

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:
WRITTEN SUBMISSIONS**

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INTRODUCTION

1. At the centre of this case is the right to education, which this Court has said is fundamental to the human condition.¹ Education is an enabler and a multiplier of rights. The inclusive vision for the right to basic education has been embraced by this Court² and recently echoed in the Abidjan principles as follows:

“The right to education is based on the premise that a ‘well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence’, while recognising that education is also an enabler and multiplier right serving as “the primary vehicle by which socially and economically marginalised adults and children can lift themselves out of poverty”.³

2. This case affects the rights of children in independent schools and the related constitutional obligations of independent schools. The issues raised in this case are of critical importance because they do not only

¹ **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 53.

² **Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others** 2011 (8) BCLR 761 (CC) para 41 – 44.

³ **The Abidjan Principles – Guiding principles on the human rights obligations of States to provide public education and to regulate private involvement in education, 13 February 2019**, p 3. <https://www.abidjanprinciples.org/en/background/overview> The Abidjan Principles were developed using international human rights legal standards and jurisprudence, with inputs from stakeholders from various backgrounds — human rights lawyers, education specialists and practitioners, and affected communities — and geographic regions. Specific efforts were made to reach out to communities and rights-holders affected by education policies, and in particular by the growth of private actors in education.

affect the applicants but potentially 167 000 pupils in approximately 760 independent schools serving a wide socio-economic spectrum of the population.

3. In these written submissions, Equal Education (“EE”) addresses the following principle issues:

3.1. The full social context of independent schooling;

3.2. What is meant by the term ‘basic education’;

3.3. What is the relationship between section 29(1) and section 29(3) of the Constitution; and

3.4. Is the failure to provide a hearing an inferior standard as envisaged by section 29(3)(c) of the Constitution.

4. EE has drawn some of its arguments from international law which the Court must consider and foreign law which the Court may consider when interpreting a right in the Bill of Rights.⁴ This Court has also “*made it plain that it is entitled to consider both binding and non-binding instruments of international law.*”⁵ Of course, the weight

⁴ Section 39(1)(b) and (c) of the Constitution.

⁵ **Glenister v President of the Republic of South Africa and Others** (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) at para 178 fn 28. See also **S v Makwanyane** 1995 (3) SA 391 (CC) at para 35. The inserted text is from **Government of the Republic of South Africa v**

accorded to international law may vary, with more weight being given to international law that is binding on South Africa.⁶ But even non-binding sources, including reports by international bodies, are important sources of international law, and therefore important aids in interpreting the Constitution.

THE BROADER CONTEXT OF INDEPENDENT SCHOOLS – MAJORITY LOW TO MIDDLE CLASS, BLACK AND FEMALE

5. Globally there has been the rapid growth of private actors in education particularly for the poor.⁷ The changing face of the independent schools' sector in South Africa mirrors this trend.⁸
6. Independent schools are no longer the preserve of the rich. In fact,

Grootboom 2001 (1) SA 46 (CC) (“Grootboom”) para 26, which endorsed the comments in Makwanyane and tailored the paragraph to the final Constitution.

“public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].

With regards to 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.

⁶ **Grootboom** supra para 26.

⁷ Record, vol 7, EE founding affidavit in the High Court, p663, paras 10 and 11 and Annexure **TM3**, p717, para 1.

⁸ Record, vol 7, EE founding affidavit in the High Court, p664, para 15.

schools like Pridwin are increasingly becoming the exception rather than the norm with the rise of low-fee and mid-fee independent schools.⁹

6.1. The South African independent school sector is said to have grown rapidly from a low base in the last 15 years. According to official statistics, independent school's enrolment grew by 75.9% between 2000 and 2010 compared to only 1.4% in government schools.¹⁰

6.2. There has been a major demographic shift in the composition of the independent school sector, from being mainly white and serving the rich to being mainly black and the majority of schools now serving low- and middle-income learners.¹¹

6.3. Some characteristics of low-fee independent schools include smaller classes than public schools, but also fewer facilities. They were located in a wide range of buildings, from abandoned factories and shacks to shopping centres.¹² McCay and Hofmeyr give examples of these schools such as

⁹ Record, vol 7, EE founding affidavit, p663 para 11.

¹⁰ Record, vol 7, Annexure **TM3**, p 694: The performance of independent schools in South Africa.

¹¹ Record, vol 7, Annexure **TM3**, p 695: The performance of independent schools in South Africa.

¹² Record, vol 7, Annexure **TM3**, p 695: The performance of independent schools in South Africa.

*“Masibambane in Orange Farm, or in office blocks, like Sekolo sa Borokgo, a bridging high school in Randburg, and in abandoned factories as in the case of the Get Ahead schools in Queenstown.”*¹³

- 6.4. The drive towards independent schools is fuelled by various factors. Among them is: the reality that independent schools are the closest to the area in which the learners reside or the parent’s place of work; and the inequities within the public education system.¹⁴ See for example the High Court judgment in **Fourie v Centuria 266 (Pty) Ltd and Others**¹⁵ where the High Court accepted that Spark School Silverlake provided educational facilities to previously disadvantaged children and that the closure of the school would deprive the children of the right to education.
7. The broader context of the independent school sector is relevant to this application for the following reasons:
- 7.1. The *pro forma* Parent contracts containing similar provisions as

¹³ EE founding affidavit Constitutional Court, Annexure **YVL1**.

¹⁴ Record, vol 7, p664, para 13: EE founding affidavit High Court.

¹⁵ [2017] ZAGPPHC 4, para 12.1.

the Pridwin Parent contracts are provided by fifth respondent “ISASA” as standardised precedents used in a number of its member schools. ISASA has stated that the “potential for far-reaching consequences arise from the fact that contracts similar to the Parent Contracts are used in a number of ISASA member schools.”¹⁶

7.2. ISASA states that it serves:

“over 760 schools representing a broad spectrum of socio-economic and cultural communities, religious affiliations, philosophies and education levels, from pre-school to post-matric. Our low-, mid- and high-fee schools educate more than 167 000 pupils.”¹⁷
(Emphasis added.)

7.3. The social, economic and political context is relevant to inform the scope and content of the right to education. For example, in **Rail Commuters Action Group**, this Court had regard to the “social, political and economic context within which the power is to be exercised and a consideration of the relevant provisions of the Constitution.”¹⁸ In **Ramakatsa**, this Court noted that—

“The scope and content of the rights entrenched by this section may be ascertained by means of an

¹⁶ Record, vol 8, p 776, para 6: ISASA application to intervene.

¹⁷ 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**”).

¹⁸ **Rail Commuters Action Group v Transnet Ltd t/a Metrorail** 2005 (2) SA 359 (CC) at 85.

interpretation process which must be informed by context that is both historical and constitutional.”¹⁹

- 7.4. Finally the social, economic and political context of the right to education as provided by independent schools is important to understand in determining the potential for infringement by private actors.²⁰ EE submits that to determine the ‘**potential**’ invasion of the right to education that may be occasioned by persons other than the State, the Court must understand the full social context within which private actors – beyond the narrow facts of the matter – to determine whether section 8(2) of the Constitution should apply.
- 7.5. As stated by the Supreme Court of India The right to education is a complex right because it requires the collective action of a number of actors in order to be secured.²¹ In ***Society for Unaided Private Schools of Rajasthan***.²²

“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

¹⁹ **Ramakatsa and Others v Magashule and Others** 2013 (2) BCLR 202 (CC) at 64.

²⁰ **Khumalo v Holomisa** 2002 (5) SA 401 (CC) at para 33.

²¹ Currie and De Waal *Bill of Rights Handbook* (6th ed) p 638.

²² **Society for Unaided Private Schools of Rajasthan v Union of India and Another** (2012) 6 SCC para 5.

education (the parents, the legal guardians, society and the State). These actors influence the right to education." [Emphasis added]

8. EE submits that it is important to understand the proper context within which private actors influence the right to education.
9. Having discussed the broader context within which the right to education operates, we now turn to discuss the meaning of the term "basic education".

THE MEANING OF THE TERM "BASIC EDUCATION"

10. The Supreme Court of Appeal ("SCA") found that Pridwin was not providing a basic education as envisaged by section 29(1)(a), it concluded that this is an obligation imposed on the State and that a non-subsidised independent school has no positive or negative obligations.²³

The development of the term "basic education" in international human rights law

11. The Universal Declaration of Human Rights ("the Universal

²³ Record, vol 12, p1152: Supreme court of Appeal Judgment, paras 38 - 40.

Declaration”) was a milestone document adopted on 10 December 1948. It placed education on the agenda for various countries with different legal and cultural backgrounds. It provided in Article 26, for compulsory “elementary education”.²⁴

12. The Universal Declaration was followed, more than 40 years later, by the World Declaration on Education for All (“the World Declaration”)²⁵. It is in the World Declaration that there was a shift away from the use of the term ‘primary’ or ‘elementary’ education and use the term, ‘basic education’ instead. Article 1 of the World Declaration states:

“Every person - child, youth and adult - shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning. The scope of basic learning needs and how they should be met varies with individual countries and cultures, and inevitably, changes with the passage of time.

²⁴ Article 26(1) of the Universal Declaration states:

“Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.”

²⁵ United Nations Educational, Scientific and Cultural Organizations, World Declaration on Education for All.

Basic education is more than an end in itself. It is the foundation for lifelong learning and human development on which countries may build, systematically, further levels and types of education and training.” (Emphasis added.)

13. The World Declaration moved towards a dispensation where everyone must benefit from educational opportunities that would meet their basic learning needs. This includes, but is not limited to, skills, knowledge and attitudes and thus do not only refer to a specific curriculum and its outcomes.
14. In 1999, in its preliminary report on the right to basic education, the Special Rapporteur on the Right to education noted that:

“[t]he language of international educational strategies shifted from primary to basic education, different from the continued use of primary education in human rights. The term basic education was introduced by the 1990 Jomtien Conference and influenced the subsequent international and domestic strategies and statistical categories. UNICEF has affirmed that primary education is the core of basic education, but basic education goes beyond the confines of formal schooling to encompass non-formal education as well as early childhood education, including also “second chance” primary education for youth, adults and parents’ education. Definitions of primary and basic education thus overlap but are not synonymous.”²⁶

15. In 2007, the United Nations Educational Scientific and Cultural Organisation (“**UNESCO**”) held an Experts Consultation on the

²⁶ Preliminary report of the Special Rapporteur on the right to education, E/CN.4/1999/49, 13 January 1999, at para 15.

“operational definition of ‘basic education’”.²⁷ The paper sought to identify some characteristics of “basic education” while acknowledging that the approach should generally be flexible and should be applied in a way that embraces local specificities of each country. Three characteristics that EE wishes to highlight from the experts’ consultation, are:

“...Basic education is directed to the full development of the human personality. It develops the capability for comprehension and critical thinking, and it inculcates the respect for human rights and values, notably, human dignity, solidarity, tolerance, democratic citizenship and a sense of justice and equity.

The State guarantees the right to basic education of good quality based on minimum standards, applicable to all forms of education, and provided by qualified teachers, as well as effective management along with a system of implementation and assessment.

. . . In those States where basic education is also provided by private schools, the State ensures that such schools respect the objectives and content as mentioned in the present definition.”²⁸

16. It appears from the above that:

16.1. Basic education is directed at the full development of the human personality;

²⁷ United Nations Educational Scientific and Cultural Organisation, m Experts’ Consultation on the Operational Definition of Basic Education ED/BAS/RVE/2009/PI/1, 18 December 2007.

²⁸ Ibid, p2.

- 16.2. The State guarantees basic education;
- 16.3. Basic education may be provided by private schools;
- 16.4. Where basic education is also provided by private schools, the State has an obligation to ensure that those schools respect the standards set in international human rights law instruments.
17. Critically for this case, in respect of the last requirement pertaining private schools, the experts provided the following explanatory note:

“The main objective of this paragraph is to bring the basic education provided by private schools into line with that provided by State schools....However, whereas for State schools it is absolutely clear that the State is responsible, for private schools it is stated emphatically that the State must ensure that they respect fully the content and objectives mentioned in the present definition. In other words, since responsibility still lies with the State, it has the task of monitoring the activity of private schools with regard to basic education.

The definition is limited to general principles on the understanding that each State must organize a system of prior authorization, successive monitoring, verification, and so on, in order to ensure that private schools respect the content and objectives set out in the definition, thus enabling the State, in turn, to respect its international commitments in that regard.

The phrase “**private schools**” is used here only in contrast to “State schools”, which means that any type of school not run entirely by the State, for example in a mixed, semi-public or private manner, is covered by the phrase “private schools”.²⁹

²⁹ Ibid, paras 48 to 50.

18. EE notes the following from the Experts' consultation on the definition of basic education:

18.1. First: The Experts made no distinction between subsidised and non-subsidised private schools or those with some contractual relationship with the state. The Experts simply defined a private school as a school that is not run entirely by the State.

18.2. Second: Rather than exclude private schools from the definition of "basic education" the experts expressly sought to bring basic education provided by private schools in line with that provided by the State.

18.3. Third: the changing definition of basic education, which now also encompasses private schools, does not absolve the State as being primarily responsible for basic education. The definition simply acknowledges that private schools (irrespective of how they are constituted) can be providers of basic education.

19. EE submits that the definition of "basic education" has been a flexible and changing concept intended to meet the requirements of society from time to time. While initially international law instruments recognised "elementary or primary" education this has evolved to

“basic education”. More recently, as a response to the increasing role of private actors in the provision of education, international law instruments now envisage a role for private actors in the provision of basic education.

20. EE also brings to this Court’s attention the recently developed Abidjan principles. These principles were “developed using international human rights legal standards and jurisprudence. . . . They emerged out of a need to respond to the rapid growth of various forms of private involvement in education in the last 20 years which, if left unchecked, could gravely impair the progress made in the realisation of the right to education.” Again, rather than excluding private actors, international norms and standards include private involvement in the provision of right to education. Some of these principles will be discussed further below.

The use of the term “basic education” in South Africa

21. The term “basic education” was first introduced through section 32 of the interim Constitution.³⁰ In 1995, the Ministry of Education released

³⁰ “Every person shall have the right -

(a) to basic education and to equal access to educational institutions

(b) to instruction in the language of his or her choice where this is reasonably practicable

the White Paper on Education and Training which sought to grapple with the term “basic education” (the “**White paper**”).³¹ From EE’s research, this seems to be the only policy document from the (now) Department of Basic Education that has directly engaged the term “basic education”. The White Paper notes the following:

“The right to basic education accorded in section 32(a) applies to all persons, that is to all children, youth and adults. Basic education is thus a legal entitlement to which every person has a claim”.³²

22. The White Paper goes on to cite the definition of basic education set out in the World Declaration (above) and endorses this definition.³³ It states that:

“Basic education must be defined in terms of learning needs appropriate to the age and experience of the learner, whether child, youth or adult, men or women, workers, work seekers or self-employed. Basic education programmes should therefore be flexible, developmental, and targeted at the specific requirements of particular learning audiences or groups, and should provide access to a nationally recognised qualification or qualifications.”³⁴ (Emphasis added.)

(c) to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race.”

³¹ Department of Education, White Paper on Education and Training (“White paper”).

³² White paper, p40, para 11.

³³ White paper, para 14.

³⁴ White paper, para 14.

23. Relying on the White Paper Churr explain the term basic education as follows:

“Basic education is a flexible concept which must be defined so as to meet the 'learning needs appropriate to the age and experience of the learner, whether child, youth or adult ...', and should also provide access to nationally recognised qualifications.”³⁵

24. EE submits that this understanding of the term basic education is the correct one and the one that will guarantee the fullest protection of the right. The term “basic education” should be understood as follows:

24.1. First: It is a flexible concept – it must necessarily be flexible to meet the changing requirements of society from time to time;

24.2. Second: it pertains to the “learning needs appropriate to the age and experience of the learner, whether child, youth or adult”;

24.3. Third: it should also provide access to nationally recognised qualification(s).

25. The term “basic education” refers primarily to the content of the right to education. At its broadest and most general sense, it pertains to the legal entitlement to having one’s basic learning needs met. Whether

³⁵ C Churr, 'Realisation of a child's right to a basic education in the South African school system: Some lessons from Germany' (2015) 18 *PER* 7.

those basic learning needs are met by the State or an independent school is a separate and distinct issue.

26. Accordingly, and with respect to the SCA's finding that Pridwin was not providing a basic education as envisaged by section 29(1)(a) and had no obligations in respect thereof conflates the content of the right to basic education with the obligation to provide for that right. The meaning of basic education and the nature of rights set out in both the section 29(1) and section 29(3) is what EE turns to next.

THE PROPER INTERPRETATION OF SECTION 29(1) AND 29(3)

27. Section 29(1) provides that "[e]veryone has the right to basic education". Section 29(1)(a) is an overarching right to basic education that rests with all people living in South Africa: the right applies without exception and applies to children and adults. Within this provision, as in other provisions in the Bill of Rights, are a number of components of rights, obligations (both positive and negative), right-holders and duty bearers.

- 27.1. First, the right applies to everyone, therefore all persons have the right to basic education.

- 27.2. Second, the right imposes a number of obligations; both positive and negative.³⁶
- 27.3. Third, there is the positive obligation on the State to provide basic education. As was stated in *Juma Masjid* this right is not progressively realised;³⁷ therefore the State's obligation to provide basic education is immediately due.
- 27.4. Fourth, there is also a negative obligation on the State to refrain from doing anything that may impair the enjoyment of the right to basic education.
- 27.5. Fifth, there is the obligation on private persons whether juristic or natural, to refrain from impairing the enjoyment of the right to basic education. Where, as in this case, people enjoy the right to basic education, that enjoyment may not be impaired by a private entity such as independent schools without due process.
28. 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

³⁶ **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.

³⁷ **Governing Body of the Juma Masjid Primary School & others v Essay NO & others (Centre for Child Law & another as Amici Curiae)** 2011 (8) BCLR 761 (CC), para 37.

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). To what extent the positive or negative dimension is applicable to a private actor should be determined “in an incremental and context-driven manner”³⁸ consistent with section 8(2) of the Constitution.

29. Section 29(1)(a) is an overarching right to basic education that rests with all individuals living in South Africa. The right applies without exception and applies to all learners irrespective of whether that education is provided by the State, or subsidised or non-subsidised independent schools.
30. In the same way as section 29(1) does, section 29(3) contains both rights and obligations and imposes both entitlements on right-holders and obligations on duty-bearers. For the court’s convenience it is quoted below:

“Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—

³⁸ Rail Commuters Action Group at para 85.

- (a) do not discriminate on the basis of race;
- (b) are registered with the state; and
- (c) maintain standards that are not inferior to standards at comparable public educational institutions.”

31. From the quotation above a number of things are apparent.

31.1. Firstly, all persons (seeking to establish or maintain independent educational institutions) are right-holders; the right held by right-holders is a defensive and permissive right. Speaking of its predecessor, the Constitutional Court stated that it “guarantees a freedom . . . to establish educational institutions. . . . A person can invoke the protection of the Court where that freedom is threatened”.³⁹ In this form the right is defensive. It is also permissive in the sense that it permits all persons to establish and maintain independent education institutions. That which the independent educational institutions may provide is basic education as enunciated in section 29(1);

31.2. Secondly, the State has a negative obligation to not interfere with the enjoyment of the right to establish an independent educational institution where that institution meets the grounds set out in subsections (a) to (c) of section 29(3);

³⁹

Gauteng Bill para 9.

- 31.3. Thirdly, in order to enjoy the right to establish and maintain an independent educational institution to provide basic education, the latter must, comply with the qualifiers within section 29(3) i.e. no discrimination based on race, registration with the State and the maintenance of standards not inferior to those provided in comparable public institutions.
- 31.4. It is apposite at this moment to state that the right in section 29(3) relates not only to establishment but to maintenance as well i.e. for as long as the independent educational institution continues to comply with the qualifiers in section 29(3) it may continue to exist, when it ceases to, it falls outside of the scope of maintenance in section 29(3) and no longer enjoys the protections set out therein.
- 31.5. Fourthly, those persons that enjoy basic education provided by independent educational institutions are entitled to standards not inferior to those of comparable public institutions.
32. The Constitution in section 8(2) makes expressly clear that the rights contained in the Bill of Rights can, depending on the nature of the right and the duties imposed by it, be applied “horizontally” to bind private parties. Therefore section 29(1)(a) read with section 8(2) applies to

independent schools.

33. 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 children to be educated and section 29(3) speaks to the freedom imparted on independent schools to provide that education. In providing that education, independent schools are to fulfil their negative obligation in terms of section 29(1)(a) and not obviate children's rights to basic education. They must also fulfil a positive obligation in maintaining standards not inferior to comparable public schools.

34. It is to the latter point that we now turn.

THE RIGHT OF CHILDREN TO A HEARING

35. EE agrees with the submission of the first *amicus curiae* ("CCL") that a child's right to a hearing flows from section 29(1)(a) read with section 28 of the Constitution. EE will therefore not repeat those submissions. In what follows, EE identifies an additional basis on which the right to a hearing may be sourced in the Constitution.

INFERIOR STANDARDS IN TERMS OF SECTION 29(3)(c)

Constitutional and statutory right to establish independent schools

36. Independent school's establishment is guaranteed by section 29(3) of the Constitution which reads as follows:

- “(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—
- (a) do not discriminate on the basis of race;
 - (b) are registered with the state; and
 - (c) maintain standards that are not inferior to standards at comparable public educational institutions.”

37. This provision is buttressed by the South African Schools Act⁴⁰ (“Schools Act”) which at section 45 permits the establishment and maintenance of independent schools and at section 46(1) provides that all independent schools must be registered. Pursuant thereto, section 46(3) of the Schools Act sets out the prerequisites for registration:

- “(3) A Head of Department must register an independent school if he or she is satisfied that—
- (a) the standards to be maintained by such school will not be inferior to the standards in comparable public schools;
 - (b) the admission policy of the school does not discriminate on the grounds of race; and
 - (c) the school complies with the grounds for registration contemplated in subsection (2).” (Emphasis added.)

⁴⁰ Act 84 of 1996 (“Schools Act”).

38. A number of things are drawn from section 29(3) of the Constitution read with sections 45 and 46 of the Schools Act.

38.1. First, as is the case in international and regional law⁴¹, the South African Constitutional and legislative system permits both the establishment and the maintenance of independent schools.

38.2. Second, the freedom to establish and maintain an independent school is subject to three obligations on that independent educational institution:

⁴¹ Article 13 of International Covenant on Economic, Social and Cultural Rights (“ICESCR”), ratified by South Africa in 2015, reads as follows:

- “3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.
4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article [which guarantees the child’s right to education] and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.”

Article 29(2) of the Convention on the Rights of the Child (“CRC”), ratified by South Africa in 1995, contains a similar provision. It is clear from the foregoing that both the ICESCR and CRC recognise the rights of individuals to establish independent schools.

Article 11(4) of the African Charter on the Rights and Welfare of the Child (“ACRWC”), ratified by South Africa in 2000, like section 29(3) of the Constitution creates a benchmark of standards and reads as follows:

“States Parties to the present Charter shall respect the rights and duties of parents, and where applicable, of legal guardians to choose for their children’s schools, other than those established by public authorities, which conform to such minimum standards may be approved by the State, to ensure the religious and moral education of the child in a manner with the evolving capacities of the child”

- 38.2.1. Not to discriminate on the basis of race;
- 38.2.2. To be registered with the State;
- 38.2.3. To maintain standards that will not be inferior to the standards in comparable public schools.

38.3. Third, Independent schools have an obligation to maintain standards the same as or superior to those of public schools.

38.4. Fourth, corollary to the independent schools' obligation to maintain standards that are not inferior to those in public schools is the learners' right not to be subjected to standards that are not inferior to those of public schools.

39. Given the import of the obligation to maintain standards not inferior to those at comparable public schools it is necessary to determine what subjects falls within the meaning of the term "standards" and what constitutes "inferior standards". We now turn to that discussion.

The meaning of the term 'standards'

40. In 1999, the Committee of Economic, Social and Cultural Rights

(“ESCR Committee”)⁴² published General Comment 11. The ESCR Committee said that States have an obligation to establish minimum educational standards for independent schools.⁴³ It also stated the following concerning independent schools’ right of establishment:

“The second element of article 13(3) is the liberty of parents and guardians to choose other than public schools for their children, provided the schools conform to “such minimum educational standards as may be laid down or approved by the State”. This has to be read with the complementary provision, article 13 (4), which affirms “the liberty of individuals and bodies to establish and direct educational institutions”, provided the institutions conform to the educational objectives set out in article 13 (1) and certain minimum standards. These minimum standards may relate to issues such as admission, curricula and the recognition of certificates. In their turn, these standards must be consistent with the educational objectives set out in article 13 (1).”⁴⁴ (Emphasis added.)

41. Therefore, while the ICESCR speaks only of minimum educational standards, the ESCR Committee interprets the standards that ought to be met as more than just pedagogical standards. For the ESCR Committee the standards that independent schools ought to meet to enjoy establishment include admissions.

⁴² Established in terms of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”)

⁴³ Ibid, at para 54.

⁴⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 13: The right to education, E/C.12/1999/10 (“Comment No. 13”), at para 29.

42. The reasoning of the ESCR Committee that ‘standards’ may include issues like admissions standards⁴⁵ is echoed in the decision of the Supreme Court of India, ***Unni Krishnan v State of Andhra Pradesh***, where the following was held:

“No private education institution can survive or subsist without recognition and/or affiliation. The bodies which grant recognition and/or affiliation are the authorities of the State. In such a situation, it is obligatory in the interest of general public upon the authority granting recognition or affiliation to insist upon such conditions as are approve to ensure not only education of requisite standard but also fairness and equal treatment in the matter of admission of students.”⁴⁶ (Emphasis Added.)

43. Similarly, in the European Court of Human Rights Case — **Castello-Roberts v the United Kingdom** — the court found that a disciplinary code falls within the right to education.⁴⁷

44. Finally, in ***John Wesley***, the high court accepted that standards related not only to education but to governance as well holding:

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

⁴⁵ General Comment No. 13, para 29.

⁴⁶ **Unni Krishnan JP and Ors Etc v State of Andhra Pradesh and Ors** 1993 SCR (1) 594.

⁴⁷ **Castello-Roberts v the United Kingdom** App no 13134/87 (ECHR, 25 March 1993), para 27.

[Schools] Act.”⁴⁸

45. If standards include the subject of governance, as in the *John Wesley* decision or admissions as in the *Unni Krishnan* decision they must, by parity of reasoning, also include the expulsion (effective expulsion) or removal of a child as in this case. This is because, both admission and expulsion concern themselves with the same question: whether the child can be educated at the independent school.
46. Moreover, EE notes that the recently developed Abidjan Principles include a very expansive list of issues that States must address when dealing with minimum standards.⁴⁹ This expansive list includes the governance of private educational institutions which includes requirement for the full and effective participation of children and learners amongst other stakeholders; protection of the rights of learners to freedom of association and speech⁵⁰, suspension and expulsion of learners requiring “due process and that any such suspension or expulsion be reasonable and proportionate.”⁵¹
47. These principles are indicative of the broad scope of issues that can

⁴⁸ **NM v John Wesley School and Another** 2019 (2) SA 557 (KZD) (John Wesley) para 52.

⁴⁹ Abidjan Principle 55(a)(iii).

⁵⁰ Abidjan Principle 55(c).

⁵¹ Abidjan Principle 55(g).

form part of “standards”.

The reference to ‘standards’ in the Constitution go beyond educational standards

48. The SCA took the view that the standards to which section 29(3) relate are only educational standards; it held that:

“Section 29(3) expressly recognises the right to establish and maintain independent schools, which is what Pridwin is. And though it provides a standard of education not inferior to a public school it is not providing a basic education as envisaged [section] 29(1)(a)” (Footnote omitted; emphasis added.)

49. From a textual reading of the Constitution, reference to standards is not limited in its scope to educational standards.

50. While the term “standards” is not defined in the Schools Act, the term “norms and standards” appears repeatedly. When reference is made to the latter, it is in respect of basic infrastructure, school funding, subsidies, and compliance.⁵² Significantly, the legislature is explicit when seeking to refer more narrowly to the standard of education. This is demonstrated in the context of home schooling

⁵² Sections 5A, 19(3) and 35, 48, and 58C of the Schools Act.

(section 51(2)(b)(ii) of the Schools Act) which explicitly references educational standards and reads as follows:

“The Head of Department must register a learner as contemplated in subsection (1) if he or she is satisfied that . . . the education likely to be received by the learner at home . . . will be of a standard not inferior to the standard of education provided at public schools”.

51. Thus, contrary to the reasoning of the SCA,⁵³ it is by no means apparent that the “standards” as appears in section 29(3)(c) of the Constitution relates only to educational standards.

52. EE submits that the term “standards” as used in the Constitution must be interpreted broadly in line with international human rights law norms. It may encompass standards set in legislation and regulation. While the State may regulate independent schools and set appropriate standards, there is also a constitutional obligation on independent schools not to maintain standards that are inferior. Whether or not a standard is inferior may be determined by reference to legislation or regulations applicable to comparable public schools.

53. EE respectfully submits firstly that it is necessary for this Honourable

⁵³ Record, vol 12, p 1152: Supreme Court of Appeal Judgment, para 39.

Court to correct the SCA's narrow interpretation of the term "standards" in section 29(3) of the Constitution. EE submits, secondly, that affording a child the opportunity to be heard prior to being removed from a school is a standard established in public schools, and is a standard which children in independent schools are accordingly equally entitled.

Whether the removal of the applicants' children without a hearing constitutes an inferior standard

54. In this case, a decision was made which had the effect of removing children from their school. In public schools, children can only be removed from a school under limited circumstances (in the context of a suspension or expulsion) and in accordance with strict requirements designed to protect the rights and interests of the child. There is no provision in public schools for learners to be excluded or removed from a school on the basis of their parent's conduct.

55. The removal of the applicant's children in the case has been referred to as an "effective expulsion". EE notes the objection to the suggestion that the children in this case were "expelled" or "effectively expelled" as the latter concept is only relevant to the termination of a child's right

to attend the school in consequence to their misconduct or bad behaviour.⁵⁴

56. EE however notes that in **Welkom**, this Court was faced with a school governing body policy that excluded pregnant learners from attending school in the year that they were to give birth and permitted them to be readmitted in the following year. As in this case, the learner in Welkom was not prohibited from attending school as a result of misconduct or bad behaviour. The minority found however that the prohibition constituted an expulsion and said—

“[b]earing in mind that the policy is to the effect that a learner who has been given “leave of absence” is not to return to school in the year in which she gives birth, it seems to me that it can be said that the learner is expelled from school for the academic year in which she is excluded from school but is re-admitted once the period of exclusion has expired.”⁵⁵ (Emphasis added.)

57. EE submits that central to the question then is what effect the decision to terminate a contract has on the child. If the effect of the decision of the independent school is to remove the child and or preclude them from attending or returning to a school that they attended that decision

⁵⁴ Record, vol 2, p196, paras 162 and 163.

⁵⁵ **Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another** 2014 (2) SA 228 (CC), at para 226.

may constitute an expulsion or an effective expulsion.

58. Nevertheless, regardless of whether it is termed an “expulsion”, “effective expulsion”, or “removal”, the important point is that the child is being excluded from the school. The question of whether the process for removal constitutes an inferior standard then requires a consideration of the processes required in public schools when a learner is removed from a school.
59. The Schools Act sets out the process under which a learner may be removed from a school in the context of expulsion. In brief, section 9(1C)(b) of the Schools Act provides that a hearing must precede the expulsion of a learner from a public school. The Schools Act provides guidance on how the hearings should take place, it provides for notice to be given of the proposed action to be taken and for due process to be followed and for the child to be heard and to get an opportunity to tell their side of the story.⁵⁶

⁵⁶ For example: Parents of the learner must be given notice in writing of the proposed action (Item 13.2 of the Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners, 15 May 1998, Government Gazette 18900, GenN 776 of 1998 (“Code of Conduct Guidelines”).

- (a) due process safeguarding the interests of the learner and any other party involved in disciplinary proceedings (Section 8(5)(a) of the Schools Act)
- (b) hearing must not be intimidating to the learner (Item 13.2 of the Code of Conduct Guidelines);
- (c) learner must get the opportunity to be heard and tell their side of the story and to present the relevant facts (Item 13.4(c) of the Code of Conduct Guidelines).

60. The effect of this approach in public schools is that a learner cannot be removed or excluded from a school without having been given an opportunity to be heard. That ensures that the child, who will be affected by the decision, is not invisible in the decisions that affect them. They have the opportunity to be heard and to influence that decision.

61. The public school standard is thus that a child can only be removed from a school once they have been engaged. There is no reason to suggest that this standard should be lowered where the child is being removed in circumstances such as in the present case. On the contrary, this standard is particularly important where a child is an entirely innocent party and being removed on the basis of the conduct of others. In summation, EE submits that:

61.1. The Court must interpret the obligation to maintain “standards” in section 29(3)(c) as going beyond educational standards and including issues such as admission and removal of children.

61.2. The source of those “standards” against which independent schools must maintain exist in, *inter alia*, legislation and regulations applicable to comparable public schools.

61.3. Central to the determination of a comparable public standard is

what effect the decision has on the child. If the effect of the decision of the independent school is to remove the child from a school, the procedural standards in place at public school for the removal of a child must be adhered to in the independent school as well.

61.4. In public schools, a child must be afforded a hearing before they are removed. To the extent that the Parent contract allows the removal of the children without a hearing this constitutes an inferior standard. This renders children in independent schools invisible in the decisions that affect them. The inferiority of the independent school standard is worsened by the fact that the children were removed in consequence to conduct not committed by them. There is no reason for lessening the standard of a hearing where the child did not commit any act of misconduct.

61.5. In order to ensure that independent schools maintain “standards” that are not inferior to standards at comparable public educational institutions, a Parent contract must necessarily provide in its implementation the hearing for the children prior a decision being taken that amounts to the removal of the child.

62. The approach proposed by EE is consistent with a generous interpretation of the to basic education in section 29(1) and 29(3) of the Constitution and it will afford children “the fullest possible protection of their constitutional guarantees”.⁵⁷

CONCLUSION

63. In conclusion EE submits that the SCA was incorrect in finding that Pridwin does not provide basic education and has no obligations in respect of the right to basic education. The SCA’s understanding of the concept of both “basic education” and “standards” was, respectfully, misguided. This interpretation must be corrected as it has broader implications given the number and demographics of learners educated in independent schools.

64. EE submits that an independent school’s decision that will have the effect of removing a child from a school ought to be proceeded by a hearing at which the child’s views are taken into account; this is the procedural standard afforded to learners at public schools and independent schools may not adopt a standard inferior to that.

⁵⁷ See generally, **Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd** 2007 (10) BCLR 1027 (CC), at para 53.

65. Finally, while not directed to do so by this Honourable Court, EE files these written submissions for the following reason: EE was admitted as *amicus curiae* on 16 April 2019 and on the same day was directed to file written submissions on the question of mootness. It did so on 26 April 2019. On 13 May 2019, in response to a letter sent to the Constitutional Court on 9 May 2019, EE was informed by this Honourable Court that the hearing of the matter on both the question of mootness and the merits would continue on 16 May 2019. It is in light of that letter that EE files these heads of argument on the merits.

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15 May 2019