**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:

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| **AB** | First Applicant |
| **CB** | Second Applicant |

and

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| **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

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

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**FIRST, SECOND AND THIRD RESPONDENTS' HEADS OF ARGUMENT ON THE ISSUE OF MOOTNESS**

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## INTRODUCTION

1. Consequent upon the honourable Chief Justice's directions of 16 April 2019, Pridwin makes the following submissions in supplementation of those in its main heads of argument.[1]

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[1] First, second and third respondents' main heads of argument: p 6-8, par 10-20

**HAS THE MATTER BEEN RENDERED MOOT?**

2. We submit the matter has indeed been rendered moot by the fact that the applicants' children have now left Pridwin and the applicants no longer seek any relief entitling their children to remain at the school.

3. The applicants' prayers for practical relief (that is, that their children be permitted to remain at Pridwin) have thus been abandoned. Only declaratory relief is sought. This relief is wholly academic, as more fully discussed below.

**THE APPEAL BEING MOOT, IS IT IN THE INTERESTS OF THE JUSTICE TO HEAR IT?**

4. The proper approach to mootness has been laid down by this Court on various occasions[2] and recently summarised by it,[3] as follows:

> [43] This court's jurisprudence regarding mootness is well settled. As a starting point, this court will not adjudicate an appeal if it no longer presents an existing or live controversy. This is because this court will generally refrain from giving advisory opinions on legal questions, no matter how interesting, which are academic and have no immediate practical effect or result. Courts exist to determine concrete legal disputes and their scarce resources should not be frittered away entertaining abstract propositions of law.
> [44] But mootness is not an absolute bar to the justiciability of an issue. The court may entertain an appeal, even if moot, where the interests of justice so

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2 This Court's approach to mootness has been developed through the line of authorities of ***J T Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others*** 1997 (3) SA 514 (CC) at par 17, ***National Coalition for gay and Lesbian Equality and Others v Minister of Home Affairs and Others*** 2000 (2) SA 1 (CC) at fn 18, ***Independent Electoral Commission v Langeberg Municipality*** 2001 (3) SA 925 (CC) at par 11, ***Masethla v President of the Republic of South Africa and Another*** 2008 (1) SA 566 (CC) at fn 9, ***Cape Town City v Aurecon SA (Pty) Ltd*** 2017 (4) SA 223 (CC) at par 54 and ***MEC for Education, KwaZulu-Natal, and Others v Pillay*** 2008 (1) SA 474 (CC) at par 32.

3 ***POPCRU v SACOSWU and Others*** 2019 (1) SA 73 (CC) at par 43-44

> require. In making this determination the court exercises a judicial discretion based upon a number of factors. These include, but are not limited to, considering whether any order may have some practical effect, and if so its nature or importance to the parties or to others.

5. Accordingly, we submit it is for the applicants to show why, despite the absence of any concrete dispute between the parties, it is nevertheless in the interests of justice that the appeal be heard by this Court. We submit they cannot succeed.

6. The first of the factors which this Court has identified as being of potential assistance in answering the question of whether it is in the interest of justice to hear an appeal which is moot,[4] is directed to the nature and extent of the immediate practical effect that any possible order might have. It is non-existent in the context of this matter for the following reasons.

7. Firstly, the children are no longer at Pridwin, which is the reason for the issue of mootness being raised. While the submission is made on the applicants' behalf that they are at risk of being subjected to a clause similar to clause 9.3 of the parent contract at a new school,[5] that is in itself insufficient without a factual substratum. It is pure speculation whether they may face cancellation of the parent contract again. On the facts, a judgment in this appeal will, therefore, be of no immediate practical value to the applicants or their children.

8. Secondly, misconduct similar to that committed by the first applicant is not recorded in any other reported cases dealing with termination of school

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4 ***MEC for Education, KwaZulu-Natal, and Others v Pillay*** (*supra*) at par 32

5 Applicants main heads of argument: p 7, par 22

contracts at independent schools. It must be inferred from this that the first applicant's conduct was so unusual as to be unlikely to be repeated by him or others whose children attend independent schools. Therefore, a judgment from this Court is unlikely to be of any practical assistance to other parents of children at independent schools which employ the ISASA standard form contract.

9. Thirdly, clause 9.3 allows for the termination of the parent contract "*at any time, for any reason*". It would be beyond the scope of a judgment by this Court to meaningfully define the term "*any reason*", such as to render a pronouncement of general application to others attending independent schools. Each matter would have to be decided on its own facts as to whether a school invoking clause 9.3 (or a parent invoking his/her equivalent right in terms of clause 9.2) had "*any reason*" to do so.

10. As regards the next factor identified by the Court (the importance of the issue to the parties or others), a termination by notice clause is common place in a wide variety of contracts which impact upon children directly or indirectly. However, there is a distinct difference between the common-place nature of such a clause constituting a consideration in the determination of this matter on the one hand, and in exercising a discretion to determine the constitutional validity of all similar notice clauses on the facts of this matter on the other. The result might be entirely skewed if decided in a different context.

11. If the issue is more narrowly viewed (with regard to independent schools only, and not with regard to notice clauses generally), then this matter is of such

confined application – because just 4% of all independent schools which use the ISASA standard form contract are in the same position as Pridwin (as entirely self-funded schools) – that it cannot be regarded as being an important issue even to the general body of independent schools. This is more so when it is borne in mind that there is nothing on the papers showing any other instance of the application of this clause or a similar one.

12. As regards the complexity of the issue and the fullness of the argument to be presented to this Court, it is respectfully submitted that there has been a full and considered judgment by both the High Court and the Supreme Court of Appeal. There is nothing inherently wrong in the reasoning of either of these courts. These judgments deal sufficiently with the application of clause 9.3 of an ISASA standard form contract when applied to entirely self-funded independent schools.

13. Whilst the fullness of the arguments as they relate to the specific facts and circumstances of this case are sufficient for this appeal, if there is to be a judgment which impacts, for example, upon the general application of all termination on notice clauses which directly or indirectly impact upon children, then the arguments may not be sufficient and, as afore-submitted, it would be undesirable to give a judgment in those circumstances.

14. In short, a pronouncement on the law as it relates to the application of a clause similar to clause 9.3 of the parent contract to state subsidised independent schools, would be undesirable since different considerations might apply in the application of such a clause to such schools. Those considerations (such as

public interest) have not been canvassed in the papers,[6] since the facts of this matter are different.

15. Likewise, a general judicial pronouncement on the application of termination on notice clauses, which impact upon children directly or indirectly, would be even less desirable, for the same reasons afore-submitted.

16. A third factor which is relevant is that there are no conflicting decisions which require settling by this Court.

17. Finally, the practical effect of the relief sought has been discussed above. There is no immediate practical effect for the applicants or other parents and children at entirely self-funded independent schools, which use the ISASA standard form contract.

**COSTS**

18. The applicants have unreasonably persisted with their insistence that their application for leave to appeal (and if granted, their appeal) proceeds to hearing, instead of acting practically and sensibly by withdrawing their application for leave to appeal as soon as their children were no longer going to return to Pridwin, and putting an end to this lengthy and most acrimonious litigation.

19. The lack of merit in their stance in the matter, as a whole, is patent from the

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6 First, second and third respondents' main heads of argument: p 37-38, par 97-98

tenor of the judgments of the High Court and the Supreme Court of Appeal, neither of which had any hesitation in dismissing their case.

20. The applicants have been legally represented throughout and are doubtlessly alive to the risks of prosecuting litigation in a case where there is no merit.

21. There is no suggestion of impecuniosity on their parts so there is no good reason why costs should not follow the result.

22. We respectfully submit that leave should be refused (or the appeal should fail) for reasons of mootness alone, and that the applicants should be directed to pay the first, second and third respondents' costs, including the costs consequent upon the employment of two counsel.

ALISTAIR FRANKLIN SC
ANTHONY BISHOP
First to third respondents' counsel
Chambers, Sandton
26 April 2019