IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO : **CCT 294/18**
SCA CASE NO : **1134/2017**
HIGH COURT 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 SOUTH AFRICA	Fifth Respondent

and

CENTRE FOR CHILD LAW	First Amicus Curiae
EQUAL EDUCATION	Second Amicus Curiae

FIRST, SECOND AND THIRD RESPONDENTS' HEADS OF ARGUMENT

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INTRODUCTION

1. At the heart of this matter is clause 9.3 of the parent contract, which provides that:

> The School also has the right to cancel this Contract at any time, for any reason, provided that it gives you a full term's notice, in writing, of its decision to terminate this Contract. At the end of the term in question, you will be required to withdraw the Child from the School, and the School will refund to you the amount of any fees pre-paid for a period after the end of the term less anything owing to the School by you.[1] [2]

2. The applicants challenge this clause. In such challenge, the approach to be adopted as laid down by this Court is as follows:

> There are two questions to be asked in determining fairness. The first is whether the clause itself is unreasonable. Secondly, if the clause is reasonable, whether it should be enforced in the light of the circumstances which prevented compliance with the time-limitation clause.[3]

3. The basis of the applicants' challenges to clause 9.3 of the parent contract is that it offends against their children's rights enshrined in terms of sections

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1 Vol 2, p 133, cl 9.3

2 Clause 9.3 is immediately preceded by an equivalent clause, which provides:

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

3 ***Barkhuizen v Napier*** 2007 (5) SA 323 (CC) at par 56

28(2)[4] and 29(1)(b)[5] of the Constitution[6].

4. The *onus* is upon the applicants to prove that clause 9.3 infringes the constitutional provisions relied upon for their challenge – firstly, as regards its *ex facie* meaning, and, failing that, as regards its application in the specific circumstances of this case.

5. A plain reading of clause 9.3 shows it does not offend or infringe the express provisions of either section 28(2) or section 29(1)(a). It is a standard notice clause found in countless contracts, including contracts which affect children. Notwithstanding this, the applicants contend that either or both of these constitutional provisions legally imply that the children have a right to be heard (seemingly by way of a fair hearing being afforded to their parents), before the school would be entitled to exercise its contractual right to give a full term's written notice of cancellation "*at any time, for any reason*". So too, they contend that termination of the parent contract on notice unreasonably interfered with the children's right to a basic education.

6. Sections 28(2) and 29(1)(a) plainly do not expressly provide for a hearing in the case of termination of a contract on notice, including a contract involving

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[4] Section 28(2) provides that:

> (2) A child's best interests are of paramount importance in every matter concerning the child.

[5] Section 29(1)(b) provides that:

> (1) Everyone has the right-
> (a) to a basic education, including adult basic education; …

[6] The importance of making a constitutional challenged with reference to specific constitutional provisions was pointed out in ***Bredenkamp and Others v Standard Bank of SA Ltd*** 2010 (4) SA 468 (SCA) at par 43.

children, and nor is termination of a contract of schooling with an independent school an infringement of the right to a basic education under section 29(1)(a). The applicants are driven to rely upon principles adopted in very different factual and legal scenarios for their contention that these sections imply the right to a hearing in the circumstances of this case and that the children's basic education rights have been affected. It is respectfully submitted that the authorities relied upon by the applicants do not support their case.

7. Furthermore, the applicants assiduously avoid dealing seriously with the facts giving rise to the termination. Pridwin's version of events, which was correctly accepted by the High Court and the Supreme Court of Appeal on the strength of the *Plascon-Evans* rule, paints a bleak picture of repeated and material misconduct by the parents. It is small wonder the school took the decision to terminate.

8. In short, we submit that the attack upon clause 9.3 and its application is contrived, that it finds no support in either of the constitutional provisions upon which the applicants rely or on the facts of the case, and that the applicants have not discharged the *onus* upon them per ***Barkhuizen***. Consequently, there is no merit in the appeal and leave to appeal ought to be refused[7].

9. In any event, the matter is now moot, as we set out below.

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[7] Should leave to appeal be granted, the first to third respondents would submit then that the appeal should fail.

MOOTNESS

10. When the High Court decided the main application, the children were attending Pridwin and would foreseeably continue to do so pending the outcome of all appeals, including any proceedings before this Court. The same situation prevailed during the appeal to the Supreme Court of Appeal.

11. This Court is now asked to adjudicate a very different matter, based almost entirely on legal considerations, since the children have recently been moved to a new school and will not be returning to Pridwin. The main relief always at the heart of this matter – namely, that the children be allowed to remain at Pridwin – is no longer sought.

12. The facts of this matter, however, make the decision relating to these particular applicants at this particular school, unique and peculiar,[8] and they make a decision in this matter highly unlikely to be of direct application to others.

13. This submission may confidently be made in the light of the fact that notwithstanding the existence of these constitutional provisions ever since 4 February 1997, there is not a single reported instance of the application of a notice clause being challenged on the basis of sections 28(2) and/or 29(1)(a) or any other constitutional provision, despite such notice clauses being common place in society and their application very often affecting the rights of children.

14. For the applicants and the first to third respondents, a judgment of this Court no

[8] The particularly relevant circumstances of this case have been set out in paragraphs 45 to 58 of these heads of argument.

longer has any practical effect. For them, the relief sought is moot.

15. The public interest factor is insufficient to motivate the granting of leave to appeal[9]. The applicants say that a ruling in this matter will be of material public interest and benefit and that this Court should entertain the appeal for this reason, despite their children no longer being at Pridwin. The facts show otherwise.

16. As at 2015, there were 12,814,473[10] learners (cumulatively in both public and independent schools) in South Africa, of whom 7,368,110[11] were in primary schools (both public and independent) throughout South Africa. Of all of these primary school learners, 318,532[12] were at independent primary schools, and 158,949 of these [13] were boys. The total number of independent school learners was 566,194[14].

17. Approximately 167,000[15] of these independent learners are at ISASA member schools. About 30%[16] of these qualify for State subsidies.

18. As at 2010, high-fee independent schools made up 14%[17] of all independent learners and received no State subsidies. Since the school is a member of

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9 ***MEC for Education, KwaZulu-Natal, and others v Pillay*** 2008 (1) SA 474 (CC) at par 32
10 Vol 7, p 632, table 2, blue row – "*South Africa*", column "*Public and Independent*", "*Learners*"
11 Vol 7, p 634, table 4, blue row – "*South Africa*", "*Both*", "*Total*" of column "*Total Primary (Gr 1-7)*"
12 Vol 7, p 634, table 4, blue row – "*South Africa*", "*Independent*", "*Total*" of column "*Total Primary (Gr 1-7)*"
13 Vol 7, p 634, table 4, blue row – "*South Africa*", "*Independent*", "*Male*" of column "*Total Primary (Gr 1-7)*"
14 Vol 7, p 634, table 4, blue row – "*South Africa*", "*What is ISASA*", "*Independent*", "*Total*" of column "*Grand Total*"
15 Vol 7, p 636, "*What is ISASA*", third paragraph
16 Vol 7, p 637, "*We strengthen your school's sustainability and save you money*", fourth bullet-paragraph
17 Vol 7, p 638, ln 19-20 and p 639, ln 9-10

ISASA, the 440 pupils at Pridwin, therefore, are in a similar contractual position to slightly more than 4%[18] of all independent learners. If this position is limited to primary schools, then the position reduces to slightly more than 2%[19]. If limited to boys at primary schools, who make up about half of the independent primary school learners, then the position reduces to approximately 1%[20] of all learners at independent schools.

19. It is respectfully submitted that these low percentages do not in any way constitute significant public interest in a judgment sufficient to justify this matter being entertained by this Court, despite the matter now being moot between the parties.

20. Simply upon these considerations and quite apart from those pertinent to the merits of the appeal, we submit leave to appeal ought to be refused. The issue of mootness will be dealt with further in written submissions on mootness called for by this Court in its directions dated 16 April 2019, which were received shortly before the filing of these heads.

THE APPLICANTS' APPROACH

21. The applicants' approach is to commence with an assumption in law which favours them and then to reason as if that assumed position had been

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[18] 167,000 / 566,194 x 14% = 4.129%

[19] 318,532 / 566,194 = 56.258% of independent learners are at primary school
⇨ 167,000 x 56,258% = 93,950 learners at ISASA member schools are in primary schools
⇨ 93,950 / 566,194 = 16.593% of independent learners are at ISASA member schools
⇨ 16,593% x 14% = 2.323% of learners are at ISASA member schools which are primary schools

[20] Vol 7, p 634, table 4, blue row – "*South Africa*", "*Independent*", "*Female*" versus "*Male*" of column "*Total Primary (Gr 1-7)*"

established[21]. The proper approach to analysing the legal position was that adopted by the High Court, which approach accords with that laid down by this Court in ***Barkhuizen***[22], cited above.

22. We will argue that, based on a proper interpretation of the true ambit of sections 28(2) and 29(1)(a), and upon the extraordinary facts of this case, the applicants must fail on the ***Barkhuizen*** approach, as they did both before the High Court and the Supreme Court of Appeal.

23. The first important consideration is that the applicants' children (like all others in South Africa) have at all times enjoyed the right to a basic education. Section 29 of the Constitution requires that the Constitutionally guaranteed right to a basic education is to be provided by the State, in public schools[23]. The applicants' decision to enrol their children at an independent school was a matter of choice, since nowhere is there any allegation that the circumstances at the time of enrolment at Pridwin were such that they were left with no other alternative but to enrol their children there.[24]

24. This brings the *pacta sunt servanda* maxim directly into play. As is explained by this Court[25], the *pacta sunt servanda* principle remains:

> … a profoundly moral principle, on which the coherence of any society relies.

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21 This approach is clear, for example, from page 9, paragraph 30 *et seq* of the applicants' heads of argument.

22 ***Barkhuizen*** (*supra*) at par 56

23 Or schools executing the functions of a public school or on behalf of a public school.

24 This aspect also impacts on the applicants' argument that the parent contract is offered on a take-it-or-leave-it basis.

25 ***Barkhuizen*** (*supra*) at par 15

> It is also a universally recognised legal principle. But the general rule that agreements must be honoured cannot apply to immoral agreements that violate public policy.[26]

25. It is submitted that clause 9.3 should be enforced at face value, unless the applicants can discharge the *onus* on them to show that a right to be heard prior to invoking the notice provisions of clause 9.3 is implied by law by virtue of sections 28(2) and/or 29(1)(a), or that termination of the parent contract on notice implicated the children's right to "*a basic education*".

26. This they cannot do. Pridwin is an entirely self-funded independent school. This makes the exercise of the applicants' right of choice to have their children attend Pridwin very relevant. By exercising their right to associate with Pridwin, they also agreed that their association would be governed by all of the provisions of the parent contract. The parent contract also provided the mechanisms to disassociate. One such mechanism was clause 9.2, which provided for termination on written notice by the applicants. Another was clause 9.3, which afforded the equivalent right to the school to give written notice. Both clauses allowed for a term's written notice to be given "*at any time, for any reason*". Each party was given equivalent rights.

27. Notice clauses which provide for the termination of an agreement upon the expiry of the notice period are common place in a variety of agreements and are implied in all indefinite duration agreements[27]. There is no authority for the proposition that notice clauses which result in the termination of agreements

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[26] ***Barkhuizen*** (*supra*) at par 87
[27] ***Bredenkamp*** (*supra*) at par 23

which may affect children, require a fair hearing prior to a party relying on such clause.

28. The applicants have not said that they seek to develop the law, as they ought to have done if this is their objective.[28] However, even if this appeal is seen as an endeavour to develop the law of contract, all parties' rights in concluding contracts are underscored by their rights to freedom and dignity[29]. With this in mind, there are a number of objections to the case presented by the applicants.

29. Firstly, the proposed development would have the effect that contracting parties could no longer agree to terminate their agreements on notice without more, but would require the party wishing to exercise its right to terminate to first afford a hearing to all children, where their interests might potentially be affected by the invocation of the notice provision.

30. This limitation upon the rights of freedom and dignity to contract and terminate contracts on notice would not relate to all contracts, since some do not impact upon children, and would not, therefore, relate to all contracting parties. This proposed development of the law of contract would therefor introduce a limitation upon the rights of freedom and dignity of those persons, but would not be a law of general application. It would not satisfy section 36[30] of the

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28 Compare ***Bredenkamp*** (*supra*) at par 23-24, 27 and 29

29 ***Barkhuizen*** (*supra*) at par 57

30 Section 36 of the Constitution provides that:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
(a) the nature of the right;

Constitution.

31. Secondly, as this Court has identified[31], the paramountcy principle applies to every matter concerning a child, which implicates both their direct and indirect interests. In the private law sphere, this impact is no less significant than it is in the public law sphere. Some examples of contracts, which would impact the lives of children, would include:

31.1. agreements of lease, which allow for children to live at certain premises;

31.2. security contracts, which provide for the safety and security of children at home; and

31.3. internet or other telecommunication agreements, which allow children access to information, including that required for their schooling.

32. If any of these agreements were to contain a notice clause, allowing one or both of the parties thereto to terminate the contract, such notice could not be exercised before the party wishing to do so had held a fair hearing, on the applicants' contentions.

(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

[31] ***S v M*** (*Centre for Child Law as amicus curiae*) 2008 (3) SA 232 (CC) at par 25

33. This concern raises the following further issues:

33.1. Would the law now expect of every contracting party in the private law sphere to:

33.1.1. know that it must hold a fair hearing;

33.1.2. know how to hold a fair hearing; and,

33.1.3. hold a fair hearing in accordance with its knowledge of this obligation,

failing which, its failure to hold a fair hearing could be subjected to a common law review process, which could itself take several years before the propriety of the giving of notice is determined?

33.2. Will the already over-burdened courts now be expected to sit in numerous additional review applications, which could potentially be followed by appeals, including appeals to this Court?

34. The answers to these questions must surely, it is respectfully submitted, be *no*. This Court has pointed out that it:

> …, far from holding that section 28 acts as an overbearing and unrealistic trump of other rights, has declared that the best-interests injunction is capable

of limitation.[32]

35. Unquestionably, all contracts that are terminated on notice, if they affect children directly or indirectly, will impact those upon children. While that impact can emotively be described as "*effectively expelling*" the applicants' children, as has been done here, or as "*effectively evicting*" children in the case of a lease, or "*effectively subjecting children to criminal harm*" in the case of a security contract, or "*effectively depriving children of educational material or being able to communicate*" in the case of an internet or telecommunications contract, that description is of no assistance.

36. The only meaningful enquiry would be: "*Is the notice period so short that termination of the contract on notice would bring undue harm to the children, if the terms of the notice period were applied?*" While no such enquiry has been raised by the applicants here, precisely because the notice period of a full term is adequate and because in this matter the applicants were afforded more than a full term's notice, this is the only enquiry which commends itself on the strength of the approach previously adopted by this Court, albeit in notably different circumstances.

37. As with the trustees in the ***Juma Musjid***[33] matter, who were entitled to seek the eviction of the school[34], it is respectfully submitted that the school was entitled to give notice in terms of clause 9.3. But, in giving such notice, the school was

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32 ***S v M*** (*supra*) at par 26

33 ***Governing Body of the Juma Musjid Primary School & Others v Essay NO & Others*** 2011 (8) BCLR 761 (CC)

34 ***Juma Musjid*** (*supra*) at par 64

obliged to ensure the paramountcy of the interests of the applicants' children, as well as those of all of the other boys at Pridwin, as well as taking into account the rights of all other affected parties, including staff and other parents. This was a balancing process which was carried out, as it ought to have been[35].

38. The potential harm that the applicants' children might have stood to suffer, had the school terminated the parent contract summarily, because of the substantial misconduct of the first applicant, was that they might not have been able to receive "*a basic education*" from another school for a brief period. This risk was entirely negated by the more than adequate notice period, which afforded the applicants ample opportunity to withdraw their children from the school, as they were contractually obliged to do, in terms of clause 9.3, and to place them in another school, as they were legislatively obliged to do in terms of section 3(1)[36] of the South African Schools Act[37].

39. This Court criticised the High Court in the *Juma Musjid* matter for neglecting to ask the MEC to provide information on how the constitutional mandate of providing basic education was to be fulfilled[38]. In this matter, that information was before the High Court, at the time that it had to make its decision both on

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35 ***Juma Musjid*** (*supra*) at par 70

36 Section 3(1) of the South African Schools Act 84 of 1996 provides that:

(1) Subject to this Act and any applicable provincial law, every parent must cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first.

37 Act 84 of 1996

38 ***Juma Musjid*** (*supra*) at par 69

an interlocutory basis and upon a final basis[39].

40. This Court's solution in the ***Juma Musjid*** matter, was to grant a provisional order[40], in terms whereof the eviction order of the High Court was set aside, certain directions were given, including that the MEC was to file a report, and the trustees were permitted to approach this Court again, on suitably supplemented papers, for a just and equitable order, including one for eviction. This Court later granted a final order of eviction, with suitable time being allowed for the learners of the Juma Musjid Primary School to be taken up in other schools[41].

41. But, this was not the approach adopted in the instant matter. Instead, the applicants, who had indicated their desire to withdraw their children from the school, as early as January 2016[42], have persistently contended for a line of argument that is inherently flawed and unrealistic. Their stubborn approach that there should be a fair hearing, before the school could invoke its right to give written notice of termination in terms of clause 9.3, and that the termination on notice impacted upon the children's right to a basic education, has roundly and correctly been rejected by both the High Court and the Supreme Court of Appeal. These were the issues presented to these Courts for their determination and they were obliged to decide them on the case as pleaded[43].

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39 Vol 6, p 532-542

40 ***Juma Musjid*** (*supra*) at par 2-3

41 ***Juma Musjid*** (*supra*) at par 77 and 88

42 Vol 1, p 19, par 37

43 See ***MEC for Education, Gauteng Province, and Others v Governing Body Rivonia Primary School and Others*** 2013 (6) SA 582 (CC), where at par 100 it was said that:

42. The law has been developed to require parties to hold a fair hearing before taking an adverse decision primarily in two instances:

42.1. firstly, in order to give effect to fair labour practices, which is underscored by section 23(1) of the Constitution and amplified[44] by the Labour Relations Act[45]; and

42.2. secondly, in order to ensure just administrative action, which is provided for in section 33(1) of the Constitution and amplified[46] by the Promotion of Administrative Justice Act[47].

43. In both of these instances, the legislature must have considered that most employers and most administrators had the capacity to comply with the right to afford a fair hearing, as well as the consequences of the hearing being challenged. There is no indication of a similar contemplation in the circumstances of the present matter.

44. The above reasoning assists in underscoring the distinctions between the present situation and the circumstances under which the judicial pronouncements were made in the cases cited by the applicants as authority

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[100] Just as they bind other courts, the rules of procedure must be followed in this Court too. In our system of law the issues determined in any court are defined in the pleadings by the parties themselves. Adjudication of issues is undertaken at the instance or request of parties. In other words, it is the parties who decide which cause of action they would like to pursue in litigation. Where a particular cause of action has been chosen and pleaded by an applicant or plaintiff and it turns out that the evidence adduced in its support does not sustain the action, a court cannot, of its own accord, choose a different cause of action and find in favour of a losing litigant. This is simply not open to any court.

44 Section 185-186 of the Labour Relations Act 66 of 1995
45 Act 66 of 1995
46 Section 3 of the Promotion of Administrative Justice Act 3 of 2000
47 Act 3 of 2000

for their propositions. Before dealing with these authorities, we first set out the factual context within which these questions arise. It is the scrutiny of these facts which the applicants are so eager to avoid but which are highly relevant when considering the second leg of the enquiry under ***Barkhuizen***.

THE FACTS LEADING TO TERMINATION ON NOTICE

45. The second respondent (Mr Marx) set out the full history leading to the termination in Pridwin's affidavits in the High Court. The applicants deliberately avoid these facts, as they have throughout these proceedings, precisely because the full narrative places them in such a bad light and demonstrates conclusively that Pridwin was justified in terminating its relationship with these parents. The High Court correctly accepted that it was bound to accept Pridwin's version of events in motion proceedings and the Supreme Court of Appeal endorsed this approach. Pridwin's version shows that it would have been entitled to end the contracts summarily. Instead, in the interests of the children, it opted to terminate them on notice, allowing more than five months for the parents to find a new school.

46. The earliest event occurred in October 2015. During a meeting with the teacher in charge of tennis, Ms Migliore, the first applicant (AB) had rudely and aggressively accused her of being incompetent, demoralizing of the children and having no appreciation of the damage she was doing to the children's enthusiasm for tennis. This left Ms Migliore feeling intimidated, offended and threatened, which she described as "*the most traumatic experience*" she had ever had as an intern. It left her in tears, diminished her self-confidence, and it

took her a long time to recover from it[48]. This event concerned the tennis trials for 8 and 9 year olds[49].

47. This episode forms part of the matrix of persistent harassment of Pridwin staff members by AB. Initially, this was reflected in AB's obsession with match statistics and his displeasure with team selection and the batting orders for the Pridwin Under 9 cricket team, based on his statistics. This obsession included:

47.1. AB's routine, detailed comparison between hard copy cricket results produced by the school, and the electronically published versions thereof[50], the detailed statistical analysis of cricket results[51], and a barrage of emails of complaint[52], pertaining to DB, his older son, who was 8 years old at the time;

47.2. a fortnight during which AB tendered his services as a cricket coach in order to demonstrate how poor Pridwin's coaching standards were, but during which he refused adamantly to comply with Pridwin's standard coaching procedures and etiquette[53]; and

47.3. the demand[54] by AB for an apology from the head of sport, Mr. Joubert, where there was no basis for the allegation that Joubert had defamed

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48 Vol 2, pp 169-171, par 86, as read with vol 2, p 186, par 133 and vol 4, p 376-377, par 11-13
49 Vol 4, p 376, par 8. See also the report by Mr Joubert of this incident at vol 3, p 373, ln 9-12
50 Vol 2, p 166-167, par 78-79
51 Vol 2, p 166-167, par 79
52 Vol 2, p 166-167, par 79
53 Vol 2, p 174-176, par 96-102; p 326-328
54 Vol 1, p 88, ln 1–12

AB[55].

48. Although most of the events relate to AB, the second applicant (CB) was complicit. In respect of the alleged defamation of AB, CB, a practising psychiatrist, wrote to Marx, saying "*I am not sure if JP's behaviour emanates from just a low IQ or obvious malice*"[56] and "*I don't think JP realises the calibre of people he is choosing to take on*"[57].

49. These (in retrospect) relatively minor episodes were followed by three significant incidents. The first occurred on 10 November 2015[58], when DB was playing cricket against Crawford College at Trinity House School. AB was watching his son playing in the Under 9 team. His son was given out LBW. In response, AB accosted the umpire, Mr Mokoele, when the players came off the field, saying "*You fat fuck; you don't respect parents*" and then threatened that he would wait for Mr Mokoele after the match and kill him, because he did not show respect, all said whilst AB held a cricket bat threateningly in his hands[59]. This followed AB earlier having shouted abuse at the umpire from the side of the field[60]. The Pridwin coach called Mr Marx (who was not present) to immediately come to Trinity House and deal with AB[61]. When Mr Marx confronted AB and told him that his reported behaviour was unacceptable, AB became angry and said that he would speak to umpires in any manner he

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55 Vol 1, p 93, pars 9-10; vol 3, p 224, par 252
56 Vol 1, p 85, ln 23-24; vol 2, p 182, par 115
57 Vol 1, p 85, ln 29-30; vol 2, p 182, par 117
58 Vol 2, p 172 - 175, par 92-95
59 Vol 4, p 400, par 6
60 Vol 2, p 217, par 231
61 Vol 4, p 398, par 9

chose, as they were not gods[62]. When Mr Marx threatened to exclude AB or his son from sports matches if AB was not willing to comply with the school's code of conduct[63], AB's response was that where he came from, if an umpire gave a bad decision like he had witnessed that day, then a stump would be taken out of the ground and the umpire would be stabbed with it[64].

50. The second incident occurred on 27 January 2016. DB had been given out (caught behind) in an under 10 cricket match[65]. Apart from making disparaging remarks about other boys in the team (which was an ongoing pattern), AB shouted from the side of the field that this was "*a useless decision*"[66]. After the match, the coach, Mr Broderick, was confronted by AB and told that he was a "*Fucken shit*" coach[67]. The effect of the disparaging remarks made by AB about other boys in the side was reported to Mr Marx by a parent, who expressed in detail her objection to the improper conduct of AB and the effect it was having on her son[68].

51. Mr Marx wrote the next morning to the chairman of the Board of Pridwin and two other board members, Ms Patel and Ms Theunissen, about this incident[69] and suggested a hearing[70], which met with the Board's approval[71]. Before this could happen, AB and CB arrived at Mr Marx's office unannounced, seeking a

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62 Vol 3, p 217, par 233
63 Vol 3, pp 217-218, par 234
64 Vol 3, p 218, par 235
65 Vol 2, p 176, par 103
66 Vol 4, p 331, ln 4
67 Vol 4, p 331, ln 23 and 26
68 Vol 4, p 329, ln 8-44
69 Vol 2, p 178, par 104; vol 3, pp 218-219, par 237
70 Vol 4, p 335, ln 14-20
71 Vol 2, p 178, par 105; p 226, ln 27-31

meeting about the previous day's events[72]. During the meeting, Mr Marx indicated that he had approached the Board[73]. Eventually, given the event which had occurred, and the need to control AB's behaviour, an agreement was reached at the meeting (the 28 January 2016 agreement) to the following effect:

51.1. AB would refrain from coaching or offering advice or giving his opinion to any boys at sporting activities, including DB and his younger son (EB); he would not sit with or near the boys at sporting activities; he would not publically criticize any referees and would abide by coaching, refereeing and selection decisions; and he would not do anything to bring the school into disrepute[74].

51.2. Marx agreed to manage his staff so that DB and EB were not victimized or disadvantaged; and that he would not do anything to compromise AB and CB's ability to find a placement for DB and EB at another school, undertaking to support them in such endeavours[75].

52. As the High Court correctly observed, the fact that an agreement of this sort had to be concluded lends strong support to the cogency of Pridwin's complaints[76].

53. Shortly after the conclusion of the agreement, and on 3 February 2016, a letter

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72 Vol 2, p 178, par 106
73 Vol 2, p 178, par 106
74 Vol 2, pp 179-180, par 108.1
75 Vol 2, p 180, par 108.2
76 Vol 10, p 1025-1026, par 134-135

was written by Mr Marx supporting the desired move of DB and EB to St John's school[77]. This application to St Johns indicated a clear intention by AB and CB to remove DB and EB from Pridwin[78].

54. The third incident occurred on 27 June 2016[79]. Mr Marx was called urgently to the Pridwin soccer field. When he arrived, he found an uninvited external soccer coach who had been brought to Pridwin by AB, Mr Mosoana, on the field trying to engage with and give unsolicited advice to the school's soccer coach, Mr Prinsloo[80], while the under 10 soccer trials were in progress. Mr Marx approached Mr Mosoana and asked him to move to the side of the field. AB become irate and when Mr Marx tried to explain that it was unacceptable for him to interrupt the school's sports program[81] by bringing in his own coach without an appointment[82], AB pulled Mr Marx away by the arm and said that he and Mr Mosoana should leave, since "*these people do not know what they are doing*". DB was not even present at the trials that day[83].

55. The incident was a clear breach of the 28 January 2016 agreement and was confirmed on oath by a parent[84]. When Marx asked AB why he was interfering in the coaching in circumstances where he no longer wanted DB and EB at the school, AB's retort was that the sport at the school was pathetic and he did not

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77 Vol 1, p 83, ln 7-20; Vol 2, p 181, par 110
78 Vol 2, p 181, par 111
79 Vol 2, pp 186-187, par 134
80 Vol 2, p 186-187, par 134
81 Vol 2, p 188, par 137; vol 4, p 383, ln 8-18; vol 2, pp 188-189, par 139; vol 4, p 384, ln 14-35
82 Vol 2, p 187, par 135
83 Vol 2, p 188, par 138
84 Vol 2, p 187-188, par 136; vol 4, p 379-382 (signed version: vol 6, p 523-526)

want to be there[85].

56. AB left the school with Mosoana[86]. Shortly thereafter, AB came unannounced into Marx's office and insisted on explaining his actions that day. Marx said that it was unacceptable for him to have brought an outsider onto the school's premises, uninvited, and for them to then disrupt the sporting session. Marx pointed out that this was in breach of the 28 January 2016 agreement[87].

57. After considering all the events which had occurred, including the most recent one, and after taking advice, Marx dispatched the termination letter[88] on 30 June 2016[89]. In it, Marx set out the following:

    57.1. the parent contracts could be immediately terminated in terms of clause 4.3, as read with clause 9.5, of the parent contracts for material breach thereof[90];

    57.2. there had been such breach, being the incident of November 2015 where the Trinity House umpire, Mr Mokoele, had been threatened by AB[91], AB's criticism of sports coaching and his disruptive fortnight as a cricket coach[92], the incident of January 2016 where AB had been abusive to one of the school's umpires, Mr Broderick[93], which resulted

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85 Vol 2, p 187-188, par 136
86 Vol 2, p 189-190, par 140
87 Vol 2, p 189-190, par 140
88 Vol 2, p 104-106
89 Vol 4, p 385, ln 10-11
90 Vol 2, p 104, ln 6-17
91 Vol 2, p 104, ln 19-23
92 Vol 2, p 104, ln 24-30
93 Vol 2, p 104, ln 31-36

in the 28 January 2016 agreement[94], the demand for an apology by Mr Joubert for allegedly defaming AB, which demand was baseless and intimidatory[95], and the incident of 27 June 2016 on the soccer field, where AB and Mr Mosoana had disrupted the soccer trials, which was in itself a breach of the 28 January 2016 agreement[96];

57.3. that "*In the interests only of your sons, I have instead, in my sole discretion, elected to invoke clause 9.3 of the Contract*"[97]; and

57.4. that he was giving a full term's notice that the parent contracts in respect of DB and EB would be terminated at the end of the third term of 2016, resulting in their last day being 9 December 2016[98].

58. As we submit below, these facts show that Pridwin acted more than reasonably in all the circumstances.

PRIDWIN'S SUBMISSIONS ON SECTIONS 28 AND 29

59. The contention by AB and CB that the school was obliged to hear and consider their views on whether the parent contracts should be terminated (and by equivalent reasoning, to consider a "*lesser sanction*", when deciding what action to take) finds no basis, express or tacit, in the parent contracts. Well established principles of contract at common law do not require a hearing as a

94 Vol 2, p 105, ln 1-20
95 Vol 2, p 105, ln 21-24
96 Vol 2, p 105, ln 28-38
97 Vol 2, p 105, ln 45-46
98 Vol 2, p 106, ln 6-9

prerequisite to the termination of an agreement on notice.

60. Knowing this, AB and CB have sought to found their case upon constitutional provisions, namely, section 28(2), that a child's best interests are of paramount importance in every matter concerning a child, and section 29(1)(a), that everyone has the right to "*a basic education*".

61. In relying upon section 28(2), the applicants' focus is solely on the interests of their children, to the exclusion of the other children at the school, the school itself, its staff members, its parents and its board.

62. Their approach is to rely upon a variety of this Court's decisions, all dealing with non-contractual, criminal law, administrative law or property law, matters, which, as pointed out in ***Bredenkamp***[99], is unhelpful in deciding the issue.

63. Section 28(2) does not provide an unlimited veto right which trumps all others, as the applicants would have it. This would offend principles of equality.

64. In ***Director of Public Prosecutions, Transvaal***[100], it was held that the constitutional value enshrined in section 28 "*must be interpreted so as to promote the foundational values of human dignity, equality and freedom*".

65. In ***S v M***[101], the Court warned that:

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99 ***Bredenkamp*** (supra) at par 52

100 ***Director of Public Prosecutions, Transvaal v Minister of Justice and Others*** 2009 (4) SA 222 (CC) at par 72

101 ***S v M*** (*supra*) at par 25

> A more difficult problem is to establish an appropriate operational thrust for the paramountcy principal. The word 'paramount' is emphatic. Coupled with the far-reaching phrase 'in every matter concerning the child', and taken literally, it would cover virtually all laws and all forms of public action, since very few measures would not have a direct or indirect impact on children, and thereby concern them. Similarly, a vast range of private actions will have some consequences for children. This cannot mean that the direct or indirect impact of a measure or action on children must in all cases oust or override all other considerations. If the paramountcy principle is spread too thin it risks being transformed from an effective instrument of child protection into an empty rhetorical phrase of weak application, thereby defeating rather than promoting the objective of s 28(2). The problem, then, is how to apply the paramountcy principle in a meaningful way without unduly obliterating other valuable and constitutionally protected interests.

66. Applying both these approaches requires the dignity of not only DB and EB to be protected, but also the dignity of every other child at the school and every other person at the school. It requires that every person's rights be considered equally. No child's rights should override or be subservient to any other child's rights and no child's rights should be subservient to any adult's rights. The exercise of each person's rights should give effect to their freedoms, including their right to associate or dissociate with other persons.

67. With these principles in mind, any argument that section 28(2) gives rise to a right impliedly incorporated into the parent contracts to be heard prior to the school exercising its right to terminate on notice, falls flat. Such a requirement cannot be a law of general application and cannot, therefore, be applied to limit

a party's rights under a contract, where such rights are underscored by the rights to freedom and dignity and the *pacta sunt servanda* maxim.

68. There is a further, perhaps more obvious, difficulty with the applicants' contentions in this regard. In ***Bredenkamp***, the argument that the common law should be developed was abandoned, because, having accepted that a contract could be terminated on notice, "*at the same time to contend that this [contract] could not without good cause*", resulted in "*[t]he two rules … [being] in conflict*"[102]. Simply put, contracts may be terminated on notice (and here specifically "*for any reason*") or as a result of a material breach or repudiation (that is, for good reason). The two bases are distinct. In order to achieve the result of combining the two bases, there would have to be a development of the common law[103], which the applicants have not contended for, or the parent contract would have to provide expressly or tacitly for such a combination of requirements, which it does not.

69. Next, AB and CB contend that the decision to terminate infringed DB and EB's substantive right to basic education under section 29(1)(a). They submit that DB and EB may negatively protect this right by preventing the school from interfering with it. Simultaneously, they contend that Pridwin is providing a basic education and is performing a constitutional duty in so doing. This argument is materially flawed.

70. If it were correct that Pridwin, an independent educational institution which

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[102] ***Bredenkamp*** (*supra*) at par 29
[103] ***Bredenkamp*** (*supra*) at par 29

receives no State funding, is providing a basic education, even where there is no contractual *nexus* with the State obliging it to do so, this would give rise to remarkable consequences. By parity of reasoning, it would mean that a doctor in private practice, for example, is discharging a State or constitutional function in providing medical care to a member of the public (for example, when being consulted by a patient and prescribing medication), since this constitutes the provision of a service which is an obligation which falls upon the State.

71. The proposition need only be stated to be rejected as patently wrong. This is certainly not what the Constitution provides for. In circumstances where section 29(3) expressly provides for independent educational institutions, distinct from those of the State, the failure of the contention becomes more pronounced.

72. In any event, were Pridwin providing a basic education, as that concept is to be understood in terms of section 29(1)(a), then the termination of the parent contracts would be an infringement of DB and EB's direct right to basic education, not one which is only negatively protectable against the school.

73. It is clear from case authority that interference with a negatively protectable right occurs where the wrong-doing party is not itself under the obligation to provide the service (here, the provision of a basic education), but its actions have the indirect effect of preventing a person from enjoying their Constitutionally protected right.

74. Thus, whereas the infringement of a positively protectable right involves a

direct infringement of that right, the infringement of a negative right involves an indirect infringement of that right.

75. For Pridwin, as was the case of the property owner in ***Juma Musjid*** as we see below, there is no primary positive obligation upon it to provide a basic education[104]. That duty rests on the State. There was no obligation on Pridwin to admit DB and EB, nor is there an obligation on it to admit any other children. As an independent education institution it makes that election, subject to the limited provisions of the South African Schools Act relevant to private schools.

76. While section 8(2) of the Constitution provides that a provision in the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right, it was pertinently pointed out in ***Juma Musjid*** that the purpose of section 8(2) 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[105].

77. Accordingly, the right to a basic education may be negatively protected from improper invasion. Breach of the obligation occurs:

77.1. directly when there is a failure to respect the right; and

77.2. indirectly when:

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104 ***Juma Musjid*** (*supra*) at par 57
105 ***Juma Musjid*** (*supra*) at par 58

77.2.1. there is a failure to prevent the direct infringement by another; or

77.2.2. there is a failure to protect the existing protection of the right by taking measures that diminish that protection[106].

78. Pridwin is not, as was the case of the trust in ***Juma Musjid***, performing a public function and was paying the costs of various items which the State ought to have[107]. In ***Juma Musjid***, a private entity (the trust) acted in a way which negatively impacted upon the public school's ability to provide a basic education to its learners, by seeking its eviction from the trust's property. That is not the case here. Nothing that Pridwin has done has in any way prevented DB and EB from obtaining "*a basic education*" from a public school. There has been no infringement, direct or indirect, of that right. There has been no failure to respect that right by Mr Marx, the school or the Board.

79. The truth is that the applicants wished to send their sons to another private school in the area of equivalent standard to that of Pridwin and keep DB and EB at Pridwin until they could achieve this. This objective finds no support in section 28(2) or 29(1)(a).

80. Accordingly, we submit there is no basis to contend that termination of the parent contracts by notice has been unreasonable in the circumstances, so as to breach the provisions of sections 28(2) or 29(1)(a).

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106 ***Juma Musjid*** (*supra*) at par 58
107 ***Juma Musjid*** (*supra*) at par 59

THE AUTHORITIES IN CONTEXT

81. Against the background of those submissions we contend that the authorities relied on by the applicants are not apposite and deal with very different circumstances. We deal with each of them in turn below.

Juma Musjid

82. We have referred to this case above. The crux of the *Juma Musjid* matter was that the High Court had "*authorised the eviction, effectively, of a public school conducted on private property*"[108]. This Court described in detail how the State has a positive obligation to provide public schooling, thereby respecting the learners' rights to "*a basic education*"[109].

83. This Court was equally clear that, while section 8(2) of the Constitutional rendered a provision in the Bill of Rights binding upon natural and juristic persons, its purpose was not to obstruct private autonomy or to impose on a private party the duties of the State in protecting the Bill of Rights[110]. This Court emphasised that the purpose of section 8(2) is rather to require private parties not to interfere with or diminish the enjoyment of a right, adding that its application also depends on the intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the State or organs of State[111].

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108 ***Juma Musjid*** (*supra*) at par 1
109 ***Juma Musjid*** (*supra*) at par 45 and 57
110 ***Juma Musjid*** (*supra*) at par 58
111 ***Ibid***

84. Upon this approach, given that Pridwin is an entirely self-funded independent school, it is respectfully submitted that there is no positive obligation upon Pridwin to provide a basic education. That obligation in terms of section 29(1)(a) rests on the State alone. It also cannot be said, therefore, that in terminating the children's right to attend Pridwin on written notice, Pridwin breached any positive obligation to provide a basic education to them.

85. However, upon the applicants' reasoning[112], the provision of education at Pridwin is the provision of "*a basic education*", as contemplated in section 29(1)(a). But, the legislature in employing the phrase "*a basic education*" did so:

85.1. to denote a right to a specific concept[113]; and

85.2. to distinguish that right from a different right, being the right to "*further education*", as that term is employed in section 29(1)(b).

86. It further made the right to be educated in the official language or languages of choice in public educational institutions, where reasonably practicable, applicable to all "*education*" at such institutions and this would apply to both "*a basic education*" and "*further education*", as appears from section 29(2).

87. Significantly, the legislature did not oblige "*independent education institutions*", which would include Pridwin, to provide "*a basic education*", stipulating instead

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112 Applicants' heads of argument: p 24, par 80 and p 25, par 82

113 Section 29(1)(a) does not provide for a right to basic education, but for "*the right to a basic education*", which right includes adult basic education. The employment of the article "*a*" denotes the specific concept of "*a basic education*".

that they were to "*maintain standards that are not inferior to standards at comparable public educational institutions*"[114]. The entire tenor of section 29(3) is to entrench the right to establish independent educational institutions, prescribing only that they:

87.1. should not discriminate on the basis of race;

87.2. be registered with the State; and

87.3. maintain the requisite standards[115].

88. This distinction is important because the Constitution protects the right to "*a basic education*", both where there is a positive obligation to provide it (which is not relevant to Pridwin) and a negative obligation not to interfere with the enjoyment of that right.

89. In determining what Pridwin's obligations were, it is helpful to ask the questions: What rights were being exercised by the applicants' children when they attended Pridwin? Was it their right under section 29(1)(a) or their rights in terms of the parent contract?

90. The answers are obvious. The applicants had elected not to send their children to a public school, even though it was their children's right to attend a public

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114 Section 29(3)(c) of the Constitution

115 Contrary to the submissions in the Applicants' heads of argument at p 26, fn 87, "*standards*" clearly refers to standards of education, which could include standards of extramural activities, standards of the buildings and equipment and standards of teacher-learner conduct in the school. It would not include standards of procedural fairness applicable to contractual terminations in public schools, where entirely different considerations would likely apply.

school. The applicants elected not to enforce this right against the State but rather to consensually contract with an independent school, Pridwin. When Pridwin gave notice of termination of the parent contract in writing as clause 9.3 permitted, it operated in terms of the express provisions of the contract.

91. Furthermore, when Pridwin exercised this right, it obliged the applicants to withdraw their children from Pridwin at the end of the notice period. The applicants' obligation in terms of section 3(1) of the South African Schools Act continued to bind them to cause their children to attend school. In discharging that obligation, they could either enforce their children's right to receive "*a basic education*" from a public school or they could elect to contract with another independent school.

92. Once it is accepted that Pridwin is not under any obligation to provide "*a basic education*", but that only public educational institutions are, then Pridwin cannot be said to have breached its negative obligation not to interfere with the children's rights of enjoyment to a basic education at Pridwin. The children, while at Pridwin, were exercising their rights under the parent contract to receive the education provided for in terms thereof. Since they were not exercising their rights under section 29(1)(a) to "*a basic education*", it is axiomatic that they could not force Pridwin to accept them in terms of their section 29(1)(a) rights. Their only relief lay in contract law. Since Pridwin had not breached the parent contract, no such relief existed.

93. The applicants' argument that this is an absurd distinction because it would mean that persons attending a private hospital would not be receiving

healthcare does not pass muster. The corollary of the applicants' argument is that a person attending a private hospital is receiving healthcare and, therefore, they are exercising their right in terms of section 27(1)(a), which entitles them to have access to health care. This argument, developed logically, would mean, for example, that a person, who had attended a private hospital for elective cosmetic surgery had received health care, as contemplated in section 27(1)(a). That person could refuse to be discharged until they felt that they had fully recovered, despite not being in need of any emergency medical treatment, because at the time of undergoing surgery they were enjoying access to health care, which right is protected by section 27(1)(a).

94. Put differently, the applicants' contentions amount to this: if a private entity has provided services in the nature of those which the State is constitutionally obliged to provide, then the private entity cannot terminate the provision of those services since it would constitute a breach of their negative obligations towards the rights-holder. The proposition need only be stated to be rejected as being without merit[116]. It entirely negates the principle of *pacta sunt servanda* and is contrary to what this Court has described the role of section 8(2) to be, as discussed above.

KZN Joint Liaison Committee[117]

95. Contrary to the present matter, there is no indication in the ***KZN Joint Liaison Committee*** matter that either the High Court or this Court's attention was

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[116] Compare vol 11, p 1153, par 40-41

[117] ***KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, KwaZulu-Natal and Others*** 2013 (4) SA 262 (CC)

directed to the argument about whether the right to "*a basic education*" was being provided to a learner, when they attend an entirely self-funded independent school as opposed to a State subsidised independent school. Rather, it is apparent that Cameron J[118] was dealing exclusively with the situation of independent schools that receive State subsidies. No different approach seems to have been adopted by Froneman J[119] or Nkabinde J[120].

96. These judgments discuss why the payment of a subsidy to independent schools was commercially sound and, in fact, served to assist the State in providing "*a basic education*" more cheaply than if the learners at State subsidised independent schools were to attend public schools. It appears as if in each of the judgments, this Court accepted that these State subsidised independent schools were discharging the State's obligation to provide "*a basic education*". To borrow the words of this Court:

> The conclusion must be viewed in the context of the interpretative exercise that the court had engaged in[121].

97. It is respectfully submitted that the situation of Pridwin, which receives no State subsidies and is entirely self-funded, is markedly different to State funded independent schools. Where the State subsidises an independent school, it has a clear public interest in the school. The need for the subsidy must exist, hence it is provided. If the subsidy was not provided, the independent school could not survive and would have to stop operating. This would place a heavier

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118 ***KZN Joint Liaison Committee*** (*supra*) at par 41 and 47
119 ***KZN Joint Liaison Committee*** (*supra*) at par 89
120 ***KZN Joint Liaison Committee*** (*supra*) at par 144
121 ***Daniels v Scribante and Another*** 2017 (4) SA 341 (CC)

burden on public schools. Thus, there exists, at least by tacit mandate, an agreement between the State and the State subsidised independent schools that the State will continue to subsidise them and they will continue to educate learners, thus removing the obligation from the State to do so at an even greater cost to it. In addition, the obligation to subsidise exists in law, as noted in ***KZN Joint Liaison Committee***. This supports the notion of a tacit mandate[122].

98. There would, it is respectfully submitted, also be different considerations applicable to terminating a learner's attendance at a State subsidised independent school, as opposed to a self-funded independent school. If a State subsidised independent school is discharging the State's obligations to provide the learners with "*a basic education*", then those learners, by attending those schools, are exercising their right to "*a basic education*" under section 29(1)(a). There would be considerations of a breach of their right to "*a basic education*", if their attendance on the strength of that right was terminated. Additional considerations might exist, such as an obligation upon a State subsidised independent school to ensure that another school (be it a public or State subsidised independent school) could provide "*a basic education*" to the learner, whose attendance at that State subsidised independent school was to be terminated, before the termination could lawfully take place.

99. But, these are not facts and circumstances which arise in the case before this Court.

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[122] Compare ***AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*** *(No 2)* 2014 (4) SA 179 (CC) at par 66

Daniels v Scribante

100. The facts in ***Daniels v Scribante*** demonstrated a disregard for Daniels' fundamental right to human dignity. The refusal to allow her to effect the most basic repairs to the dwelling that she inhabited, against the slight risk that she might at some uncertain point claim a refund of the moneys expended, was a clear breach of her rights.

101. While the first to third respondents do not dispute that positive obligations may be imposed upon private persons, it respectfully submits that the extension of positive obligations, ordinarily shouldered by the State, to a private individual will not readily and easily arise.

102. The applicants' contention seems to be that this is what section 8(2) provides for. But this is not the case, as explained in the ***Juma Musjid*** decision and as referred to above[123]. The applicants have not made out a case for the imposition of a positive obligation on Pridwin to provide "*a basic education*". Much less have they alleged that their children were exercising their right to "*a basic education*", while attending Pridwin, and that it is that right that the school has unconstitutionally breached in terminating the parent contract on notice.

John Wesley School[124]

103. The *John Wesley School* matter concerned the segregation of a learner from

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[123] But, this Court has cautioned in ***Daniels v Scribante*** (*supra*) at par 45 that conclusions should be viewed in terms of their interpretative context.

[124] ***MS v John Wesley School and Another*** [2018] ZAKZDHC (19 December 2018)

the other learners because his school fees were outstanding. This was a form of punishment imposed upon a child and clearly not in his best interests. The facts bear no similarity to the present matter. The termination of the parent contracts by Pridwin occurred on written notice, as provided for in terms of clause 9.3, and no other basis.

104. The question of a fair procedure being applied, when disciplinary steps are employed, such as segregation or termination for misconduct, requires significantly different considerations to those relevant to the termination of the parent contract by Pridwin.

C v Department of Health[125]

105. In ***C v Department of Health***, the High Court had declared sections 151 and 152 of the Children's Act constitutionally invalid, in that they drastically interfered with a child's rights to parental care, when the child was removed from its parent's custody without an opportunity for automatic review within a reasonable time[126]. This Court was asked to confirm the declaration of invalidity.

106. In this context – the removal of a child from the care of its parents, in a judicial or legislatively sanctioned process – it was held that such drastic action requires adequate consideration and that the family, and particularly the child, must be given an opportunity to make representations on whether the child's

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[125] ***C and Others v Department of Health and Social Development, Gauteng, and Others*** 2012 (2) SA 208 (CC)

[126] ***C v Department of Health*** (*supra*) at par 14

removal is in his/her best interests[127]. This Court found that sections 151 and 152 placed too great a limitation on the consideration of the best interests of the child[128] and the access to courts provided for in section 34 of the Constitution[129].

107. Removal of a child from the care of its parents is punitive in nature, albeit under the guise of the child's own protection. The considerations are entirely different to a termination of a schooling contract on notice, as provided for here in terms of clause 9.3 of the parent contract.

J v NDPP[130]

108. The declaration of a child as a sex offender, which concerned this Court in ***J v NDPP***, was clearly intended as a sanction. The absence of a hearing before the imposition of a sanction flies in the face of the maxim *audi alteram partem*.

109. The termination of the parent contract on notice, as provided for in terms of clause 9.3 is not an imposition of a sanction in response to misconduct. Termination for misconduct is dealt with under entirely different provisions in the parent contract. The principles laid down in ***J v NDPP*** find starkly different application to the case concerning Pridwin.

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127 ***C v Department of Health*** (*supra*) at par 27
128 ***Ibid***
129 ***C v Department of Health*** (*supra*) at par 28
130 ***J v National Director of Public Prosecutions and Another*** *(Childline South Africa and others as amici curiae*) 2014 (7) BCLR 764 (CC)

Centre for the Child v The Governing Body of Hoërskool Fochville[131]

110. The Court in ***Centre for the Child v The Governing Body of Hoërskool Fochville*** considered an appeal against an order made on the strength of an application in terms of Uniform Rule 30A after alleged non-compliance with Rule 35(12).

111. The references to a right to be heard enjoyed by children was given in the context of litigation, which is an entirely distinct situation from the present one.

112. On the strength of the above, we submit that none of the cases cited by the applicants assists their arguments.

RELIANCE UPON THE CHILDREN'S ACT

113. It is not the case, as the applicants suggest,[132] that there have been facts identified which necessarily invoke the consideration of sections 6(2), 8 and 9 of the Children's Act. There is no mention or reliance upon it in the founding papers. Resultantly, issues arising from the Children's Act have not been properly canvassed on the pleadings.

114. The applicants' pleaded case relies upon sections 28(2) and 29(1)(a) of the Constitution and to a much lesser degree the provisions of PAJA, as well as certain regulations and various other documents. That was the case for the first to third respondents to meet and that is the case for adjudication before

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131 ***Centre for the Child v The Governing Body of Hoërskool Fochville*** 2016 (2) SA 131 (SCA)

132 Applicants' heads of argument: p 30, fn 96

this Court.

RELIANCE UPON PAJA, THE R&R DOCUMENT AND REGULATIONS 6(1)(h) AND (i)

115. The applicants' reliance upon PAJA is without substance. It was properly rejected in the Supreme Court of Appeal[133].

116. While the applicants late into the proceedings in the High Court and again in the Supreme Court of Appeal attempted to rely upon the document styled "*Rights and Responsibilities of Independent Schools*" (the R&R document), its assistance in deciding the matter has been properly rejected by both the High Court and the Supreme Court of Appeal[134].

117. The applicants' reliance upon Regulations 6(1)(h) and (i) of the Gauteng Regulations have also properly been rejected by the Supreme Court of Appeal[135].

THE APPLICANTS' CONTENTION OF SUBSTANTIVE UNREASONABLENESS

118. The applicants' challenge on the grounds of substantive unfairness[136] seemingly goes to the second leg of the ***Barkhuizen*** approach. The argument mimics that put up in the Supreme Court of Appeal, where it was properly

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133 Vol 11, p 1156, par 49-50 and p 1160, par 61-63
134 Vol 11, p 1158, par 55
135 Vol 11, p 1158-1159, par 57 and p 1159, par 59-60
136 Applicants' heads of argument: p 43-47, par 118-133

rejected[137].

119. The context in which the school exercised its right to terminate in terms of clause 9.3 of the parent contract is significant[138]. It has been dealt with in detail above. The persistent, repeated, material misconduct by the first applicant (AB) constitutes "*any reason*", as that term is employed in clause 9.3 of the parent contract.

120. It is trite that the version put up on oath by the first to third respondents must be accepted, where there are any factual disputes, on the *Plascon-Evans* test, except where the version given by the respondents is palpably false or implausible. It has never been argued that this is the case, and the applicants do not suggest so now.

121. With respect, the attack by Mocumie J on the factual account given by the headmaster (Mr Marx)[139] is therefore puzzling and contrary to legal precedent. It is doubtlessly this unfounded attack which motivated her ladyship's dissenting position.

122. Given the deleterious effects of the first applicant's behaviour on the other children at the school, the staff and the parents, the decision to terminate the parent contract was undoubtedly substantively reasonable and appropriate.

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137 Vol 11, p1161-1164, par 64-74
138 This has been set out in paragraphs 45 to 58 above.
139 Vol 11, p 1176-1178, par 100-104

THE ATTACK ON CLAUSE 9.3 AS BEING CONTRARY TO PUBLIC POLICY

123. For the applicants to succeed with their contention that clause 9.3 is contrary to public policy and, therefore, constitutionally invalid they need to show that upon the strength of sections 28(2) and 29(1)(a) of the Constitution, a right to be heard prior to the invocation of the notice clause exists in law. The first question to be asked is: Why, after more than 22 years of the operation of the Constitution has the reliance upon a notice clause to terminate a contract, which termination affects a child, ever been raised as being constitutionally invalid?

124. The obvious answer is that this proposition is so implausible that no other litigant has ever ventured to advance it. Such a contention would turn the law of contract on its head and make nonsense of the *pacta sunt servanda* principle.

125. A termination on notice clause is sound both commercially and having regard to the best interests of children affected thereby. Although Mocumie JA held that the conclusion of the parent contract is distinctly different – "*not one of the normal day to day contracts in the commercial world*"[140] – how the learned Judge of Appeal reached that conclusion is not clear nor is it, with respect, correct.

126. The first to third respondents' submissions that no right to a hearing before invoking the right to terminate on notice exist and that the law cannot be

[140] Vol 11, p 1171-1172, par 92

developed, as the applicants would have it, has been set out above. These arguments too operate against the conclusions that the applicants seek to draw. This point too, it is respectfully submitted, should fail.

CONCLUSION

127. It is respectfully submitted that:

127.1. clause 9.3 of the parent contract is valid and enforceable;

127.2. the school properly and validly terminated the parent contract by invoking its rights in terms of clause 9.3; and

127.3. the termination should stand.

128. In the result, it is respectfully submitted that the applicants have failed to discharge the *onus* upon them to satisfy either of the two prongs of the ***Barkhuizen*** approach.

129. The first to third respondents accordingly seek an order:

129.1. that the applicants' application for leave to appeal is refused with costs;

129.2. *alternatively*, if leave to appeal be granted, that the applicants' appeal is dismissed and the applicants are directed to pay the costs of the appeal, including the costs of two counsel, of the first to third respondents.

ALISTAIR FRANKLIN SC

ANTHONY BISHOP

First to third respondents' counsel

Chambers, Sandton

18 April 2019