IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO: 294/2018
SCA CASE NO: 1134/2017
HC CASE NO: 38670/2016

In the matter between:

AB	First Applicant
CB	Second Applicant
and	
PRIDWIN PREPARATORY SCHOOL	First Respondent
SELWYN MARX	Second Respondent
THE BOARD OF PRIDWIN PREPARATORY SCHOOL	Third Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION, GAUTENG	Fourth Respondent
INDEPENDENT SCHOOLS ASSOCIATION OF SOUTHERN AFRICA	Fifth Respondent

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APPLICANTS' HEADS OF ARGUMENT

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INTRODUCTION

1 This application concerns the constitutional rights of the applicants' children, DB and EB, to have their best interests considered paramount in all matters concerning them and to a basic education.

2 The case turns on a central question: is it constitutionally permissible for an independent school to expel children due to their parents' alleged conduct, without even affording a hearing on the children's best interests?

3 DB and EB were learners at Pridwin Preparatory School, an independent school in Johannesburg. In 2016, they were in grade 4 and grade R respectively. They had known no other school and had formed close bonds with their friends and teachers.[1]

4 On 30 June 2016, the headmaster of Pridwin, Mr Marx, took the unilateral decision to terminate the Parent Contract that allowed the children to attend the school.[2] He did so based on the alleged conduct of their father, AB. This application for leave to appeal concerns the validity of that decision.

5 Mr Marx's decision meant that DB and EB were to be expelled from Pridwin at the end of the 2016 academic year. They were only spared that result because of an interim interdict granted by the High Court.[3]

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[1] FA Vol 12 p 1212 para 52.
[2] Termination Letter Vol 2 pp 104 – 106.
[3] Order of Modiba J Vol 9 pp 936 – 937.

6 It is common cause that the children were blameless. Mr Marx acknowledged that they are "*model pupils*".[4] In a letter to AB, Mr Marx candidly explained that "*[the] cancellation of the contract has nothing to do with your boys ... [it] has everything to do with <u>your conduct</u>*".[5]

7 Yet the effect of Mr Marx's decision was borne by the two children. The decision meant that they were to be forced to leave Pridwin – the only school they had ever known.

8 Mr Marx reached this decision without affording the applicants a fair hearing, let alone a hearing on the best interests of their children. AB was not afforded a hearing on the intended cancellation; CB, the children's mother, was not heard at all; and no attempt was made to hear the children's views, either in person or through their parents. Mr Marx did not even consult his senior management or the board before making this decision.[6]

9 Mr Marx claims that he was entitled to act in this way because of clause 9.3 of the Pridwin Parent Contract, a "*termination-on-notice*" clause. This clause provides that "*The School … has the right to cancel this Contract <u>at any time, for any reason</u>, provided that it gives you a full term's notice, in writing, of its decision to terminate this Contract*".[7]

10 Clause 9.3 is a generic term found in many independent schools' contracts. ISASA, a national association of independent schools, confirms that it was the author of the standard-form Parent Contract and has encouraged its members to

[4] Email of 1 July 2016 Vol 1 p 63.
[5] Email of 1 July 2016 Vol 1 p 63.
[6] FA Vol 12 p 2013 para 29 ; Pridwin AA Vol 13 p 1307 paras 48 – 49.
[7] Parent Contract Vol 2 p 133.

adopt it.[8] The contract is presented to parents on a take-it-or-leave-it basis.[9] ISASA intervened in the High Court because the validity of Mr Marx's use of clause 9.3 has wider ramifications for its member schools, which educate approximately 168,000 learners.[10]

11 The applicants challenge the validity of Mr Marx's decision on three grounds:

11.1 First, the effective expulsion of the children was procedurally unconstitutional due to Mr Marx's failure to afford the applicants a hearing on the best interests of the children, in breach sections 28(2) and 29(1)(a) of the Constitution and the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

11.2 Second, the decision was substantively unconstitutional as Mr Marx's decision was self-evidently not in the best interests of DB and EB and also violated the obligation not to unreasonably interfere with the children's basic education, in breach of sections 28(2) and 29(1)(a) of the Constitution.

11.3 Third, if clause 9.3 of the Parent Contract permits cancellation without following a fair procedure and without regard for the rights of children, it is unconstitutional, contrary to public policy, and unenforceable to that extent.

12 In a 4-1 decision, a majority of the Supreme Court of Appeal rejected these grounds and upheld the judgment of Hartford AJ in the High Court.[11] Mocumie JA,

[8] ISASA Affidavit Vol 8 p 776 para 6.
[9] FA Vol 12 p 1203 para 32; Pridwin AA Vol 13 p 1308 at para 54.
[10] ISASA Affidavit Vol 8 p 777 para 10.3, p 779 para 15.1.
[11] SCA Judgment Vol 11 pp 1076 – 1165.

writing in dissent, would have found for the applicants and declared Mr Marx's decision to be unlawful and invalid.[12]

13 The majority judgment made five key findings which, if not corrected by this Court, will have serious implications for the rights of learners at independent schools across the country:

13.1 First, the majority held that section 28(2) of the Constitution affords no right to a hearing on the best interests of the child when an independent school decides to terminate a contract due to the parents' alleged conduct.[13]

13.2 Second, the majority held that a non-subsidised independent school, such as Pridwin, has no constitutional obligations – not even negative obligations – to respect the section 29(1)(a) right to a basic education while learners attend the school.[14]

13.3 Third, the majority held that the decision to terminate a schooling contract and to expel learners is not subject to PAJA.[15]

13.4 Fourth, the majority judgment rejected the applicants' challenge to the substantive reasonableness of Mr Marx's decision under section 28(2) and section 29(1)(a) of the Constitution, holding that there is no duty on independent schools to act reasonably or to consider alternative sanctions in terminating a contract on notice.[16]

[12] Mocumie JA Judgment Vol 11 pp 1167 – 1188.
[13] SCA Judgment Vol 11 p 1149 – 1152 paras 29 – 37.
[14] SCA Judgment Vol 11 pp 1152 – 1156 paras 38 – 48.
[15] SCA Judgment Vol 11 pp 1156 – 1160 paras 49 – 63.
[16] SCA Judgment Vol 11 pp 1161 – 1164 paras 64 – 69.

13.5 Fifth, the majority held that clause 9.3 of the Parent Contract is valid, even though it accepted that this clause permits the termination of the contract without a hearing and for any reason.[17]

14 In what follows, we demonstrate why the majority judgment cannot stand and why the applicants should succeed.

14.1 First, we address the present circumstances of the children and why it is in the interests of justice for this Court to decide the matter.

14.2 Second, we outline the relevant factual background.

14.3 Third, we address the constitutional rights of learners and the corresponding obligations imposed on Pridwin.

14.4 Fourth, we demonstrate that Mr Marx's decision was procedurally unconstitutional.

14.5 Fifth, we demonstrate that the decision was substantively unconstitutional.

14.6 Sixth, we address the invalidity of clause 9.3 of the Parent Contract.

14.7 Finally, we conclude by addressing the remedy and costs.

[17] SCA Judgment Vol 11 pp 1164 – 1166 paras 75 – 80.

THE CHILDREN'S CIRCUMSTANCES AND THE INTERESTS OF JUSTICE

15 The applicants' children have recently left Pridwin and have been moved to another independent school. These developments were communicated to the Court in a letter dated 18 March 2019.

16 Given this change in circumstances, this Court is not asked to decide on the future of the children's schooling. The applicants no longer seek an order entitling the children to remain at Pridwin.[18]

17 Instead, the dispute is focused squarely on the validity of Mr Marx's decision to terminate the Parent Contract and the validity of clause 9.3. In this regard, the applicants persist in seeking the declaratory orders set out in the amended Notice of Motion in the High Court.[19]

18 It remains in the interests of justice to decide this matter given the practical impact of this Court's judgment, the wider importance of the issues, the need to correct the harmful precedent established by the SCA, and the extensive argument that has already been advanced.[20]

19 This Court's judgment in *Pillay*[21] – the "nose stud case" – arose in a similar context. By the time the matter reached this Court, Sunali Pillay had already matriculated. Nevertheless, this Court held that it was in the interests of justice to decide the

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[18] As communicated in the letter, the applicants do not persist with prayer 3 of the Amended Notice of Motion in the High Court, Vol 6 p 545 – 546.
[19] Amended NoM Vol 6 p 545 – 546.
[20] *Police and Prisons Civil Rights Union v South African Correctional Services Workers' Union and Others* [2018] ZACC 24; 2019 (1) SA 73 (CC); 2018 (11) BCLR 1411 (CC) at paras 73 - 81; *MEC for Education: Kwazulu-Natal and Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) at para 32; *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) at paras 9 – 11.
[21] *Pillay* ibid.

matter, particularly given the practical significance of its order for the future conduct of her school and all other schools, even though it would have no impact on Sunali.[22] Those considerations of practical effect have equal application here.

20 The key factor in this case is that clause 9.3 of the Pridwin Parent Contract is a generic clause applied by independent schools across the country. As noted above, ISASA drafted this clause and its members have adopted it, affecting up to 168,000 other learners.[23] Variants of this clause have also been adopted by comparatively low-fee independent schools.[24]

21 As a result, this Court's judgment on the constitutionality of clause 9.3 and its enforcement in the context of this case will have substantial practical significance for the parties and other children attending independent schools. That is precisely the basis on which ISASA intervened in these proceedings.[25] Pridwin itself acknowledges that "*the judgment of the SCA has a wider implication than just for Pridwin*".[26]

22 Unlike *Pillay*, this Court's order will still have practical effect for the applicants and their children. For so long as the applicants' children continue to attend independent schools, they are at risk of being subjected to a version of clause 9.3. And if the SCA judgment stands, they face the prospect of having their schooling terminated again, on notice, without any hearing, and for any reason. That risk is shared with other learners.

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[22] Ibid at para 35.
[23] ISASA Affidavit Vol 8 p 776 para 6.
[24] Equal Education affidavit vol 7 pp 667 - 666 paras 21 - 23.
[25] ISASA Affidavit Vol 8 p 776 para 6.
[26] Pridwin AA Vol 13 p 1308 para 55.

23 Beyond clause 9.3, the precedent set by the SCA judgment has far broader implications for the rights of learners which requires correction. In particular, the majority's restrictive interpretation of sections 28(2) and 29(1)(a) of the Constitution runs directly in conflict with this Court's case law, as we will demonstrate in a moment.

24 In *POPCRU v SACOSWU*,[27] Jafta J recently affirmed that it is in the interests of justice to "*correct wrong statements of law*" such as this, even where the dispute may have been rendered moot between the parties. That need is amplified by the presence of conflicting judgments.[28]

25 This Court is well-positioned to decide these disputes. This Court has the benefit of full argument, detailed judgments of the High Court and the SCA, and it will have input from Equal Education and the Centre for Child Law, which are both in the process of applying for admission as *amici*.[29]

26 On this basis, we submit that the interests of justice strongly favour granting leave to appeal and deciding this matter, even though the children's circumstances have changed.

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[27] *Police and Prisons Civil Rights Union v South African Correctional Services Workers' Union and Others* [2018] ZACC 24; 2019 (1) SA 73 (CC); 2018 (11) BCLR 1411 (CC) at para 81 and authorities cited at fn 33.

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

[29] The Centre for Child Law has now filed its application for admission as an amicus. Equal Education has written to the parties indicating it intention to apply.

FACTUAL BACKGROUND

27 In determining the relevant factual background, it is necessary to emphasise again what this case is not about. This case is not about whether AB and CB are good or bad parents, nor whether Mr Marx is a good or bad headmaster, nor even whether Pridwin is a good or bad school.

28 Pridwin has failed to recognise that this is so. In this Court and in the lower courts, Pridwin has sought to blur the legal issues by raising every conceivable incident designed to paint AB (and, to a lesser extent, CB) in a bad light.

29 The various allegations remain heavily disputed on the papers. However, it is unnecessary to decide these disputes on paper for a simple reason.

30 If this Court accepts that the applicants were entitled to a fair hearing on the best interests of the children, as we submit it should, then Mr Marx's decision must be invalidated on that basis alone. Such a hearing would have allowed AB and CB a proper opportunity to respond to Pridwin's allegations as well as addressing the best interests of the children.

31 Pridwin repeatedly suggests that a fair hearing would have made no difference to Mr Marx's unilateral decision, given its allegations against AB on paper. But this Court has consistently rejected such arguments and in doing so it has cited with approval the well-known dictum in *John v Rees*:[30]

[30] *John v Rees* [1969] 2 All ER 274 (CH) at 402. Cited with approval in *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31; 2016 (1) SA 132 (CC) at para 176; *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18; 2014 (5) SA 69 (CC); 2014 (8) BCLR 930 (CC) at para 85; *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2009] ZACC 6; 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC) at para 153 - 154, which in turn cited *Administrator, Transvaal and Others v Zenzile and Others* 1991 (1) SA 21 (A) at 37E-F.

> *"As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."*

32 This principle has particular significance in this case. The purpose of a fair hearing was not only (or even primarily) to determine AB's guilt or innocence. Rather, the focus of a fair hearing ought to have been whether termination was consistent with the rights and best interests of the children and how best to protect their interests. As we will demonstrate, Mr Marx's failure to afford the applicants a hearing on these critical issues was fatal to the decision.

33 In any event, Pridwin's allegations against AB cannot assist its case, as a brief chronology of the events demonstrates.

The events of 2015 and 2016

34 During the latter half of 2015, AB and CB became concerned about unfairness and inconsistency in sport at Pridwin.[31] AB raised his concerns with the head of Sport, Mr Joubert, and the headmaster, Mr Marx.[32]

35 Similar concerns were reflected in a report on transformation at the school, prepared by a former member of the Pridwin board.[33] The report highlighted sport as a particular area of concern.[34] Mr Marx was notably dismissive of this report.[35] His answering affidavit further suggested that if the applicants believed that Pridwin was "*systemically flawed*" then they should take their children elsewhere.[36]

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[31] FA Vol 1 p 16 para 22.
[32] FA Vol 1 p 16 paras 24 - 25.
[33] Transformation Report Vol 2 p 121.
[34] Transformation Report Vol 2 p 121. para 2.a.
[35] Pridwin AA Vol 2 p 161 – 162 paras 63 "*It is vague and not easily understood*".
[36] Pridwin AA Vol 2 p 164 para 7

36 What followed was a series of incidents, including the Migliore incident of October 2015,[37] the Trinity House incident of November 2015,[38] the St John's incident of January 2016[39] and the dispute between Mr Joubert and AB[40] (the Head of sport at Pridwin) in February 2016. Pridwin alleges that in all of these incidents AB behaved in an unbecoming manner and in contravention of the standards expected of Pridwin parents. AB strenuously disputed those claims.

37 Despite what Pridwin now says about these incidents, it is clear from the chronology that Mr Marx did not consider these incidents to be sufficiently serious to terminate the Parent Contract. Instead, the position in early 2016 was as follows:

37.1 In January 2016, Mr Marx had formally appointed AB as the coach of the Pridwin U9B cricket team.[41] This was <u>after</u> the Migliore and Trinity House incidents.

37.2 Following the January 2016 St John's incident, Mr Marx had written to his Board suggesting a formal disciplinary process be instituted against AB, including a formal hearing.[42] However, Mr Marx decided not to pursue this route.

37.3 Instead, on 28 January 2016, Mr Marx reached a reciprocal agreement with AB and CB regarding AB's conduct at sporting events and Mr Marx's handling of his staff.[43] Notably, this agreement was not concluded in the

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[37] Pridwin AA Vol 2 p 169 para 86; Reply vol 5 p 449 para 42; Reply Vol 6 p 604 para 58.
[38] Pridwin AA Vol 2 pp 172 –173 paras 92 – 95; Reply Vol 6 pp 591 - 594 paras 19- 20.
[39] FA Vol 1 pp 17 – 18 para 18; Pridwin AA Vol 2 pp 176 – 178 para 103.
[40] FA Vol 1 pp 21 – 23, paras 42 – 45; Pridwin AA Vol 2 pp 182 - 184, paras 115 - 125.
[41] FA Vol 1 p 17 para 26.
[42] Pridwin AA Vol 2 pp 178 & 180 paras 104 - 105 & 109. Letter to Board Vol 4 p 335.
[43] FA Vol **1** pp 18 -19 paras 30 – 32; Pridwin AA Vol 2 pp 178 - 180, paras 106 - 108. Agreement Vol 2 p 105.

context of an impending or potential cancellation and was not disciplinary in nature.

37.4 Significantly, on 3 February 2016, Mr Marx wrote an email to the headmaster of St John's conveying (his presumably honest held views) that the boys "*will make any school proud*" and that he would "*miss the relationship [he] had developed with [AB]"*.[44]

38 This is further reason why this Court need not become embroiled in the factual disputes relating to the incidents above. Even if Pridwin's version of these incidents from November 2015 to March 2016 was accepted, these incidents did not themselves lead to Mr Marx's decision to terminate the contracts.

39 Nor for that matter could they have justified such a decision in Mr Marx's own mind, as demonstrated by his email to the headmaster of St John's on 3 February 2016.

The events of 27 June 2016

40 What ultimately caused Mr Marx to terminate the contracts were the events of 27 June 2016, the "soccer incident". In the scheme of things, the events on that day do not justify compelling two model pupils to leave the school.

41 On 27 June 2016, AB attended the Pridwin U10 soccer trials with DB's club soccer coach, Mr Mosoana.[45] This occurred after Mr Mosoana had offered to come along, in an effort to improve DB's football for the Pridwin environment.[46]

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[44] St John's Letter Vol 1 p 83.
[45] FA Vol 1 p 27 paras 51 – 52; Mosoana Affidavit Vol 6 p 528 para 3.
[46] FA Vol 1 p 27 para 51.3; Mosoana Affidavit Vol 6 p 528 para 3.

42 On the version of AB and Mr Mosoana:[47]

42.1 Mr Mosoana attempted to converse with Mr Prinsloo, one of the coaches running the trials. Mr Prinsloo told Mr Mosoana that he did not wish to engage with him about the trials. Mr Prinsloo was extremely rude to Mr Mosoana.

42.2 AB then approached Mr Prinsloo to enquire why he had been rude to his guest. Mr Prinsloo began screaming at AB. Mr Marx then entered the fray. At this point AB cut the conversation short and left with Mr Mosoana, to take him back to his club football coaching commitments.

42.3 Later that afternoon, AB returned to Pridwin and went to Mr Marx's office to complain about the way both he and Mr Mosoana had been treated by Pridwin staff. AB proffered no explanation for what had occurred earlier that afternoon and was not asked to provide such an explanation. Instead Mr Marx simply screamed at him and eventually told him to take his sons out of the school.

43 This version of events is denied by Mr Marx.[48] He states that

43.1 AB and Mr Mosoana were criticising the trials from the side-line after which Mr Mosoana interrupted the trials to converse with Mr Prinsloo;

43.2 Mr Mosoana and AB were rude and confrontational towards Mr Prinsloo and AB pulled Mr Marx's arm in the altercation; and

[47] FA Vol 1 pp 28 – 29 para 54 – 55; Mosoana Affidavit Vol 6 p 528 para 3.
[48] Pridwin AA Vol 2 pp 187 – 190 paras 136, 139 & 140.

43.3 Upon returning to Pridwin, AB gave Mr Marx a full explanation of the events that had transpired earlier, which Mr Marx found to be unacceptable.

44 Even on Mr Marx's own version, what occurred next was a clear breach of the children's rights.

The decision to cancel the contracts

45 Three days later, on 30 June 2016, Mr Marx sent AB a letter cancelling the Parent Contracts with effect from the end of the 2016 school year.[49]

46 Without affording the appellants an opportunity to make representations about the cancellation of the contracts – or indeed the best interests of the children – DB and EB were effectively expelled from Pridwin due to the alleged conduct of their father.

47 On 5 August 2016, the appellants' attorneys addressed a letter to Mr Marx.[50] That letter asked Mr Marx to identify who took the decision, on what grounds, and why the applicants were denied a fair hearing.

48 Mr Marx responded to these questions on 6 September 2016.[51] He stated that he alone had taken the decision to cancel the Parent Contracts. This was contrary to his initial instinct in January 2016 to refer the matter to the Pridwin Board.[52] Mr Marx further stressed that he had no obligation to afford the applicants an opportunity to make representations before cancelling the Parent Contract. Even so, Mr Marx claimed that AB was afforded an opportunity to make representations

[49] FA Vol 1 pp 29 - 30 para 56. Termination Letter Vol 2 p 104 - 106.
[50] Letter of 5 August, 2016, Vol 2 p 107.
[51] Response of 6 September 2016, Vol 2 pp 111 – 112.
[52] Pridwin AA Vol 2 pp 178 & 180 paras 104 - 105 & 109. Letter to Board Vol 4 p 335.

concerning the incident that took place on 27 June 2016 and that those representations were unacceptable.

49 The applicants proceeded to launch proceedings in the High Court, challenging the validity of the cancellation.

CHILDREN'S RIGHTS AND PRIDWIN'S DUTIES

50 All parties accept that Mr Marx's decision to terminate the Parent Contract had to be compatible with the Constitution.

51 In *Barkhuizen v Napier*,[53] this Court set out a two-part test for determining the constitutional validity of such exercises of contractual power:

51.1 First, is the contractual provision, on its face, in violation of the Constitution?

51.2 Second, even if the provision is facially valid, is the enforcement of the contractual provision in the specific circumstances of the case in violation of the Constitution?

52 Clause 9.3 of the Pridwin Parent Contract does not, on its face, preclude the right to a fair hearing nor does it preclude a school from adequately protecting the constitutional rights of children. At best for Pridwin, it is silent on these issues.

53 Accordingly, the applicants' primary challenge has always been to the constitutional validity of Mr Marx's enforcement of this clause, in electing not to afford a hearing and in disregard of the children's best interests.

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[53] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at paras 56 – 58. See also *Bredenkamp and Others v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA).

54 It is only in the event that this Court concludes that clause 9.3 cannot be interpreted in a constitutionally compatible way that this Court is asked to declare clause 9.3 invalid.

Horizontal application of constitutional rights

55 While the respondents accept that Pridwin is bound by the Constitution, they repeatedly suggest that the imposition of constitutional obligations on Pridwin and other independent schools is somehow unusual, extreme or undesirable.

56 This aversion to constitutional obligations is out of step with section 8(2) of the Constitution and its transformative purpose.

57 Section 8(2) of the Constitution imposes constitutional obligations on private entities, such as Pridwin, "*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.*"

58 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. Justice Madlanga recently explained the transformative aims of section 8(2) as follows, with reference to this Court's case law:

> "*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.*
>
> …

> *"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 social and economic realities have arisen out of our perverted past and cannot be sanitised."*[54]

59 Independent schools, such as Pridwin, are not exempt from these demands for the transformation of private relations. Indeed, section 8(2) has particular significance given the expanding role of independent schools in the South African education system.

59.1 In 2015, independent schools catered to approximately 566,195 South African learners.[55] This amounted to a 40% increase in the number of learners attending independent schools in the preceding decade.[56]

59.2 Independent schools no longer only cater to the wealthy.[57] The independent school sector is now dominated by comparatively low-fee independent schools, which now educate up to 73% of the learners in this sector.[58]

59.3 This change is driven, in large part, by the fact that the public school system is ailing. As the CEO of the Anglican Board of Education put it, *"there is* a *crisis in [South African] education... [t]hat is why independent schools are thriving.*"[59]

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[54] Justice Madlanga "*The Human Rights Duties of Companies and other Private Actors in South Africa*" (2018) 29 *Stellenbosch Law Review* 359 at 364, 368 (Emphasis added).
[55] Reply Vol 6 p 618 para 132.1; Equal Education Affidavit Vol 7 p 663, para 10.
[56] Reply Vol 6 p 618 para 132.2.
[57] Reply Vol 6 p 618 para 132.4.
[58] Equal Education Affidavit Vol 7 p 663 para 11.
[59] Reply Vol 6 p 618 para 132.3.

59.4 The size of the independent school sector has now reached proportions that, if it were to close overnight, a significant strain would be placed on the public school system.[60]

60 As the power and significance of the independent school sector continues to grow, so does the need for constitutional protection. Children should not be excluded from this protection merely because parental choice or circumstance has placed them in independent schools.

61 Pridwin seeks to distance itself from other independent schools, suggesting that its wealth[61] and exclusivity[62] somehow entitle it to a greater degree of constitutional exemption. That stance is plainly incorrect, as we now demonstrate.

Pridwin is bound by section 28(2) of the Constitution

62 The starting point in understanding Pridwin's constitutional obligations is section 28(2) of the Constitution. It provides that "*[a] child's best interests are of paramount importance in every matter concerning the child."*

63 This provision is both a constitutional principle and a self-standing right.[63] It requires that children's interests are to be afforded the "*highest value*",[64] meaning

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[60] Reply Vol 6 p 618, para 132.6.
[61] Pridwin Affidavit Vol 8 p 834 para 20: *"Pridwin is, without putting too fine a point on it, an expensive independent school."*
[62] Pridwin Affidavit Vol 8 p 834 para 21: "*Pridwin is situate[d] in an enclave of old Johannesburg and is not readily identifiable as an area which attracts middle to low income earning parents."*
[63] *J v National Director of Public Prosecutions and Another* [2014] ZACC 13; 2014 (2) SACR 1 (CC); 2014 (7) BCLR 764 (CC) at para 35. See also *Minister of Welfare and Population Development v Fitzpatrick and Others* [2000] ZACC 6; 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC) at para 17;
[64] *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at para 42.

that their interests are "*more important than anything else"* albeit that "*everything else is [not] unimportant.*"[65]

64 The Children's Act 38 of 2005 gives effect to section 28(2). Section 9 of the Act echoes section 28(2) while the further provisions of the Act elaborate on the content of this right. We return to discuss their significance below.

65 Mr Marx rightly concedes that he was bound by section 28(2) in making his decision.[66] Both the High Court and the SCA accepted that he was so bound.[67]

66 We deal later with whether Mr Marx's decision was procedurally and substantively in compliance with section 28(2). For now, we make a narrow point. Given the significant and irreversible impact that Mr Marx's decision would have on the rights and interests of DB and EB, he was required to comply with section 28(2) of the Constitution in making his decision. This is so even if Pridwin is to be regarded as a truly private actor.

Pridwin is bound by section 29(1)(a) of the Constitution

67 Section 29(1)(a) of the Constitution provides that *"[e]veryone has the right... to* a *basic education"*.

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[65] *Centre for Child Law v Minister of Justice and Constitutional Development and Others* [2009] ZACC 18; 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC) at para 29; *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC) at para 73.
[66] Pridwin AA Vol 13 p 1292 para 5.
[67] High Court Judgment Vol 10 p 992 paras 52 – 53; SCA Judgment Vol 11, p 1143, para 8.

68 This Court has held that this right applies to learners in independent schools. As Cameron J held in *KZN Joint Liaison Committee*,[68] "*all learners, including those at independent schools, are entitled to* a *basic education*."

69 The applicants do not contend that wholly independent schools have an obligation to provide a basic education to all and sundry. Rather, what matters is that when a child attends an independent school, that school is indeed providing the basic education to which the child is constitutionally entitled.

70 This means 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.

71 *In Juma Musjid*,[69] this Court squarely addressed the duties of private actors to respect the right to a basic education.

71.1 There a private trust had provided its private property for use by a public school. It wished to evict the school as no proper agreement had been concluded with the province and it was not being paid.

71.2 This Court emphatically rejected the notion that the trust bore no Constitutional obligations to the affected learners. Nkabinde J held 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*

[68] *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal and Others* [2013] ZACC 10; 2013 (4) SA 262 (CC); 2013 (6) BCLR 615 (CC) at para 47.

[69] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. & Others* [2011] ZACC 13; 2011 (8) BCLR 761 (CC).

> *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".*
>
> *... Notably, counsel for the Trustees conceded during oral argument that the Trust had a duty not to impair the learners' right to a basic education. This concession was properly made.*
>
> *The High Court therefore misdirected itself in finding that the trustees had no obligation in relation to the learners' right to a basic education. Accordingly, I conclude that the Trust does have a negative constitutional obligation not to impair the learners' right to a basic education."*[70]

72 In *AllPay II*,[71] this Court developed this approach further, albeit in the context of the right to social assistance. It re-affirmed *Juma Musjid* and then added:

> *"Where an entity has performed a constitutional function for a significant period already, … considerations of obstructing private autonomy by imposing the duties of the State to protect constitutional rights on private parties, do not feature prominently, if at all."*

73 Independent schools in South Africa are certainly performing a constitutional function by providing an education to their learners. In Pridwin's case, it has been doing so since 1923. Pridwin's own Parent Contract reflects this commitment, as it affirms that "*[w]hile your Child remains a pupil of the School, we undertake to exercise reasonable skill and care in respect of his or her education and welfare*".[72] As a consequence, Pridwin's constitutional duty to respect the right to a basic education and not to unreasonably disrupt or impair a child's education is hardly a restriction of its private autonomy. It has already imposed similar restraints on itself in contract.

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[70] Ibid at paras 57 – 60 (Emphasis added).
[71] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (No 2) [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) at para 66.
[72] Clause 2.3 of the Parent Contract, Vol 2 p 127.

74 Pridwin nevertheless persists in arguing that it cannot be subject to these constitutional duties in the absence of a subsidy or some other contractual link with the state. The majority judgment in the SCA reflects that reasoning.[73]

75 That argument runs contrary to this Court's judgment in *Daniels v Scribante*.[74] There this Court held that the Constitution may indeed impose positive duties on private landowners to ensure security of tenure under section 25(6) of the Constitution, even in the absence of any relationship between the landowner and the state.[75] On that basis, it could hardly be contended that a link to the state is a necessary condition for constitutional obligations.

76 In her dissenting judgment in the SCA, Mocumie JA considered these authorities and concluded that Pridwin was indeed duty-bound to respect DB and EB's right to receive a basic education and was barred from unreasonably interfering with that right.[76]

77 By contrast, the majority judgment held that Pridwin was not subject to constitutional duties under section 29(1)(a), let alone negative duties. According to the majority, the only restraint imposed by section 29(1)(a) is that non-subsidised independent schools may not obstruct learners from moving to public schools.[77]

78 The consequence of the majority's reasoning is that learners are not protected under section 29(1)(a) against unreasonable disruptions to their education while they remain at non-subsidised independent schools. This consequence is starkly

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[73] SCA Judgment Vol 11 p 1152 – 1153 para 39.
[74] *Daniels v Scribante and Another* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC).
[75] Ibid at paras 37 – 53.
[76] Mocumie JA Judgment Vol 11 p 1173 at para 95.
[77] SCA Judgment Vol 11 p 1154 at para 43.

illustrated by comparing the SCA judgment with the recent High Court judgment in *Mhlongo v John Wesley School*.[78]

78.1 In *Mhlongo*, a non-subsidised independent school[79] barred the applicant's ten-year-old son from writing exams and kept him in the school's art room, away from his peers, due to his parents' failure to pay overdue fees of just over R3000. The school relied on an ISASA exclusion policy which approved of such conduct.

78.2 The High Court held that this conduct and the ISASA policy were an unconstitutional violation of sections 28(2), 29(1)(a), and 29(3)(c) of the Constitution, particularly given the fact that the school had alternative means to recover the arrears. Significantly, the High Court held that:

> *"Since the Constitution require[s] 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."*[80]

And further:

> *"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."*[81]

78.3 However, the SCA judgment entirely rejects these principles. According to the majority, non-subsidised independent schools owe no duty to respect the child's ongoing education at the school, have no duty to act reasonably or fairly in enforcing their contractual rights, and have no duty to consider alternative, less-restrictive remedies.

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[78] *Mhlongo v John Wesley School and Another* [2018] ZAKZDHC 64 (19 December 2018).
[79] Ibid at para 24. The Court recorded that the John Wesley School "*relies exclusively on the collection of school fees for its sustenance*".
[80] Ibid at para 69 (Emphasis added).
[81] Ibid at para 77 (Emphasised added).

78.4 On the SCA's approach, a school could indeed bar learners from writing exams and segregate them from their peers due to a parent's conduct, all without breaching section 29(1)(a) of the Constitution.

79 The majority's reasoning in the SCA was mistaken on two primary grounds:

80 First, the majority erred by holding that independent schools such as Pridwin do not provide their learners with a basic education, as only the state provides such an education.[82] That is akin to claiming that a private hospital does not provide healthcare or a landlord does not provide housing. The error involves a simple confusion of concepts: the existence and enjoyment of a socio-economic right is one thing, the identity of the primary duty-bearer is another.

81 Properly understood, the existence and enjoyment of a "basic education" is not confined to state provision.

81.1 The concept of a "basic education" traces its roots to the 1990 World Declaration on Education for All (1990 Declaration)[83] which was instrumental in introducing the concept of "basic education" into international human rights law.[84] Art 1 of the 1990 Declaration explains that the right to basic education is a guarantee that:

> *'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*

[82] SCA Judgment Vol 11 p 1152 – 1153 para 39.
[83] Adopted by the World Conference on Education for All, Jomtien (1990) available at http://www.unesco.org/education/pdf/JOMTIE_E.PDF.
[84] See Katarina Tomasevski CESCR 'Preliminary Report of the Special Rapporteur on the Right to Education'UNDoc E/CN 4/1999/49 para 15. Tomasevski (the former UN Special Rapporteur on the Right to Education) noted that the 1990 Declaration shifted the language of international education rights from 'primary education'— as found in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC), among other instruments — towards 'basic education'. This international shift undoubtedly influenced the wording of section 29 of the Constitution.

> *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.'*

81.2 In *Juma Musjid*, this Court echoed this description in describing the purpose of a basic education as follows:

> *"[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 world opportunities*."[85]

82 On this understanding, 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. But that does not mean that they stop receiving a basic education the moment they enrol at these schools, nor do they lose constitutional protection against unreasonable interferences with their education while they remain at these schools.

83 Pridwin's continued denial of this conclusion is made more baffling by its own Mission and Values Statement. The language of this Statement is virtually identical to the World Declaration and *Juma Musjid*, as it commits Pridwin to –

> *"1.2.1.2. Provide a balanced curriculum which ensures the development of a solid foundation for each child, enabling him to achieve his full potential intellectually, emotionally, physically, socially, creatively, and spiritually, and thereby to acquire sufficient self-confidence and judgment to face and contribute to the challenges of a continuously changing world.*
>
> *1.2.1.3. Provide an environment in which each child will develop a lively, enquiring mind and positive attitudes towards learning together with an awareness and understanding of his strengths and weaknesses."*[86]

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[85] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. & Others* [2011] ZACC 13; 2011 (8) BCLR 761 (CC).at para 43.
[86] Pridwin's Mission and Values Statement Vol 5 p 428.

84 Pridwin's constitutional obligations are further reinforced by section 29(3)(c) of the Constitution which provides that independent schools must "*maintain standards that are not inferior to standards at comparable public educational institutions.*"

84.1 At the very least, that requires independent schools to provide a basic education to learners who attend their schools and not to diminish or impair that education while the learners remain at the school.[87]

84.2 Section 29(1)(a) and section 29(3)(c) are therefore intertwined and mutually reinforcing provisions, rather than being bifurcated standards, as Pridwin contends.

85 Second, the SCA majority erred by seeking to distinguish this Court's judgments in *KZN Joint Liaison Committee* and *Juma Musjid* on their facts, ignoring the broader legal principles. That attempt to distinguish these judgments leads to anomalous results:

85.1 On the majority's reading of *KZN Joint Liaison Committee*, a learner only receives a basic education at an independent school if the school is subsidised by the state. The untenable consequence of that interpretation is that where the state exercises its discretion to refuse a subsidy or fails to continue paying subsidies to independent schools (as it did in *KZN Joint Liaison Committee*), then the learners would cease to be protected by section 29(1)(a). We submit that fundamental rights cannot depend on such variables.

[87] There is also no reason to confine "standards" in section 29(3) to academic standards. The term is sufficiently flexible to include, for example, standards of procedural fairness, disciplinary standards, enrolment standards, and the like.

85.2 The majority further sought to distinguish *Juma Musjid* as it claimed that the trust was only subject to a negative duty under section 29(1)(a) because the children in issue were attending a public school on the trust's land.[88] On that reasoning, if the trust had leased its property to a non-subsidised independent school, such as Pridwin, the trust would have been free to evict the school at will, without any regard to the section 29(1)(a) rights of children.[89] That proposition is at odds with the generous and protective interpretation of section 29(1)(a) that was advanced by this Court.

86 On this basis, the majority's interpretation of section 29(1)(a) was incorrect. Pridwin is indeed under a duty not to unreasonably impair or diminish the right to basic education of its learners. And, in this regard, as *AllPay II* makes clear, concerns over Pridwin's *"private autonomy"* recede.

87 We do not suggest that Pridwin may never terminate a Parent Contract or expel a child. What we submit, instead, is that in terminating a Parent Contract, Pridwin is bound to act reasonably and fairly. We now turn to explain the respects in which Pridwin failed to comply with these duties.

[88] SCA Judgment Vol 11 pp 1153 – 1154 paras 41 – 44.
[89] Pridwin admits that this is the consequence of this interpretation: Pridwin AA Vol 13 p 1370 at para 245.

THE RIGHT TO A FAIR HEARING

88 Mr Marx was obliged to afford the applicants a fair hearing before he decided to terminate the Parent Contract. This duty flows from at least three sources, which we now address in turn.

Section 28(2) of the Constitution and the Children's Act

89 We have explained above why Mr Marx was bound by section 28(2) of the Constitution and was required to accord the best interests of DB and EB paramount importance.

90 Once this was so, then Mr Marx had 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. The applicants, as parents, were obviously best placed to make such submissions so that Mr Marx could properly consider this issue. DB and EB also had a self-standing right to have their views heard on this issue, either in person or through their parents.

91 This Court has held that section 28(2) incorporates a procedural component, affording a right to a fair hearing where the interests of children are at stake. This was made clear in *C v Department of Health*.[90]

91.1 There, this Court dealt with statutory provisions which permitted a child to be removed from his or her parents' care but did not afford any automatic opportunity to make representations.

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

91.2 The concurring judgment of Skweyiya J (with Froneman J concurring) held that this was impermissible because section 28(2) required that parents 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."*[91]

91.3 Removal from family care is of course not the same as removal from school. But the same principle applies. Once Mr Marx was making a decision which – to put it at its lowest – had a profound effect on the rights and interests of DB and EB, he was required, at the very least, to give AB and CB a fair hearing on whether the decision was in the best interests of the children.

92 The subsequent judgment of *J v NDPP*[92] confirms the right to be heard flowing from section 28(2).

92.1 In that matter, the Court had to determine the constitutional validity of section 50(2)(a) of the Criminal Law (Sexual Offences Act) Amendment Act 32 of 2007, which involved automatic placement of child offenders on a sex offenders registry after they had been convicted by a court.

92.2 The Court held that one of the principles flowing from section 28(2) of the Constitution is that:

> *"[T]he child or her representatives must be afforded an appropriate and adequate opportunity to make representations and to be*

[91] Ibid at para 27.
[92] *J v National Director of Public Prosecutions and Another* [2014] ZACC 13; 2014 (2) SACR 1 (CC); 2014 (7) BCLR 764 (CC).

> *heard at every stage of the justice process, giving due weight to the age and maturity of the child."*[93]

93 These principles were reflected in the SCA's judgment in *Centre for Child Law v The Governing Body of Hoërskool Fochville*[94] which confirmed that children have a right to be heard in matters affecting their interests, either directly or through their representatives.

94 In her dissenting judgment, Mocumie JA explained that while the facts of these cases differ from the present case, the "*overarching principle*" remains that there is a right to a fair hearing where children's rights and interests are at stake and that this right assumes special significance in the context of a school.[95]

95 This "*overarching principle*" is codified in the provisions of the Children's Act. Courts and decision-makers are obliged to have regard to these provisions wherever they are applicable.[96]

95.1 The rights and principles under the Children's Act are made applicable to Pridwin by virtue of section 8(3) of the Act, which mirrors section 8(2) of the Constitution in providing that "*A provision of this Act binds both natural or 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*."

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[93] Ibid at para 40.
[94] *Centre for Child Law v The Governing Body of Hoërskool Fochville* 2016 (2) SA 121 (SCA) at paras 19 – 29.
[95] SCA Judgment Vol 11 p 1176 at para 99.
[96] See section 6(2), read with sections 8 and 9 of the Act. This duty is the complete answer to the respondents' technical quibbles over the pleading of these provisions. In any event, this Court has held that "*[w]here a litigant relies upon a statutory provision, it is not necessary to specify it, but it must be clear from the facts alleged by the litigant that the section is relevant and operative*". See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 27.

95.2 Section 10 of the Act confers a specific right on children to participate in all decisions affecting them, taking into account their age, maturity and development:

> *"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."*

95.3 Pridwin now contends that the children were too immature to participate directly in any hearing.[97] This is despite the fact that the eldest child, DB, was ten years old at the time.[98] In any event, this was no reason to deprive the applicants of an opportunity to communicate the children's views to Pridwin and Mr Marx before a decision was taken.

95.4 Section 6(3) of the Children's Act specifically provides for the right of family-members to express their views concerning the interests of children:

> *(3) If 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*."[99]

95.5 These provisions give effect to South Africa's international law obligations under the UN Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child, which both recognise the rights of children to be heard, either in person or through representatives, in decisions affecting their interests.[100]

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[97] Pridwin AA Vol 13 pp 1357 – 1358 paras 203 – 204, p 1362 para 219.
[98] FA Vol 1 p 15 para 19.
[99] The section 6 principles guide "*the implementation of all legislation applicable to children*", including the Children's Act. Therefore, these principles are applicable to Pridwin when it implements and complies with its duties under section 9 of the Act to ensure that the best interests of the child are paramount in all matters concerning the child. There is no basis to confine the section 6 principles to organs of state, contrary to what Pridwin and ISASA contend.
[100] The relevant provisions are helpfully summarised in *Centre for Child Law v The Governing Body of Hoërskool Fochville* 2016 (2) SA 121 (SCA) at para 19.

96 Both the SCA and the High Court rejected this duty to provide a fair hearing on the best interests of the children by using a "floodgates" argument. On Pridwin's urging, both courts reasoned that a fair hearing will have "*catastrophic*" consequences for all commercial contracts.[101] 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.[102]

97 Such arguments are unsustainable. As Mocumie JA held, a contract with an independent school for the provision of an education is "*distinctly different*" from an ordinary commercial transaction.[103] These differences are clear from the facts of this case:

97.1 Pridwin is not a commercial entity. It is a non-profit institution that has existed since 1923 for the sole purpose of educating children and caring for their wellbeing.

97.2 In its Mission and Values Statement, Pridwin declares that its goal is "*[t]o unlock the unique and multifaceted potential of each child so that this potential can be utilised for the betterment of society and the world.*" Pridwin further aims to "*[p]romote an atmosphere and ethos of warm, loving and caring concern."*[104]

97.3 Clause 2.3 of the Parent Contract reflects these values, as Pridwin affirms that "*[w]hile your Child remains a pupil of the School, we undertake to*

[101] SCA Judgment Vol 11 p 1165 at para 77.
[102] High Court Judgment Vol 10 p 1007 – 1008 at para 89; SCA Judgment Vol 11 p 1151 para 34.
[103] SCA Judgment Vol 11 p 1172 para 92
[104] Pridwin's Mission and Values Statement Vol 5 p 428.

exercise reasonable skill and care in respect of his or her education and welfare".[105]

97.4 Independent schools across Johannesburg also receive substantial rates reductions from the municipality.[106] Pridwin notably declined the invitation to disclose whether it is a beneficiary.[107]

97.5 These undertakings, commitments and benefits are hardly the stuff of an ordinary commercial entity. Independent schools such as Pridwin are indeed distinct.

98 The "floodgates" argument also ignores the context-specific nature of the section 8(2) inquiry under the Constitution. The mere fact that independent schools are subject to constitutional and statutory duties to afford a fair hearing does not mean that all natural and juristic persons in all other contexts will be subject to identical duties. In *Daniels v Scribante*,[108] Madlanga J explained this context-specific inquiry as follows:

> *"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 . . . [Section 8(2)] was after all included to overcome the conventional*

[105] Clause 2.3 of the Parent Contract, Vol 2 p 127.
[106] FA Vol 1 p 45 para 103.5; Annexure RAB5 Vol 7 p 644.
[107] Pridwin AA Vol 3 p 260 paras 366 - 368.
[108] *Daniels v Scribante* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC).

> *assumption that human rights need only be protected in vertical relationships."*[109]

99 On this basis, this Court is not called upon to decide that there is a right to a hearing 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, given their distinct role and the potential impact of such decisions on children's rights.

Section 29(1)(a) of the Constitution

100 The same conclusion flows from the fact that Mr Marx was under a constitutional duty to act reasonably in taking a decision which would impair or diminish the children's existing access to a basic education. He could not possibly hope to act reasonably without at least affording a fair hearing to the parties directly affected and who were likely to be in possession of the relevant facts – that is AB and CB and, to the extent appropriate, their children.

101 As this Court has explained, a fair hearing has both intrinsic and instrumental value in circumstances where individuals' rights are threatened.[110] In *Joseph*,[111] this Court further explained the role of a hearing as follows:

> *"Procedural fairness ... is concerned with giving people an opportunity to participate in the decisions that will affect them, and - crucially -* a *chance of influencing the outcome of those decisions. Such participation is* a *safeguard that not only signals respect for the dignity and worth of the participants, <u>but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy</u>."'*

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[109] Ibid at paras 39 – 41 (Emphasis added).
[110] *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18; 2014 (5) SA 69 (CC); 2014 (8) BCLR 930 (CC) at para 85.
[111] *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (4) SA 55 (CC); 2010 (3) BCLR 212 (CC) at para 42 (Emphasis added).

102 In this context, Mr Marx was duty-bound to allow the applicants a fair hearing on whether cancellation was reasonable and 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 Mr Marx to claim that such a hearing would have made no difference to his decision.

The right to be heard in terms of PAJA

103 Even if the Constitution did not itself confer this right to be heard, it would flow from PAJA.

103.1 Section 1 of PAJA defines administrative action to include "*any decision taken by a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision".*

103.2 The same section defines "empowering provision" as including "*an agreement, instrument or other document in terms of which an administrative action was purportedly taken*".

104 The effect of PAJA is that even private bodies, which are not organs of state, are subject to its constraints when they are *"exercising a public power or performing a public function"*. The mere fact that those functions have a contractual basis is no bar to recognition as administrative action, as the definition of an empowering provision makes clear.

105 Decisions involving the expulsion and exclusion of learners are patently of an administrative character. The various High Court authorities referred to by the respondents did not question this proposition.[112] The only issue in those cases was whether independent schools were exercising public powers or performing public functions in making those decisions.

106 On the flexible test developed by this Court,[113] independent schools are indeed exercising public powers and functions when they decide to terminate schooling contracts. As this Court has explained, the question is not "*who exercises the power, nor even, where does the power come from: but what does the power look and feel like? What does it do?*".[114]

107 In this light, the following considerations are of particular relevance:

107.1 Independent schools operate by virtue of section 29(3) of the Constitution and the registration requirements of the Schools Act 84 of 1996. They are also subject to a web of provincial legislation, governmental regulations and policies.[115]

107.2 The provision of an education is an inherently public function. It is a "*a task for which the public, in the shape of the state, has assumed responsibility*"

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[112] See *Khan v Ansur NO And Others* 2009 (3) SA 258 (D) at para 32; *Klein v Dainfern College and Another* [2005] ZAGPHC 102; 2006 (3) SA 73 (TPD); *Brink and Others v Diocesan School for Girls and Others* (1072/2012) [2012] ZAECGHC 21 (1 May 2012).
[113] *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* [2017] ZACC 3; 2017 (3) SA 242 (CC); 2017 (6) BCLR 700 (CC) at paras 74 – 84; *Chirwa v Transnet Ltd* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) at para 186; *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another [2006] ZACC 9; 2007 (1) SA 343 (CC)* at para 119.
[114] *AMCU* ibid at para 74.
[115] The relevant statutory instruments are detailed in FA Vol 1 p 43 – 44 para 101.

and education is inextricably "*linked to the functions and powers of the government*".[116]

107.3 As set out above, the evidence shows that the government's task of providing an education is being increasingly privatised to a growing body of independent schools. They have become essential to the provision of a basic education.

107.4 Decisions on the termination of schooling contracts and the expulstion of learners are clearly coercive in effect and have far-reaching consequences for learners' rights.[117]

107.5 There is also clear "*governmental interest"* and "*public interest*" in an independent school's decision to terminate a schooling contract.[118] Pridwin asserts that when it removes a child from the school, this becomes the state's problem, as the state must then make places available in public schools and provide appropriate funding. The public interest in such decisions is manifest.

108 This governmental and public interest is further reflected in the Communication Protocol agreement between the Department of Basic Education and the National Alliance of Independent School Associations ("NAISA"),[119] containing a document

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[116] *Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another* [2010] ZASCA 94; 2010 (5) SA 457 (SCA) at para 31.
[117] *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another [2006] ZACC 9; 2007 (1) SA 343 (CC)* at para 119.
[118] *Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another* [2010] ZASCA 94; 2010 (5) SA 457 (SCA) at paras 31, 40.
[119] Communications Protocol Vol 11 pp 1082 – 1086.

titled the "Rights and Responsibilities of Independent Schools".[120] NAISA's members include ISASA, of which Pridwin is a member.[121]

108.1 The Communications Protocol records that its purpose is to "*clarify the distinct nature of independent schools...[and] cover only those areas that are normally the cause of uncertainty and potential conflict between district officials and independent schools.*"[122]

108.2 Clause 8 of the Rights and Responsibilities document crucially provides that:

> *"Exclusions fall into two broad areas:*
>
> - *Exclusion on grounds of contravention of the rules contained in the School's Code of Conduct and grievance procedure, drafted in line with the relevant legislation and good practice.*
> - *Exclusion on the grounds that the contract between the parents and the school has been broken, usually because the parents have failed to pay fees.*
>
> *Independent schools may exclude a learner on the basis of any of the above grounds provided that a fair procedure has been followed.*
>
> *The best interests of the child should always be adhered to."*[123]
>
> (Emphasis added)

108.3 The Rights and Responsibilities document envisages that independent schools cannot operate in an unfettered manner when cancelling parent contracts. They must follow a fair procedure. This document is currently undergoing amendments which will make these obligations even more explicit.[124]

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[120] Rights and Responsibilities Document Vol 9 p 917 – 924.
[121] Supplementary Affidavit Vol 11 p 1107 para 7.
[122] Communications Protocol Vol 11 pp 1083.
[123] Rights and Responsibilities Document Vol 9 p 922.
[124] CB's Supplementary Affidavit Vol 11 pp 1109 – 1111 para 15 – 20.

108.4 While this document is not legally binding on Pridwin, it is nevertheless a strong indication of the public interest in the manner in which independent schools take decisions to expel learners.

109 Pridwin is also accountable to the state for the manner in which it makes decisions to terminate schooling contracts due to alleged breaches by parents. This is evident from Regulation 6(1)(i) and 6(2) of the of the Gauteng Notice for the Registration and Subsidy of Independent Schools ("Gauteng Regulations").[125]

109.1 Regulation 6(1)(i) provides that no registered independent school in Gauteng may "*expel or suspend a learner during an academic year … due to non-adherence to contractual obligations between the parent and the school*."

109.2 Regulation 6(2) further provides that "*[w]here the board of an independent school and the parent cannot reach an agreement on contractual obligation as contemplated in subparagraph 6 (1) (i) the board must escalate the matter to the Directorate responsible for independent schools in the Department.*"

109.3 As a result, decisions on termination are indeed subject to public scrutiny, contrary to what is suggested in the majority judgment in the SCA.[126] These decisions are not pure exercises of private contractual powers.

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[125] Notice 2919 of 2013, Gauteng *Provincial Gazette* No 303, published on 25 October 2013. These regulations were specifically pleaded in the founding papers. See FA Vol 1 p 14 para 17.4, pp 52 – 53 para 121 – 123.
[126] SCA Judgment Vol 11 p 1160 para 62.

110 In light of these considerations, Pridwin and other independent schools exercise public powers and functions when they decide to terminate schooling contracts and effectively expel learners. It is therefore appropriate that these decisions be subjected to judicial control under PAJA and the requirements of procedural fairness that flow from it.

Pridwin's breach of the right to a fair hearing

111 Mr Marx's failure to afford a fair hearing is plain from his own version. 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.[127]

112 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 be 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."*[128]

113 On Mr Marx's own version, therefore, the following is clear:

113.1 The representations, such as they were, were made at the behest of AB, not Mr Marx.

[127] Pridwin AA Vol 2 p 151 para 35.
[128] Pridwin AA Vol 2 pp 189 – 190 para 140.

113.2 The representations did not 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.

113.3 Mr Marx gave no indication that he was of the view that AB had breached the Parent Contracts, nor that he was considering cancelling the Parent Contracts.

113.4 Mr Marx did not invite AB to make representations about whether the Parent Contracts should be cancelled, and AB did not make such representations.

113.5 Significantly, Mr Marx did not give AB an opportunity to make representations about whether the cancellation of the Parent Contracts would be in the best interests of DB and EB.

113.6 There was no opportunity afforded to CB to make any representations of any kind, despite the fact that she is the children's mother and a signatory to the Parent Contract.

113.7 Mr Marx also made no attempt to inquire into the children's views on termination, either through their parents or by seeking the children's views directly.

114 Only one conclusion can be drawn from all of this: to the extent that AB made any representations on 27 June 2016, they were meaningless in the context as Mr Marx gave no indication that he was considering terminating the Parent Contract. As Wallis J (as he then was) pointed out in *Sokhela v MEG for Agriculture and*

Environmental Affairs (KwaZulu-Natal),[129] 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.

115 Again, the insinuation running throughout Pridwin's case is that a hearing would have made no difference in the circumstances. But that runs contrary to the principle, emphasised above, 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.[130]

116 We again emphasise that a fair hearing would not have been confined to AB's alleged conduct on 27 June 2016. Instead, the hearing ought to have allowed for representations on whether termination was in DB and EB's best interests and, if termination was to follow, how best to safeguard the children's interests. These matters could have only been properly ventilated and addressed through a fair hearing.

117 We therefore submit that Mr Marx's decision was in breach of his procedural duties in terms of the Constitution and PAJA. On this basis alone, it falls to be declared invalid.

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

[130] *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31; 2016 (1) SA 132 (CC) at para 176. See further authorities at fn 30 and **Error! Bookmark not defined.** above.

SUBSTANTIVE UNREASONABLENESS

118 Quite apart from the procedural breaches, we submit that Mr Marx's decision was also substantively unlawful, as it was in breach of both sections 28(2) and section 29(1)(a) of the Constitution.

119 The effect of section 28(2) of the Constitution is that it is not generally permissible for children to be forced to suffer as a result of their parents' misdeeds, without proper regard for the children's interests. In *S v M*[131] this Court captured the principle as follows:

> *"Every child has or her own dignity. 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, umbilically destined to sink or swim with them. The unusually emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited upon their children."*[132]

120 The principle in *S v M* is one of wide application that is not confined to the sentencing context. It reflects the fact that children are individuals, possessed of their own dignity, who are worthy of full moral consideration in their own right. Decision-makers are required to give proper regard to the interests and rights of children as individuals, rather than merely treating them as extensions of their parents.

121 This principle is now codified in the Children's Act. Section 6(2) specifically requires that:

> *"(2) All proceedings, actions or decisions in a matter concerning a child must -*
> *…*
> *(b) respect the child's inherent dignity;*

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[131] *S v M* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC).
[132] Ibid at para 18 (Emphasis added).

(c) treat the child fairly and equitably …"

122 Yet, in the present case, the entire basis of the cancellation is the alleged misconduct of AB, rather than any misconduct of the children. As Mr Marx candidly admitted in his e-mail to AB, the "*cancellation of the contract* has *nothing to do with your boys. They are both model pupils. The cancellation of the contract has everything to do with your conduct.*"[133]

123 This is a classic illustration of the alleged sins of the father being visited on the sons. Yet that is precisely what S *v M* and the Children's Act say is impermissible.

124 In making this submission, we do not suggest that there could never be a situation in which a school could cancel the contract due to a parent's behaviour. But section 28(2), read with section 29(1)(a), requires a reasonable decision that strikes a proportionate balance between the rights and interests of the children and the rights of others. Mocumie JA supported this reasoning and suggested that the section 36(1) proportionality analysis would be an appropriate benchmark for this analysis.[134]

125 As Mocumie JA rightly emphasised in her dissent, Mr Marx's mere say-so that he considered the children's best interests was not sufficient to discharge this constitutional obligation.

125.1 In *S v M* this Court emphasised that section 28(2) "*requires that the interests of children who stand to be affected receive due consideration"* and that this *"calls for appropriate weight to be given"* those interests.*"*[135]

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[133] Email of 1 July 2016 Vol 1 p 63.
[134] Mocumie JA Judgment Vol 11 p 1171 paras 91 – 92.
[135] Ibid at para 42.

125.2 Whether a child's interests have been given "*due consideration*" and "*appropriate weight*" is therefore an objective assessment rather than a mere subjective determination.

126 The availability of less restrictive sanctions is a key consideration in this objective assessment. Even if AB had misconducted himself in the manner alleged by Pridwin (which the applicants deny) there were clearly a range of measures available to Pridwin to sanction his behaviour while still respecting the rights of the children.

127 This was especially the case because the papers made it clear that the only source of friction between AB and Pridwin concerned sporting events. There was nothing in the papers to suggest any difficulties between AB, CB and the Pridwin academic staff.[136]

128 Accordingly, Mr Marx and the school had a range of options available, including issuing a final written warning, banning AB from attending any sports practices or matches; or banning AB from addressing or conversing with staff members involved in the sports programme.

129 Though these alternative sanctions were squarely raised in the founding papers,[137] there was never an adequate explanation from Pridwin as to why they were not proportionate and appropriate sanctions in the circumstances.[138] A fair hearing would again have allowed for a proper assessment of these alternatives.

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[136] FA Vol 1 p 12 para 13.2; Pridwin AA Vol 2 p 202 para 182.
[137] FA Vol 1 p 40 para 88.
[138] AA Vol 3 pp 254 – 256 paras 347 – 351.

130 In this context, it was not sufficient for Mr Marx simply to assert that he had to give regard to the rights of the other 440 learners at Pridwin. The fallacy in that reasoning is that the continued presence of DB and EB posed no threat whatsoever to the other learners – these were "model pupils" after all. Given the range of alternative sanctions available, Mr Marx had ample means to address AB's alleged conduct in a manner that would appropriately balance the rights and interests of all concerned.

131 The 28 January 2016 agreement could also not conceivably be viewed as a lesser sanction in this context.[139] It was not concluded in the context of an impending cancellation of the contracts, nor following any disciplinary process. In any event, there were other sanctions not yet applied and available that were far less severe than cancellation and would not have imperilled the children's rights and interests.

132 Finally, both the SCA 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.[140] That is not an accurate reflection of the facts:

132.1 As the timeline of events makes clear, Mr Marx did not seek such confirmation when deciding to cancel the contracts in June 2016.

132.2 Mr Marx addressed a letter to the Chief Director: School Management at the Gauteng Department of Education only on 29 November 2016.[141] The letter

[139] SCA Judgment Vol 11 p 1163 para 71; High Court Judgment Vol 10 p 1028.
[140] High Court Judgment Vol 10, p 989, para 42; SCA Judgment Vol 11 at para 44.
[141] Mr Marx's Letter Vol 6 p 535.

enquired if and how DB and EB would be placed at a public school for the 2017 academic year.

132.3 This letter was sent some five months after the cancellation of the contracts. Moreover, it was sent in an attempt to prevent the granting of an interim interdict that would secure DB and EB's places at Pridwin pending a determination of the lawfulness of the cancellation.

132.4 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.[142]

132.5 In those circumstances, the decision to terminate the Parent Contract was hardly reasonable.

133 We therefore submit that Mr Marx's decision was unreasonable and impermissible and breached sections 28(2) and 29(1)(a) of the Constitution. On this basis too, the decision falls to be reviewed, set aside and declared invalid.

THE INVALIDITY OF CLAUSE 9.3

134 We have made our submissions above on the basis that clause 9.3 of the Parent Contract is capable of a constitutionally compatible meaning that does not exclude the right to a fair hearing or the duty to respect the right to a basic education.

[142] Response to Mr Marx Vol 6 p 536.

135 Pridwin's approach has been to assert that clause 9.3 provides an unfettered right to cancel at will, provided the requisite notice is given, without any hearing and for any reason, good, bad or indifferent.

136 We do not accept that this is a proper construction of clause 9.3. But even if it were, it would then render the clause unconstitutional and contrary to public policy.[143]

137 This Court has held that contracts contrary to public policy are unenforceable to that extent and, in determining public policy, one must now look to the Constitution.[144]

138 We have addressed Pridwin's constitutional obligations in detail above. To the extent that clause 9.3 of the Parent Contract is in conflict with those duties, it is contrary to public policy and invalid. Mocumie JA agreed with this conclusion and would have declared clause 9.3 invalid on three bases:

138.1 First, clause 9.3 fails to afford any right to a hearing before termination;[145]

138.2 Second, clause 9.3 is overbroad, as it permits termination for any reason, even if that reason is contrary to the rights of children;[146] and

138.3 Third, clause 9.3 permits termination without any proper and adequate assessment of the best interests of the child.[147]

139 These considerations are strengthened by the following factors:

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[143] See Amended Notice of Motion Vol 6 pp 545 – 547 prayer 4: *"It is declared that clause 9.3 of the Parent Contracts 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 and/or without taking a reasonable decision."*
[144] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 28.
[145] Mocumie JA Judgment Vol 11 p 1182 – 1183 at para 115.
[146] Mocumie JA Judgment Vol 11 p 1183 at para 116.
[147] Mocumie JA Judgment Vol 11 p 1183 at para 117.

139.1 The Parent Contracts are standard-form contracts presented to parents for signature. They are not negotiated by the parties.[148] Mr Marx confirms this.[149]

139.2 The Parent Contracts were drafted by ISASA, for the benefit of all its member schools. There are therefore thousands of children whose rights to education at their current school are subject to clause 9.3.

139.3 The potential for the abuse of this power is evidenced by the facts of this case. On Pridwin's interpretation of the clause, independent schools are entitled to remove learners from the school due to their parents' alleged conduct, without a hearing and in circumstances where this is unreasonable.

140 In addition to constitutional values, public policy is also usefully informed by the "*legal convictions of the legal policy makers of the community*"[150] and "*the morals of the trade sector involved*".[151]

141 One does not need to look far to determine the views and morals of the independent school sector. One need only look to clause 8 of the Rights and Responsibilities document, referred to earlier, which clearly envisages that independent schools must follow a fair procedure in seeking to terminate a child's schooling due to their parents' alleged actions.[152]

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[148] FA Vol 12 p 1203 para 32.
[149] Pridwin AA Vol 13 p 1308 at para 54: "The parent contract is indeed in a pre-printed format".
[150] *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) at para 10. Citing *Schultz v Butt* 1986 (3) SA 667 (A) at 679D-E and *Premier Hangers CC v Polyoak (Pty) Ltd* 1997 (1) SA 416 (A) at 422E-F.
[151] *Phumelela Gaming and Leisure Ltd v Gründlingh* [2006] ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC) at para 32.
[152] Rights and Responsibilities Document Vol 9 p 922.

142 Accordingly, to the extent that clause 9.3 of the Parent Contract purports to derogate from or impede the constitutional duties and policy considerations spelt out above, it falls to be declared invalid.

CONCLUSION AND REMEDY

143 For the reasons set out above, we submit that the applicants ought to be granted leave to appeal and the appeal should succeed. The orders of the Supreme Court of Appeal and the High Court should be set aside and replaced with an order in the following terms:

> *"1. It is declared that the decision by the second respondent to cancel the Parent Contracts, with the effect that DB and EB are required to leave Pridwin Preparatory School ("Pridwin") at the end of 2016, is unconstitutional, unlawful and invalid.*
>
> *2. It is declared that clause 9.3 of the Parent Contracts 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 and/or without taking a reasonable decision."*

144 Finally, the first to third respondents and the fifth respondent ought to be directed to pay the applicants' costs in all three courts, jointly and severally, including the costs of two counsel.

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5 April 2019