CONSTITUTIONAL COURT OF SOUTH AFRICA

Case no: **CCT 294/2018**

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

EQUAL EDUCATION:

SUBMISSIONS ON MOOTNESS

INTRODUCTION

1. This case concerns the rights of children in independent schools and the related constitutional obligations of independent schools.

2. Equal Education ("**EE**") submits that based on the importance of this case on children in independent schools there is a compelling public interest for this Court to adjudicate this matter and pronounce itself on the issues finally. Moreover, the Supreme Court of Appeal's judgment stands, unless overturned, as precedent binding on lower courts. It must necessarily be in the interests of justice to correct incorrect legal precedent[1], particularly where it concerns the ambit and application of rights in the Bill of Rights on children.

3. It is well-established that mootness is not a bar to the justiciability of an issue. [2]

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[1] Thus, for example, this Court decided a matter that was moot because the "judgment of the SCA with all its implications for future regulation would remain binding" and the issues under consideration were so crucial to "… the rights contained in the Bill of Rights that it is in the interests of justice to grant leave to appeal." **AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and Another** 2007 (1) SA 343 (CC) at 27. The SCA has previously exercised its discretion to hear an appeal in a matter that had become moot in order to provide "future guidance" in a matter involving important questions of law on which there is little authority. **Midi Television (Pty) Limited t/a e-tv v Director of Public Prosecutions (Western Cape)** 2007 (5) SA 540 (SCA) at para 4.

[2] **Ruta v Minister of Home Affairs** 2019 (2) SA 329 (CC); **Sebola v Standard Bank of South Africa Ltd** 2012 (5) SA 142 (CC) at paras 3 and 32-3; **Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)** [2007] ZACC 24; 2008 (2) SA 472 (CC);2008 (4) BCLR 442 (CC) at para 29 citing para 22 of **Radio Pretoria v Chairperson, Independent Communications Authority of South Africa** [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC), where this Court said:

> "It is by now axiomatic that mootness does not constitute an absolute bar to the justiciability of an issue. The court has a discretion whether or not to hear a matter. The test is one of the interests of justice. A relevant consideration is whether the order that the court may make will have any practical effect either on the parties or on others. In the exercise of its discretion the court may decide to resolve an issue that is moot if to do so will be in the public interest. This will be the case where it will either benefit the larger public or achieve legal certainty."

The only question then is whether this Court should nevertheless, for the benefit of future cases, decide the appeal. This Court has a discretion to do so, as it has repeatedly recognised. That discretion must be exercised according to what the interests of justice require.[3]

THE NATURE AND EXTENT OF THE PRACTICAL EFFECT THAT ANY POSSIBLE ORDER MIGHT HAVE

4. The issues in this matter will have an impact beyond the immediate parties. This appears to be uncontentious. The bone of contention seems to be the extent of the reach of this Court's decision. The First to Third Respondents ("**Pridwin**") contend that a low percentage of pupils - between 4% and 1% of children in independent schools[4] – are in a similar position to the applicants.[5] Even on the narrow and circumscribed basis on which Pridwin contends that this Court's judgment could have application, it is evident that it will have practical effect on others.

5. O' Regan J in **Rail Commuters Action Group** commended to this Court an approach which considered a constitutional provision within the "social, political and economic context".[6] The relevant social context in which this matter must be

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

4 Pridwin heads of argument ("**HoA**") para 18 pp 7 - 8.

5 Pridwin paras 15 and 19 pp 7 - 8.

6 **Rail Commuters Action Group v Transnet Ltd t/a Metrorail** 2005 (2) SA 359 (CC) (Rail Commuters Action Group) at para 85.

decided is that the impugned clause arises from the Fifth Respondents ("ISASA's") pro forma contract.[7] ISASA is a broad association of approximately 760 independent schools (167 000 pupils) that serves "a broad spectrum of socio-economic and cultural communities" in "low-, mid- and high-fee independent schools".[8] Approximately a third of ISASA schools were subsidised low- and mid-fee independent schools.[9]

6. Moreover, the demographic shift in the composition of independent schools shows that the children are mainly black and female; the majority of schools now serve low- and middle-income children.[10] Indeed private education for the poor is a growing trend seen throughout the world.[11]

7. There is no suggestion that clause 9.3 of the Parent Contract only operates in schools like Pridwin. If fact, ISASA emphasises that it *"uses it as a standardized precedent in its other member schools."*[12] Given that this case arises from a clause that is the same as one found in an ISASA *pro forma* contract that can be applied across the spectrum of ISASA member schools and given to parents on a take-it-or-leave-it basis, EE submits that it necessarily follows that the impact of this judgment extends even to parents and children that are in different contractual positions to the applicants. To determine whether or not to adjudicate

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7 Record vol 8 p 776: ISASA intervention application para 10.4.

8 Record vol 7 p 636: Pamphlet of ISASA titled "Why belong to ISASA" Annexure "**RAB3**" to Applicant's relying affidavit High Court ("**Applicant's HC RA**").

9 EE Constitutional Court Founding Affidavit annexure **SM1**.

10 EE Constitutional Court Founding Affidavit paras 19.2 - 19.4; Record vol 7 p 695: The performance of independent schools in South Africa.

11 EE Constitutional Court Founding Affidavit para 20 annexure **SM1**.

12 ISASA heads of argument (heads) para 60 p 40.

this matter, this Court must consider the broader social context within which independent schools operate to ensure that it affords children "the fullest possible protection of their constitutional guarantees".[13]

THE IMPORTANCE AND COMPLEXITY OF THE ISSUE

8. At the centre of this dispute is the right to education, which, this court, has said is fundamental to the human condition:

> "Teaching and learning are as old as human beings have lived. Education is primordial and integral to the human condition. The new arrivals into humankind are taught and learn how to live useful and fulfilled lives. So education's formative goodness to the body, intellect and soul has been beyond question from antiquity. And its collective usefulness to communities has been recognised from prehistoric times to now. The indigenous and ancient African wisdom teaches that "thuto ke lesedi la sechaba"; "imfundo yisibani sesizwe" (education is the light of the nation) and recognises that education is a collective enterprise by observing that it takes a village to bring up a child."[14]

9. This case raises important issues about the ambit and application of constitutional rights on private conduct. It arises within the context of the right to education which is being provided by a private actor but the legal precedent will find applicability in all cases where a private actor performs a function typically provided by the state.

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13 **Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd** 2007 (6) SA 199 (CC) (Goedgelegen) para 53.

14 **Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another** 2016 (4) SA 546 (CC), para 1.

10. The right to education is a complex right because it requires the collective action of a number of actors in order to be secured.[15] As stated by the Supreme Court of India[16] in **Society for Un-aided Private Schools of Rajasthan**:[17]

> "Education is a process which engages many different actors: the one who provides education (the teacher, the owner of an educational institution, the parents), the one who receives education (the child, the pupil) and the one who is legally responsible for the one who receives education (the parents, the legal guardians, society and the State). These actors influence the right to education." [Emphasis added]

11. The right to basic education as formulated in the Constitution envisions private individuals and institutions as potential providers of the right to basic education.[18] The right to basic education envisages both a right-holder and a duty-bearer. The right-holders are "everyone" and, contrary to the finding of the SCA,[19] the duty-bearers are either the state or the natural or juristic persons, depending, as set out in section 8(2), on the nature of the right and the nature of the duty.

12. This Court in **Khumalo v Holomisa**[20] suggests that there are two key considerations in applying section 8(2) of the Constitution – the intensity of the

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15 Currie and De Waal Bill of Rights Handbook (6th ed) p 638.

Section 39(1)(c) of the Constitution provides that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum . . . may consider foreign law". In **H v Fetal Assessment Centre** 2015 (2) SA 193 (CC) this Court recognised that foreign law "may be used as a tool in assisting this Court in coming to decisions on the issues before it."

17 **Society for Unaided Private Schools of Rajasthan v Union of India and Another** (2012) 6 SCC para 5.

18 Currie and De Waal Bill of Rights Handbook (6th ed) p 638.

19 Supreme Court of Appeal Judgment, vol 12, p1152, para 38.

20 2002 (5) SA 401 (CC) at para 33:

> "Given 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, it is clear that the right to freedom of expression is of direct horizontal application in this case as contemplated by section 8(2) of the Constitution."

right and the potential for invasion of that right which could be occasioned by private actors.

13. With regard to the intensity of the right:

13.1. The International Covenant on Economic, Social and Cultural Rights states that "*[e]ducation is both a human right in itself and an indispensable means of realizing other human rights.*"[21]

13.2. So important is the right to education that the Supreme Court of India read it as an integral part of the right to life. It held that the right to life is not limited to the "*protection of limb or faculty*" but *"includes the right to live with dignity and all that goes with it"*. The Court continued to state that *"[t]he right to life …and the dignity of an individual cannot be assured unless it is accompanied by the right to education…".*[22]

14. With regard to the potential for infringement by private actors:

14.1. First: one does not need to look far to see that the potential for infringement of the right to basic education by private actors can be real and substantial.[23] This is simply because private actors are not only duty-

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21 ICESCR Committee General Comment 13 (21st Session, 1999) "The Right to Education (art 13)" UN Doc E/C.12/1999/10 at para 1. See also **Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others** 2011 (8) BCLR 761 (CC) at para 43 where this Court held:

> "The significance of education, in particular basic education for individual and societal development in our democratic dispensation in the light of the legacy of apartheid, cannot be overlooked."

22 **Miss Mohini Jain vs State Of Karnataka And Ors** 1992 SCR (3) 658 p 9 – 10.

23 See generally the Report of the UN Special Rapporteur on the Right of Education, Kishore Singh 'Protecting the Right of Education against Commercialization' Human Rights Council (10 June 2015) UN Doc A/HRC/29/30.

bearers of this right but can directly or indirectly influence the provision of the right to basic education for children.

14.2. Second: the potential for infringement by a private actor in this case is made more acute by the fact that ISASA uses this as a "standardised precedent" in its member schools of approximately 750 independent schools.

14.3. Third: There are increasingly a number of cases concerning private education institutions. The potential for infringement exists not only with termination of a contract (as was seen in this case) or exclusions (as was seen in **Mhlongo v John Wesley School**).[24]

14.4. The potential for infringement exists with other aspects of education such as (*inter alia*) curricula, child protection measures and admissions. For example, in **Mlawuli v St Francis' College** an independent school controlled admissions by concluding a contract each academic year. The school used the contractual relationship to refuse re-admission to a child because the child was *"surly, disrespectful and disruptive."* This was despite the fact that the school accepted that *"the child never failed any subjects and did not commit any act which would warrant expulsion"*. The school said that the child had said that he did not want to be at the school and *"the school authorities felt that the boy was a negative influence on*

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[24] In **Mhlongo v John Wesley School** 2019 (2) SA 557 (KZD) an independent school (and ISASA member) kept a child in the art room while his classmates were writing exams due to outstanding fees. The conduct of the school was said to have negatively affected the child's psychological well-being and destroyed his self-esteem (para 16). The school stated that it was acting on an ISASA policy document (para 13).

the other learners and that they did not want him to return after the 2015 year."[25]

15. The difficulty with the SCA's interpretation of the right to basic education in section 29(1)(a) is that it insulates non-subsidised independent schools from the application of section 8(2) by finding that they have no positive or negative obligations. This is despite the intensity of the right to basic education and its potential for infringement by private actors.

16. EE submits that it is critical for this Court to reinforce that the right to basic education is expansive in both the nature of the right-holder and how it is to be achieved. Firstly, with regards to the right-bearer, it provides that all people (both children and adults) have a right to basic education. It does not serve to exclude from the parameters of that right, those who are educated in independent schools (whether subsidised or not). The right has both a positive and negative dimension.[26] To what extent the positive or negative dimension is applicable will be determined "in an incremental and context-driven manner."[27]

17. Similarly, section 29(3) envisages both right-holders and duty-bearers. Like section 29(1)(a) all persons are right-holders; the right held by right-holders is a defensive right. Speaking of its predecessor, the Constitutional Court stated that it "guarantees a freedom . . . to establish educational institutions. . . . A person

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25 **Mlawuli v St Francis' College** [2016] ZAKZDHC 17 para 3.

26 **Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of the Gauteng School Education Bill of 1995** 1996 (3) SA 165 (CC) (Gauteng Bill) para 9.

27 **Rail Commuters Action Group** at para 85.

can invoke the protection of the Court where that freedom is threatened".[28]

18. The rights set out in section 29 are not mutually exclusive; to the contrary, within the private education sphere, they are cooperative. Section 29(1)(a) speaks to the right of pupils (in this case CB and DB) to be educated and section 29(3) speaks to the freedom imparted on Pridwin to provide that education. In providing that education, Pridwin is to fulfil its negative obligation in terms of section 29(1)(a); the state on the other hand, is to fulfil its negative obligation by not interfering with Pridwin's right to provide such independent education. It is apparent therefore, that both section 29(1)(a) and 29(3) are applicable to this case.

19. A Namibian court found that the expulsion of a learner on the basis of a contractual relationship required the observance of the principle of *audi alteram partem*.[29] In our view, the constitutional framework embeds in both the negative and positive dimensions of the rights in section 29(1)(a) and section 29(3) a right to hearing, in favour of the child, prior to the exercise, by an independent school, of the contractual power to exclude a child from the same.

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28 **Gauteng Bill** para 9.

29 **Guios and Others v School Principal, Cornelius Goreseb High School, Khorixas, and Others** 1990 (3) SA 536 (SWA), 538G/H.

CONCLUSION

20. In determining this matter, this Court will have the benefit of the judgments of the SCA and the High Court. It will also have the benefit of the full submissions that have been made by the parties and as well as the submissions of the *amici* that have been admitted to the matter. EE remains at the court's disposal and, should the need arise or a direction be made to that effect, will submit comprehensive written and oral submissions on the contents hereof.

21. This matter is ripe for hearing, it is important to the rights of children in independent schools and merits this Court's attention. In the circumstances, it is in the interests of justice for this matter to be heard.

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26 April 2019