IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 4594/2016

In the matter between:

N ~~DUDUZO~~ F~~ORTUNE~~ M ~~HLONGO~~

APPLICANT

and

JOHN WESLEY SCHOOL FIRST RESPONDENT

DARREN TARR SECOND RESPONDENT

ORDER

After hearing Counsel and having considered the matter, the following order is made:

1. The exclusion policy as practiced by the first respondent constitutes law and conduct that is unlawful and inconsistent with the Constitution of the Republic of South Africa and is declared invalid.

JUDGMENT

DATE DELIVERED: 19 December 2018

Masipa J

Introduction

[1] The applicant is a parent of a learner ZM (a minor learner) enrolled at the first respondent during September 2015 for the 2016 school year. The first respondent is an independent school registered in terms of the South African Schools Act (the Act).[1] The second respondent is the principal at the first respondent.

[2] The applicant approached this court on the basis of urgency on 16 May 2016 for the following relief:

'1. That a Rule Nisi issued calling upon the 1st and 2nd Respondents to show cause before this Honourable Court on the date to be appointed by the Court why an order in the following terms should not be made:

(a) That the Applicant's minor child, Z~~ethembiso~~ M~~hlongo~~, be allowed to resume writing the examinations immediately at John Wesley School.

(b) That the parents of the minor child, Z~~ethembiso~~ M~~hlongo~~, be allowed to settle the arrears on the school fees account by payment of the instalments of R3017 over

[1] 84 of 1996

the period of three months, which instalment includes the normal monthly school fees and such payments shall begin on 31 May 2016.

(c) That the Respondents be directed to pay the costs of this application.

2. That the policy of exclusion as practiced by John Wesley School constitute law and conduct that is unlawful and inconsistent with the Constitution as the Supreme law of the republic and is declared invalid. That the orders contained in para 1(a) and para 1(b) shall operate as an interim order with immediate effect pending the final determination of this application.'

[3] Evident from the nature of the relief claimed, the application was brought as one of urgency. The court hearing the matter found that the matter was not sufficiently urgent to warrant the granting of the interim relief and allowed the parties to file further affidavits before the matter could be argued. The applicant raised a constitutional issue to the effect that the first respondent's exclusion policy infringes upon and undermines the provisions of ss 28(2) and 29 of the Constitution.[2] Further, that it was inconsistent with s 40(1)(d) of the Consumer Protection Act[3] (the CPA) and s 6 of the Children's Act.[4] Following the first court appearance, the matter was adjourned to afford the applicant an opportunity to file a rule 16A notice which was done.

The Facts

[4] On 17 September 2015 the applicant and the first respondent, concluded a fee agreement (the agreement), relating to ZMs enrolment as a learner at the first respondent. The terms of the contract concluded by the applicant and the first respondent (the parties) set out the rights and obligations between them. Clause 6 of the contract embodies a declaration by the parties of legal guardians of the learners. Clause 6(d) is relevant to this case and reads as follows:

'd) I accept that I am personally responsible to pay the fees on demand from the school. I understand that the school may demand payment of fees from me jointly with any other parent,

[2] The Constitution of the Republic of South Africa, 1996.
[3] 68 of 2008.
[4] 38 of 2005.

legal guardian or payer, or separately from me alone. This obligation exists throughout the duration of the contract, even if I am not the stated payer.'

[5] Clause 7 of the contract is a declaration by the payer if this is a different person to that in clause 6. Clause 7 reads as follows:

'7. By signing below, I declare that:

- I am the payer of some or all of the fees set out in this contract;
- I have read and understood this contract, including the attachments to it and the policies of the school;
- I understand that I and the child must comply with the terms and conditions of this contract for the child to remain enrolled at the school.'

[6] The agreement makes reference to the school policies and ZMs obligations to comply with them. It also makes reference to terms and conditions which are said to be contained in the ISASA policy document. The applicant signed the agreement as the person responsible for the payment of ZMs school fees. The agreement provides that, the school fees are due in advance and are payable by the first day of every month. It became apparent from annexure "H" to the respondents answering affidavit that the school fees are payable over a period of 11 months being the period from January to November each year.

[7] On 9 December 2015, the first respondent issued a letter of reminder of the 2016 school fees. The letter set out the difficulties which the first respondent was experiencing due to the non-payment or late payment of school fees. It highlighted amongst others that in 2016 it would strictly enforce its deregistration policy in respect of learners whose parents were in arrears for two months. The letter appealed to parents to avoid the embarrassment associated with this by ensuring that their children's school fees were paid timeously. Parents were also reminded of discounts applicable for early settlement of school fees.

[8] The monthly instalments payable by the applicant was R1 740. By 18 January 2016, the applicant had effected payment in the sum of R3 130. There were no payments effected by the applicant. Consequently, in February 2016, the first respondent notified the applicant of the need to ensure that all fees were paid in full. In subsequent accounts issued by the first respondent the applicant was informed that he was in arrears and added that ZM would not receive his first term report.

[9] There were no payments effected for three months from February 2016 until 13 May 2016 when an amount of R1 740 was paid. At that stage, the applicant was in arrears in the sum of R5 570. The May 2016 payment reduced the arrear amount to R3 830. Three statements were issued in May 2016 which indicated that examinations were about to commence and calling upon the applicant to settle the arrears. In addition to the accounts being emailed to the applicant, he was telephoned on 25 April 2016 and advised to settle the arrears. It appears that this did not invoke any action on the applicant's part.

[10] On 10 May 2016, the applicant's wife K~~hethiwe~~ M~~hlongo~~ (Mrs M~~hlongo~~) wrote an email to the second respondent requesting an indulgence for three months to allow for her to bring the account up to date without compromising ZMs studies. She indicated that she was having some challenges which affected her financial standing with the result that she had not been able to make necessary payments towards the school fees.

[11] In reply to Mrs M~~hlongo~~'s correspondence, the second respondent indicated that while he sympathised with her misfortune, the school policies did not permit negotiated repayment terms. He indicated that full payment of all arrear fees had to be paid. He urged her to make alternative arrangements for the payment of the school fees to ensure that the learner was allowed to write his examinations and to avoid his possible de-registration from the school.

[12] Mrs M~~hlongo~~ pleaded with the second respondent to allow ZM to write the examinations on the basis that she would settle the school fees by the end of May 2016. On 11 May 2016, the second respondent reiterated that no payment terms could be

negotiated and that her request could not be accommodated. He reminded her of the contractual obligation to pay school fees in advance.

[13] The need for the urgent application arose from the respondents refusal to enter into a settlement agreement with the applicant and his wife which would have allowed them to settle the outstanding arrears within a few months. As a result of the refusal, ZM, who was ten years old at the time, was not allowed to write his examinations which commenced on 13 May 2016. The respondents contend that the applicant and his wife failed to pay the arrear school fees as at 13 May 2016 and consequently, the first respondent was entitled to invoke its exclusion policy. The exclusion policy is said to be guaranteed by the Act and confirmed by the policy document of the Independent Schools Association of Southern Africa (ISASA).

[14] The adjournment of the matter resulted in the interim relief sought not being granted and the matter losing its urgency. Since ZM was excluded from the examinations, the applicant and his wife surrendered a funeral policy to pay the arrear school fees. Despite this, it was essential for the court to consider the exclusion practice of the first respondent and determine whether it was inconsistent with the Constitution.

[15] According to the respondents, the ISASA policy document acknowledges the importance of s 28 of the Constitution, by advising its affiliate schools to give adequate warning of pending exclusions. The first respondent contends that it gave the applicant such notices including a further notice on its Newsletter of 13 April 2016 sent a month prior to the commencement of the examinations.

[16] According to the applicant, ZM was kept in the art room while his classmates were writing examinations. The applicant contends that ZMs right to education as provided by s 29 of the Constitution were infringed. So were his interests which are protected by s 28(2) of the Constitution. He contended further contended that the first respondent's drastic action was unreasonable since ZM is not responsible for the

payment of his school fees. The first respondent's conduct negatively affected ZMs psychological well-being and destroyed his self-esteem.

[17] The reason advanced for the non-payment of the school fees was that the applicant was initially responsible for the payment of ZMs school fees. However, due to other financial obligations, it was agreed between ZMs parents that Mrs M~~hlongo~~ would take over the responsibility for the payment of the school fees from February 2016. Mrs M~~hlongo~~ changed her employment and relocated to Johannesburg. She was not paid on time and incurred relocation costs which made it impossible for her to meet her obligations to pay school fees. This was what led to the attempted settlement arrangements.

[18] The applicant acknowledged the first respondent's entitlement to receive school fees from parents. He contends however that in exercising its right, the first respondent is not entitled to trample on the constitutional rights of learners since such learners are not responsible for the payment of the school fees. He contended that the first respondent's rights to school fees could be enforced by instituting legal action against the parents to recover monies owed, alternatively, a settlement agreement can be concluded for the arrears. He argued that consequently, the exclusion of learners from writing examinations as a result of the non-payment of school fees is unethical.

[19] The applicant categorised the exclusion as maltreatment, neglect, abuse and degradation in contravention of s 28(1)(d) of the Constitution. He argued that the exclusion infringes upon the learner's right to education as protected by s 29 of the Constitution. The applicant contends that the first respondent's policy constitute law and conduct that is unlawful and inconsistent with the Constitution and must in terms of s 172(1) of the Constitution be declared invalid.

[20] It is common cause that the duty to pay school fees is that of the parents. The first respondent contends that the financial difficulties of the parents are not its concern. All that it is concerned about, is that they meet their contractual obligations to pay the

school fees. Further, that it was apparent from the payment terms that parents are handed over for debt collection 40 days after the exclusion process. This was because engaging the services of a debt collector was costly and protracted and would seriously compromise its cash flow as there are many defaulters.

[21] According to the respondents, exclusion of learners is the last desperate resort after begging and pleading with the parents. Exclusion creates the urgency required in securing payment from the parents. The first respondent indicated that the practice would continue. As at 6 May 2016, school fees arrears were in the amount of R620 899.79 and twelve days later with examinations being imminent, an amount of R422 548.15 was paid.

[22] The first respondent denied that the exclusion was unethical nor was there any maltreatment, neglect, abuse or degradation on its part. It questioned what it labelled as the applicant's obligation to pay school fees and contended that this reflected his lack of moral principle and unwillingness to adhere to proper rules of conduct. The first respondent contends further that parents need to consider s 28(2) of the Constitution before allowing their children to be subject to exclusion.

[23] In respect of s 29 of the Constitution, the right to education, the first respondent contends that this is not an absolute right in independent schools as opposed to public schools. There is an abundance of choice between public and independent schools with the result that citizens are not deprived, of access to education. Since independent schools are autonomous, they can impose a limitation on any clause contained in the Bill of Rights if considered reasonable and justifiable in an open and democratic society as set out in s 36 of the Constitution. The first respondent contends that enforcing exclusions was in protection of its rights protected under ss 26 and 27 of the Constitution. The exclusion from examinations is thus not inconsistent with the Constitution.

[24] The first respondent contends that it has applied the exclusion policy for many years and that the practice is implicit. Since it is registered as a Non-Profitable

Organisation, (NPO), its abilities to generate profit are limited. It therefore relies exclusively on the collection of school fees for its sustenance. Consequently, it does not negotiate repayment terms.

[25] According to the applicant, parents are required to sign fresh contracts of admission yearly and therefore the document annexed to the respondents affidavit as "H" which set out the terms of payments was irrelevant and misleading and not applicable since it was in respect of the 2012 school year.

[26] In terms of the contract concluded in respect of the 2016 school year, there is no provision to exclude a learner in order to recover outstanding school fees. In fact, the contract makes reference to suspension and expelling of learners only in respect of their conduct and specifically that this will be applied after a proper disciplinary hearing. The contract also provides for a cancellation clause and sets out that in order for the first respondent to cancel the contract, it is required to give written full term notice of its intention.

[27] Payment of fees must be done timeously and in advance failing which the full amount becomes due. Importantly, the contract makes provisions for consideration of a settlement. It was made clear, that the contract was regulated by the provisions of the National Credit Act[5] (the NCA) and that failure to pay school fees timeously would result in interest being charged together with late payment administration costs, collection costs and legal costs on attorney and own client scale.

[28] In terms of the 2015 contract, the parties agreed that in case of a default in paying school fees, legal proceedings could be instituted. In view of the terms of the 2015 contract, the applicant contends that there was no prior agreement for ZM to be excluded as a result of the non-payment of fees. He averred that the first respondent's conduct in excluding ZM amounts to cohesion, undue influence, pressure, duress, embarrassment and unfair tactics which are amongst other forms of conduct prohibited by s 40(1)(c) and (d) the CPA.

[5] 34 of 2005.

[29] The applicant contends correctly that ZM is a minor and was not able to prevent the implementation of the decision to exclude him and to protect his interest when he was excluded. The applicant avers that the exclusion of ZM from writing examinations was inconsistent with and in breach of the contract.

[30] The applicant relied on a document headed Rights and Responsibilities of Independent Schools from the Department of Basic Education, and stated that independent schools operate within the confines of the Constitution and relevant national and provincial legislation. Schools are always required to protect the best interest of the child.

[31] He submitted that in terms of the Act, exclusion takes place where there is a contravention of the school code by the learner and after a fair hearing. The applicant contends that the same principle should apply to independent schools. Where however exclusion is as a result of a breach of contract by parents, fair procedure must be followed taking into consideration the best interest of the child. To adhere to this, a child would amongst others not be disallowed from writing examinations. Where the school wishes to terminate the contract it has with the parents, timeous notice must be given taking into account the best interest of the child.

[32] The first respondent did not follow the relevant agreed procedure relating to the cancellation as set out in the agreement and instead unilaterally excluded the learner in contravention of the contract. The respondents filed a further affidavit to the effect that following from the filing of its answering affidavit, ZM was permitted to write the examinations in 2016 once the arrear school fees were settled. Further, that the applicant and his wife had since complied with their obligations to pay school fees timeously. They contended that the exclusion of ZM from writing examinations was common cause and admitted to the existence and application of the exclusion policy. This court was called upon to decide on the constitutionality of the policy. The respondent contention was that the entire issue is academic since ZM was

subsequently allowed to write his examination. There was therefore no issue for the court to pronounce on. It based this on *Minister of Justice & others v Estate Stransham-Ford*[6] where the following was stated:

'[22] Since the advent of an enforceable Bill of Rights, many test cases have been brought with a view to establishing some broader principle. But none have been brought in circumstances where the cause of action advanced had been extinguished before judgment at first instance. There have been cases in which, after judgment at first instance, circumstances have altered so that the judgment has become moot. There the Constitutional Court has reserved to itself a discretion, if it is in the interests of justice to do so, to consider and determine matters even though they have become moot. It is a prerequisite for the exercise of the discretion that any order the court may ultimately make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and 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.

[23] The common feature of the cases, where the Constitutional Court has heard matters notwithstanding the fact that the case no longer presented a live issue, was that the order had a practical impact on the future conduct of one or both of the parties to the litigation. In *IEC v Langeberg Municipality*, while the relevant election had been held, the judgment would affect the manner in which the IEC conducted elections in the future. In *Pillay* the court granted a narrow declaratory order that significantly reduced the impact on the school of the order made in the court below. In *Pheko*, while the interdictory relief that had been sought had become academic, a decision on the merits would affect its claim for restitutionary relief.' (Footnotes omitted.)

[33] Mr *Shapiro* for the respondents submitted that courts always resist the temptation pronounce on hypothetical situations or abstract positions of law and relied on *Estate Stransham-Ford.*[7] Since ZM wrote examinations in 2016 and his parents have complied with their obligations to pay school fees, this court was therefore called upon to pronounce in a vacuum on an issue which will have severe consequential effects on independent schools throughout the country.

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[6] *Minister of Justice & others v Estate Stransham-Ford* 2017 (3) SA 152 (SCA).
[7] Paras 17 and 21.

[34] Mr *Shapiro* argued that such issues should only be considered where there exists controversy or compelling reasons to do so. He sought to justify the reasons for the temporary exclusion where parents had a contractual obligation since the contrary would impose an obligation on independent schools to educate learners without payment in the hope that they would be able to recover such fees through litigation. It was submitted that this ignored the fact that such parents elected to educate their children at a private school and undertook contractually to pay the fees while accepting consequences of the failure to do so.

[35] In respect of the live issue the respondents contend in respect of the exclusion policy that there are no prospects of future harm that would allow a consideration of the matter. This it argues is because there is no evidence of any harmful effects of the temporary exclusion, as ZM subsequently wrote examinations and his school fees were paid up to date and he will leave the school at the end of 2018.

[36] The ambit of the declaration sought by the applicant was said to be unclear as to whether it related to temporary exclusion of learners from examination while accepting their exclusion at different times of the year or whether the applicant seeks the court to declare any exclusion relating to the non-payment of fees unconstitutional. It was also not clear whether the court is being asked to declare an agreed clause in a contract unenforceable and unconstitutional without the applicant seeking such relief.

[37] If the court was to find that those contractual limitations are unconstitutional, this will remove a significant and recognised difference between private and public schools. Since independent schools are autonomous, the inability to fund their operations would be prejudicial to the learners and to staff. As stated in *Mlawuli v St Francis College*,[8] private schools do not exercise a public function and the relationship they have with the parents is contractual.

[8] *Mlawuli v St Francis College* (1102/2016) 2016 ZAKZDHC 17 (20 April 2016).

[38] Mr *Shapiro* submitted that if it is contended that the enforceability of the contractual terms remained a live issue, then there were two further issues to be canvassed in order for the matter to be justiciable. The first being the identity of righ(s) of the child infringed and secondly, the actual harm caused. He submitted that there were no allegations that ZM suffered academic prejudice as a result of the temporary exclusion nor was there evidence that his rights to dignity and equality were infringed.

[39] It was submitted that the temporary exclusion was a proportionate means of securing payments for the amounts due. If there was no real infringement or harm of the child's rights, then the question of conflict between the contract and constitutional values did not arise and cannot be determined on the facts of this case.

[40] The respondents' also raised a point that issues before court were moot, no longer justiciable and should be dismissed. As to costs of costs, it was contended that since the applicant appeared in person and the respondents were represented pro-bono, each party should bear its own costs.

[41] Mr *Broster SC* appearing with Ms *Du Toit* as amicus submitted that even if the issue can be said to be moot, the Constitutional Court in *MEC for Education, KwaZulu-Natal, and others v Pillay* stated:[9]

'…(a) case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the court is to avoid giving advisory opinions on abstract propositions of law'.

[42] In *Pillay*, the court found that the learner was no longer at the school and therefore that the issue was moot. It however, found that in certain instances, the

[9] *MEC for Education, KwaZulu-Natal, and others v Pillay* 2008 (1) SA 474 (CC) para 32; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) (2000 (1) BCLR 39) at fn18. See also *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC) (1996 (12) BCLR 1599) in para 15.

interest of justice called for the court to hear a matter even if it is moot if any order likely to be made will have some practical effect on the parties or/on others.

[43] The court in *Pillay* identified relevant factors to consider in such circumstances. These are dealt with as was raised by Mr *Broster* as being the following:

(1) The nature and extent of the practical effect that any possible order might have. In this regard, it was set out that any order of invalidity will affect approximately 760 schools represented by ISASA affecting 160 000 learners. The effect is therefore widespread.

(2) In respect of the issue relating to exclusion, it was said that judging from the jurisprudence, the difference between public and independent schools, the effect of the contractual arrangements between the school and the parent have not been properly examined and the rules applied led to the child being victimised and humiliated. This was as a result of the schools unconstitutional methods to enforce the contractual provisions on the parents consequently, the child's interest are prejudiced.

[44] It was argued by Mr *Broster* that the contention by Mr *Shapiro* relating to the mootness of the *lis* cannot be correct. This is because it is apparent from the relief sought by the applicant that the matter went beyond allowing ZM to write his examinations. Clause 2 of the relief sought speaks of the declaration of constitutionality. This is clearly an issue which this court still needs to decide.

[45] Mr *Broster* argued that ISASA takes into account only the interest of the schools and not that of the children. Further, that there is no reported case raising issues similar to the current one where the learner is entirely innocent and has been victimised and humiliated by the school's approach to his parents inability to pay agreed fees. It was submitted that the courts have in many instances held that the sanctity of contracts trumps any consideration of the interest of the child. This was apparent when this

matter was in court for interim relief where the child was being excluded from writing examinations. Little consideration was given to the interest of the child.

[46] Mr *Broster* submitted that the policy of ISASA was breathtakingly offensive since it amongst others provides for the exclusion of learners on the grounds of breach of contract between the school and parents usually related to non-payment of school fees. The policy recognises the provisions of s 28 (2) of the Constitution as a guiding factor and mentions that the child's best interest is paramount in all matters involving children. Where a child is to be excluded for non-payment of fees by the parents, the best practice is that adequate warning be given especially before end of year examinations. A more drastic action can be taken earlier in the year. The policy provides further that a child cannot be taken out of school without an arrangement by parents to place him in another school. Any conduct to the contrary would be in contravention of the law on compulsory education.

[47] Mr *Broster* submitted that the contract of the first respondent was prepared in a manner which is calculated to punish a learner for the failure by his or her parents to pay school fees. It was submitted that such contract cannot be reconciled with s 28(2) of the Constitution.

[48] In *Head of Department, Western Cape Education Department & others v MS*,[10] the court found that an interpretation which burdens both parents with the responsibility for school fees was inconsistent with the injunction in s 28(2) of the Constitution. The court found that s 41(7) of the Act prohibited the exclusion of a learner from school programs in a public school for non-payment of school fees. This included suspension from classes. Mr *Broster* submitted that the suspension contemplated in the contract or practice by the first respondent is absolutely prohibited in public schools.

[49] Isolating a child in the art room when he should be writing an examination amounts to victimisation and is extremely humiliating to the child. Co-learners would be curious to know why he did not write the examination and what he was doing in the art

[10] *Head of Department, Western Cape Education Department & others v MS* 2018 (2) SA 418 (SCA) at 440.

room. It would be excruciatingly humiliating for a child to explain that it was because his parents had not paid school fees. This would brand his parents as uncaring or as failures because of their inability to pay school fees.

[50] Mr *Broster* submitted that the applicant provided a reasonable explanation on why they had not paid the school fees timeously. Due to the humiliating experience on ZM, the applicant surrendered a funeral policy valued at R16 000 for R3 731.94. This was after he was denied an interim order on the basis of his breach of contract and the fact that ZM would be given an opportunity to write his examination at a later stage once arrears are settled.

[51] It was submitted that the contractual provisions which permitted the school to victimise the child on the basis of non-payment of school fees by his parents fall foul of s 29(3)(c) of the Constitution to maintain standards that are not inferior to the standards at comparable public school institutions. Section 46(3) of the Act provides for the registration of independent schools if satisfied that s 29(3)(c) of the Constitution would be complied with amongst others.

[52] It is apparent from the preamble of the Act that setting standards which do not guarantee learners in independent schools the same standard of education or governance is contrary to the purpose and provisions of the Act.

[53] An interpretation which avoids the application of s 47(1) of the Act by contract in independent schools is unthinkable. The schools contract appears to bear the approval of ISASA. Clause 24 provides that each parent stands as surety and co-principal debtor to the school while clause 6(a) renders both parents jointly liable for school fees. Clauses 26 and 27 provides for interest charged for late payments at the maximum permissible rate in terms of the NCA. Clause 28 provides for recovery costs associated with late payment including collection commission and legal costs on an attorney and own client scale.

[54] It was argued that it was apparent from a reading of the contract that the school can take adequate precautions to protect itself against non-payment of fees by parents at any time during the course of the contract. In view of this, it is unnecessary to give the independent schools powers which result in the victimisation and humiliation of children by excluding them in ordinary school activities as was the case in this matter. The ISASA policy results in principals of independent schools believing they have powers to victimize and humiliate learners when their parents do not pay school fees.

[55] It was submitted by Mr *Broster* that the treatment of ZM due to non-payment of school fees was contrary to the Constitution and common law relating to public policy and no court ought to enforce this provision. This was because ZM did nothing wrong and the penalties imposed on him in relation to the suspension are not covered by the contract. The conduct of the school was aimed at putting pressure on the parents and ZM to ensure that school fees were paid. It was argued that this was an entirely illegitimate means for the first respondent and other independent schools to adopt when they have at their disposal an entitlement to sue the parents for fees and execute against them in the normal course of civil proceedings to recover their fees.

Analysis

Further Affidavit

[56] Prior to the hearing of this matter, the respondents filed a further affidavit which affidavit was filed without leave of the court. The essence of that affidavit was to make out a case for the argument that the cause of action being the deprivation or exclusion of ZM from writing examinations had fallen away and the issue had become moot. This was premised on the contention that the issue had since been resolved following the payment of school fees which resulted in ZM being permitted to sit for catch-up examinations. Consequently, to place before court evidence that the case was moot. In motion proceedings three sets of affidavits are allowed and further affidavits may only

be filed with leave of the court. Such leave is in the discretion of the court to be exercised judicially upon consideration of the facts.[11]

[57] Leave of court will only be granted in special circumstances like where something new emerges from applicant's replying affidavit. There must be a satisfactory explanation which negatives mala fides as to the reason why the information was not placed before the court at an earlier stage.[12] In this case, it is common cause that after the respondents filed their answering affidavit, the applicant paid the arear school fees and ZM was allowed to sit for his examinations. This is apparent from the applicant's replying affidavit and was a new issue which the respondents had no opportunity to deal with. Although leave of this court was not sought in introducing a fourth affidavit, such affidavit was necessary for the proper consideration of the matter since it placed relevant facts before the court. The affidavit is therefore allowed.

The contract

[58] In respect of written contracts, it is trite that the signatories to a contractual document signifies assent to the contents of the document and are bound by the *caveat subscripto* rule.[13] It is important in this case to first determine the contract which applied at the time of the incident. This is because the respondents relied on a 2011 contract relating to the exclusion of learners for non-payment of school fees while there was a 2015 contract signed by the parties in respect of the 2016 school year. If the 2015 contract is the applicable one, as submitted by the applicant, it makes no provision for the exclusion of learners for non-payment of school fees and remedies are availed to the school in that regard. The result is that the first respondent would have breached the terms of its own contract when it excluded ZM from writing examinations and there would be no need for this court to make any declaration of invalidity and the applicant will have recourse to contractual remedies.

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[11] *Afric Oil (Pty) Ltd v Ramadaan Investments CC* 2004 (1) SA 35 (N) at 38i-39b.
[12] Herbstein and Van Winsen *Civil Practice of the Supreme Court of South Africa* 5th edition at 359.
[13] *Slip Knot Investments 777 (Pty) Ltd) v Du Toit* 2011 (4) SA 72 (SCA) para 12.

[59] From a reading of the 2011 contract, there is nothing to suggest that it was to remain in operation for the duration of the learner's schooling year. This together with the fact that a completely different contract with distinguished terms regulating non-payment of fees was signed leads to a conclusion that in 2016, different terms were applicable in respect of the recovery of fees. Notably, the respondents in their reply sought to rely on the contract signed between the parties referring to the 2011 contract and only included the portion of the 2015 contract where parents agreed that they would be bound to pay school fees. It is concerning that the respondents deemed it unnecessary to place all relevant facts before the court to afford the court an opportunity to consider the matter in full.

[60] The decision of *Mlawuli v St Francis College* relied on by the respondents does not assist them. The case emphasised the distinction between independent schools and public schools which is not disputed by any of the parties in the current matter. Further, the decision sought to be challenged in that matter was that relating to a refusal to admit a learner in a different schooling year. It had nothing to do with a decision to exclude an enrolled learner from writing examinations. The parents of the learner in *Mlawuli* had been given sufficient opportunity to enroll the learner at another school as they were informed that the learner would not be allowed to return to the school the following year.

[61] It can reasonably be concluded from the facts of the current case that the first respondent cannot rely on the 2011 contract. This being so, the respondents have breached the terms of the 2015 contract when it excluded ZM from writing his examinations since the contract concluded by the parties provided for a different process to be followed where parents defaulted in payment.

[62] However, Mr *Broster* argues that ISASA's to which the first respondent is a member makes provision for exclusion. In view of this and the implications that such policy has on the parties in this matter and to others, it is essential that this court considers the validity of such a policy.

The Constitutional considerations

[63] Section 28(2) of the Constitution is a right which places the child's best interest as being of paramount importance. It is a right conferred by the Bill of rights like other rights and not merely a guiding principle. The section dictates that that a child's best interests are of paramount importance in every matter concerning the child. The reach of s 28(2) is not restricted to the rights enumerated in s 28 and must be interpreted beyond those provisions.[14] It however also serves a purpose of assisting with the interpretation of other rights as was the case in the *Governing Body of the Juma Musjid Primary School & others v Essay NO & others.*[15]

[64] As correctly submitted by Mr *Shapiro*, the fact that s 28(2) of the Constitution sets out the best interest of the child as being paramount, does not mean that such right may not be limited in terms of s 36 of the Constitution. In *Sonderup v Tondelli & another*[16] the court held that the child's best interest is mutually interrelated and interdependent and form a single constitutional value system. This right like other rights in the Bill of Rights is subject to limitations that are reasonable and justifiable.

[65] Section 29(3) of the Constitution allows for the establishment of independent education institutions and sets out certain conditions which such institutions must comply with. The relevant one in this matter is s 29(3)(c) which proves for independent institution to maintain standards not inferior and comparable to those in public education.

[66] In terms of the policy document of the Department of Basic Education, all schools are bound by the provincial grounds for registration, by the Act, general law and any legislation that protects the best interest of the child. Provincial education departments have the responsibility to monitor independent schools that are registered with them. This document recognises exclusions in independent schools, it categories them as falling within the two broad areas being exclusion where the learner contravenes the

[14] *Minister of Welfare and Population Development v Fitzpatrick & others* 2000 (3) SA 422 (CC).
[15] *Governing Body of the Juma Musjid Primary School & others v Essay NO & others* 2011 (8) BCLR 761 (CC).
[16] *Sonderup v Tondelli & another* 2001 (1) SA 1171 (CC).

school code and exclusions relating to the contract between parents and the school mainly in respect of non-payment of school fees. When considering these exclusions, the best interest of the child should always be adhered to.

[67] The Basic Education Hand Rights Book-Education Rights in South Africa, chapter 20: Education Rights in Independent Schools discusses the provisions of s 29 of the Constitution. Amongst other considerations, it adopts the principles set out in *Juma Musjid Primary School,* the court found that s 28(2) of the Constitution imposes the horizontal application of the right to education on independent schools since it extends the application of the Bill of Rights to bind a natural or a juristic person 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. The court went further to set out that the purpose of s 28(2) was not to obstruct private autonomy or to impose on a private party the duties of the State, but rather to require private parties not to interfere with or diminish the enjoyment of a right. It found that there was a negative constitutional obligation not to impair the learners' right to a basic education.

[68] In *Juma Musjid Primary School*, The Trust, as the owner of the property, was entitled to seek eviction in view of its extensive but fruitless efforts to engage the MEC to alleviate the position of learners affected by the proposed eviction. That did not imply, however, that it was entitled to an eviction order. The Trust's constitutional obligation, once it had allowed the school to operate on its property, was to minimise the potential impairment of the learners' right to a basic education. This required consideration and compliance with guaranteed rights in ss 29(1) and 28(2) of the Constitution.

[69] Since the Constitution require private parties or bodies not to interfere with or diminish the right to basic education, independent schools must act in a manner that minimises any harm on the learner's right to basic education. The Department of Basic Education and National Alliance of Independent School Associations (NAISA) signed a protocol in 2008 which dealt with exclusions amongst other considerations. Similar to ISASA, the protocol recognises the right of independent schools to exclude a learner who contravenes the schools code of conduct drafted in line with relevant legislation

and good practice and in instances where the contract between the school and parents has been broken usually due to non-payment of fees. However, such exclusion may only be implemented after following a fair procedure and in doing so, regard must be had to the child's best interest.

[70] While the Act does not prohibit independent schools from suspending or expelling learners whose parents have failed to pay school fees in time, this need not be the case in all circumstances. Independent schools must act in a manner that minimises the negative impact of their actions on the ability of learners to attend school. Since expelling or excluding a learner for unpaid school fees invariably impacts on this, the learner's circumstances must be considered. Therefore, any decision to suspend or expel a learner during school term must satisfy due process. These include adequate warning prior to suspension or exclusion, provision to make arrangements to settle fees or opportunity to make arrangements to enroll a learner at a new school. These must precede the suspension or expulsion of the learner.

[71] In its correspondence to the parents during February to May 2016, the school saw it as an option to deprive ZM of his term report. This was a lesser harm than to subject ZM to such victimisation and humiliation by making him sit in the art room while other learners were writing their examination.

[72] The Act provides for the exclusion policy provided it is reasonably applied in accordance with the provisions of the Act. This does not include humiliating and punishing a learner as a result of his parents conduct. Refusing the learner to sit for his examinations and making him sit in the art hall can surely not be in compliance with the Act and with the provisions of the Constitution.

[73] It was unreasonable for the second respondent to adopt a stance that there would be no negotiations in respect of settling the arrear fees without first establishing from the M~~hlongo~~'s what the cause for the default was. If indeed the explanation is proffered is correct, there was a reasonable explanation and it would have been apparent to him that the school fees could be settled within a short period of time and

without invoking any costly recovery measures. He however adopted a robust approach which led to the detriment of ZM.

[74] While it may be correct that the parents' financial difficulties are not the school's concern, there may be instances where there is a reasonable explanation why the school fees are not paid timeously. This calls for the school to enquire into such reason and thereafter reach a reasonable decision which is not detrimental to the learner and does not encroach on the learner's right to education.

[75] It is concerning that without establishing the cause for the default the respondents labelled the applicant as lacking moral principles and someone unwilling to comply with rules. If this was the case, there would not have been attempts by his wife to make settlement arrangements. The fact that measures were taken to contact the school and an attempt to make payment arrangements is a sign that the applicant takes his responsibility to pay the school fees seriously.

[76] While it is not a right for parents to enroll their children in private schools, there is nothing to bar these parents who are willing and able to enroll their children in private schools from doing so. The fact that their personal circumstances change subsequent to that should be considered when that arises. It is therefore unreasonable for the second respondent to refuse to consider the change. The application of the limitation clause referred to by the first respondent is subject to reasonableness and justifiability. The fact that the exclusion policy was been applied for years does not make it correct or acceptable. It may be that it lacked a brave person like the applicant to challenge it. It is acknowledged and accepted that as an independent school, the first respondent must collect school fees. However, in doing so, the first respondent must always take cognisance of its duties/obligations and the role it plays in society. This is reflected in the manner in which it enforces its rights including the recovery of fees. It must always take into account that it is dealing with children who are specifically protected by the Constitution and whose rights ate paramount.

[77] I agree with the applicant that while the first respondent may be entitled to invoke its authority to exclude learners, a fair procedure must be followed. The exclusion must also be for a fair reason taking into account what is in the best interest of the child. In this regard, it should not matter whether the school is an independent school or a public school. This must apply regardless of whether such exclusion relates to the child's conduct or any breaches by its guardians or parents.

[78] A consideration of the best interest of the child goes beyond looking at other rights protected by the Constitution. Mr *Shapiro's* reference to an infringement of the right to equality and dignity seeks to limit the best interest of the child to such rights and cannot be correct. The concept is much broader than that. Any conduct, contractual or otherwise, which is contrary to the best interest of the child conflicts with s 28 the Constitution. Section 39 of the Constitution always calls for courts and other decision makers to take into account the provisions of the Bill of Rights when deciding on matters.

[79] Mr *Shapiro's* argument that the Constitutional Court reserved the right for it to consider matters which can be said to be moot to it cannot be correct. This is because *Pillay*[17] made reference to the court and did not limit such powers to it. Where the interest of justice requires, any court with the requisite jurisdiction may hear the issues before it.

[80] While it is accepted that independent schools are autonomous, this does not exclude them from the operations of the Act and the Constitution. A finding in that suspending a learner from class due to non-payment of school fees was contrary to the provisions of s 28 (2) of the Constitution would apply similarly to independent schools.

[81] The best practice in respect of independent schools and the non-payment of school fees would be to engage in collection methods that do not impact on the child's best interest and where it becomes necessary to secure school fees after exhausting

[17] See above n9.

these collection mechanisms, the schools should ensure that this is done in a manner which does not victimise or humiliate the learner. If this is implemented subsequent to the end of the year examinations the rights enshrined by the Constitution will not be violated .

[82] That ZM was allowed to write his examinations once the arrears were paid do not make the first respondent's conduct less reprehensible. In fact it continued to humiliate ZM further as he was being treated different. The first respondent's conduct in isolating ZM and placing him in the art room while other learners wrote examinations was degrading, humiliating and inhumane. It penalized ZM, a minor child for his parents conduct for which he was not liable. The first respondent in implementing such a penalty failed to take into account ZM's interest and conducted itself contrary to international treaties, the Act and the Constitution. As Mr *Broster* argued, this also failed to consider the impact it would have on the relationship between ZM and his parents branding them as uncaring when they had a legitimate reason for the non-payment. Clearly this was not in the best interest of ZM.

[83] The Constitution is the supreme law of the Republic and law and conduct inconsistent with it is invalid.[18] The power to declare law or conduct that is inconsistent with the Constitution invalid has been conferred upon the courts. When deciding a constitutional matter within its power, a court 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'.[19]

[84] Since s 46(a) of the Act allows for the registration of independent school's provided they met the requirements of s 29(3) I agree with Mr *Broster* that any conduct by the school or policy or contract which falls foul of the provisions of s 29 (3) of the Constitution is not only unconstitutional but is also invalid. The exclusion policy as a result of non-payment of school fees in so far as it is applied by the first respondent results in a standard inferior to that which is applicable in public education as set out in

[18] Section 2 of the Constitution
[19] Section 172(1)(a) of the Constitution.

MS.[20] It is clearly contrary to public policy and is aimed at humiliating, degrading and victimising learners as was the case with ZM. The suggestion that it was a reasonable and justifiable means for the limitation of the rights in ss 28 and 29 of the Constitution is devoid of any merit. It is unjustifiable and infringes on the rights in both ss 28(2) and 29(3) of the Bill of Rights. It is thus unconstitutional and falls to be declared as invalid.

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Masipa J

Appearances

Counsel for Applicant	:	In person
Instructed by	:	N/A
Counsel for the Respondents	:	Mr W N Shapiro
Instructed by	:	Romer Attorneys
Amicus Counsel	:	Mr L B Broster SC, appearing with Ms C VDu Toit
Instructed by	:	As Friends of the Court
Matter heard on	:	26 April 2018
Judgment delivered on	:	19 December 2018

[20] See above n10.