter is the determination of the constitutional rights of children in the private education system and the constitutional obligations of independent schools towards those children. The issue at stake is what relevance, if any, do children's constitutional rights to basic education have on the validity and enforcement of a private contract between an independent school and a child's parents where that contract seeks to regulate the child's admission to, and attendance at, the School (Parent Contract). Invariably the Parent Contract contains a clause which entitles either party to cancel on notice. Is this clause constitutionally valid and, if so, does its enforcement without affording a child a hearing offend a child's right to a basic education and the paramountcy of a child's best interests?

[5] Before embarking on an analysis, the facts must be set out. They are so extreme, and the conduct of the applicants so abhorrent, that they could be considered unique.

Background

[6] The applicants are the parents of two boys who were aged 6 years and 10 years old when this application was launched. The children, DB and EB, commenced their schooling at Pridwin Preparatory School (Pridwin or School) in 2012 and 2016 respectively. Pridwin, the first respondent, is a small elite boys' preparatory school in Melrose, Johannesburg, and has 445 learners. It is one of the small group of schools comprising 4% of independent schools that receives no state subsidy at all and is entirely self-funded. The substantial fees paid by the parents are commensurate with the quality of education and the lavish amenities it provides.

[7] Mr Selwyn Marx, the headmaster, is the second respondent (headmaster). The School Board of Pridwin is the third respondent. The Member of the Executive Council for Education (who has not participated in the proceedings before this Court) is the fourth respondent and the Independent Schools Association of

South Africa (ISASA) is the fifth respondent. The Centre for Child Law (CCL) and Equal Education (EE) have been admitted as *amici curiae*.

[8] The conclusion of a contract between the School and the parents of each learner is a prerequisite for admission to Pridwin. The applicants entered into two identical Parent Contracts with the School in respect of their two boys. Clause 9.3 of the Parent Contract is the crux of the dispute. It provides:

> "The School also has the right to cancel this Contract at any time, for any reason, provided that it gives you a full term's notice, in writing, of its decision to terminate this Contract. At the end of the term in question, you will be required to withdraw the Child from the School, and the School will refund to you the amount of any fees pre-paid for a period after the end of the term less anything owing to the School by you."

[9] Clause 9.2 is a corresponding clause, which entitles the parents to cancel for any reason, on one term's written notice, alternatively on the payment of a full term's fees.[3] Clause 9.4 provides for the immediate cancellation of the contract by the School on the grounds of a material breach, which grounds are listed in clause 9.5 and include acting in a way "that [the parent] or child become seriously and unreasonably uncooperative with the School and in the opinion of the Head, your or your child's behaviour negatively affects your Child's or other children's progress at the School, the well-being of School staff, or brings the School into disrepute".

[3] Clause 9.2 of the Parent Contract provides:

> "You have the right to cancel this Contract at any time, for any reason, provided that you give the School a full term's notice, in writing, of this intention before the withdrawal of the Child from the School. Alternatively, a full term's fees (including additional fees pro-rated for the term) is payable to the School in lieu of notice, and as a reasonable cancellation fee taking into account the nature of the educational services, capacity planning and reasonable potential to fill the vacancy. Such amount is due and payable on the first day of the term which would have been the final term if the appropriate notice had been given. Should you have elected to pay annual school fees or should any additional fees have been paid in advance, those fees will be credited in proportion to the terms remaining, less any amount payable in lieu of appropriate notice."

[10] What should have been a nurturing and enriching school environment for the two young boys, their peers and teachers at the School took a nasty turn, almost entirely as a result of the behaviour of their father, AB, who was aided and abetted by his wife, CB. There is no suggestion that the two boys were anything but model learners.

[11] Initially, the applicants' concern was apparently that their elder son was being socially isolated and bullied. They requested that he receive preferential treatment. This concern extended to gross lengths. AB, for instance, came to check the room temperature in the classroom to ensure that it was appropriate for his son.

[12] Later AB's primary complaint shifted. Now it was about the standard of sport at Pridwin. His apparent unshakable conviction was that his children, particularly his elder son, had exceptional sporting ability, but that this was being stifled because Pridwin refused to recognise his true potential. This manifested in extreme behaviour; AB analysed his eldest son's cricket results to ensure that accurate records were kept in order to monitor whether due recognition was being given to his son's achievements. He insisted that his son was a candidate for the provincial cricket team. He demanded that the School newsletter be corrected as he did not believe it accurately recorded the number of runs his son had made in cricket. He regularly confronted the coaches. He even went so far as to obtain the services of an actuary to prove that the team selection process was "an absolute farce".

[13] AB's grossly intrusive interference was not only confined to cricket. In his supposed quest for accountability and excellence, he queried the team selections in soccer. All the while he denied that he was a "pushy" parent. He enrolled his son in a soccer club with SuperSport and expected that he would be placed in their academy for gifted players. The under 9 tennis coach was reduced to tears as a result of exchanges with, and accusations by, AB.

[14] It seems that the youngest boy was not spared the unrelenting parental pressure and extremity of conduct – AB informed the headmaster that he had been personally coaching the young boy in preparation for Pridwin and that he had displayed skills far beyond his years. AB believed that sporting prowess would turn his children into successful future businessmen. The headmaster's suggestion that success in later life was achieved by a variety of factors including failure, disappointments, support, love and affirmation, fell on deaf ears.

[15] Predictably, over the years the relationship between AB and Pridwin became increasingly toxic. This culminated in the headmaster addressing a letter to the applicants during June 2016, invoking clause 9.3 of the Parent Contract, effectively terminating the contract and entailing that the two boys' continued education at Pridwin came to an end. Rather than the one term's notice provided for in the clause, the applicants were given six months as the boys were required to leave the School by the end of that academic year. What follows are the main incidents that led to this state of affairs.

[16] On 10 November 2015, while the Pridwin under 9A cricket team was competing in a cricket festival held at Trinityhouse Preparatory School (Trinity) – another private school – the headmaster was called by the headmaster of Trinity to deal with the misconduct of a Pridwin parent, who was, of course, AB. He disputed the correctness of the Trinity umpire's decision when his son had been given out. Mr Mokoele, the Trinity umpire, deposed to an affidavit, expressing his shock at AB's aggressive behaviour who told him he had made a mistake by giving his son out and said: "You fat f***; you don't respect parents". With a cricket bat in hand, AB told Mr Mokoele that he would wait for him after the game and kill him because he did not show him respect.

[17] The headmaster had to apologise for AB's behaviour. When confronted, AB became angry and said that umpires were not gods and that where he came from if an umpire made a bad decision, they would take a cricket stump out of the ground and

stab him. He told the headmaster that he had connections with the "Economic Freedom Front" which could easily destroy the School. In reply, AB denied these allegations. Nevertheless, AB wrote a letter of apology to Mr Mokoele in which, peculiarly, he concluded by setting out his own sporting history as the captain of the under 13 and under 16 cricket teams and his student number at Rhodes University and the University of Cape Town.

[18] In January 2016, as a result of the perceived weakness of the standard of cricket coaching at Pridwin, AB volunteered his services as coach of the B team. He offered a donation of R50 000 if the B team he coached could beat Pridwin's A team, ostensibly to expose the inadequacy of the coaching. Immediately on his appointment, acrimony developed between AB and Pridwin's head of sport, Mr Joubert. AB's coaching stint was short-lived, and on the morning of 27 January 2016, after only two and a half weeks, his services as a coach were terminated.

[19] On the afternoon of the same day, Pridwin's under 10A cricket team were playing against a nearby private school, St John's College (St John's). During the game, the umpire gave AB's son out for being caught behind the wicket. AB immediately objected to the decision. Another unpleasant scene took place. According to Pridwin's coach, Mr Broderick, AB became abusive and called him a "f***ing s**t coach". A parent who was present at the game stated that her son had told her that AB had sat amongst the boys, and, using crude language, criticised the umpire's decision and that this had had an adverse effect on her son. He also undermined and disparaged the performance of the other boys in the team, which was very distressing for the children.

[20] The following day, 28 January 2016, the headmaster addressed a letter to the School Board of Pridwin. In it, he indicated his intention to charge AB with misconduct and to hold a hearing. Before a hearing could take place, the applicants requested a meeting with the headmaster. This resulted in a settlement being reached.

The applicants indicated their desire to move their boys to St John's and requested the headmaster's assistance in this regard.

[21] AB agreed to certain conditions pending the move. These were that he would refrain from coaching or offering any advice to any boys during sporting events, including his own children; not sit with or near the boys at sporting events; refrain from publicly criticising referees and umpires; and abide by all refereeing and selection decisions. In return, the headmaster agreed that the boys would not be victimised and that he would endeavour to assist with securing their placements at St John's.

[22] This agreement evidently had little impact on AB. Nevertheless, the headmaster wrote to St John's requesting that the two boys be accepted. There is no suggestion that the boys suffered any victimisation.

[23] The discord between the applicants and Pridwin, particularly Mr Joubert, did not abate. Relations deteriorated so badly that both parties employed the services of lawyers – allegations and counter allegations were made. So acute was the suspicion and mistrust that when the under 10 cricket team was sent to the wrong school to play a match in March 2016, AB blamed Mr Joubert. Even though Trinity apologised in writing because the scheduling error was theirs, AB demanded to have access to Mr Joubert's telephone records to investigate whether Mr Joubert was lying.

[24] CB, although not directly involved, encouraged her husband's conduct. She wrote insultingly to the headmaster that she was "not sure if [Mr Joubert's] behaviour emanated from just a low IQ or obvious malice" and that he clearly did not "realise the calibre of people he is choosing to take on". At a later stage, she wrote to the headmaster accusing him of being "a sociopath" and "a narcissist" who had failed her children.

[25] The applicants instituted a formal grievance procedure against Mr Joubert and spuriously requested an independent investigation into "lack of transformation" in school sports. A meeting was held between the Chairman of the School Board of Pridwin and CB. The investigation did not proceed as the applicants refused to agree to the terms of reference.

[26] Matters finally came to a head on 27 June 2016. During that year, the applicants' eldest son had been selected for the Soccer SuperSport Gauteng Central Region team. AB, supposedly suspicious that his son would not be treated fairly when Pridwin's soccer trials took place on 21, 23 and 27 June 2016, "offered" for the SuperSport coach, Mr Mosoana, to attend the trials with him on 27 June 2016.

[27] According to AB, during tea break Mr Mosoana politely approached one of the coaches, Mr Prinsloo, to discuss the trials. Mr Prinsloo refused to entertain this, and on AB's version, was hostile and aggressive. AB claimed that he felt compelled to intervene and went onto the pitch to confront Mr Prinsloo. Once again the headmaster had to be called to the scene to deal with AB. The precise details of the altercation are disputed, but it is common cause that another ugly scene ensued with AB at the centre of it. Ironically, on that day, AB's son was not present and did not participate in the trials as he was ill.

[28] A mother of one of the other boys, who was watching the trials, set out her observations. On her version, all members of the Pridwin staff conducted themselves in a placatory manner, in the face of the aggression coming from AB. Despite Mr Prinsloo's attempts to divert the attention of the boys, they kept on staring at the spectacle that was taking place. According to the mother, Pridwin prides itself on imparting exemplary manners to children and she did not want her son to be exposed to such inappropriate, disrespectful and aggressive conduct.

[29] This incident was the straw that broke the camel's back as far as the headmaster was concerned. On the same afternoon, AB returned to the School after

dropping off Mr Mosoana and attempted to engage the headmaster. The headmaster informed AB that his conduct was in breach of the agreement they had reached on 28 January earlier that year and asked him to leave his office.

[30] A few days later on 30 June 2016, the headmaster, after seeking legal advice, terminated the Parent Contract in terms of clause 9.3.

[31] The parties then entered into correspondence through their attorneys. AB expressed the view that he should have been afforded a hearing before the decision was taken. The headmaster's response was that he was not obliged to do so, as AB had deliberately flouted the terms of the settlement agreement. In addition, AB's representations to the headmaster on the afternoon of 27 June had been rejected. This decision, said the headmaster, was taken in the best interests of the School – AB's conduct had been threatening and intimidating to the staff and damaging to the reputation of the School. In any event, said the headmaster, the stated intention of the applicants in January 2016 was to remove their boys from Pridwin.

Litigation history

High Court

[32] On 1 December 2016, almost five months after the headmaster terminated the contract, the applicants approached the High Court of South Africa, Gauteng Local Division, Johannesburg (High Court) on an urgent basis. An interim order was sought entitling the children to remain at Pridwin pending the determination of the main application. They sought to set aside the headmaster's cancellation of the Parent Contract. The High Court granted the interim order.

[33] In the main application that followed, the applicants sought the following orders:

(a) The decision of the headmaster to cancel the Parent Contract be declared unconstitutional, unlawful and invalid;

(b) The decision be reviewed and set aside;
(c) the children be entitled to remain at Pridwin;
(d) The School be precluded from cancelling the Parent Contract subject to a fair and reasonable procedure being followed;
(e) The notice clause be declared unconstitutional in that it was contrary to public policy and unenforceable, to the extent that it allowed Pridwin to cancel the Parent Contract without fair process; and
(f) Costs including the costs of two counsel.

[34] The High Court dismissed the main application.[4] The applicants were ordered to remove their two children from the School by the end of the 2017 academic year. Until that time, the applicants were ordered to comply with all their obligations in terms of the Parent Contract.

[35] The High Court upheld the School's right to cancel the Parent Contract, in terms of clause 9.3, in accordance with the *pacta sunt servanda* (agreements must be honoured) principle.[5] As to whether the termination of the contract infringed section 29(1)(a) of the Constitution, the High Court found this case to be distinguishable from this Court's decision in *Juma Musjid*[6] as, unlike Pridwin, the Juma Musjid Primary School was a public school. In order for the negative obligation in section 29(1)(a) to be triggered, Pridwin must be exercising private powers for public purposes.[7] Pridwin, unlike low-fee independent schools, is entirely independent of the state and receives no subsidies from the state. It has no obligation to provide a basic education. Nor is there any contractual nexus between it and the state.[8] The High Court held that the right to basic education in section 29(1) did not

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[4] *AB v Pridwin Preparatory School* [2017] ZAGPJHC 186 (High Court judgment), per Hartford J.

[5] Id at para 14.

[6] *Governing Body of the Juma Musjid Primary School v Essay NO* [2011] ZACC 13; 2011 JDR 0343 (CC); 2011 (8) BCLR 761 (CC) (*Juma Musjid*).

[7] High Court judgment above n 4 at paras 18-9 and 25.

[8] Id at paras 27-8.

include the right on the part of a learner to attend a wholly independent school. To find otherwise would entitle every learner to attend only the best wholly independent schools.[9]

[36] With regard to whether the children's rights in terms of section 28(2) of the Constitution were infringed, the High Court was satisfied that when the headmaster terminated the Parent Contract he gave an appropriate degree of consideration to the best interests of not only the applicants but of all the other 445 learners in the School.[10]

[37] After judgment was delivered in the main application, the School approached the High Court on an urgent basis. It sought an order finding the applicants in contempt of the order that they should not breach the Parent Contract. The High Court interdicted and restrained the applicants from acting in breach of the Parent Contract, specifically from failing to maintain a courteous and constructive relationship with the headmaster. The incidents which gave rise to this application are merely further evidence of the irretrievable breakdown in the relationship between the applicants and the School.

Constitutional Court (2017)

[38] Dissatisfied with the High Court's decision, the applicants filed an application for direct access to this Court in 2017 under case number CCT 191/17. On 30 August 2017, the application was dismissed on the grounds that it was not in the interests of justice to grant leave to appeal at that stage. The applicants then petitioned the Supreme Court of Appeal, which granted them leave.

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[9] Id at paras 32-3.

[10] Id at para 53.

Supreme Court of Appeal

[39] On 1 November 2018, a 4-1 majority judgment of the Supreme Court of Appeal upheld the High Court judgment, concluding that independent schools have no constitutional duty to afford a hearing in these circumstances.[11]

[40] The majority noted that it was the School's business to run a private school to educate children. This it has done since 1923, embracing the idea that the best interests of the children are paramount in whatever it does.[12] The School quite properly accepted that it is bound by section 8(2) of the Constitution[13] "to the extent that, it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right."[14] The majority thus found that the headmaster had considered the best interests of the children when he invoked the termination clause. He properly balanced the rights of the two children against those of all other children at the School, as well as those of other stakeholders, in coming to his decision.[15]

[41] The majority found that Pridwin has no positive duty to provide a basic education and, therefore, had no constitutional obligation to admit these children into the School. Nor does it provide a basic education – to find otherwise would lead to remarkable consequences.[16] Instead, Pridwin's obligations are confined to those set out in the Parent Contract:

> "Section 29(3) expressly recognises the right to establish and maintain independent schools, which is what Pridwin is. And though it provides a standard of education not

[11] *AB v Pridwin Preparatory School* [2018] ZASCA 150; 2019 (1) SA 327 (SCA) (Supreme Court of Appeal judgment) per Cachalia JA for the majority. Mocumie JA dissented.

[12] Id at para 29.

[13] Section 8(2) of the Constitution reads:

> "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

[14] Supreme Court of Appeal judgment above n 11 at para 29.

[15] Id at para 31.

[16] Id at paras 40 and 42.

> inferior to a public school, it is not providing a basic education as envisaged [in] section 29(1)(a). It would only be doing so if it was contracted by the state for this purpose, as explained in *Allpay v SASSA*. It would then be under a positive duty to do so because it was performing a constitutional function. Section 29(1)(a) cannot therefore be used to impose a duty on a private school, not provided for in the Parent Contract".[17]

[42] The nub of the majority's reasoning was that it was not in the best interests of all concerned for this particular family to remain at Pridwin.[18] The provision of basic education is the state's obligation and not that of private institutions. Private schools only have a duty not to unreasonably diminish a learner's access to an existing education. Pridwin did not provide a basic education and had done nothing to prevent the children from obtaining a basic education at one of the three state schools in their residential area, which would have been obliged to take them.[19] Termination clauses in these kinds of private contracts are not against public policy and not unconstitutional.[20]

[43] The dissent held that the appeal should succeed on the basis that the termination clause is unconstitutional, against public policy and unenforceable to the extent that it purports to allow the School to terminate the Parent Contract without following fair procedure and without the views of the affected children being given due and appropriate consideration.[21]

[17] Id at para 39.

[18] Id at para 81.

[19] Id at para 44.

[20] Id at para 81. The majority judgment summarised what it considered as "clearly established" in contract law in six propositions. Given that this judgment finds that the majority misperceived the impact of the provisions of the Bill of Rights on the parties' contract in this case, it is not necessary to engage with the propositions that court expounded.

[21] Id at para 84.

[44] The applicants, dissatisfied with the decisions of the High Court and Supreme Court of Appeal, approached this Court, even though, by now, the boys had long left Pridwin and were attending another school.

In this Court

[45] The primary issue before this Court is the determination of children's constitutional rights in the context of private education. But before that, the applicants must clear the hurdles of jurisdiction and mootness. The issues before us are thus:

(a) Jurisdiction and leave to appeal;

(b) The constitutional validity of the Parent Contract and the enforcement thereof; and

(c) Children's constitutional rights in the context of private education.

Jurisdiction and leave to appeal

[46] Full arguments have been advanced by the parties, including the amici curiae. There is no dispute between the parties that the constitutionality of the clause is an important and complex constitutional matter that engages the jurisdiction of this Court. Both the High Court and the majority of the Supreme Court of Appeal found that the right to basic education and best interests of the child were not implicated. The Supreme Court of Appeal's finding largely insulates non-subsidised independent schools from constitutional obligations. Whether that is correct is an important question.

[47] The matter raises important constitutional issues, pertaining to the best interests of the child and the right to basic education in private schools. The impact of the enforcement, and thus termination, of the Parent Contract requires interrogation as the outcome will impact on all independent schools and children attending those schools. The contractual aspect of this case requires this Court to examine the principles set out

in *Barkhuizen*.[22] Equally important, the applicants invoke section 8(2) of the Constitution and call for a direct application of the Bill of Rights to contractual matters affecting children. As a result, this matter comprises constitutional issues and raises arguable points of law of general public importance. Therefore, this matter engages the jurisdiction of this Court in terms of section 167(3)(b) of the Constitution.[23]

[48] This takes me to the question of leave to appeal and, particularly, mootness. At present there is no pending dispute. For all intents and purposes, the applicants' case is moot on the facts.

[49] As mentioned above, the boys have since left Pridwin. They now attend another elite private school. Shortly before the hearing, the applicants indicated that they did not pursue any relief seeking the children's reinstatement at Pridwin. They persist, first, in seeking an order declaring the headmaster's decision to terminate the Parent Contract unlawful. Secondly, they seek to declare clause 9.3 unconstitutional, contrary to public policy and unenforceable to the extent that it purports to allow Pridwin to cancel the Parent Contract without following a fair procedure and / or without taking a reasonable decision.

[50] The general principle is that an application is moot when a court's ruling will have no direct practical effect.[24] Courts exist to determine concrete legal disputes and

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[22] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC).

[23] Section 167(3) of the Constitution provides:

> "The Constitutional Court—
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> . . .
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> (b) may decide—
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> (i) constitutional matters; and
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> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court."

[24] *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (2) SA 329 (CC); 2019 (3) BCLR 383 (CC) at para 7.

their scarce resources should not be frittered away by entertaining abstract propositions of law, however engaging. Typically, this Court will not adjudicate an appeal if it no longer presents an existing or live controversy, and will refrain from giving advisory opinions on legal questions which are merely abstract, academic or hypothetical and have no immediate practical effect or result.[25] This principle was recently reiterated in *President of the Republic of South Africa*.[26] There, it was held that "courts should be loath to fulfil an advisory role, particularly for the benefit of those who have dependable advice abundantly available to them and in circumstances where no actual purpose would be served by that decision".[27]

[51] But that is not the end of the matter because "mootness is not an absolute bar to deciding an issue . . . the question is whether the interests of justice require that it be decided."[28] In class actions or public interest litigation, the decisions pertaining to the rights contained in the Bill of Rights can have a far-reaching practical effect on many others.

[52] In *Langeberg Municipality*, this Court formulated the test for adjudicating a moot matter in these terms:

> "This Court has a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order, which this Court may make, will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and

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[25] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 21 and *JT Publishing v Minister of Safety and Security* [1996] ZACC 23; 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC) at para 15.

[26] *President of the Republic of South Africa v Democratic Alliance* [2019] ZACC 35; 2019 JDR 1753 (CC); 2019 (11) BCLR 1403 (CC).

[27] Id at para 35.

[28] *Sebola v Standard Bank of South Africa Ltd* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) at para 32.

> extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument advanced."[29]

[53] The interests of justice test, to determine mootness, has been reiterated several times by this Court. In *POPCRU*, it was held that the discretion is based upon a number of factors which include, but are not limited to, considering whether the order may have some practical effect, and if so, its nature or importance to the parties or to others.[30] The prospects of success are an additional consideration, which, although important are not decisive in determining whether it would be in the interests of justice to adjudicate the matter, notwithstanding its mootness.[31]

[54] This Court in *Pillay*[32] dealt with a public school that had prohibited a Hindu girl from wearing a small nose stud. By the time the matter reached this Court, she had matriculated and left the School. The following factors were identified as being relevant to whether the matter should be heard: the nature and extent of the practical effect any possible order may have; the importance and complexity of the issue; the fullness or otherwise of the arguments advanced; and whether a judgment would resolve disputes between different courts.[33]

[55] The Court held that the issue impacted upon Ms Pillay's religious and cultural rights and would, in the future, have significant practical effect on the school she had attended, as well as all other schools across the country. It was therefore held that,

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[29] *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) (*Langeberg Municipality*) at para 11.

[30] *POPCRU v SACOSWU* [2018] ZACC 24; 2019 (1) SA 73 (CC); 2018 (11) BCLR 1411 (CC) at para 44.

[31] *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC) at para 20; *National Education Health & Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA (1) (CC); 2003 (2) BCLR 154 (CC) at para 25 and *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12.

[32] *MEC for Education, Kwazulu-Natal v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (*Pillay*).

[33] Id at para 32.

even though there was no live issue between the parties, it was in the interests of justice to grant leave to appeal and that the matter be heard by this Court.[34]

[56] As independent schools proliferate in South Africa, there is widespread use of clauses, if not identical, then certainly similar to clause 9.3. These do not impact only on the elite as in this case, but also upon less affluent parents who, in the hope of a better education for their children, enrol them in low-fee, state-subsidised independent schools. Statistics indicate that the majority of independent schools now serve low- and middle-income children. The demographic shift in the composition shows that the children who attend these schools are mainly black and female. The impact of a judgment dealing with these clauses will be far-reaching. It will determine how independent schools conduct themselves when terminating these types of Parent Contracts.

[57] The educational rights of children at independent schools and the concomitant constitutional obligations of these schools goes far beyond the confines of this case. Indeed, the transient nature of schooling makes the presence of an extant legal issue by the time the court processes are finalised, a rare occurrence. Accordingly, it is in the interests of justice that leave should be granted on the issue of the constitutionality of clause 9.3 of the Parent Contract and its enforceability without following fair procedure.

[58] However, the order sought to declare the headmaster's decision to terminate the Parent Contract invalid, is of an altogether different nature. The children have left the School. The facts are unique and the likelihood of a termination on similar facts is extremely remote. A decision on this aspect has no practical effect on the parties themselves. Nor can it be said that the applicants' motive for pursuing the litigation is born of altruism. Their impetuous insistence on litigating to the highest court in the country was not to vindicate constitutional principles but to settle a score against the

[34] Id at para 35.

School. This is evidenced by the acrimony and vitriol they displayed at every point. This Court cannot be used to settle scores, instigated and self-created by the parents.

[59] In the light of these particular and extraordinary facts it is therefore, in my view, not in the interests of justice for this Court to determine whether the headmaster's decision to terminate the Parent Contract was invalid. What will have practical and far-reaching effects is a pronouncement on the constitutionality of clause 9.3 and the enforcement thereof. To this extent, and to this extent only, it is in the broader public interest for this Court to make a decision on that point alone, and to thus grant leave to appeal notwithstanding mootness.

The constitutional validity of clause 9.3

[60] The first question is whether the clause is facially valid without more and, if so, whether its enforcement should be countenanced in circumstances where the affected parties are not afforded a hearing. Counsel for the applicants, in this Court as well as in the Supreme Court of Appeal, stressed that the primary challenge was not to the validity of the clause on its face, but to the manner in which it was enforced without affording the parties a hearing.

[61] All contractual agreements between private parties are governed by the principle of *pacta sunt servanda,* unless they offend public policy. Where it is alleged that constitutional values or rights are implicated, public policy must now be determined by reference to the values embedded in the Constitution, including notions of fairness, justice and reasonableness.[35] The Parent Contract, in particular clause 9.3, must stand up to scrutiny, based on the test set out in *Barkhuizen*, where this Court authoritatively stated that the application of public policy in determining the unconscionableness of contractual terms and their enforcement must, where constitutional values or rights are implicated, be done in accordance with notions of fairness, justice and equity, and reasonableness cannot be separated from public

[35] *Barkhuizen* above n 22 at para 51.

policy. Public policy takes into consideration the necessity to do simple justice between individuals and is informed by the concept of *ubuntu*.[36] What public policy is, and whether a term in a contract is contrary to public policy, must now be determined by reference to these values. This leaves space for enforcing agreed bargains (*pacta sunt servanda*), but at the same time allows courts to decline to enforce particular contractual terms that are in conflict with public policy, as informed by constitutional values, even though the parties may have consented to them.[37]

[62] The majority in the Supreme Court of Appeal found that the right of the School to enter into contracts, to terminate them freely according to their terms, along with the freedom to disassociate with whomsoever it wishes should take precedence.[38] The Court reasoned that, since one is dealing with a private power, no right to be heard arises. Nor can a right to be heard before cancellation be inferred from section 28(2).[39] If this was the case, it would, for example, the Court continued, oblige a lessor to hold a prior hearing if she wished to terminate a lease where children were involved. To preclude a party from relying on a breach clause before cancelling any contract without a hearing on the best interests of the child, would lead to an absurd result.[40]

[63] However, this finding fails to account for the peculiar nature of contracts that seek to impinge upon or regulate the fundamental educational rights of children under the Constitution. These cannot be equated with standard commercial contracts such as a lease. Contracts specifically dealing with the education of children are of a different species in that there are markedly different considerations at stake. While there is nothing offensive about the clause itself (*per se*), the enforceability of clause 9.3 and

[36] Id.

[37] Id at paras 29, 30, 51 and 73.

[38] Supreme Court of Appeal judgment above n 11 at para 32.

[39] Id at para 37.

[40] Id at paras 33-4.

similar clauses may impact directly upon the educational and other constitutional rights of children.

[64] The School contends that the Supreme Court of Appeal majority was correct in holding that independent schools have no constitutional obligation to provide basic education. Accordingly, except to the limited extent that the child's best interests are of paramount importance in every matter concerning the child, the contract between the School and the parents is a private matter between private contracting parties. As between the contracting parties, there is no reason to find the notice clause to be facially against public policy,[41] nor would its enforcement without hearing interested parties be in breach of the general duty of good faith that underlies contracts.[42]

[65] There is nothing intrinsically unreasonable or unfair in clause 9.3 of the Parent Contract, the School contends. There is no suggestion that clause 9.3 was not drawn to the attention of the parents, nor that one term's notice is an unreasonably short period of time. The Parent Contract was freely and voluntarily entered into between persons of equal bargaining power. It cannot be said to fall short of the *Barkhuizen* standard.[43]

[66] The problem here lies not with the facial terms of the contract, but with the effect of its enforcement — not on the parties to the contract, the parents — but on their children. Then the question is how do obligations owed to the children by the School possibly arise? And if there are obligations of this kind, how would that impact on enforcement of the Parent Contract?

[67] *Barkhuizen* clearly viewed the constitutionality of a contractual clause through the prism of public policy. However, where constitutional rights are directly at issue,

[41] *Barkhuizen* above n 22 at para 59.

[42] Id at para 80.

[43] Id at para 59.

I do not understand *Barkhuizen* to inhibit determining the enforceability of a contractual clause by direct application of the Bill of Rights to private persons in terms of sections 8(2) and 8(3). Langa CJ in his concurring judgment pointed out that, to the extent that Ngcobo J's judgment was authority for the proposition that the only acceptable challenge to the constitutionality of a contractual term was an indirect application under section 39(2), he disagreed, stating that:

> "While I agree that indirect application may ordinarily be the best manner to address the problem, I am not convinced that section 8 does not allow for the possibility that certain rights may apply directly to contractual terms or the common law that underlies them. Fortunately, I find it unnecessary to decide the matter at this time as, to my mind, what public policy requires in this case is exactly the same as what a direct application of section 34 would demand. Indeed, the distinction between direct and indirect application will seldom be outcome determinative."[44]

[68] The crucial issue is then whether independent schools, by providing education to children, assume constitutional duties and obligations that inhibit the free exercise of contractual rights. In this matter, these are the best interests of the child as entrenched in section 28(2) of the Constitution and the right to basic education as protected in section 29(1)(a) of the Constitution. If independent schools do not have this duty, the children will have no independent right to expect their constitutional educational rights to be enforced through inhibiting free exercise of contractual rights. That the best interests of the child are paramount is accepted and embraced by the School. But, if a constitutional duty to provide basic education protects also those children who attend an independent school, may the School evade these obligations by attempting to contract out of it? To answer that one needs to consider the Constitution.

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[44] Id at para 186.

Children's constitutional rights in private basic education

Best interests of the child

[69] Section 28(2) of the Constitution provides that "[a] child's best interests are of paramount importance in every matter concerning the child".[45] The paramountcy of the rights of the child has been emphasised by this Court in numerous cases. In *Fitzpatrick*, this Court stated:

> "The plain meaning of the words clearly indicates that the reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be

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[45] Section 28 of the Constitution states:

> "(1) Every child has the right—
>
> (a) to a name and a nationality from birth;
>
> (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
>
> (c) to basic nutrition, shelter, basic health care services and social services;
>
> (d) to be protected from maltreatment, neglect, abuse or degradation;
>
> (e) to be protected from exploitative labour practices;
>
> (f) not to be required or permitted to perform work or provide services that—
>
> (i) are inappropriate for a person of that child's age; or
>
> (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
>
> (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—
>
> (i) kept separately from detained persons over the age of 18 years; and
>
> (ii) treated in a manner, and kept in conditions, that take account of the child's age;
>
> (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
>
> (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.
>
> (2) A child's best interests are of paramount importance in every matter concerning the child.
>
> (3) In this section "child" means a person under the age of 18 years.""

> interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1)."[46]

[70] In *J*, the above dictum from *Fitzpatrick* was confirmed.[47] However, this is not without its limitations and should not be taken without qualification. The fact that a child's best interests are paramount does not mean that those interests are superior to, and will trump, all other fundamental rights. Otherwise taken literally, it would cover every field of human endeavour that has some direct or indirect impact on children, as indeed the Supreme Court of Appeal sought to reason, and it could even be rendered empty rhetoric. The import of the principle was eloquently articulated in *S v M*, where this Court held:

> "The paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely, the interests of children who may be concerned."[48]

[71] This Court also held that:

> "Accordingly, the fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights in the Bill of Rights their operation has to take account of their relationship with other rights which might require that their ambit be limited."[49]

[72] There is no dispute that section 28(2) is binding on all schools including independent schools, and the School accepted as much. The best interests of the child

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[46] *Minister for Welfare and Population Development v Fitzpatrick* [2000] ZACC 6; 2000 (3) SA 422 (CC); 2000 (7) BCLR 713(CC) at para 17 (*Fitzpatrick*).

[47] *J v National Director of Public Prosecutions* [2014] ZACC 1; 2014 (2) SACR 1 (CC); 2014 (7) BCLR 764 (CC) at para 35.

[48] *S v M* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at para 42.

[49] Id at para 26.

provision is both a constitutional principle and a self-standing right.[50] The content of the child's best interests right is encapsulated in *Director of Public Prosecutions, Transvaal*, where this Court held that although it is neither necessary nor desirable to define the content of the right in section 28(2), the right in that subsection—

> "imposes an obligation on all those who make decisions concerning a child to ensure that the best interests of the child enjoy paramount importance in their decisions. Section 28(2) provides a benchmark for the treatment and the protection of children"[51]

[73] This Court has held that, in other contexts, section 28(2) incorporates a procedural component affording a right to a fair hearing where the interests of children are at stake. In *C,* it was held that the child concerned must be given an opportunity to make representations to a Children's Court on whether the removal to a place of safety is in the child's best interests.[52] The Supreme Court of Appeal confirmed this in *Fochville*.[53] However, both these cases involved the exercise of a public power.

[74] Although there are provisions in the Children's Act[54] and international law instruments[55] as to rights of representation of children themselves in matters affecting

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[50] *J* above n 47 at para 35.

[51] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC) at para 73.

[52] *C v Department of Health and Social Development, Gauteng* [2012] ZACC 1; 2012 (2) SA 208 (CC); 2012 (4) BCLR 329 (CC) at para 27.

[53] *Centre for Child Law v The Governing Body of Hoërskool Fochville* [2015] ZASCA 155; 2016 (2) SA 121 (SCA) at para 22 (*Hoërskool Fochville*).

[54] 38 of 2005. Section 6(3) of Children's Act states that "[i]f it is in the best interests of the child, the child's family must be given the opportunity to express their views in any matter concerning the child."

Section 10 of the Children's Act provides:

> "Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration."

[55] For example, see article 12 of the The Convention on the Rights of the Child, United Nations General Assembly, adopted 20 November 1989 (Convention), which provides:

them, there is no direct authority that imposes this obligation on independent schools in relation to the enforcement of Parent Contract with the School.

[75] If the Supreme Court of Appeal is correct that independent schools have no constitutional educational obligations towards those children attending them, it may be difficult to locate an obligation under section 28(2) paramountcy alone as the source of a constitutional right in favour of the children in the contractual arrangement between the School and the parents. It is thus necessary to examine section 29 of the Constitution, which deals with education rights, in order to see whether it provides the source for the constitutional rights of children who attend independent schools and the constitutional obligations of those independent schools that the applicants contend for.

The right to basic education

[76] The relevant parts of section 29 of the Constitution provide:

> "(1) Everyone has the right—
> (a) to a basic education, including adult basic education; and
> (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.
> (2) . . .
> (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—
> (a) do not discriminate on the basis of race;
> (b) are registered with the state; and
> (c) maintain standards that are not inferior to standards at comparable public educational institutions.

"1. States Parties shall assure to the child who is capable of forming their own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

> (4) Subsection (3) does not preclude state subsidies for independent educational institutions."

[77] Clearly, there is no general positive duty on private entities to provide education, basic or otherwise. Section 29(3) makes it plain that they may establish and maintain independent educational institutions. And when they do so these independent educational institutions provide, at least in a literal sense, "education". They must maintain standards not inferior to those at comparable public educational institutions. There is thus nothing textually, either in section 29(1)(a) or section 29(3), that militates against holding that independent schools established under section 29(3) assume constitutional education obligations towards those children who are educated in them.

[78] While it is difficult to establish where the line should be drawn between basic education and further education, it cannot be disputed that basic education includes what is commonly known as primary education. Indeed, in *Juma Musjid* this Court accepted that education offered from Grades 1 to 9 constituted basic education.[56] Here, when the application was launched in 2016, the boys were in Grade R and Grade 4 respectively. Consequently, Pridwin was offering a basic education, albeit one of a superior quality than that offered at most public schools.

[79] The School contended, supporting the judgments in its favour by both the majority of the Supreme Court of Appeal and the High Court, that it does not provide a "basic education". What it offers is a superior education to which not every child is constitutionally entitled. But that is to misconstrue the concept of basic education, which stands in contradistinction not to a superior education, but to a secondary or tertiary education.

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[56] *Juma Musjid* above n 6 at para 38.

[80] Accordingly, it is clear that every institution, elite or non-elite, that provides non-secondary or non-tertiary education is necessarily simultaneously engaged in providing those attending it a basic education. From a slightly different perspective, a basic education is also a component of every superior education.

[81] To find that only the state provides a basic education, and that only the state bears the burden of providing a basic education, is to misconstrue what this Court has held in *Juma Musjid* and *Kwa-Zulu Natal Joint Liaison Committee.*[57] In *Juma Musjid*, the High Court concluded that the Trust owed no constitutional obligation to the learners at the school. This Court unequivocally repudiated that conclusion, and stated that it "was based squarely on pre-constitutional common law principles".[58] It criticised the High Court for its failure to have "proper regard to section 8(2) of the Constitution and the impact the eviction would have on the learners' rights".[59] In the case before us, there is no eviction, but other breaches of fundamental rights are at issue. The notion that the School, because it is arguably superior and operates independently of the state, does not provide basic education, and therefore owes no constitutional duties of fair consideration to the children for whose education the parents have contracted with it, errs in the same way.

[82] This is not to suggest that the private conduct of independent schools should be subject to the Bill of Rights in the same manner and to the same extent as public institutions. This Court, in *Daniels*,[60] was at pains to draw the distinction between the positive obligation imposed on the state, which has the public purse at its disposal and private institutions with limited resources. But independent schools cannot be enclaves of power immune from constitutional obligations.

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[57] *Kwazulu-Natal Joint Liaison Committee v MEC for Education, Kwazulu-Natal* [2013] ZACC 10; 2013 (4) SA 262 (CC); 2013 (6) BCLR 615 (CC).

[58] *Juma Musjid* above n 6 at para 54.

[59] Id.

[60] *Daniels v Scribante* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) at para 40 quoting Currie and De Waal *The Bill of Rights Handbook* 6 ed (Juta & Co Ltd, Cape Town 2013) at 50. Currie and De Waal state that "the state is supposed to be motivated by a concern for the well-being of society as a whole".

[83] While the majority of the Supreme Court of Appeal's did not distinguish *Kwa-Zulu Natal Joint Liaison Committee* from this case, the High Court attempted to distinguish *Kwa-Zulu Natal Joint Liaison Committee* on the basis that the schools involved were receiving state subsidies. This implies that a child receives a basic education only if the state contributes financially.[61] On this interpretation, once the state fails to pay, the children are no longer receiving a basic education. This cannot be. Whether one receives a basic education depends on the content of the education provided and not on the financial source providing the means for that education. The identity of the service provider cannot determine the nature of the service provided.

[84] The Supreme Court of Appeal majority relied on this Court's decision in *AllPay II*[62] in support of its conclusion that independent schools do not undertake constitutional obligations to provide education. The distinction, it held, lies in the fact that in that case the private entity contracted with the relevant state department to fulfil its constitutional functions.[63] The distinction fails at two levels.

[85] First, the assumption of constitutional obligations does not ultimately depend on the form by which they are assumed (a contract in the case of *AllPay*), but on the volitional nature of the assumption. No private entity is constitutionally obliged to establish and maintain independent educational institutions. But once a private entity voluntarily decides to do so, it cannot escape at least some constitutional responsibilities that the right entails, as the provisions of section 29(3)(a)-(c) explicitly recognise.

[86] Secondly, the right to basic education contains both positive and negative obligations. In *Juma Musjid*, this Court held that the right to basic education is

[61] High Court judgment above n 4 at paras 31-3.

[62] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2014] ZACC 42; 2014 (1) SA 604 (CC); 2014 (6) BCLR 461 (CC) (*AllPay*).

[63] Supreme Court of Appeal judgment above n 11 at para 39.

immediately realisable and not subject to an internal limitation requiring it to be realised only "progressively".[64] While the state has both a positive and a negative duty to realise the right, private entities, have, at the very least, a negative duty not to diminish the right. That emerges from *Juma Musjid* itself, as well as from *Daniels*.[65] No attempt was made by the applicants to argue that independent schools have a positive obligation. In fact, this was specifically disavowed by counsel for the applicants.

[87] In the particular circumstances of *Juma Musjid*, the negative duty was sourced in section 8(2) of the Constitution:[66]

> "[I]t needs to be stressed however that the purpose of section 8(2) of the Constitution is not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights. It is rather to require private parties not to interfere with or diminish the enjoyment of a right. Its application also depends on the 'intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the state or organs of state'."[67]

[88] The content of independent schools' obligations under the Constitution is circumscribed. It does not extend to a positive duty to continue providing education at the private institution. But once an independent school provides basic education, it is then required to ensure that the right to basic education of children attending the independent school is not negatively infringed. That will occur, for instance, where no independent opportunity to be heard is afforded before a decision is made to discontinue that education.

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[64] *Juma Musjid* above n 6 at para 37.

[65] Id at para 57 and *Daniels* above n 60 at para 159.

[66] Section 8(2) provides:

> "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

[67] *Juma Musjid* above n 6 at para 58.

[89] Pridwin had a negative duty not to impair and diminish the boys' right to a basic education. In addition, there should be no interference with the rights already enjoyed by the boys except where there is proper justification for that interference.[68] In *Hoërskool Ermelo*,[69] this Court dealt with the right of learners to receive education in a language of their choice at a public school. The test was formulated in these terms:

> "It must follow that when a learner already enjoys the benefit of being taught in an official language of choice the state bears the negative duty not to take away or diminish the right without appropriate justification."[70]

[90] As it is apparent from *Juma Musjid*, this test applies even where the interference with the enjoyment of this right comes from a private person. This stems from the direct application of the Bill of Rights, which guarantees rights, including rights of access to education.

[91] Therefore, while *Barkhuizen* demands that contracts freely and consciously entered into must be honoured, the contractual autonomy of parties is curtailed when dealing with the right of basic education and the best interests of the child. In these instances, the enforcement of the contract must be subject to the constitutional precepts outlined above because of the direct applicability of rights in the Bill of Rights. Even if the more general public policy approach is preferred, the result will effectively be the same: it is against public policy to enforce a contractual claim that infringes the constitutional rights of children who are not parties to the contract.

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[68] Id; *Jaftha v Schoeman; Van Rooyen v Stoltz* [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) at para 33; *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) at para 46; and *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 34.

[69] *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) (*Hoërskool Ermelo*).

[70] Id at para 52.

[92] This outcome renders it unnecessary to seek an alternative source for independent schools' constitutional education obligations in either the Children's Act or Promotion of Administrative Justice Act.[71]

Conclusion

[93] Schools that provide basic education are under a constitutional duty not to diminish the right to basic education and at all times to act in the best interests of the child. In most circumstances, this would entail: alerting the parents involved to the proposed termination; providing reasons therefor; and affording an opportunity for a fair and appropriate hearing. Of course, this would entail giving the children themselves the opportunity to express their views on a matter that concerns them, where this would be appropriate. In certain circumstances, what would be reasonable and fair would be to hear their teachers, parents, another intermediary, or even a collection of the above. However, after a hearing, the best interests of the other children at the school, or any other relevant consideration, may well prevail.

[94] The constitutional requirement is that there should be both substantive and procedural fairness before any child is excluded from a school.[72] Because the specific circumstances of this case are moot between the parties, I do not consider it necessary to deal with that issue. I thus express no views on the factual findings in that regard in the second judgment.

Costs

[95] The applicants have won their constitutional point, but it is a Pyrrhic victory. The exhausting battle they waged against the School became pointless once their sons were accommodated elsewhere. The primary issue that occupied the High Court and the Supreme Court of Appeal, namely the children's entitlement to remain at Pridwin,

[71] Act 3 of 2000.

[72] Process requirements do not only have a functional purpose; they also have intrinsic value. See, albeit in a different context, *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC) at para 158.

is long since moot. Having found that it is not in the interests of justice to hear this aspect of the case, there is no justification for awarding costs to the applicants. Their conduct throughout, even approaching witnesses to change statements made under oath, militates against any costs order in their favour.

Order

[96] In the result, I would have made the following order:

1. Leave to appeal is granted.
2. It is declared that clause 9.3 of the Parent Contract between the applicants and the first respondent is unconstitutional, contrary to public policy and unenforceable to the extent that it purports to allow Pridwin to cancel the Parent Contracts without following a fair procedure.
3. It is declared that a child’s basic education should not be terminated without an appropriate and substantively fair procedure.
4. There is no order as to costs in this Court.
5. The applicants are to pay their own costs in the High Court and the Supreme Court of Appeal.

THERON J (Jafta J, Khampepe J, Ledwaba AJ, Madlanga J and Mhlantla J concurring)

Introduction

[97] This application concerns the constitutional rights of the applicants’ children, two boys, DB and EB, to have their best interests considered paramount in all matters concerning them and to a basic education. The central question to be considered is whether it is constitutionally permissible for an independent school to expel children due to their parents’ alleged misconduct, without following a fair procedure and without appropriate justification for its decision. DB and EB were learners at Pridwin, an independent school in Johannesburg. In 2016, they were in grade 4 and grade R respectively. On 30 June 2016, Pridwin took the unilateral decision to terminate the

Parent Contract that allowed the children to attend the School.[73] This application concerns the constitutional validity of that decision.

[98] In making the decision to cancel the Parent Contract, Pridwin relied on clause 9.3 of that contract, which provides:

> "The School also has the right to cancel this Contract at any time, for any reason, provided that it gives you a full term's notice, in writing, of its decision to terminate this Contract. At the end of the term in question, you will be required to withdraw the Child from the School, and the School will refund to you the amount of any fees pre-paid for a period after the end of the term less anything owing to the School by you."

[99] The applicants seek orders declaring Pridwin's decision unconstitutional and invalid on both procedural and substantive grounds, on the basis that the decision was in breach of section 28(2) (the best interests of the child standard) and section 29(1)(a) (the right to basic education) of the Constitution. In the event that this Court finds that clause 9.3 is not capable of a constitutionally compliant interpretation, they seek an order declaring clause 9.3 of the Parent Contract unconstitutional, contrary to public policy and invalid to the extent that it permits cancellation of the Parent Contract without a fair hearing and on unreasonable grounds that breach children's rights.

Divergence of approach between the judgments

[100] I have read the comprehensive judgment by my sister, Nicholls AJ (first judgment). I am regrettably unable to agree with paragraphs 1 and 2 of the proposed order and the underlying reasoning. The first judgment has carefully set out the relevant facts in this matter and I gratefully adopt that exposition. I refer to the facts in this judgment only insofar as is necessary.

[73] Like many independent schools, Pridwin requires the parent(s) or guardian(s) of the learners that attend the school to enter into an agreement that governs the relationship between the school and the parent(s) or guardian(s) and, to some extent, the relationship between the school and its learners. The Parent Contract is a precondition for admission of the learners. It establishes, among other things, the standards of conduct that each of the parties must comply with and the bases on which the relationship may be terminated with the result that the learners will be required to leave the school.

[101] The first judgment finds that leave to appeal should be granted in respect of the constitutionality of clause 9.3 of the Parent Contract and its enforceability without following a fair procedure.[74] This is clearly the public policy challenge. In this Court and the Supreme Court of Appeal, the attack by the applicants was not that the clause itself was impugned, but that to enforce it, without a prior hearing or unreasonably, was contrary to public policy.[75]

[102] In addressing the public policy challenge,[76] the first judgment applies the test as enunciated in *Barkhuizen*.[77] The first judgment simultaneously favours the direct application of the Bill of Rights to private persons in terms of sections 8(2) and 8(3) of the Constitution.[78] This represents a novel approach by this Court. The first judgment appears to have conflated two different approaches.

[103] In this matter, the claim based on public policy is directed, not at upholding the constitutional rights of the boys, but at the School's enforcement of the Parent Contract and the potential invalidity of clause 9.3 of the Parent Contract. This claim is contractual in nature, even though public policy is based on the values underpinning the Constitution. It is about the enforcement of a contractual term. The claim relating to the constitutional validity of the decision to terminate the Parent Contract is directed at upholding the boys' constitutional rights. This claim is grounded in Pridwin's obligation not to breach the boys' rights in sections 28(2) and 29(1) of the

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[74] First judgment at [57].

[75] Above n 11 at para 75. Cachalia JA explained:

> "I return to the appellants' public policy challenge to the termination clause
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> . . .
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> [Counsel's] submissions focused on the enforcement of the clause. In other words, it is not the clause itself that is impugned, but the fact that it was enforced, without a prior hearing or reasonably, which is said to be inimical to public policy."

[76] First judgment at [60] and [61].

[77] *Barkhuizen* above n 22 at para 51.

[78] First judgment at [67] to [68].

Constitution, which flow directly from the Constitution and operate independently from the contract. These rights are not dependent on whether the contract was terminated lawfully or not.

[104] This judgment deals exclusively with the constitutional validity of the decision to terminate the Parent Contract. I note the valiant attempt by my colleagues Cameron J and Froneman J in their succinct concurrence (third judgment), to find common ground between the first and second judgments. I make no comment. The second judgment will speak for itself in this regard.

[105] This case presents an opportunity to clarify certain aspects of *Barkhuizen* relating to direct horizontal application of rights between private parties, as against their indirect application through public policy. In *Barkhuizen*, this Court distinguished clearly between the public policy route and the direct application route. It stated that the public policy route involves reliance on a fundamental right "for the purpose of determining the content of public policy" and "as a reflection of public policy".[79]

[106] In *Barkhuizen*, this Court clarified that the direct application route, on the other hand, concerns the "direct application of the Bill of Rights to private persons as contemplated in sections 8(2) and 8(3) of the Constitution."[80] Because it did not consider and decide the matter in the context of sections 8(2) and (3), this Court then

[79] *Barkhuizen* above n 22 at para 20, where Ngcobo J held:

> "Now this argument conflates two different arguments. The first argument is one based on public policy, namely that clause 5.2.5 is contrary to public policy because it violates the right of the applicant to seek judicial redress. This argument does not rely directly on section 34 as a separate and independent ground for attacking the limitation clause. Rather, it relies on section 34 only for the purposes of determining the content of public policy and demonstrating that clause 5.2.5 is contrary to public policy. This argument, therefore, relies upon section 34 as a reflection of public policy. The other argument is based directly on section 34. This argument contends that clause 5.2.5 limits the rights guaranteed in section 34 and considers whether such limitation is reasonable and justifiable under section 36(1). It is this argument that was considered and upheld by the High Court but was rejected by the Supreme Court of Appeal."

[80] Id at para 23.

considered that the public policy route would generally be appropriate in challenges to the constitutionality of contractual terms. This is because contractual terms on their own do not constitute law or conduct for purposes section 172(1)(a) of the Constitution, nor are they laws of general application that can be subjected to a limitation analysis under section 36.[81] Applying the public policy approach would then mean that, instead of a section 36 limitations analysis, the validity of the contractual clause's content or enforcement will be determined with reference to public policy as evidenced by constitutional values.[82]

[107] In my view, there is no need to determine the public policy challenge, which was argued by the applicants in the alternative. The constitutional obligations imposed upon Pridwin do not arise from the Parent Contract. They arise directly from the Constitution and the application of section 8(2). On this approach, and in light of the outcome reached by applying section 8(2), a decision in respect of the public policy challenge is rendered superfluous. A challenge based on the direct application of constitutional rights to the decision of the School is discernible from the pleadings. That should be the applicable route.

Issues

[108] These are the issues in this matter:

(i) Is it in the interests of justice to hear this application?

(ii) Was Pridwin's decision unconstitutional due to the failure to afford the applicants an opportunity to be heard regarding the best interests of the children, in breach of the requirements of sections 28(2) and 29(1) of the Constitution?

(iii) Was Pridwin's decision unconstitutional in that it violated Pridwin's obligation not to unreasonably interfere with the children's basic education, in breach of sections 28(2) and 29(1) of the Constitution?

[81] Id at paras 24-30.

[82] Id at para 30.

Interests of justice

[109] Prior to the hearing of this matter, and in a letter dated 18 March 2019, this Court was advised that the applicants' children had left Pridwin and been placed in another school. Given the change in circumstances, the applicants no longer seek an order entitling the children to remain at Pridwin, as they did in the High Court and the Supreme Court of Appeal. The dispute is focused squarely on the constitutional validity of Pridwin's decision to terminate the Parent Contract and on whether Pridwin's enforcement of clause 9.3 was contrary to public policy.

[110] In these circumstances, has the matter become moot? A matter is moot if it no longer raises an "existing or live controversy" between the parties, such that this Court's order will have no practical effect or result.[83] Mootness is not an absolute bar to the justiciability of an issue. This Court has a discretion to entertain an appeal, even if moot, where it is in the interests of justice to do so.[84] This Court has identified a number of considerations in answering the question of whether it is in the interests of justice to hear an appeal that is moot. These include the nature and extent of the practical effect that any possible order might have and the importance and complexity of the issue.[85]

[111] *Pillay* arose in a similar context to this case. The child at the centre of that dispute, Sunali Pillay, had already left school by the time the appeal was heard in this Court. Nevertheless, this Court held that it was in the interests of justice to decide the matter. Langa CJ, writing for the majority, explained why:

> "[T]his matter raises vital questions about the extent of protection afforded to cultural

[83] *POPCRU* above n 30 at paras 43-4 (this was said in the minority judgment of Cachalia AJ, but there was no dispute over this principle) and *National Coalition* above n 25 at fn 18. See also *Pillay* above n 32 at para 32 and *Independent Electoral Commission* above n 29 at paras 9-11.

[84] *Independent Electoral Commission* id at para 11.

[85] *Pillay* above n 29 at para 32.

> and religious rights in the school setting and possibly beyond.
>
> . . .
>
> The issues are both important and complex. . . . Extensive argument has been presented, not only from the parties but [also] from three amici curiae. There is accordingly no doubt that the order, if the matter is heard, will have a significant practical effect on the school and all other schools in the country, although it will have no direct impact on Sunali."[86]

[112] These considerations apply with equal force in this case. First, it raises important and complex legal questions about the constitutional rights of learners under sections 28(2) and 29(1)(a) of the Constitution and the corresponding constitutional duties of independent schools. Secondly, the relief sought by the applicants will have broad practical effect. This is because clause 9.3 of the Parent Contract is a generic clause applied by independent schools across the country. ISASA, a voluntary association that represents the interests of more than 750 independent schools, and of which Pridwin is a member, drafted this clause and its members have adopted it, affecting up to 168 000 learners who attend ISASA schools. The evidence also shows that the use of this clause has spread beyond ISASA schools. Variants of this clause have been adopted by comparatively low-fee independent schools serving disadvantaged communities.

[113] ISASA intervened in the High Court because the relief sought by the applicants would have far-reaching practical consequences for other schools and learners. ISASA repeatedly emphasised this point in its founding papers in the High Court:

> "ISASA is the author of the Parent Contracts. The potential for far-reaching consequences arises from the fact that contracts similar to the Parent Contracts are used in a number of ISASA's other member schools.
>
> . . .

[86] Id at para 35.

> If clause 9.3 of the parents contract is declared invalid and unenforceable, this would have a direct and material impact upon its enforcement by all of the member schools of ISASA that have incorporated this provision in their Parents Contract.
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> . . .
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> For the reasons set out above, it is clear that any relief granted by this Court . . . especially with regard to the validity and enforceability of clause 9.3, could materially prejudice the interests of ISASA and its member schools."

[114] Thirdly, the precedent set by the High Court and Supreme Court of Appeal judgments has far broader implications for the rights of learners at independent schools, which are not confined to Pridwin or the use of clause 9.3. These judgments also stand in conflict with this Court's jurisprudence. Recently, in *POPCRU,* Jafta J affirmed that it is in the interests of justice to "correct wrong statements of law", even where the dispute may have been rendered moot between the parties.[87] That need is amplified by the presence of conflicting judgments.[88] As a result, this matter raises "discrete legal issue[s] of public importance . . . that would affect matters in the future and on which the adjudication of this Court [is] required".[89]

[115] Fourthly, this Court has been presented with extensive argument from the applicants, as well as Pridwin. In addition, ISASA intervened and was joined as a party in the High Court. It has actively participated in this matter. Two amici curiae, the Centre for Child Law and Equal Education, have also participated in these proceedings.[90]

[116] Finally, this is the first time that this Court has had an opportunity squarely to address the rights of learners at independent schools. It is also a rare opportunity, not

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[87] *POPCRU* above n 22 at para 81 and the authorities cited at fn 33.

[88] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* [2006] ZACC 9; 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) at para 27.

[89] *Hoërskool Fochville* above n 53 at para 11 and *Qoboshiyane N.O. v Avusa Publishing Eastern Cape (Pty) Ltd* [2012] ZASCA 166; 2013 (3) SA 315 (SCA) at para 5.

because of the scarcity of rights violations in independent schools, but because of the difficulties and costs involved in litigating these matters to the appellate and apex levels. Most parents and learners in the applicants' situation would not have the resources to bring a matter before this Court.

[117] In the circumstances, it is in the interests of justice to grant leave to appeal and adjudicate this matter, even though the children have since left Pridwin.

The horizontal application of constitutional rights

[118] The substance of the applicants' claim is directed at upholding the constitutional rights of the boys. The applicants' founding affidavit in this Court introduces this matter as one that "concerns the constitutional rights of [their] children, DB and EB, to have their best interests considered paramount in all matters concerning them." The key issue, the applicants contend, is whether it is "constitutionally permissible for independent schools to expel children . . . without any prior hearing on the children's best interests," notwithstanding the fact that the school concedes that it is bound by section 28(2). The applicants argue that the cancellation of the Parent Contract was unconstitutional under sections 28(2) and 29(1)(a) of the Constitution in that the children were denied a hearing (procedural argument) and the decision was unreasonable (substantive argument).

[119] In the High Court, the applicants sought an order setting aside Pridwin's decision as unconstitutional, unlawful and invalid, as well as an order declaring clause 9.3 of the Parent Contract contrary to public policy to the extent that it permitted Pridwin to cancel the Parent Contract without following a fair procedure or taking a reasonable decision. In the Supreme Court of Appeal, the applicants challenged the procedural fairness and substantive reasonableness of Mr Marx's decision under sections 28(2) and 29(1)(a) of the Constitution. They also persisted

[90] EE was admitted as an amicus in the High Court, but withdrew from the appeal. It was subsequently admitted as an amicus in this Court. The CCL was unsuccessful in its application for admission as an amicus in the

with their public policy challenge in that Court.[91]

[120] While Pridwin accepts that it is bound by the Constitution, it suggests that the imposition of constitutional obligations on Pridwin and other independent schools is extreme or undesirable. This aversion to constitutional obligations is out of step with section 8(2) of the Constitution and its transformative purpose to improve the lives of all citizens and undoing the status quo of entrenched inequality and disadvantage in our society.[92]

[121] Section 8(2) provides:

> "A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

Madlanga J recently explained, extra-curially, the transformative aims of section 8(2):

> "If we are to take seriously the transformative injunction of our Constitution to '[i]mprove the quality of life of all citizens and free the potential of each person', then our private interactions cannot be left out of the reach of those human rights obligations that may appropriately be borne by private individuals. We cannot take a business as usual approach and maintain the status quo insofar as our private interactions are concerned.
>
> . . .
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> Simply put: if we refuse to impose human rights obligations on private individuals for fear of interfering with their autonomy, we risk maintaining a perverse status quo which entrenches a social and economic system that privileges the haves, mainly white people in the South African context. By imposing certain human rights obligations on private individuals and companies, we acknowledge that our current

Supreme Court of Appeal, but was admitted as an amicus in this Court.

[91] This challenge was dismissed by the Supreme Court of Appeal, as was the challenge to the validity of clause 9.3 of the Parent Contract.

[92] *Daniels v Scribante* above n 60 at paras 41 and 57 and *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* [2009] ZACC 16; 2010 (3) SA 454 (CC); 2009 (9) BCLR 847 (CC) at para 142.

> social and economic realities have arisen out of our perverted past and cannot be sanitised."[93]

[122] As mentioned, the question of direct application of constitutional rights to challenge the constitutionality of contractual terms was raised in *Barkhuizen*. There, Ngcobo J, writing for the majority, held that the proper approach to constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by constitutional values.[94] However, in this instance, the applicants direct their challenge not only at the contractual clause, but also at the School's infringement of the boys' constitutional rights as a separate and independent ground.

[123] In *Juma Musjid*,[95] this Court held that the purpose of section 8(2) was not to impose the duties of the state in protecting the Bill of Rights on a private party, but "rather to require private parties not to interfere with or diminish the enjoyment of a right".[96] It put the matter thus:

> "This Court, in *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, made it clear that socio-economic rights (like the right to a basic education) may be negatively protected from improper invasion. Breach of this obligation occurs directly when there is a failure to respect the right, or indirectly, when there is a failure to prevent the direct infringement of the right by another or a failure to respect the existing protection of the right by taking measures that diminish that protection. It needs to be stressed however that the purpose of section 8(2) of the Constitution is not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights. It is rather to require private parties not to interfere with or

[93] Madlanga "The Human Rights Duties of Companies and other Private Actors in South Africa" (2018) 29 *Stellenbosch Law Review* 359 at 364 and 368.

[94] *Barkhuizen* above n 22 at para 30.

[95] *Juma Musjid* above n 6.

[96] Id at paras 57-8.

> diminish the enjoyment of a right."[97]

[124] In *AllPay II*, this Court confirmed that private parties may, in certain circumstances, assume constitutional obligations.[98] This Court held that where a private entity has performed a constitutional function for a significant period, considerations of obstructing private autonomy by imposing the duties of the state to protect constitutional rights on such an entity, do not feature prominently, if at all.[99] In *AllPay II*, this Court held that Cash Paymaster, the entity which administered social grants in South Africa pursuant to an agreement concluded with the South African Social Security Agency (SASSA), incurred positive constitutional obligations towards the beneficiaries of social grants.[100]

[125] Later, in *Daniels*,[101] this Court clarified that *Juma Musjid* should not be seen as espousing the principle that section 8(2) does not envisage that a private party may bear positive obligations in respect of some rights in the Bill of Rights.[102] Madlanga J, writing for the majority, in considering section 8(2) and the extent of its application, held that private persons may bear positive obligations under the Bill of Rights. He reasoned:

> "Ultimately, the question is whether – overall – private persons should be bound by the relevant provision in the Bill of Rights. In the context of that broad formulation, this question is easy to answer insofar as the right to security of tenure is concerned. By its very nature the duty imposed by the right to security of tenure, in both the negative and positive forms, does rest on private persons. People requiring protection under ESTA more often than not live on land owned by private persons. Unsurprisingly, that is the premise from which this matter is being litigated. And I

[97] Id at para 58.

[98] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency (No 2)* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) (*AllPay II*) at para 66.

[99] Id.

[100] Id.

[101] *Daniels* above n 60.

[102] Id at para 46.

> dare say the obligation resting, in particular, on an owner is a positive one. A private person is enjoined by section 25(6) of the Constitution through ESTA to accommodate another on her or his land. It is so that the obligation is also negative in the sense that the occupier's right should not be 'improperly invaded'."[103]

[126] The rights implicated in this matter are located in sections 28(2) and 29(1) of the Constitution, which are provisions of the Bill of Rights. Section 8(2) makes it expressly clear that the rights contained in the Bill of Rights can, depending on the nature of the rights and the duties imposed by it, be applied horizontally to bind private parties. Thus, section 8(2) imposes constitutional obligations on private entities, such as Pridwin.

[127] Former Deputy Chief Justice Moseneke, writing extra-curially, discussed the direct and indirect horizontal application of rights in the Bill of Rights in the context of the transformative mission of the Constitution in the private sphere.[104] He sought to address what he termed "the troubled question" of "whether, in a dispute between private parties, courts are obliged to resort to the direct horizontality sanctioned by sections 8(1) and (2) of the Constitution, or to the indirect horizontality foreshadowed by section 39(2) of the Constitution."[105]

[128] Moseneke recounts the criticisms advanced against this Court's decision in *Du Plessis*,[106] in which the majority held that the rights in the interim Constitution did not have "general direct horizontal application".[107] He states:

> "An additional criticism is that if there is no direct horizontal application of

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[103] Id at para 49. Madlanga J, at para 53, referred with approval to *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC), where this Court placed a direct and positive obligation on a private party by directing that it continue to house illegal occupiers who – if evicted immediately – would have been rendered homeless.

[104] Moseneke "Transformative Constitutionalism: Its Implications for the Law of Contract" (2009) 20 *Stellenbosch Law Review* 3.

[105] Id at 5.

[106] *Du Plessis v De Klerk* [1996] ZACC 10; 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC).

[107] Id at para 62.

> fundamental rights, a private party whose rights have been violated by another private party will be without effective remedy. On this argument, in a historically unequal society with such severe cleavages of class, gender and race as we have, private parties and associations continue to wield enormous social and financial power, which will be immunised from constitutional scrutiny at the expense of those disadvantaged and marginalised by colonialism and apartheid. The charge is that a rejection of direct horizontality is at odds with the transformative project of the new democratic order with overt pursuit of human dignity and equality as much, if not more than freedom."[108]

[129] Our final Constitution expressly recognises the direct horizontal application of the rights in the Bill of Rights. Moseneke, however, points out that nonetheless courts often resort to indirect horizontality under section 39(2) of the Constitution – avoiding direct horizontal application.[109] In questioning the appropriateness of this reluctant approach, he states:

> "[T]he Constitution harbours a transformative mission with an altruistic rather than individualistic hue. The foremost purpose of the change sought by the Constitution is not only freedom, but also the achievement of equal worth and social justice.
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> . . .
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> [P]rivate power cannot be held to be immune from constitutional scrutiny. This is particularly so, as we have already seen, when private power approximates public power or has a wide and public impact. But the horizontal application of rights and values may also be invoked even in a dispute between two private parties with no public ramification. This must be so because all rights conferred by our Constitution should be capable of full vindication. Everyone, whether faced with a big corporation or his or her neighbour only, is entitled to effective relief in the face of an unjustified invasion of a right expressly or otherwise conferred by the highest law in our land."[110]

[130] Certain academics have argued that the avoidance of direct application of the rights in the Bill of Rights has prevented this Court from giving rights "identifiable

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[108] Moseneke above n 104 at 7.

[109] Id at 8.

[110] Id at 12.

content" and has resulted in a Bill of Rights "increasingly denuded of meaning".[111] This Court should not avoid direct horizontal application where it appears to be the most appropriate means of resolving a constitutional dispute. This depends to some extent on whether the parties have pleaded their case in a way that demonstrates the direct applicability of constitutional rights to the impugned conduct. Here, we are confronted with the constitutional validity of a decision purportedly taken in the exercise of a power conferred by contract. The challenge to clause 9.3, the contractual term that ostensibly confers this power, need only be addressed in the event that the primary challenge to the conduct of the School, in making the decision to expel the children without following fair procedure and / or without taking a reasonable decision, does not succeed.

[131] In subjecting private power to constitutional control, section 8(2) recognises that private interactions have the potential to violate human rights and to perpetuate inequality and disadvantage. Independent schools, like Pridwin, are not exempt from constitutional obligations and the demands for transformation of private relations. Indeed, section 8(2) has particular significance given the expanding role of independent schools in the South African education system. In 2015, independent schools catered for approximately 566 195 South African learners. This amounted to a 40% increase in relation to the number of learners attending independent schools in the preceding decade. Independent schools no longer only cater to the wealthy. The independent school sector is now dominated by comparatively low-fee independent schools, which educate up to 73% of the learners in this sector. This change has been driven, in large part, by the fact that the public school system is, unfortunately, ailing. As the Chief Executive Officer of the Anglican Board of Education put it, "there is a crisis in [South African] education. . . . That is why independent schools are thriving." As the power and significance of the independent school sector continues to grow, so too does the need for constitutional protection. Children should not be excluded from this protection merely because parental choices or circumstances have

[111] Woolman "The Amazing, Vanishing Bill of Rights" (2007) 124 *SALJ* 762 at 763.

placed them in independent schools.

Constitutional validity of Pridwin's decision

[132] In determining the constitutional validity of Pridwin's decision, regard must be had to the circumstances surrounding it. Relevant circumstances include, in particular, the conduct of the applicants, as well as the content, context and purpose of the implicated constitutional rights.

Conduct of the applicants

[133] In considering the circumstances in which Pridwin decided to terminate the Parent Contract, it is necessary to deal briefly with the behaviour of the parents. As is evident from the detailed account contained in the first judgment, the behaviour of the parents began in October 2015 as obsessive and disturbingly overbearing, burgeoned into a pattern of persistent and alarming harassment of Pridwin's staff and culminated in several serious incidents that veered dangerously close to outright physical violence. Although most of the events canvassed in the papers were instigated by AB, the second applicant (CB) appears to have been complicit in AB's conduct. The escalating misdeeds of the parents in this matter are astonishing and fall to be condemned in the strongest possible terms.

[134] So transfixing is the unpleasant montage of parental impropriety that the best interests of DB and EB – which the parents claim they seek to vindicate – are momentarily overshadowed. But the misconduct of the parents is, for present purposes, relevant only in limited aspects. First, it is notable that the incidents precipitated by AB were, on multiple occasions, observed by other parents and children at Pridwin. On some occasions, audible disparaging remarks were made by AB about other children on his sons' sports teams. Secondly, it is relevant that, following one particularly unpleasant interaction on 27 January 2016 between AB and Pridwin's under-10 cricket coach, Mr Marx sought to hold a formal hearing with AB and CB, regarding AB's misconduct. This hearing did not take place. It was pre-

empted by the parents' arrival at the School the day after the incident and the subsequent conclusion of a settlement agreement between the parents and the School, in terms of which AB agreed to cease certain offending behaviours. Finally, it is relevant that AB breached this agreement on 27 June 2016. An external soccer coach, at the invitation of AB, attended Pridwin's under-10 soccer trials and provided unsolicited advice to the Pridwin coach. A terse verbal exchange between AB and Mr Marx in Mr Marx's office followed as a result of this incident.

[135] Mr Marx dispatched a termination letter to AB and CB on 30 June 2016. In the letter, he stated that he had exercised his right to invoke clause 9.3 in the interests of DB and EB. Pridwin extended the notice period for termination under clause 9.3 to afford the applicants time to find a new school for the children. Mr Marx also wrote a letter of support for the children's move to another school.

[136] The next step of the enquiry entails consideration of the affected constitutional rights.

Section 28(2) of the Constitution

[137] The right of children to have their best interests be of paramount importance in matters affecting them is a constitutional right enjoyed by every child in South Africa. Section 28(2) of the Constitution provides that "[a] child's best interests are of paramount importance in every matter concerning the child."

[138] Section 28(2) requires that appropriate weight be given to a child's best interests as the consideration to which the law attaches the "highest value" and that the interests of children be given due consideration[112] when different interests are being considered in order to reach a decision.[113] In engaging in this consideration,

[112] *S v M* above n 48 at para 42.

[113] *Centre for Child Law v Minister for Justice and Constitutional Development* [2009] ZACC 18; 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC) at para 29 and *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* above n 51 at para 73.

appropriate weight must be given to the best interests of the child.[114] Section 28 must be interpreted in a manner that promotes the foundational values of human dignity, equality and freedom.[115]

[139] The principle of the best interests of the child is one of the four pillars of the United Nations Convention on the Rights of the Child.[116] Article 3(1) of the Convention provides:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

[140] The United Nations Committee on the Rights of the Child (Committee) recognises the child's best interests as a threefold concept in terms of which it is considered to be a right, a principle and a rule of procedure.[117] The Committee has described the procedural element of the best interests standard, in the following terms:

> "Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account."[118]

[141] This Court has held that section 28(2) incorporates a procedural component, affording a right to be heard where the interests of children are at stake.[119] This was made clear in *C*,[120] where this Court dealt with statutory provisions which permitted a

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[114] *S v M* above n 48 at para 42 and *Centre for Child Law v Media 24 (Pty) Limited* [2019] ZACC 46; 2019 JDR 2422 (CC); 2020 (3) BCLR 245 (CC) at para 55.

[115] *Director of Public Prosecutions, Transvaal* above n 51 at para 72.

[116] Above n 55. South Africa ratified the Convention on 16 June 1995.

[117] *United Nations Committee on the Rights of the Child, General Comment No.14* (2013) on the right of a child to have his or her best interests taken as a primary consideration, adopted 29 May 2013 at page 4 (article 3 para 1).

[118] Id.

[119] *C* above n 52.

[120] Id.

child to be removed from his or her parents' care, but did not afford any automatic opportunity to make representations. The concurring judgment of Skweyiya J held that this was impermissible, because section 28(2) required that the family and the child concerned be afforded an opportunity to make representations:

> "Section 28(2) of the Constitution requires an appropriate degree of consideration of the best interests of the child. Removal of a child from family care, therefore, requires adequate consideration. As a minimum, the family, and particularly the child concerned, must be given an opportunity to make representations on whether removal is in the child's best interests."[121]

[142] This Court in *J*[122] confirmed that section 28(2) affords a child or her representatives "an appropriate and adequate opportunity to make representations and to be heard at every stage of the justice process, giving due weight to the age and maturity of the child."[123] In effect, section 28(2) recognises the vulnerability of children, their special importance in our society and the need for additional protection for them.[124]

[143] The "overarching principle" in matters involving children's rights and interests

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[121] Id at para 27.

[122] *J* above n 47.

[123] Id at para 40. See also *Hoërskool Fochville* above n 53 at para 19, where the Supreme Court of Appeal held that children have a right to be heard in matters affecting their interests, either directly or through their representatives. At para 20, the Supreme Court of Appeal pointedly noted:

> "The child's *right to be heard* and to have his or her views taken into account, in terms of the [United Nation Convention on the Rights of the Child] and the [African Charter on the Rights and Welfare of the Child] , has been recognised as forming part of South African law."

[124] *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* [2013] ZACC 35; 2014 (2) SA 168 (CC); 2013 (12) BCLR 1429 (CC) (*Teddy Bear Clinic*) at para 1, where Khampepe J explained:

> "Children are precious members of our society and any law that affects them must have due regard to their vulnerability and their need for guidance. We have a duty to ensure that they receive the support and assistance that is necessary for their positive growth and development. Indeed, this Court has recognised that children merit special protection through legislation that guards and enforces their rights and liberties."

is that their best interests must be considered.[125] This "overarching principle" has been codified in the provisions of the Children's Act.[126] Section 10 of the Children's Act confers a specific right on children to participate in all decisions affecting them, taking into account their age, maturity and development.[127] Section 6(3) of the Children's Act provides for the right of family members to express their views concerning the interests of children.[128] The provisions of section 6 serve as a guide for "the implementation of all legislation applicable to children" including the Children's Act.[129]

[144] These provisions of the Children's Act give effect to South Africa's international law obligations under the Convention[130] and the African Charter on the Rights and Welfare of the Child,[131] which both recognise the rights of children to be heard, either in person or through representatives, in decisions affecting their interests.

[145] Pridwin did not dispute that it was bound by section 28(2) of the Constitution to ensure that a child's best interests are of paramount importance in every matter

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[125] This principle was recognised by the dissenting judgment of Mocumie J in this matter in the Supreme Court of Appeal at para 99.

[126] Above n 54.

[127] Id.

[128] Id.

[129] Section 6(1)(a) of the Children's Act.

[130] Article 12 of the Convention above n 116 provides, in relevant part:

> "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

[131] Article 4(1) of the African Charter on the Rights and Welfare of the Child reads:

> "In all judicial or administrative proceedings affecting a child who is capable of communicating his [or] her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law."

concerning the child.[132] Both the High Court and the Supreme Court of Appeal accepted that it was so bound.[133] Pridwin, however, argued that the applicants' reliance on this right cannot exclude the interests and rights of the other children at the School, the School itself, its staff members, parents and Board. Pridwin disputed that its enforcement of clause 9.3 undermined the values espoused by section 28(2) of the Constitution: it was, it contended, required to act in the best interests of all the children, not only EB and DB.

[146] The appropriate enquiry in relation to the duty in section 28(2) is whether Pridwin sufficiently considered the best interests of the affected children when it took the decision to terminate the Parent Contract. A determination of what is in the best interests of children in a particular instance is a balancing exercise, to be undertaken in light of all relevant factors.[134]

[147] Pridwin, being bound by section 28(2) of the Constitution, was required to accord the best interests of DB and EB paramount importance. Once this was so, it is unclear how Pridwin could justify a decision not to afford the applicants an opportunity to make representations on whether cancellation would be in the best interests of DB and EB and how best to safeguard their interests.

[148] Once Pridwin decided to terminate the Parent Contract, which decision – to put it at its lowest – had a profound effect on the rights and interests of DB and EB, it was required, at least, to give AB and CB a fair opportunity to be heard on whether the decision was in the best interests of the children. In particular, it ought to have sought

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[132] Supreme Court of Appeal judgment above n 11 at para 29.

[133] High Court judgment above n 4 at paras 52–3 and Supreme Court of Appeal judgment id at paras 8 and 29.

[134] In *S v M* above n 48, this Court emphasised at para 24 that—

> "it is precisely the contextual nature and inherent flexibility of section 28 that constitutes the source of its strength . . . . A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned."

representations on whether termination was consistent with the rights and best interests of the children and how best to protect their interests. DB and EB also had a self-standing right to have their views heard on this issue, either in person or through a representative.[135]

[149] The applicants accepted that this Court is not called upon to decide that there is a right to an oral hearing on the children's best interests in every instance where a decision is made to terminate the Parent Contract. All that need be determined is whether Pridwin and other independent schools are subject to the constitutional obligation in section 28(2) to give due consideration to the best interests of the child when deciding to terminate a child's schooling, given the potential impact of such decisions on children's rights.

[150] The majority judgment of the Supreme Court of Appeal, ostensibly referring to an oral hearing, also concluded that there is no general right to a hearing. It held that a court is required to—

> "weigh the interests protected by the right against any countervailing interests protected by other rights to produce a legally sensible outcome. It follows that there would be instances where section 28(2) requires a hearing before a decision having an impact on a child is made, but not in others. What is clear, however, is that there is no general requirement for a hearing."[136]

[151] The Supreme Court of Appeal emphasised the right to a hearing, reasoning that a failure to allow for a hearing is not contemporaneous with a failure to consider the

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[135] Id paras 18-9 and 30, which read:

> "If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents. . . . Individually and collectively all children have the right to express themselves as independent social beings
>
> . . .
>
> The tart reply of the amicus was that a child of a primary caregiver is not a 'circumstance', but an individual whose interests needed to be considered independently".

[136] Supreme Court of Appeal judgment above n 11 at para 30.

best interests of the child. Read in the context of the judgment, this reasoning seems to contemplate an oral hearing. The focus on the right to a hearing creates a misnomer, in that the right to a hearing has been conflated with the procedural component of section 28(2), which dictates that whenever a decision is taken concerning children, a fair and determinable process must be followed. This may not amount to an oral hearing. In this case, the application of section 28(2) required Pridwin to solicit representations on the best interests of EB and DB and to consider these representations before making a final decision to exclude EB and DB.

[152] Pridwin failed to explain the process it undertook to determine what was in the best interests of the children. Mocumie JA, in her dissenting judgment in the Supreme Court of Appeal dealt with this failure:

> "To indicate that Mr Marx took into consideration the best interests of DB and EB and balanced them against those of the other four hundred-plus learners enrolled at the same School, he simply stated that he did so in the letter of termination of the contracts and repeated same in his answering affidavit. He added that he also took into consideration the parents of the four hundred-plus learners as well as the longstanding and prestigious reputation of the School in the context of the circumstances prevailing at the time. It is only his ipse dixit [unverified statement] that he indeed took the best interests of DB and EB into consideration when he terminated the contracts. In the light of the arguments raised by the appellants in this court, I find that such assertion is not supported by any evidence. It therefore begs the question, on these facts, what did he do that points to such an exercise being undertaken?"[137]

[153] There is no general requirement for an oral hearing, in that section 28(2) does not specifically create an obligation for an oral hearing. In the context of this matter, section 28(2) requires that a fair process be followed by an independent school when it takes a decision that affects the rights of children to a basic education. A determination of what is in the best interests of a child, as provided for in

[137] Id at para 100.

section 28(2), cannot be conducted in a discretionary and abstract manner. A mere statement by Pridwin that a balancing of rights has been undertaken is insufficient and does not satisfy the obligations created by the section. That the best interests of the children have been given due consideration should be objectively evident. This is not evident in this matter.

Section 29 of the Constitution

[154] Section 29(1)(a) of the Constitution provides that "everyone has the right to a basic education". Section 29(1)(a) is an overarching right to basic education that applies to all persons. This Court has held that the right to a basic education is enjoyed by children at public and independent schools alike.[138]

[155] Section 29(3) of the Constitution grants "everyone" the right to establish and maintain independent schools. It provides, in relevant part:

> "Everyone has the right to establish and maintain, at their own expense, independent educational institutions that –
>
> (a) do not discriminate on the basis of race;
> (b) are registered with the state; and
> (c) maintain standards that are not inferior to standards at comparable public educational institutions."

[156] The right in section 29(3) is both a defensive and permissive right. Speaking of its predecessor, this Court stated that it "guarantees a freedom . . . to establish educational institutions . . . A person can invoke the protection of the Court where that freedom is threatened".[139] In this form, the right is defensive. It is also permissive in the sense that it permits all persons to establish and maintain independent education institutions. That which the independent educational

[138] *KwaZulu Natal Joint Liaison Committee* above n 57 at para 47.

[139] *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of the Gauteng School Education Bill of 1995* [1996] ZACC 4, 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (*Gauteng Provincial Legislature*) at para 9.

institutions must provide is basic education as enunciated in section 29(1). The state has a negative obligation not to interfere with the enjoyment of the right to establish an independent educational institution where that institution meets the grounds set out in sub-sections (a) to (c) of section 29(3).

[157] The rights set out in section 29 are not mutually exclusive; to the contrary, within the private education sphere, they are cooperative. Section 29(1)(a) speaks to the right of children to be educated and section 29(3) speaks to the freedom given to independent schools to provide education. In providing that education, independent schools are to fulfil their negative obligation in terms of section 29(1)(a) and not obviate children's rights to basic education. In terms of section 29(3), they also assume a positive obligation, upon establishment of an independent school, to maintain standards not inferior to that of comparable public schools.

[158] This Court dealt extensively with the ambit of the right to basic education in *Juma Musjid*, noting that it is fundamental for the transformation of our society.[140] This Court emphasised the significance of the right in our overall constitutional scheme:

> "Basic education provides a foundation for a child's lifetime learning and work opportunities. To this end, access to school – an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right."[141]

[159] The majority of the Supreme Court of Appeal held that Pridwin was not providing a basic education as envisaged by section 29(1)(a). It concluded that this is an obligation imposed on the state and that a non-subsidised independent school has no positive or negative obligations.[142]

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[140] *Juma Musjid* above n 6 at paras 37-44.

[141] Id at para 43.

[142] Supreme Court of Appeal judgment above n 11 at paras 38-40.

[160] What is a basic education? Article 26 of the Universal Declaration of Human Rights (UDHR) provides for compulsory elementary education.[143] The UDHR was followed, more than 40 years later, by the World Declaration on Education for All.[144] It is in the World Declaration that there was a shift away from the use of the term "primary" or "elementary" education to the term "basic education" instead. Article 1 of the World Declaration states:

> "Every person – child, youth and adult – shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning. The scope of basic learning needs and how they should be met varies with individual countries and cultures, and inevitably, changes with the passage of time.
>
> Basic education is more than an end in itself. It is the foundation for lifelong learning and human development on which countries may build, systematically, further levels and types of education and training."

[161] The term "basic education" was first introduced through section 32 of the interim Constitution.[145] In 1995, the Ministry of Education released the White Paper

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[143] The Universal Declaration of Human Rights (10 December 1948) at Article 26(1) states:

> "Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit."

[144] United Nations Educational, Scientific and Cultural Organization World Declaration on Education for All, 1990 (*World Declaration*).

[145] Section 32 reads:

> "Every person shall have the right –
>
> (a) to basic education and to equal access to educational institutions;
>
> (b) to instruction in the language of his or her choice where this is reasonably practicable;

on Education and Training which sought to grapple with the term "basic education".[146] The White Paper notes:

> "The right to basic education accorded in section 32(a) [of the Interim Constitution] applies to all persons, that is to all children, youth and adults. Basic education is thus a legal entitlement to which every person has a claim".[147]

[162] The White Paper goes on to cite the definition of basic education set out in the World Declaration and endorses this definition. It states:

> "Basic education must be defined in terms of learning needs appropriate to the age and experience of the learner, whether child, youth or adult, men or women, workers, work seekers or self-employed. Basic education programmes should therefore be flexible, developmental, and targeted at the specific requirements of particular learning audiences or groups, and should provide access to a nationally recognised qualification or qualifications."[148]

[163] In *Juma Musjid*, this Court echoed the World Declaration's description in describing the purpose of a basic education:

> "[B]asic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and work opportunities."[149]

[164] It is clear from this analysis that the term "basic education"[150] refers primarily

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> (c) 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."

[146] Department of Education *White Paper on Education and Training* (March 1995) (*White paper*).

[147] Id, Chapter 7 at para 11.

[148] Id at para 14.

[149] *Juma Musjid* above n 6 at para 43.

[150] In Churr "Realisation of a Child's Right to a Basic Education in the South African School System: Some Lessons from Germany" (2015) 18 *PER* 7, Churr explains the term basic as:

to the *content* of the right to education. On this understanding of the term, children attending non-subsidised independent schools are undoubtedly receiving and enjoying a basic education. The quality of the education may, at times, extend beyond what section 29(1)(a) requires from the state. But that does not mean that children stop receiving a basic education the moment they enrol at these independent schools, nor do they lose constitutional protection against unjustified interferences with their education while they remain at these schools.

[165] In *Gauteng Provincial Legislature*, Mahomed DP acknowledged that the education offered at independent schools may extend beyond a basic education as envisaged in section 29(1).[151] He held that section 29(3) of the Constitution serves an important societal purpose:

> "The object of [the provision] is to make clear that while every person has a right to basic education through instruction in the language of his or her choice, those persons who want more than [a basic education] and wish to have educational institutions based on a special culture, language or religion which is common, have the freedom to set up such institutions based on that commonality."[152]

[166] In its broadest and most general sense, the term "basic education" pertains to the legal entitlement to having one's basic learning needs met. Whether those basic learning needs are met by the state or an independent school is a separate and distinct issue. The Supreme Court of Appeal's finding that Pridwin was not providing a basic education as envisaged by section 29(1)(a) and had no obligations in respect thereof conflates the content of the right to basic education with the obligation to provide basic education.

> "[A] flexible concept which must be defined so as to meet the 'learning needs appropriate to the age and experience of the learner, whether child, youth or adult . . .' and should also provide access to nationally recognised qualifications."

[151] *Gauteng Provincial Legislature* above n 139.

[152] Id at para 8.

[167] Pridwin's constitutional obligations are reinforced by section 29(3)(c). At the very least, that section requires independent schools to provide a basic education, which is not inferior to that offered at comparable public schools, to learners who attend their schools and not to diminish the standards of that education while the learners remain at the School. Sections 29(1)(a) and 29(3)(c) are therefore intertwined and mutually reinforcing provisions, rather than being bifurcated standards, as Pridwin contends.

[168] The applicants do not submit that independent schools have a positive obligation to provide a basic education to all children in South Africa. Rather, they claim that when a child attends an independent school, that school is indeed providing the basic education to which the child is constitutionally entitled in terms of section 29(1)(a). They argue that, while a child attends Pridwin, the School is, at the very least, under a negative duty not to unreasonably impair or diminish the child's ongoing education.

[169] The School parties, (Pridwin, the Board of Pridwin Preparatory School and ISASA) on the other hand, argue that there are material flaws in the applicants' argument that Pridwin is providing a basic education and fulfilling a constitutional duty in doing so. They submit that such a finding would necessarily imply that, for example, a doctor in private practice likewise discharges a state function. Independent educational institutions, according to the School parties, have nothing to do with section 29(1): rather, their constitutional locus is section 29(3), which expressly provides for independent educational institutions, distinct from those of the state. This argument found favour with the majority at the Supreme Court of Appeal which held:

> "Section 29(3) expressly recognises the right to establish and maintain independent schools, which is what Pridwin is. And though it provides a standard of education not inferior to a public school, it is not providing a basic education as envisaged in section 29(1)(a). It would only be doing so if it was contracted by the state for this

> purpose, as explained in *Allpay v SASSA*. It would then be under a positive duty to do so because it was performing a constitutional function."[153]

[170] The School parties' submissions proceed primarily from the ill-conceived premise that the right to a basic education in section 29(1) may only be fulfilled by a party that bears a positive obligation to do so – the state. It is on this basis that they contend that—

> "were Pridwin to be providing a basic education, as that concept is to be understood in terms of section 29(1)(a), then the termination of the Parent Contracts would be an infringement of DB's and EB's direct right to basic education, not one which is only negatively protectable against the school. . . . It is clear from case authority that interference with a negatively protectable right occurs where the wrong-doing party is not itself under the obligation to provide the service (here, the provision of a basic education)".

[171] The School parties accept that section 8(2) of the Constitution may impose a negative obligation on private parties, requiring them not to interfere with, or diminish the enjoyment of a right. They also accept that breach of this obligation would occur wherever the existing right is unjustifiably diminished. However, they argue that there has been no diminishment in this instance:

> "Nothing that Pridwin has done has in any way prevented DB and EB from obtaining 'a basic education' from a public school. There has been no infringement, direct or indirect, of that right. There has been no failure to respect that right by Mr Marx, the school or the Board."

[172] The Supreme Court of Appeal accepted that Pridwin had not diminished the boys' enjoyment of the right to a basic education. It reasoned:

[153] Supreme Court of Appeal judgment above n 11 at para 39.

> "In *Juma Musjid* the Trust permitted the School to occupy its premises and paid for certain expenses, which the Department undertook to repay, but failed to do. In seeking to evict the School from its property, the Trust's action negatively impacted upon the School's duty to provide a basic education to its learners. That is not the case here. Pridwin has done nothing to prevent the appellants' children from obtaining a basic education at a public school. As the High Court pointed out, there are three public schools in the area that would be obliged to take them. There has simply been no breach of the right, in any way."[154]

[173] I now deal with each of the arguments, as well as the reasoning of the majority in the Supreme Court of Appeal.

[174] In *Juma Musjid*, this Court squarely addressed the constitutional obligations placed on private entities to respect the right to a basic education. There, a private trust had permitted the establishment of a public primary school on its private land. No proper agreement was concluded between the trustees and the Department, as required by the relevant legislation, and the trust was not being paid for the use of the land. The trust subsequently indicated to the provincial Member of the Executive Council for Education that it intended to establish a private school on the land and sought to terminate the Department's right of occupation, invoking the *rei vindicatio*.[155] This Court emphatically rejected the finding by the High Court that the trust bore no constitutional obligations in relation to the affected learners' rights to a basic education. It held that the trust had a negative constitutional obligation not to impair the learners' right to a basic education."[156] It explained:

> "[S]ocio-economic rights (like the right to a basic education) may be negatively protected from improper invasion. Breach of this obligation occurs directly when there is a failure to respect the right, or indirectly, when there is a failure to prevent the direct infringement of the right by another or a failure to respect the existing

[154] Id at para 44.

[155] The *rei vindicatio* is a legal remedy available to a lawful owner who has been deprived of his or her property without consent and who wishes to recover it from the possession of another.

[156] *Juma Musjid* above n 6 at para 60.

> protection of the right by taking measures that diminish that protection."[157]

[175] The majority of the Supreme Court of Appeal relied on *Juma Musjid* in reaching the conclusion that Pridwin had not interfered with or diminished the boys' enjoyment of the right to a basic education. It reasoned:

> "The Trust, like Pridwin, had no positive obligation to provide a basic education; that duty, as I have said, rests on the State. There was no constitutional obligation on Pridwin to admit the appellants' children. The children also had no constitutional right to attend [Pridwin]. They were admitted after their parents had signed contracts with the School, subject to the limited provisions in the South African Schools Act 84 of 1996 not here relevant. And their right to remain at the School flowed from these contracts."[158]

[176] The boys' attendance at Pridwin was a result of the agreement concluded between the parents and Pridwin, as reflected in the Parent Contract. However, the boys' enjoyment of the right to a basic education flows directly from the Constitution. The Supreme Court of Appeal is correct in concluding that EB and DB's right to remain at Pridwin, specifically, flowed from the Parent Contract.[159] However, this does not absolve Pridwin from its negative constitutional obligations in relation to EB's and DB's right to a basic education. The right to a basic education is independent of the contract and arises as a result of the fact that EB and DB were, at the time, receiving a basic education.

[177] For this reason, the Supreme Court of Appeal's reliance on the ratio in *Juma Musjid* is misplaced.[160] The Supreme Court of Appeal finds that *Juma Musjid* supports the conclusion that "interference with a negatively protectable right occurs when the wrong-doing party is not itself under an obligation to provide the service –

[157] Id at paras 57-60.

[158] Id at para 42.

[159] Id.

[160] Id at paras 41-4.

basic education here – but its actions indirectly have that effect."[161] In *Juma Musjid*, a private trust's conduct negatively impacted upon a school's duty to provide a basic education to its learners. The Supreme Court of Appeal found that Pridwin, by contrast, had no constitutional duty to provide a basic education to its learners and that the termination of the Parent Contract could not have diminished the right to a basic education. The premise that Pridwin cannot provide a basic education unless it has a positive constitutional duty to do so is misconceived. It is true that neither Pridwin, nor the private trust in *Juma Musjid*, were compelled to provide a basic education. Notwithstanding this, Pridwin did provide EB and DB with a basic education.

[178] Pridwin contends that it cannot be subject to constitutional duties in terms of section 29(1)(a) in the absence of a subsidy or some other contractual link with the state. As noted above, this argument found favour with the majority in the Supreme Court of Appeal.[162] The Supreme Court of Appeal may be correct that a private entity, upon conclusion of a contract with the state, would assume a positive obligation under section 29(1)(a) to provide a basic education. No such contract exists here. However, the reasoning of the Supreme Court of Appeal, which is based on that advanced by Pridwin, proceeds from a flawed premise. It is not the case that the positive duty to provide a basic education borne by the state under section 29(1)(a) excludes the possibility of a basic education being provided by any other entity. In this case, the other entity is Pridwin. Pridwin does not have to step into the shoes of the state in order to provide a basic education. And the state does not cease to provide basic education due to the operation of independent schools like Pridwin. As mentioned, the question whether education is "basic education" for purposes of section 29(1)(a) is determined with reference to the curriculum. Neither the entity providing the education, nor the source of that entity's obligation to provide education – if any – to do so, is relevant to that determination. The finding by the Supreme Court of Appeal on this score erroneously conflates the content of basic education

[161] Id at para 41.

[162] See [169].

with the duty to provide it. Pridwin, like other independent schools, provides a basic education despite the fact that they do not bear a positive obligation to do so.

[179] The analogy that the Supreme Court of Appeal draws with *AllPay II* is misplaced. As mentioned, in *AllPay II*, this Court, per Froneman J, held that Cash Paymaster, the entity which administered social grants in South Africa pursuant to an agreement concluded with SASSA, incurred positive constitutional obligations towards the beneficiaries of social grants. In reaching this conclusion, this Court reasoned that Cash Paymaster administered the payment of social grants on SASSA's behalf – in other words, it performed its functions in the stead of the state. Cash Paymaster was thus held to be exercising a public power: it was deemed to be the "gatekeeper of the right to social security" for all recipients in South Africa and to constitute the operational arm of social grants payment in the national sphere of government.[163] Froneman J also pointed out that the contract concluded between Cash Paymaster and SASSA made clear that the former undertook constitutional obligations.[164] This Court did not hold that Cash Paymaster incurred a positive obligation to administer social grants under section 27(1)(c) purely because of its contract with SASSA. Cash Paymaster's positive obligations survived the termination of the contract. It had assumed a role that the state would otherwise have had to perform itself and, in the event that it ceased to perform that role, the adverse effects on the rights afforded to the beneficiaries of social grants in terms of section 27(1)(c) of the Constitution would have been egregious. The reliance on *AllPay II* must be qualified. Pridwin, while subject to a negative obligation, does not incur positive obligations under section 29(1)(a). Pridwin may perform a constitutional function, but, unlike Cash Paymaster, it does not fulfil a constitutional duty.

[180] The reasoning of the Supreme Court of Appeal is also contrary to this Court's

[163] *AllPay II* above n 98 at para 55.

[164] Id at para 56.

judgment in *Daniels*.[165] This Court was resolute that it is not the case that section 8(2) of the Constitution means that a private person will never bear positive obligations in relation to the rights in the Bill of Rights.[166] These obligations arise even where there is no contractual nexus between the private party (in that case, a private landowner) and the state.[167] And again, in any event, the negative obligation borne by Pridwin does not depend on the existence of the fulfilment of a positive obligation to provide a basic education: rather, it arises from the fact that EB and DB, like other learners at Pridwin, received a basic education while they attend Pridwin.

[181] The suggestion that EB and DB's rights to a basic education under section 29(1)(a) have gone unfulfilled for the duration of their time as learners at Pridwin is ludicrous. These rights were, until the children left the School, fulfilled by Pridwin. As a result of EB and DB enjoying a basic education at Pridwin, the School (like other natural and juristic persons) incurred a negative obligation towards EB and DB.

[182] The School parties argue that there is no authority for the proposition that notice clauses, which result in the termination of agreements that may affect children, require a fair hearing prior to a party relying on this clause. They also raise concerns that a finding that Pridwin was required to provide an opportunity to make representations would have a far-reaching and undesirable effect on the law of contract. Both the Supreme Court of Appeal and the High Court rejected the existence of a duty to provide a fair process in the best interests of the children by using a "floodgates" argument. On Pridwin's urging, both courts reasoned that a fair hearing requirement would have "catastrophic" consequences for all commercial contracts that have the potential to affect children. The Supreme Court of Appeal held:

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[165] *Daniels* above n 60.

[166] Id at paras 39-41 and 46-8.

[167] Id at paras 37-51.

> "As the High Court pointed out this type of clause is a common feature of commercial contracts. Many may affect children, for example an ordinary lease, as alluded to earlier. The consequence of a finding that such clauses are invalid because of some indirect effect they may have on children would be catastrophic."[168]

[183] Pridwin's Parent Contract was likened to an ordinary lease, a standard-form commercial contract, a contract for private security and even a credit agreement for the purchase of a scooter.[169] These arguments are unsustainable. As Mocumie JA held in her dissenting judgment, a contract with an independent school for the provision of an education is "distinctly different" from an ordinary commercial transaction.[170]

[184] This concern finds no foundation in the context of a direct constitutional challenge to conduct and the nature of the section 8(2) inquiry under the Constitution. The mere fact that independent schools are subject to constitutional and statutory duties to follow a fair process does not mean that all natural and juristic persons in all other contexts will be subject to identical duties. In this context, there is no purportedly far-reaching "development" of the law of contract. The challenge being adjudicated is not of a contractual nature.

[185] An example of a fact-specific direct horizontal application of rights is evidenced by this Court's finding in *Juma Musjid*.[171] As explained above,[172] in that case, this Court held that, notwithstanding that the trust was a private entity, it had a

[168] Supreme Court of Appeal judgment above n 11 at para 77. See also High Court judgment above n 4 at para 89, where it is stated:

> "[T]o find such a provision in law exists requiring a hearing in these circumstances would create an absurd situation and open the floodgates in relation to the termination, on notice, of all contracts involving children, whether directly or indirectly."

[169] Supreme Court of Appeal judgment id at para 34. See also High Court judgment id at para 89.

[170] Supreme Court of Appeal judgment id at para 92.

[171] *Juma Musjid* above n 6.

[172] See [80] – [81].

negative constitutional obligation under section 29(1)(a), as well as a positive constitutional obligation under section 28(2). With reference to the specific circumstances of the case, this Court assessed the conduct of the trust and held that the trust had acted reasonably in seeking an eviction order.

[186] In *Daniels*, Madlanga J explained this context-specific inquiry in these terms:

> "Whether private persons will be bound depends on a number of factors. What is paramount includes: what is the nature of the right; what is the history behind the right; what does the right seek to achieve; how best can that be achieved; what is the 'potential of invasion of that right by persons other than the State or organs of state'; and, would letting private persons off the net not negate the essential content of the right? If, on weighing up all the relevant factors, we are led to the conclusion that private persons are not only bound but must in fact bear a positive obligation, we should not shy away from imposing it. . . . The truth is that 'questions concerning the horizontal application of the Bill of Rights cannot be determined a priori and in the abstract.'"[173]

[187] This Court is not called upon to decide that there is a right to be heard on the children's best interests in every contractual context. All that this Court need decide is that Pridwin and other independent schools are subject to this duty when deciding to terminate a child's schooling.

[188] In addition, this Court has held that the strength of section 28(2) is its contextual nature and inherent flexibility.[174] Similarly, whether or not there is appropriate justification for a rights infringement necessarily requires consideration of the context in which the conduct occurred.[175] Accordingly, a finding that section 28(2) required the School to seek representations on the children's best interests prior to taking the decision to remove them does not reach beyond the context of exclusion

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[173] *Daniels* above n 60 at paras 39-41.

[174] *S v M* above n 48 at para 24.

[175] Id.

of children from an independent school. The same circumscription would apply in relation to a finding on whether the School's impairment of the right to a basic education was justifiable for purposes of section 29(1)(a). A determination of whether there was appropriate justification for the decision to terminate the Parent Contract would require an assessment of the particular circumstances, including the fact that an impairment of the right afforded by section 29(1)(a) will, in most instances, inevitably implicate section 28(2).

The Pridwin's breach of the right to be heard

[189] Pridwin's failure to afford the applicants, or EB and DB, an opportunity to be heard in relation to the best interests of EB and DB is plain from the papers.[176] In his answering affidavit in the High Court, Mr Marx repeatedly denied that he was under any obligation to afford the applicants a hearing. He further asserted that, to the extent that AB was entitled to a hearing, the brief exchange with AB on 27 June 2016 "constituted the exercising of his right" to be heard.

[190] Mr Marx's version of that "hearing" on 27 June 2016 was as follows:

> "[AB] insisted that he wished to speak to me and explain his actions. He wanted Mosoana, so he said, to observe the trials and to see how they could support his elder son to best prepare for his soccer season at the School. I informed him that I found it totally unacceptable that he brings a stranger onto school premises, uninvited, and that they then proceed to disrupt the sporting sessions. I informed him that this was in breach of the agreement that we had reached on 28 January 2016 in the office and I asked him to leave."

[191] On Mr Marx's own version, it is clear that the representations, such as they were, were made at the behest of AB, not Mr Marx. The representations did not

[176] It must be noted that hearing from the children directly or through representation is a decision that must be made having regard to the circumstances of the matter, the age and maturity of the children as well as any detrimental effect this could have on them. See, for example, *Teddy Bear Clinic* above n 124 at para 1 and *S v M* above n 48 at para 24.

actually canvass the incident itself, nor who had behaved properly or improperly. Instead, they dealt solely with why AB had brought Mr Mosoana to the soccer trials. Mr Marx gave no indication that he was of the view that AB had breached the Parent Contract, nor that he was considering excluding EB and DB from Pridwin. Mr Marx did not invite AB to make representations about this decision, and AB did not make such representations. Significantly, Mr Marx did not give AB an opportunity to make representations about whether such a decision would be in the best interests of DB and EB. There was also no opportunity afforded to CB to make any representations of any kind, despite the fact that she is the mother of the children. There was no attempt, direct or indirect, to inquire into the children's views on termination.

[192] To the extent that AB made any representations on 27 June 2016, they were meaningless in the context as Pridwin, represented by Mr Marx, gave no indication that it was considering excluding EB and DB from Pridwin. It is trite that an opportunity to make representations will be effective only if it relates to the decision to be made and if this is made clear to the affected parties.[177]

[193] The suggestion running throughout Pridwin's case is that a hearing would have made no difference to its unilateral decision, given its allegations against AB on paper. That runs contrary to the principle that the denial of a fair hearing cannot be excused merely because one party asserts that their mind was made up and that a hearing would have made no difference.[178] This Court has consistently rejected this argument, holding in *My Vote Counts* that—

> "authority tells us that even in the apparent 'open and shut' case, an affected party must be given an opportunity to meet the case advanced by an adversary."[179]

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[177] *Sokhela v MEG for Agriculture and Environmental Affairs, KwaZulu-Natal* 2010 (5) SA 574 (KZP) at para 58.

[178] *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31; 2016 (1) SA 132; 2015 (12) BCLR 1407 (CC) at para 176, citing *John v Rees* [1969] 2 All ER 274 (CH) at 402.

[179] *My Vote Counts* id. See also *Minister of Defence and Military Veterans v Motau* [2014] ZACC 18; 2014 (5) SA 69 (CC); 2014 (8) BCLR 930 (CC) at para 85 and *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* [2009] ZACC 6; 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC) at paras 153-4.

[194] This principle has particular significance in this case. The purpose of a fair process was not primarily to determine AB's guilt or innocence. Rather, the focus ought to have been whether the decision to terminate the Parent Contract was consistent with the rights and best interests of the children and how best to protect their interests.

[195] In the circumstances, Pridwin ought to have afforded an opportunity for representations to be made on the best interests of EB and DB, before deciding to terminate the Parent Contract which had the effect that the children were required to leave Pridwin.

Is there appropriate justification for Pridwin's decision to terminate the Parent Contract?

[196] Under section 29(1)(a), read with section 8(2) of the Constitution, private entities are under a negative obligation to refrain from limiting or impairing the right to basic education. However, this obligation is not absolute: limitation of the right is permissible. What is the test to be applied? What constitutes a justifiable infringement or limitation by a *private party*?

[197] A limitation analysis in terms of section 36 of the Constitution is not possible due to the "law of general application" threshold. The standard of appropriate justification, applied by this Court in *Hoërskool Ermelo*[180] is, however, equally applicable here.

[198] In determining whether there is appropriate justification for the limitation of the right, a number of factors may be considered – all circumstances surrounding the impairment of the right must be taken into account as it is a fact and context specific

[180] *Hoërskool Ermelo* above n 69 at para 52. See also *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch* [2019] ZACC 38; 2020 (1) SA 368 (CC); 2019 (12) BCLR 1479 (CC) at para 23.

enquiry:[181] the nature of the obligation on the alleged wrongdoer; whether the wrongdoer took measures to ameliorate the impact of the limitation of the right; the availability of alternative options; whether the process leading up to the limitation of the right was procedurally fair; and the extent of the limitation and its effect on the right holder. This list of considerations is not intended to be exhaustive. While these examples of consideration factors are sourced from *Juma Musjid*, where the standard applied was "reasonableness" and not "appropriate justification", they nevertheless offer a helpful starting point for the factors that constitute contextual considerations.

[199] In considering whether the trust was reasonable in seeking to evict the school, this Court, in *Juma Musjid*, held that a relevant factor was that the primary, positive obligation to provide a basic education rested on the state. The obligation of the trust in that case was secondary, arising only out of its willingness to allow its private property to be used as a school. The trust had, moreover, engaged in extensive negotiations with the provincial Department of Education concerned, in an effort to minimise the potential impairment of the rights to a basic education enjoyed by the learners at the Juma Musjid Primary School.

[200] It was held to be relevant, in *Juma Musjid*, that the private trust was subject to less stringent standards of reasonableness than the state, which does bear such an obligation. The obligations of an independent school in relation to the provision of a basic education are, of course, distinct from those borne by public school. Pridwin bears no positive obligation under section 29(1)(a). However, an independent school, upon its establishment and in representing itself as a provider of education to learners, does assume certain obligations under both section 29(3) of the Constitution and the relevant provisions of the Schools Act.[182] Moreover, as explained, Pridwin, unlike the private trust in *Juma Musjid*, does provide a basic education.

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[181] *Hoërskool Ermelo* id at para 52.

[182] 84 of 1996.

[201] This Court, in *Juma Musjid*, also emphasises that procedural fairness, which may be employed to minimise impairment of a right, is a critical component in evaluating whether conduct that results in the limitation of a right was reasonable.[183] For example, the Court reasoned that "the purposes of these negotiations [regarding the conclusion of an agreement], even though not stated in these terms, was to minimise the impairment of the rights of the learners."[184] The trust's repeated engagement with the provincial Department of Education and the notice of the impending potential eviction repeatedly given by the trust to the Department were found to be relevant factors in ascertaining the reasonableness of the trust's conduct.

[202] The School contended that the decision to exclude EB and DB from Pridwin was also designed to safeguard the rights of the other learners at the School. The decision to exclude the boys was prompted by the conduct of the parents. However, the present facts are quite distinct from a scenario in which a school had no option but to limit the rights of its learners due, for example, to lack of resources. The availability of less restrictive sanctions is a key consideration in the objective assessment of whether Pridwin's decision was justified. Even if AB had misconducted himself in the manner alleged by Pridwin there were a range of measures available to Pridwin to sanction his behaviour while still respecting the rights of the children. For example, Pridwin could have issued a final warning, notifying AB and CB that further misconduct would result in termination of the Parent Contract. Alternatively, it could have continued to ban AB from attending sports practices, or conversing with staff members involved in the sporting programme at Pridwin. The protection of the rights of the other children enjoying the benefits of a basic education at Pridwin must also be taken into account. If adequate measures had been implemented to manage AB's conduct, it is doubtful that the rights of the other learners would have been impaired had EB and DB remained at Pridwin. Accordingly, the invocation of the rights of the other learners does not constitute

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[183] *Juma Musjid* above n 6 at paras 63-4.

[184] Id at para 64.

appropriate justification for Pridwin's impairment of the children's rights.

[203] Both the Supreme Court of Appeal and the High Court erred in finding that Mr Marx's actions were reasonable because he had satisfied himself that places were available in public schools.[185] That is not an accurate reflection of the facts. Mr Marx did not seek such confirmation when deciding to cancel the contracts in June 2016. Mr Marx addressed a letter to the Chief Director: School Management at the Gauteng Department of Education only on 30 November 2016. The letter enquired if and how DB and EB would be placed at a public school for the 2017 academic year. It was sent some five months after the cancellation of the contracts. Moreover, the response from the Department was that DB and EB would not be guaranteed a place in a specific school. In respect of EB, the response was that he would merely be added to the waiting list for a school somewhere in the Gauteng Province.

[204] The effect of Pridwin's decision to terminate the Parent Contract was that the boys had to leave the School. In this context, Pridwin was obliged to hear the applicants, at least, on whether cancellation was in the children's best interests, given the likely disruption to their education and wellbeing. These were children who had known no other school and had formed strong bonds with their teachers and friends. Again, it is no answer for Pridwin to claim that a hearing would have made no difference to the decision.[186]

[205] As noted, the School quite rightly contends that it was required to have regard to the best interests of not only EB and DB, but of all the children at the School. Affording an opportunity to be heard in relation to the best interests of EB and DB, prior to a decision being made, could hardly be said to have a detrimental effect (or, indeed, any effect) on the best interests of the other children at the School. It could only have been beneficial.

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[185] High Court judgment above n 4 at para 42 and Supreme Court of Appeal judgment above n 11 at para 44.

[186] *My Vote Counts* above n 178 at para 176.

[206] It is not insignificant that the applicants had already, as early as January 2016, signified their intention to remove their children from Pridwin. It is also not insignificant that the headmaster had, prior to the conclusion of the January 2016 agreement between the parties, contemplated conducting a hearing around the alleged misconduct by AB. However, these facts are insufficient for purposes of satisfying the fair process required in relation to the decision to terminate a Parent Contract by an independent school. The decision to conclude a settlement agreement, made at the meeting of 28 January 2016, is distinct from the School's decision to terminate the Parent Contract, thereby excluding EB and DB from Pridwin. Similarly, the "meeting" between AB and Mr Marx on 27 June 2016 was not preceded by any notice, nor was it demarcated as an opportunity to make representations on the decision to terminate the Parent Contract.

[207] In this matter, where the diminishment of the right to basic education could have had a significant impact on the education and day-to-day lives of two young children, the School's actions, in failing to create an opportunity for representations on their best interests, was unjustified. There is nothing to suggest that the surrounding circumstances justified anything less. No appropriate justification for the limitation of the children's rights was advanced by Pridwin. This is so irrespective of the fact that the applicants had sufficient time to find another school for DB and EB to attend and sufficient resources to cause DB and EB to attend an alternative private school. That this is the case is fortunate for the boys, but it does not mean that the School was entitled to decide to terminate the Parent Contract without following due process.

[208] In the circumstances of this matter, the obligation on Pridwin, pursuant to the provisions of sections 28(2) and 29(1)(a) included the duty to inform the parents of its intention to terminate the Parent Contract. Pridwin was further obliged to afford one or both of them an opportunity to make representations on the best interests of the boys, the impact this could have on the boys' right to an education and possible steps that could have been taken to ameliorate any interference with their right to a basic

education. This would have discharged Pridwin's negative obligation to respect the boys' rights to a basic education and placed Pridwin in a position to give proper consideration to the best interests of the children, and make a decision that was procedurally and substantively fair.

Conclusion

[209] Pridwin's decision to terminate the Parent Contract was unconstitutional due to the failure to afford the applicants an opportunity to be heard on the best interests of the boys, in breach of sections 28(2) and 29(1)(a) of the Constitution. In addition, the decision was unconstitutional as, absent a fair process, it was self-evidently and objectively not in the best interests of DB and EB and, moreover, in violation of Pridwin's obligation not to interfere with the boys' right to a basic education, in the absence of any appropriate justification.

[210] For these reasons, the decision is invalid and falls to be set aside.

Costs

[211] While the applicants have been successful, this success is tainted by the long shadow of the conduct that led them to this Court. The conduct of the applicants leading to the termination of the Parent Contract is sufficient reason to depart from the general principle that costs should follow the result.

Order

[212] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld and the order of the Supreme Court of Appeal is set aside.
3. It is declared that the decision by Pridwin Preparatory School to cancel the Parent Contract is invalid and set aside.
4. Each party is to pay its own costs in this Court, the High Court and the

Supreme Court of Appeal.

CAMERON J and FRONEMAN J

[213] We may be doing the valuable judgments of our colleagues Nicholls AJ (first judgment) and Theron J (second judgment) a disservice by stating that on the crucial issue – whether the right to a basic education applies in independent schools – we discern little difference between them. This concurrence seeks to highlight the legal propositions that we consider the two judgments both embrace, whether explicitly or implicitly. And, in any event, in what follows we set out the legal propositions that we endorse as correct and agree with.

[214] Under the common law, private parties, like independent schools, had no obligation to provide basic education nor, where they did provide it, did they owe any obligation to children not to diminish or interfere with that right. This meant that the provision of private education to learners attending private schools was regulated entirely by principles of contract – including contractual autonomy.

[215] For the reasons both judgments advance, we agree that sections 28(2), 29(1)(a) and 29(3) of the Bill of Rights now impose on independent schools that provide basic education at least the negative obligation not to diminish or interfere with a child's right to that basic education. This we may call: the right that protects basic education.

[216] In applying these provisions of the Bill of Rights to private parties like independent schools, the applicable constitutional provisions are section 8(1)[187] and section 8(2). There is no legislation that directly gives effect to the right that protects basic education where independent schools already provide it. The judgments both

[187] Section 8(1) of the Constitution reads:

hold that there is, however, at least the negative obligation not to diminish or interfere with a child's right to a basic education where an independent school provides basic education. This is a new rule that did not exist under the common law or in terms of any legislation. They thus to that extent develop the common law under section 8(3)(a).[188]

[217] How far does protection of this right by independent schools go? It cannot be absolute. The finding that its content requires fairness, not only in process-fairness, but also in substance-fairness, before children attending a private school may be required to leave, complies with the requirement in section 8(3)(b) that any limitation upon a newly-established common law right must accord with the limitations provision in the Bill of Rights (section 36(1)).[189] We note that the two judgments diverge in their approach to a limitations analysis and neither applies section 36(1).[190] In fidelity to section 8(3)(b), we consider that a limitations analysis via section 36(1) remains the appropriate route.

> "The Bill of Rights applies to all law, and binds the Legislature, the Executive, the Judiciary and all organs of state."

[188] Section 8(3) reads:

> "When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—
>
> (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
>
> (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)."

[189] Section 36(1) reads:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose."

[190] See the first judgment at [89] to [90] and second judgment at [196] to [198].

[218] It is obvious that the parties' factual disputes are long since moot. We agree with the first judgment that the only remaining peg on which leave could be granted was the question whether clauses similar to clause 9.3 are enforceable. This question impinged upon a child's right to basic education at independent schools where basic education is provided.

[219] The first judgment resolves that legal issue by direct application of the children's rights against independent schools that provide basic education. On our reading the second judgment does the same, but does not deal with the enforceability of clause 9.3 or similar clauses, and thus makes no order pertaining to them. It considers only whether it is constitutionally permissible for an independent school to expel children without following fair process,[191] and accordingly declares the School's decision invalid. Despite this difference in approach, we consider that the same result would have been reached, indirectly, by applying public policy considerations where clause 9.3 was sought to be enforced,[192] and thus agree with the order the first judgment makes.

KHAMPEPE J: (Jafta J, Ledwaba AJ, Madlanga J, Mhlantla J and Theron J concurring)

Introduction

[220] This case is about children. In particular, it concerns two boys who, in their short lives, have already had to deal not only with the ordinary day-to-day excitement and stresses of an all-boys preparatory school – juggling friends, teachers, classes and sport – but who have also had to cope with particularly aggressive and intolerable behaviour by their parents during their after-school activities. This culminated in

[191] Second judgment at [97] and [132].

[192] First judgment at [61] and [91].

them being asked to leave the only school they had ever known through no fault of their own. It is hard to imagine the emotional impact this has had on them and, to make matters worse, no one asked these particular boys how they felt about this major life change. For some reason, it was not deemed necessary to consider their views or invite them to participate in this life-altering decision. They have since begun attending a new school but have still been plagued by the litigation between their parents and their previous school, in public, all the way up to the highest Court in the land. We can only hope that they will be able to settle down and continue with their young lives once this Court has given judgment. Although both the parents and the School have paid lip-service to the best interests of the children in their arguments, the children's views and participation in this matter have largely been ignored, just as at the time of their removal from their school. This concurrence focuses on what should have been the imperative all along: the children and their constitutionally-guaranteed rights.

[221] I concur in the well-considered reasoning and outcome of the judgment of my colleague, Theron J (second judgment). However, for reasons fully elucidated below, I believe it necessary to emphasise the importance of the independent and self-standing rights of the children in these circumstances.

[222] The judgments of my colleagues Nicholls AJ (first judgment) and Theron J each consider, among others, the issue of whether section 28(2) of the Constitution affords a right to a hearing on the best interests of the child when an independent school decides to terminate a Parent Contract with a child's parent(s). Both conclude on that particular question that the section 28(2) right read with section 29, in this context, affords a right to fair process, which in most cases would encompass the right to a hearing, when clauses like the one at issue in this case are sought to be enforced. However, neither judgment emphasises the importance not only of procedural fairness when enforcing these terms, but of the child's right to participate in matters directly affecting them.

[223] A principal reason for hearing this matter and handing down judgment, even though the children have long-since moved to another school and the dispute is moot, is that these types of clauses exist in most independent-school contracts and thus this Court's decision will transcend the narrow interests of the parties in this matter and affect a large number of people. It was pointed out in the second judgment that ISASA intervened for that very reason.[193] It is, therefore, necessary to clarify any misunderstanding that it may be sufficient to only give the parents a hearing regarding their child's best interests without, at the very least, giving serious consideration to the importance of hearing the children themselves and allowing them to participate in the decision.

[224] The first judgment recognises that our jurisprudence has found that section 28(2) gives children the right to have an opportunity to make representations in matters affecting them, but distinguishes these cases on the basis that they involved the exercise of public power.[194] It concludes that whilst the Children's Act and international law instruments provide for children's rights to make representations in matters affecting them, there is "no direct authority that imposes this obligation on independent schools in relation to the enforcement of Parent Contracts with the school."[195] However, having found that even independent schools have a negative obligation under section 29(1) to not interfere in a child's right to basic education, it finds that this, read alongside the best interests principle, would, in "most circumstances . . . entail . . . affording an opportunity for a fair and appropriate hearing."[196] The first judgment qualifies that this is not necessarily a hearing of the children themselves and could be in a number of forms. However, I believe that it is important to emphasise that the default or starting position should be that the child concerned is given an opportunity to make representations.

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[193] Second judgment at [114]. The second *amicus curiae* in this Court also emphasised the importance of being cognisant of the broader context of the independent school sector and its growth.

[194] First judgment at [73].

[195] Id at [74].

[196] Id at [93].

[225] The second judgment, in which I concur, acknowledges that DB and EB had a self-standing right to have their views heard on the matter, either in person or through a representative.[197] The judgment goes on to state that section 28(2) does not specifically create an obligation for an oral hearing to be given, but rather requires that a fair process be followed.[198] It continues to find, however, that in the specific context of excluding children from independent schools, section 28(2) in most cases would require the School to seek representations *on* the children's best interests prior to taking the decision to remove them from the School.[199] However, the representations it focuses on are mostly those of the parents and not from the children themselves.

[226] Thus, the purpose of this concurrence is to emphasise that the procedural right forming part of the best interests of the child in this context is, first and foremost, a right given to the *child*, which may be exercised by a representative where children are not of sufficient age or maturity to make these representations themselves. This is emphasised in our case law, our legislation as well as in international law instruments to which we are party. This concurrence does not seek to address whether or not section 28(2) always gives rise to the right of children to participate or make representations, but focuses more specifically on the relevant context this case is concerned with – namely, the exclusion of children from an independent school as a result of a breach of the Parent Contract – and the importance, in this context, for the children concerned to be given an opportunity to have their views heard on this major life change in their thus-far short life.

Best interests of the child

[227] Section 28(2) of the Constitution states that a child's best interests are of paramount importance in every matter concerning that child. This section forms part

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[197] Second judgment at [148].

[198] Id at [153].

[199] Id at [187-8] and [195].

of the Bill of Rights and therefore, under section 8(2) of the Constitution, also binds natural and juristic persons. There is therefore no question that independent schools are bound by section 28(2).

[228] In *Teddy Bear Clinic*, this Court, in a unanimous judgment, emphasised that the "best interests of the child" under section 28(2) is both a principle, which must be at the fore of any decision involving a particular child, as well as a standard against which to test provisions or conduct that affect children in general.[200] In the current case, and cases similar to it, both roles of section 28(2) are implicated. Under its first role, section 28(2) requires that, before an independent school may enforce a termination provision in a Parent Contract in a particular case, it must have due consideration of the best interests of the individual child who will be removed from the School. Under its second role, section 28(2) forms a standard that is expected of conduct which affects children in general. In this case, it prescribes that the conduct of independent schools, generally, in terminating Parent Contracts (and thereby interfering with the basic education of children) must be done in accordance with the "best interests of the child" standard required by section 28(2).

[229] I focus mostly on the latter role because we did not have the advantage of a separate representative in the hearing who could speak to the best interests of the specific children in this matter. Further, the second judgment already declares the conduct of the School invalid as a result of its failure to have due regard to the particular best interests of the children in this matter. It is, therefore, unnecessary for me to repeat this.

[230] I turn instead to the general standard required by section 28(2), against which the conduct of independent schools, when terminating a Parent Contract, can be tested.

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[200] *Teddy Bear Clinic* above n 124 at para 69.

[231] The precise meaning of section 28(2) has not been defined by this Court and I do not deem it necessary to do so here. It is "precisely the contextual nature and inherent flexibility of section 28 that constitutes the source of its strength."[201] However, we have a rich jurisprudence from which we can draw meaning in order to give effect to the best-interests standard. We are also obliged to consider international law when determining this standard.[202]

[232] It is perspicuous from our jurisprudence that the participation of children in matters involving them is an important part of the best-interests standard. The right to participate is the right of each child "to be heard and to take part in processes that affect their life course".[203] In *C,* Skweyiya J's concurrence held that section 28(2) requires "as a minimum [that] the family, and *particularly the child concerned*, must be given an opportunity to make representations".[204] The majority judgment in that matter, penned by Yacoob J, found that, in the context of removing children from family care, it is in the interests of children that an incorrect decision made by a court, social worker or police officer without hearing the child or the parents is subject to an automatic review by a court in the presence of the child and the parents.[205] It was held that the failure of the impugned provisions in that case to provide for this automatic review rendered those sections contrary to section 28(2).[206] Similarly, in *J*, an important element of the best-interests standard was that "the child or her representatives must be afforded an appropriate and adequate opportunity to make representations and to be heard at every stage."[207] In *Hoërskool Fochville*, the Supreme Court of Appeal highlighted that the right of children to representation that is separate from their parents', stems from their right to participate in all matters

[201] *S v M* above n 48 at para 24.

[202] Section 39(1)(b) of the Constitution.

[203] Moyo "Child Participation Under South African Law: Beyond the Convention on the Rights of the Child?" (2015) 31 *SAJHR* 173.

[204] *C* above n 52 at para 27 (emphasis added).

[205] Id at para 77.

[206] Id.

[207] *J* above n 47 at para 40.

affecting them which "is a right widely recognised in international law and forms part of South African law".[208]

[233] My colleagues, in the first and second judgments, have also relied on much of this jurisprudence to conclude that a hearing, in general, is necessary and, in the interests of non-repetition, I am grateful for their more detailed exposition thereon. I turn now to the provisions in international law and in the Children's Act to support my assertion that it is particularly the *child's* right to be heard that is generally required in this context, although a flexible and child-sensitive approach would require each case to be considered in light of its own particular facts.[209]

The child's right to participate or make representations in matters affecting them

[234] As a point of departure, it must be emphasised that children are individual right-bearers and not "mere extensions of [their] parents, umbilically destined to sink or swim with them."[210] It is the child whose world will be upturned by being told to leave the only school they have ever known. Moreover, it is their right to basic education that is interfered with; and it is their best interests that schools and parents are required to have due consideration of. A child's participation right acknowledges their "separate personhood" and "the need to take seriously the view expressed by the child".[211] It is hardly in line with the constitutional recognition of a child as "an individual with a distinctive personality"[212] and with "their own dignity"[213] for a school to submit that it has acted fairly by giving the parents a hearing but not granting the child an opportunity to express their views before they are removed from their school. Of course, the appropriateness of this must be determined in each case

[208] *Hoërskool Fochville* above n 53 at para 19.

[209] *S v M* above n 48 at para 24.

[210] Id at para 18.

[211] Moyo above n 203 at 174.

[212] *S v M* above n 48 at para 18.

[213] Id.

and on the basis of the age and maturity of the child, but it should, at least, be the default position under the best-interests standard in this context.

[235] This position is buttressed both by international law instruments concerning children and, domestically, through the Children's Act.

International law instruments

[236] The first and second judgments touch on the right of the child to participate in matters affecting them in international instruments like the United Nations Convention on the Rights of the Child[214] (Convention) and the African Charter on the Rights and Welfare of the Child[215] (African Charter). I wish to expand briefly on these.

[237] As a point of departure, it is worth noting that the right of all children to be heard and to be taken seriously is one of the fundamental values of the Convention,[216] which forms part of a process of "information-sharing and dialogue between children and adults based on mutual respect".[217]

[238] Article 12 of the Convention states that a "child who is capable of forming his or her own views [has] the right to express those views freely in all matters affecting the child".[218] This means that the child must be given the opportunity to be heard if the matter under discussion affects them.[219] It also requires that a child shall "in particular, be provided the opportunity to be heard in any judicial and administrative

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[214] Convention above n 55 and 116.

[215] 1 June 1981.

[216] *United Nations Committee on the Rights of the Child General Comment No. 12 (2009) on the right of the child to be heard* (General Comment No. 12) at para 2. It is also one of the four general principles of the Convention, alongside the right of the child to non-discrimination, the right to life and development, and the primary consideration of the child's best interests. It is therefore not only a right but also an interpretative value to be used in the interpretation and implementation of all other children's rights.

[217] Id at para 3.

[218] Article 12(1) of the Convention.

[219] General Comment No. 12 above n 216 at para 26.

proceedings affecting the child".[220] General Comment No. 12 describes typical administrative proceedings in article 12(2) as including "decisions about children's education"[221] and suspensions and expulsions from schools are given as examples of matters where a child should have the right to be heard.[222]

[239] In drawing the connection between the best interests of the child standard[223] and article 12, the Committee describes the interrelation between these two as follows:

> "The best interests of the child . . . obliges State Parties to introduce steps into the [process of undertaking actions concerning children] to ensure that the best interests of the child are taken into consideration. The Convention obliges State Parties to assure that those responsible for these actions hear the child as stipulated in article 12. This step is mandatory.
>
> . . .
>
> There is . . . a complementary role of the two general principles: one establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing either the child or the children. In fact, there can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives."[224]

[240] The African Charter, in fact, incorporates the right of a child to be heard and to participate directly or indirectly in matters affecting them as part of the best interests of the child.[225] Article 4(2) of the African Charter is similarly worded to article 12(2) of the Convention and states that, in judicial or administrative proceedings affecting a child, an opportunity must be provided for the views of that child to be expressed

[220] Article 12(2) of the Convention.

[221] General Comment No. 12 above n 216 at para 32.

[222] Id at para 67.

[223] Found in article 3 of the Convention.

[224] General Comment No. 12 above n 216 at paras 70 and 74.

[225] Article 4 is titled the "Best Interests of the Child". Article 4(1) provides that "[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration".

either by that child, if they have the capacity to form and communicate their own views, or through an impartial representative and that these views must be taken into consideration by the relevant authority.[226]

[241] International law enjoins us to give due regard to the views and wishes of the child and to allow them to participate in matters that affect them. This is a right held by children themselves, as independent rights-holders. Whilst it might be the case that the parents are better placed to speak to what might objectively be in the best interests of the child in a particular case, an important facet of the best-interests standard is allowing the child concerned to participate, where possible, in the major decisions affecting their life. Giving them an opportunity to be heard is not just a step in the process of seeking to uncover what is in their best interests; it is part and parcel of the best-interests standard against which conduct must be tested. This is even more so where the conduct concerned interferes with the educational rights of the child.

Children's Act

[242] The Children's Act was enacted to give effect to,[227] and supplement,[228] the constitutional rights of children and the rights of the child under the Convention and African Charter.[229] It "binds both natural and juristic persons, to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."[230] A great proportion of a child's developmental years are spent at school and, having consideration of the purpose of the Children's Act to

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[226] Article 4(2) of the African Charter reads:

> "In all judicial or administrative proceedings affecting a child who is capable of communicating his or her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law."

[227] Long title of the Children's Act.

[228] Section 8(1) of the Children's Act.

[229] Preamble of the Children's Act.

[230] Section 8(3) of the Children's Act.

regulate children's rights and welfare, independent schools plainly fall within the category of juristic persons whom the Act binds.

[243] The Children's Act unequivocally adopts the position that children should be involved in the decisions affecting their lives by expressing their views and participating in these decisions. This is expressly found in section 10 where a child is given the right to participate, in an appropriate way, in any matter concerning them and prescribes that their views must be given due consideration.[231] Section 10 of the Children's Act thereby largely incorporates article 12 of the Convention and article 4(2) of the African Charter into our domestic law and thus gives effect to South Africa's international obligations.

[244] Notably, section 10 of the Children's Act goes further than the international position. It does not limit the right to be heard to "judicial and administrative proceedings." Instead, it "applies horizontally and binds families and other private actors to consider the child's views before making decisions which affect [the child]".[232] The fact, therefore, that it may be an independent school does not limit the right of the child to participate. This is because: (i) the Children's Act, including section 10, which requires child participation, applies to private parties as well as to the state;[233] (ii) section 28(2) of the Constitution, read with section 8(2), applies to private and public parties; and (iii) in the context of education, section 29(3)(c) of the Constitution requires independent institutions to maintain standards that are not inferior to standards at comparable public institutions.[234] It is therefore imperative that the right of the child to participate in decisions concerning their schooling exists regardless of whether they attend an independent or public school. As highlighted by

[231] Above n 54.

[232] Moyo above n 203 at 177.

[233] Section 8(3) of the Children's Act.

[234] It is worth noting that section 9(1) of the South African Schools Act 84 of 1996 requires a fair hearing before a child may be suspended from a public school. Bearing in mind that section 29(3) of the Constitution requires independent institutions to maintain standards not inferior to public schools, independent schools ought also to provide an opportunity for a fair hearing before a student is asked to leave the school.

my colleagues, independent schools cannot be said to be immune to requirements of procedural fairness nor can they be immune to the obligations expounded above.

[245] In my view, removing a child from their school is undoubtedly a life-changing event which greatly affects a child. It is arguable that this is, in fact, one of the biggest decisions, or changes, that may befall a child in their formative years, if they are fortunate enough to avoid other challenges like a familial death, a fatal illness, moving homes or their parents' divorce. Section 31 of the Children's Act deals with "major decisions" involving the child. Whilst section 31 focuses on the responsibilities of parents, or persons with parental responsibilities, towards the child in relation to major decisions and is therefore not directly applicable here, the section is nonetheless noteworthy for two reasons. First, it mandates that before any major decision is made, the person holding parental responsibilities "must give due consideration to any views and wishes expressed by the child".[235] Second, a major decision, as defined in this section, includes one which "is likely to significantly change, or to have an adverse effect on . . . the child's education, . . . or, generally, the child's well-being".[236]

[246] In the context of removing a child from a school, whether due to the child's fault or that of the parents, which will have a major impact on the child's life, it is axiomatic that due consideration ought to be given to that child's views and wishes. The decision-maker would be unable to have this due consideration if the child concerned is not given an opportunity to express their views. Further, it is of little comfort to rest on the assumption that the parent will represent these views – particularly in a case like this where it was the parents' actions that caused the children's removal from the School.

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[235] Section 31 of the Children's Act.

[236] Id.

[247] I wish to make a final comment. This relates to the best interests of the other learners and the contention that the requirement for a hearing would open the floodgates to having to hold hearings for each child and thus be unmanageable. Whilst, of course, the School is obliged to have due consideration of the best interests of all children and, in general, this gives rise to a right to a hearing, the individual facts of each case must be determinative. In the context of removing a child from a school, the child who is predominantly affected by the decision, so much so that the decision would constitute a "major life decision", is undoubtedly the child who is being removed from the School. Thus, depending on the facts of the particular case, it may be that whilst the decision may indirectly affect the other children at the School, their right to participate could, for example, be exercised through a representative, such as a school counsellor, who is given the opportunity to voice to the decision-makers the impact of the decision on the best interests of the other learners and through whom the children may make any representations.

Conclusion

[248] In the event, the conspectus of obligations that arise from constitutional, international and legislative instruments leads to the ineluctable conclusion that not only was Pridwin under the negative obligation to not interfere in DB and EB's right to basic education without a fair process, but it also had the obligation to consider DB and EB's rights to have their views heard on the matter, and to offer this opportunity to them, either in person or through a representative. In my view, that obligation recognises the dignity and humanity of the children by ventilating the concerns, frustrations and aspirations of these two independent, young human beings who have been caught up in a fracas not of their doing.

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