THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 1134/2017

In the matter between:

AB **FIRST APPELLANT**

CB **SECOND APPELLANT**

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**

THE INDEPENDENT SCHOOLS ASSOCIATION

OF SOUTHERN AFRICA **FIFTH RESPONDENT**

EQUAL EDUCATION ***AMICUS CURIAE***

Neutral citation: *A B v Pridwin Preparatory School* (1134/2017) [2018] ZASCA 150 (01 November 2018)

Coram: Shongwe ADP, Cachalia, Mocumie, Schippers JJA and Mothle AJA

Heard: 12 September 2018

Delivered: 01 November 2018

Summary: Contract – Termination of parent contracts between independent school and parents – whether parents entitled to hearing – whether school has a duty to act reasonably – whether s 28(2) and s 29(1) of the Constitution applies – whether reciprocal termination clauses in contracts contrary to public policy.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Hartford AJ sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Cachalia JA (Shongwe ADP, Schippers JA and Mothle AJA concurring)

Introduction

[1] This appeal concerns the right of a private school to terminate contracts between it and the parents of two children. The School exercised that right by invoking a termination clause in the contracts.[1] The consequence of the termination is that the parents will have to find another school for their children.

[2] The parents dispute the School's right to cancel the contracts by using the termination clause, without more. They say that the Constitution imposes an obligation on the School to hear them and to act reasonably before cancelling the contracts. They also contend that the Promotion of Administrative Justice Act 3 of 2000 (PAJA) gives them a right to be heard. In addition, there is constitutional challenge to the termination clause on public policy grounds.

[3] The parents accordingly instituted review proceedings in the High Court, Gauteng, before Hartford AJ, to set aside the cancellation of the contract. In a comprehensive and closely reasoned judgment, the learned judge dismissed each of the parents' contentions and upheld the School's right to cancel the contract.[2] She

[1] Clause 9.3 para 7 below.
[2] *AB & another v Pridwin Preparatory School & others* (38670/2016) [2017] ZAGPJHC 186 (3 July 2017).

also granted the parents leave to appeal to this court on 5 October 2017, after they had failed to obtain direct access to the Constitutional Court.[3]

The Parties

[4] In the high court the parents were referred to as AB (the father) and CB (the mother), and their children as DB and EB. I shall adopt this nomenclature. It shall be convenient to refer to the parents together as the appellants. The School, Pridwin Preparatory School (Pridwin or the School) is the first respondent and, Mr Selwyn Marx, the Principal, the second respondent. The third and fourth respondents are the School Board and the Member of the Executive Council for Education, Gauteng, who is not party to the dispute. The Independent Schools Association of Southern Africa (ISASA) is an intervening party. It is an umbrella body representing the interests of private schools, including Pridwin. Equal Education was admitted as amicus curiae in the high court, but withdrew from the appeal. The Centre for Child Law applied belatedly to be admitted as amicus curiae in this court. Its application was refused.

The terms of the contract

[5] There were two contracts, in identical terms, styled the 'parent contract', concluded on 8 March 2011 on 9 March and 2015 for DB and EB respectively. I shall set out the terms of the contract that bear on this appeal. The document containing the contract has the following heading: *'Parent . . . Declaration and Contract of Enrolment'.* It is followed by this statement: '. . . *The rights and obligations contained in this Contract are binding . . . and must be carried out in order for the Child to be successfully enrolled and retained at the School'*.

[6] What follows is an 'Important Notice' whose contents read thus: '*By . . . entering into this Contract you agree to the conditions contained in this document as well as any terms and conditions contained in the Policies of the School, which forms part of this Contract.* ***It is important that you read and understand these Policies as they have important legal consequences for you. If there is any provision in this Contract that you do not fully understand, please ask for an explanation before***

[3] Case CCT 191/17 (30 August 2017).

signing . . . *This contract contains clauses which appear in similar text to this notice, which have also been highlighted…'*

[7] The highlighted clauses include the following:

'GENERAL OBLIGATIONS OF THE SCHOOL

2.1 *. . .* ***The Head may, at his/her sole discretion, cancel enrolment in accordance with the Rules.***

2.2 *For the sake of clarity, this Agreement regulates the enrolment and admission of your child to the school and also regulates the relationship between the School, your Child, yourself and/or a Third party once your child is admitted and enrolled with the School.'*

'PARENT'S GENERAL OBLIGATIONS

4.2 *In order to fulfil our obligations, we need your co-operation. Without detracting from any specific obligations contained in this contract,* ***you are required to: fulfil your own obligations under these terms and conditions; . . . maintain a courteous and constructive relationship with School staff.***

4.3 *The Head may in his or her discretion require you to remove or may suspend or expel your child if your behaviour is in the reasonable opinion of the Head so unreasonable as to affect or likely to affect the progress of your child or another child (or other children) at the School or the well-being of the School Staff or to bring the School into disrepute.*

…

'TERMINATION AND NOTICE REQUIREMENTS

9.2 ***You 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 . . . .***

9.3 ***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.***

9.4 *This is without prejudice to the School's other remedies:* ***the School may cancel this Contract immediately*** *and has no obligation to return any Deposit or pre-*

paid fees to you ***if you are in material breach of any of your obligations and have not (in the case of a breach which is capable of remedy) remedied the material breach within twenty (20) business days of a notice from the School requiring you to remedy the breach, ...***

9.5 *For purposes of this Contract,* ***a material breach is considered to exist where you*** *or your Child (as the case may be) –*

9.5.1 ***fail to uphold the Policies and/or Rules of the School; . . . .***

9.5.5 ***act in such a way that you*** *or the Child* ***become seriously and unreasonably uncooperative with the School and in the opinion of the Head, your*** *or your Child's* ***behaviour negatively*** *affects your Child's or other children's progress at the School,* ***the well-being of School staff, or brings the School into disrepute.***

In clause 1.13 '*Policies'* is defined as:

'The rules and principles adopted by the School, as published by the School from time to time, which are used to regulate the day-to-day running of the School. These Policies may include (but need not be limited to) the School rules; Schedule of Fees; Debtor's Policy; Terms and Conditions of the School; as well as the Code of Conduct and the School's Cautionary and Grievance Procedures for Parents and are available on request free of charge, or on the School's website' (emphasis added).

[8] In cancelling the contract the School invoked clause 9.3 (the termination and notice provision). It is important to point out that even though this clause entitles the School to 'terminate for any reason' it accepts that the termination is subject to constitutional scrutiny. It also acknowledges its constitutional obligation to apply the 'best interests of the child' principle when terminating a contract, and maintains that it did so. I explore this issue later in the judgment.

Circumstances leading to and reason for the termination

[9] Mr Marx explains the circumstances leading to the cancellation in the School's affidavits. The appellants elide the facts described here; no doubt because they catalogue a sorry tale of misconduct on their part spanning eight months. But, before us, counsel properly accepted that they were bound by these facts in motion proceedings, as the high court had found. This narrative shows that the School would have been entitled to cancel the contract summarily for breach. Instead, it opted to

terminate on notice, allowing the parents adequate time to find another school for their children.

[10] The earliest event occurred in October 2015, during the under-9 tennis trials. In the course of a meeting with a young intern in charge of tennis, Ms Migliore, AB rudely and aggressively accused her of incompetence, demoralising the children and damaging their enthusiasm for tennis. It left her in tears feeling threatened and traumatised. It also diminished her self-confidence, and took her a long time to recover from.

[11] This episode forms part of the matrix of AB's persistent harassment of Pridwin's staff members. Initially, this was reflected in his obsession with match statistics, his displeasure with team selection and the batting line-up for the Under-9 cricket team. This fixation included:

(i) Making detailed comparisons between hard copy cricket results produced by the School, and the electronically published versions, and producing a barrage of email complaints, pertaining to DB, who was just 8 years' old at the time;

(ii) Tendering his services as a cricket coach over a fortnight in order to demonstrate how poor the School's coaching standards were, while refusing to comply with its standard coaching procedures and etiquette, and

(iii) Demanding an apology from the head of sport, Mr Joubert, on the groundless allegation that the latter had defamed him.

[12] Although most of the events relate to AB's conduct, CB, his wife, was complicit. Regarding the alleged defamation of AB, CB, a practising psychiatrist, wrote to Mr Marx, saying 'I am not sure if JP's (Joubert's) behaviour emanates from a low IQ or obvious malice' and 'I don't think JP realises the calibre of people he is choosing to take on'.

[13] These episodes were followed by three significant incidents. The first occurred on 10 November 2015, during a cricket game against Crawford College at Trinity House School. AB was watching his son, DB, playing in the Under-9 team. The child was given out leg before wicket. In response AB shouted abuse at the umpire, Mr Mokoela, from the side of the field. Shortly afterwards, when the children came off

the field, he accosted Mr Mokoele with a cricket-bat in his hand, saying: 'you fat . . . (expletive omitted), you don't respect parents', and threatened to wait for him after the match and kill him.[4]

[14] Mr Joubert contacted Mr Marx and requested his immediate attendance at Trinity House to deal with the problem. When he arrived there he confronted AB over his reported behaviour. AB showed no sign of contrition, insisting instead that he would talk to umpires in any manner he chose, as they were not gods. When Mr Marx intimated that he would have to exclude AB or his son from sport matches in future if AB was not willing to comply with the School's code of conduct, AB retorted that where he came from, an umpire would be stabbed with a stump from the wicket for having made a bad decision.

[15] The second incident occurred on 27 January 2016. DB had been given out (caught behind) in an under-10 cricket match, prompting AB to shout from the side of the field that it was 'a useless decision'. After the match, AB confronted the coach, Mr Broderick, and accused him of being a '. . . (expletive omitted)' coach. AB also made disparaging remarks about other boys in the team, which appears to have been a pattern of his behaviour at these matches. Mrs Till, a parent, reported this to Mr Marx and expressed her disquiet at AB's behaviour, which was having an adverse effect on her son.

[16] The following morning, Mr Marx wrote to the Chairman of the School Board and two other board members, Ms Patel and Ms Theunissen, about this incident and recommended that a hearing be held. The Board approved his recommendation. Later that morning AB and CB arrived at Mr Marx's office to discuss the previous day's

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[4] It is a matter of concern that against the advice of his own legal representatives, AB approached Mr Mokoele, after the high court had delivered its judgment, and secured his agreement to retract this allegation. The appellants' attorneys then obtained an affidavit from Mr Mokoela in which he did precisely this. The affidavit formed part of an application to introduce further evidence at the appeal, which included a different version of the Migliore and Joubert incidents. The evidence pertaining to the Migliore and Joubert incidents was not tendered in their replying affidavits on the advice of their legal representatives, they say. The appellants also considered it necessary to change their counsel shortly before the appeal. However, in a letter to the registrar dated 5 September 2018, the appellants' attorneys informed the court that: 'Upon further advice and in the interests of justice' the application to introduce further evidence is withdrawn. Pursuant thereto a 'Notice of Withdrawal' together with a tender to pay the respondents' costs was delivered.

events. During the meeting, Mr Marx informed them that he had approached the Board.

[17] The idea of holding a hearing was abandoned. Instead, Mr Marx reached an agreement with the appellants on 28 January 2016 to the following effect:

(i) AB would refrain from coaching or offering advice or giving his opinion to any boys at sporting activities, including his own children; he would not sit with or near the boys at sporting activities; he would not publicly criticise referees and would abide by coaching, refereeing and selection decisions. He would also not do anything to bring the School into disrepute.

(ii) In return, Mr Marx undertook to ensure that the appellants' children would not be victimised by the staff and that their efforts to find a place for them at another school would not be impeded. Shortly after the conclusion of the agreement, on 3 February 2016, Mr Marx penned a letter to support their application to move their boys to another private school in Johannesburg, St John's. But for reasons not explained in the papers, the children were not moved.

[18] The agreement seems to have had no effect on AB. Because, on 27 June 2016, Mr Marx was once again called to a sporting event: this time it was to the soccer-field. On his arrival he found a soccer-coach, Mr Mosoana, who is not associated with the School, there at AB's behest. Mr Mosoana was attempting to give unsolicited – and unwelcome – advice to the School's soccer-coach, Mr Prinsloo, while the under-10 soccer trials were in progress.

[19] Mr Marx approached Mr Mosoana, imploring him to leave the field and told AB that it was unacceptable for him to interrupt the sports program by bringing his own coach to the School without an appointment. He also objected to AB's interference with the coaching as he no longer wanted his children to be at the School. AB's retort was that sport at the School was pathetic and that he did not want to be there. He would leave because the School did not know what it was doing, he added. He then left with Mr Mosoana.

[20] Shortly afterwards AB arrived at Mr Marx's office and insisted on explaining his actions that day. Mr 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. He made it clear that this was a breach of the 28 January 2016 agreement. The meeting ended on this note.

[21] On 23 February 2016, the Board met with the appellants to hear their grievances regarding the head of sport, Mr Joubert, who they claimed, had defamed AB during the Trinity School incident. They were offered an independent lawyer to hear the grievances of both sides and make recommendations to the School. The offer came to naught.

[22] From the School's perspective, the behaviour of AB and CB had created a toxic and intolerable atmosphere. The School had had enough. On 30 June 2016, Mr Marx despatched a carefully written letter to AB. In summary he said the following:

(i) The contracts could immediately be terminated in terms of clause 4.3, as read with clause 9.5, of the parent contracts for material breach. He explained that a material breach exists 'where you act in such a way that you become seriously and unreasonably uncooperative with the School and in the opinion of the Head, your behaviour negatively affects your child's or other children's progress at the School, the well-being of School staff, or brings the School into disrepute.'

(ii) There had been breaches as the incidents mentioned above showed;

(iii) That *'in the interests only of your sons, I have instead, in my sole discretion, elected to invoke clause 9.3 of the Contract'*; (emphasis added) and

(iv) That he was giving a full term's notice to cancel the parent contracts at the end of the third term of 2016, which meant that the children's last day at school would be 9 December 2016. In effect, the appellants were given five months' notice, which is more than the clause required.

The Appellants' case

[23] The appellants enrolled their children at Pridwin by concluding the two parent contracts four years apart. They were aware that these contracts contained a highlighted warning that *'If there is any provision in this Contract that you do not fully understand, please ask for an explanation before signing'*. They signed both contracts freely, without question. They thereby accepted, explicitly, to be bound by its terms for their children to remain at the School. And they understood, too, the standard of

conduct expected of them as parents for the right of their children to be and to remain at the School.

[24] They accept too, as they must, that the contracts do not provide – expressly or tacitly – for a hearing or require the School to consider lesser sanctions before termination. Their contention that the principles of natural justice afford them these rights was properly rejected by the high court,[5] as was an attempt to find them in the School's policies.[6] These arguments were abandoned in this court, for good reason.

[25] Knowing all of this the appellants sought to have the termination of the contracts declared unconstitutional, invalid and unlawful, and reviewed and set aside. They rely, mainly, upon two constitutional provisions, namely s 28(2), that the child's best interests are of paramount importance in every matter concerning the child, and s 29(1)*(a)*, the right to a basic education, to achieve this. They thus seek a finding that the School's decision violated these provisions.

[26] Their second ground of attack flows from a latterly introduced prayer, after Pridwin had filed its answering papers, that the termination clause (clause 9.3) be declared unconstitutional, contrary to public policy and unenforceable 'to the extent that it purports to allow Pridwin to cancel the parent contracts without following a fair procedure and/or without taking a reasonable decision'.

Private Contracts and Public Policy

[27] The relationship between private contracts and their control by the courts through the instrument of public policy, underpinned by the Constitution, is now clearly established. It is unnecessary to rehash all the learning from our courts on this topic. It suffices to set out the most important principles to be gleaned from them:

(i) Public policy demands that contracts freely and consciously entered into must be honoured;[7]

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[5] Judgment fn 2 paras [95]-[97].
[6] Ibid [98]-[101].
[7] *Barkhuizen V Napier* 2007 (5) SA 323 (CC) paras 57 and 87.

(ii) A court will declare invalid a contract that is prima facie inimical to a constitutional value or principle, or otherwise contrary to public policy;[8]

(iii) Where a contract is not prima facie contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it;[9]

(iv) The party who attacks the contract or its enforcement bears the onus to establish the facts;[10]

(v) A court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds;[11]

(vi) A court will decline to use this power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose.[12]

[28] I shall return to the public policy challenge later. At this stage I point out only that the appellants do not attack the enforcement of the contracts by relying directly upon the School's failure to act fairly and reasonably. What they do, instead, is attempt to import this duty through ss 28(2) and 29(1)*(a)* of the Constitution. I examine how they do this and whether there are proper legal grounds for doing so. First, s 28(2).

The s 28(2) challenge

[29] Pridwin's business is to run a private school to educate children, and it has done so since 1923. So, it is hardly surprising that the School embraces the idea that the best interests of the children is paramount in whatever it does. Further, it quite properly accepts that s 28(2), which embodies this principle, binds it, in the language of s 8(2) of the Bill of rights: '…to the extent that, it is applicable, taking into account the nature

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[8] *Barkhuizen* Ibid para 28; *Bredenkamp & others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) paras 46 and 47.

[9] *Bredenkamp* Ibid para 47.

[10] Ibid para 49.

[11] *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA (A) 1 at 9C-D; *Verolin Spence, et al. v. BMO Trust Company,* 2016 CanLII 34005 (SCC) at para 41.This was a judgment of the Court of Appeal for Ontario in Canada. An application for leave to appeal to the Canadian Supreme Court was dismissed. The dispute was over the disherison by a testator (a black man) of one of his daughters (Verolin) because she had borne a child from a white man and the question was whether the disherison was contrary to public policy. The Court held that it was not.

[12] *Potgieter & another v Potgieter NO & others* 2012 (1) SA 637 (SCA) paras 32-34.

of the right and the nature of the duty imposed by the right'. I shall henceforth refer to it as the 'best interests principle'.

[30] The Constitutional Court has said that s 28 (2) 'must be interpreted so as to promote the foundational values of human dignity, equality and freedom'.[13] It has also said that it is unnecessary to determine the content of this right because it provides an adequate benchmark for the treatment and protection of children in its present form.[14] It bears emphasis that the application of the right must take into account its relationship with other rights, which might limit its ambit. Otherwise, taken literally, it could cover virtually every field of human endeavour – public and private – that has some direct or indirect impact on children, thereby rendering the right meaningless.[15] In each case what is required, therefore, is for a court to weigh the interests protected by the right against any countervailing interests protected by other rights to produce a legally sensible outcome. It follows that there would be instances where s 28(2) requires a hearing before a decision having an impact on a child is made, but not in others. What is clear, however, is that there is no general requirement for a hearing.

[31] There is no dispute that Pridwin applied the best interests principle when it terminated the contracts. In his termination letter to the appellants, Mr Marx said that he had exercised his discretion to invoke the termination clause, which provided for a notice period, solely in the interests of the two children, instead of summarily cancelling the contracts because of the appellants' repeated breaches, as he was entitled to do. In addition, he said, he had balanced their rights against those of all the other children as well as other stakeholders, in coming to his decision. He was particularly mindful of the deleterious effect that AB's behaviour was having on the other children.

[32] The approach of the appellants in demanding a hearing before the contracts were cancelled, however, is to focus on the interests of their children to the exclusion of all others. It is not only the dignity of DB and EB that needs protection, but also the dignity of every other child and every other person at the School. This means that

[13] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, & others* 2009 (4) SA 222 (CC) para 72.
[14] Ibid para 73.
[15] *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) para 26.

every person's rights are worthy of equal consideration. This includes the right of the School to enter into and terminate contracts freely in accordance with their terms, and the freedom to associate and to disassociate with whomsoever it wishes.[16]

[33] Bearing this in mind the argument that s 28(2) gives rise to an implied right to be heard before a parent contract is terminated, falls flat. It is not a right that arises generally from s 28(2), and it cannot be deployed to limit a party's rights to terminate a contract on notice.

[34] If it were otherwise this would entitle a lessee to a prior hearing whenever a lessor wishes to terminate a lease, if there are children on the property. It would also mean, as counsel for the appellants was constrained to accept, that if the appellants themselves wished to terminate the contract, in accordance with clause 9.2, they would first have to give the School a hearing. Even more preposterous is the idea that the School or a lessor would not be able to rely on a breach clause before cancelling a contract, without affording a hearing to the aggrieved party, which is the unavoidable consequence of the appellants' stance.

[35] The appellants call in aid three cases in attempt to buttress their case for a hearing flowing from s 28(2). They are *C v Department of Health and Social Development*;[17] *J v NDPP*[18] and *Centre for Child Law v Hoërskool Fochville.*[19] In the first matter the court found that before children are removed from their families under the Children's Act 38 of 2005, the family and children should have the right make representations as to whether their removal was in their best interests. The second matter (*J v NDPP*) had to decide the constitutional validity of a provision placing child offenders on the sex-offenders' registry, and again, the court held that this could not be done without affording the right of the child 'to make representations and to be heard'.

[16] Section 18 of the Constitution says that everyone has the right to freedom of association.
[17] *C & others v Department of Health and Social Development, Gauteng & others* 2012 (2) SA 208 (CC) para 27.
[18] *J v National Director of Public Prosecutions & another* (*Childline South Africa & others* as *Amici Curiae*) 2014 (7) BCLR 764 (CC) para 40.
[19] *Centre for Child Law v Hoërskool Fochville & another* 2016 (2) SA 121 (SCA) para 20.

[36] In *Hoërskool Fochville*, this court was dealing with an application under Uniform rule 30 A to compel the production of documents in which children had made statements regarding the School. One of the questions considered was whether it was appropriate for an intervening party – a public interest body representing the interests of children – to assist the children in the litigation. During the course of its judgment this court referred to a passage in *Christian Education South Africa v Minister of Education*[20], in which the Constitutional Court said in a postscript, after deciding that case, that it would have been of assistance to the court had a *curator ad litem* been appointed to represent the children in order to hear their views.

[37] None of these cases helps us answer the question with which we are concerned: whether a right to a hearing, derived from s 28(2), may be imported into a termination clause in a private contract between parents and a school. In fact, they are wholly inapplicable to this case. This brings me to what the appellants contend is the second source of the right to a hearing, namely, s 29(1)(a) of the Constitution.

Section 29(1)(a)

[38] Section 29 (1)*(a)* guarantees the right of everyone to a 'basic education'. This is an obligation on the State, not one imposed on private institutions. But, the appellants contend, Pridwin provides a basic education and is thus performing a constitutional function. It therefore bears a negative duty not to unreasonably diminish a learner's access to an education. The obligation to act reasonably, therefore, requires the School to afford the opportunity to make representations before a contract is terminated. And also to consider alternative sanctions available to it before taking this step. There is little merit in the point.

[39] 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[21] it is not providing a basic education as envisaged s 29(1)*(a)*. It would only be doing so if it was contracted by the State for this

[20] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 CC para 53.
[21] Section 29(3)*(c)*.

purpose, as explained in *Allpay v SASSA.*[22] It would then be under a positive duty to do so because it was performing a constitutional function. Section 29(1)*(a)* cannot therefore be used to impose a duty on a private school, not provided for in a parent contract, to grant a hearing before it terminates a contract on notice.

[40] It is thus difficult to understand the appellants' contention that Pridwin is performing a constitutional function (which would ordinarily impose a positive duty on it), but is saddled, instead, with a negative duty not to impede the right of the appellants' children to a basic education. If the appellants were correct that Pridwin, a non-subsidised independent educational institution, is providing a basic education, it would lead to remarkable consequences.[23] It would mean that a private security company contracted to provide safety and security to a community is discharging a constitutional function.[24] So too would a private clinic that renders treatment to a patient, since the provision of health care services is also a state obligation.[25] The proposition simply cannot withstand the most basic scrutiny.

[41] It is apparent from the authorities that interference with a negatively protectable right occurs when the wrong-doing party is not itself under an obligation to provide the service – basic education, here – but its actions indirectly have that effect. *Juma Musjid*[26] is a case in point. The owner of a private property (a trust) obtained an eviction order against Juma Musjid School, after notifying it that it was terminating the school's occupancy. Juma Musjid was a public school and the responsible public authority – the MEC for Education – had failed to enter into a lease with the Trust.

[42] The Trust, like Pridwin, had no positive obligation to provide a basic education; that duty, as I have said, rests on the state.[27] There was no constitutional obligation

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[22] *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others* 2014 (4) SA 179 (CC) para 51-53.
[23] Compare *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, KwaZulu-Natal & others* 2013 (4) SA 202 (CC) paras 39 and 45. The Court held that where the state pays a subsidy to an independent school, it does so in accordance with its duty to fulfil the right to basic education and therefore attracts a negative duty not to impair the right by removing the subsidy without hearing the school.
[24] See the policing function in s 205 of the Constitution read with read with s 12(1) of the Bill of Rights.
[25] Section 27(1)*(a)* imposes an obligation of the state to provide access to health care services.
[26] *Governing Body of the Juma Musjid Primary School & others v Essay NO & others (Centre for Child Law & another as amici curiae)* 2011 (8) BCLR 761 (CC).
[27] Ibid para 57.

on Pridwin to admit the appellants' children. The children also had no constitutional right to attend this School. They were admitted after their parents had signed contracts with the School, subject to the limited provisions in the South African Schools Act 84 of 1996 not here relevant. And their right to remain at the School flowed from these contracts.

[43] While s 8(2) of the Constitution provides that the Bill of Rights applies horizontally, it was pertinently pointed out in *Juma Musjid* that its purpose is not to obstruct private autonomy or to impose the duties of the state on private parties. Rather, it is to oblige private parties not to impede, interfere with or diminish the enjoyment of a right.[28] A private party would thus breach the obligation directly if it failed to respect the right, and indirectly if there was a failure to prevent its direct infringement by another; or to take steps to avoid its diminution.[29]

[44] In *Juma Musjid*, the Trust permitted the School to occupy its premises and paid for certain expenses, which the Department undertook to repay, but failed to do so. In seeking to evict the School from its property, the Trust's action negatively impacted upon the School's duty to provide a basic education to its learners. That is not the case here. Pridwin has done nothing to prevent the appellants' children from obtaining a basic education at a public school. As the high court pointed out, there are three public schools in the area that would be obliged to take them.[30] There has simply been no breach of the right, in any way.

[45] Another case on which the appellants place much store is *Daniels v Scribante*.[31] There the court had to determine whether a domestic worker, who had occupied land with the owner's consent, under the Extension of Security of Tenure Act 62 of 1997 (ESTA) was entitled to make improvements to her dwelling. Among the questions the court had to deal with was whether the owner was under an obligation to permit this right, under s 25(6) of the Constitution,[32] where she had not obtained the owner's

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[28] Ibid para 58.
[29] Ibid.
[30] Judgment fn 2 para 43.
[31] *Daniels v Scribante & another* 2017 (4) SA 341 (CC).
[32] '**Property**

permission in terms of s 6 of ESTA. She contended that s 13 of ESTA imposed a positive obligation on the owner to allow this.[33]

[46] The court had little difficulty finding in her favour.[34] It held that by its very nature s 25(6) read with ESTA imposes both a positive and a negative duty on private persons to protect security of land tenure. The positive duty on the landowner is to accommodate persons of insecure tenure on their land. And the negative obligation is not to improperly invade that right.[35] The appellants invoke this judgment to support the contention that there is no requirement for a contractual nexus between the state and a private person for a positive or negative duty to be imposed, as the high court had found.[36]

[47] The contention is stillborn. What is clear from this case is that the obligations – in both their positive and negative guises – were imposed on the private land owner in the first instance by s 25(6) and secondly through ESTA. But, as I have pointed out earlier, the fact that s 29(3) of the Constitution, read with the Schools Act, specifically permits independent educational institutions to be established does not mean that they perform a constitutional function to provide basic education as envisaged in s 29(1)*(a)*.

[48] It follows that the appellants' attempt to source the right to a hearing from a negative duty to act fairly arising from s 29(1)*(a)* of the Constitution must also fail, as

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(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.'

[33] Section 6 **Rights and duties of occupier**

'(1) Subject to the provisions of this Act, an occupier shall have the right to reside on and use the land on which he or she resided and which he or she used on or after 4 February 1997, and to have access to such services as had been agreed upon with the owner or person in charge, whether expressly or tacitly.

(2) Without prejudice to the generality of the provisions of section 5 and subsection (1), and balanced with the rights of the owner or person in charge, an occupier shall have the right-

(a) to security of tenure;

. . . .'

Section 13 **Effect of order for eviction**

'(1) If a court makes an order for eviction in terms of this Act-

(a) the court shall order the owner or person in charge to pay compensation for structures erected and improvements made by the occupier and any standing crops planted by the occupier, to the extent that it is just and equitable with due regard to all relevant factors . . . .'

[34] Ibid para 37.

[35] Ibid para 49.

[36] Judgment fn 2 para 27.

must its attempt to impose a duty on the School to act reasonably, an issue to which I shall return. Suffice to say at this stage that even if there was a duty on Pridwin to act reasonably in terminating the contracts, it did so adequately.

PAJA

[49] The appellants last and perhaps least meritorious attempt to insist that they had a right to be heard is their reliance on PAJA. The short answer is that in cancelling the contracts Pridwin was not exercising a public power or performing a public function. It was exercising a contractual right that did not constitute administrative action. The high court dismissed their argument.[37]

[50] In this court, counsel for the appellants made another attempt to rescue the PAJA argument; they contended that there is a 'governmental' interest in the decision to cancel the contracts, derived from this court's adoption of the test for judicial review in *Calibre Clinical Consultants.*[38] Nugent JA explained in that case that the courts tend to seek out features that are governmental in kind to decide whether conduct is reviewable.[39] What needs to be considered, he said:

'is the extent to which the functions concerned are "woven into a system of governmental control", or "integrated into a system of statutory regulation", or that the government "regulates, supervises and inspects the performance of the function", or it is "a task for which the public, in the shape of the state, have assumed responsibility", or it is "linked to the functions and powers of government", or it constitutes "a privatisation of the business of government itself", or it is publicly funded, or there is "potentially a governmental interest in the decision-making power in question", or the body concerned is "taking the place of central government or local authorities", and so on.'[40]

[51] The appellants say that the 'governmental interest', which would make the termination of the parent contracts an exercise of public power, is apparent from a document signed by the Department of Education and the National Association of Independent Schools (NAISA) (of which ISASA is a part) styled the 'Rights and

[37] See judgment fn 2 paras 29, 30 and 96. See also *Khan v Ansur NO & others* 2009 (3) SA 258 (D) para 32.
[38] *Calibre Clinical Consultants (Pty) Ltd & another v National Bargaining Council for the Road Freight Industry & another* 2010 (5) SA 457 (SCA) para 38.
[39] Ibid para 39.
[40] Ibid.

Responsibilities of Independent Schools' (R & R document). Clause 8 of this document deals with the exclusion of learners and provides:

'Exclusions fall into two broad areas:

- Exclusion on grounds of contravention of the rules contained in the School's Code of Conduct and grievance procedure, drafted in line with the relevant legislation and good practice.
- Exclusion on the grounds that the contract between the parents and the school has been broken, usually because the parents have failed to pay fees.

Independent schools may exclude a learner on the basis of any of the above grounds provided that a fair procedure has been followed. (emphasis added)

The best interests of the child should always be adhered to.'

[52] The appellants appear to have obtained the R & R document from the internet and served it on the respondents on 24 May 2017, with a supplementary affidavit, a day before the hearing in the high court. Both Pridwin and ISASA took the view at the time that they would not respond to it because of its lateness and also because it was not binding on them. I should add that NAISA was not joined in the proceedings and the MEC for Education, who is, did not file any affidavit. So we have no idea what their views on the purpose or effect of the document are.

[53] In the high court, the appellants conceded that the document was not binding on the School but argued that it must nevertheless be part of the context of matters present in the mind of the parties when they contracted. That was of course not true because the document had only belatedly become part of their case.[41]

[54] As a result of the uncertainty regarding the status of the document, at the hearing of the appeal, the presiding judge directed the parties to file further affidavits on this point. They did so. In Pridwin's supplementary affidavit, Mr Marx confirms that the document is not binding on the School and that he had not been aware of it before it was filed in court. ISASA's affidavit further confirms that the document is not binding on it or on Pridwin. It explains that it is no more than a communications protocol, which is clear from the document itself.

[41] Judgment fn 2 para 103.

[55] The high court correctly rejected the appellants' attempt to use this document as a basis for attempting to secure a right to be heard before the contracts were cancelled. The learned judge put it thus:

'This document was simply plucked from the internet and provided to this Court without further information. There is neither a date that it was signed or placed before the court, nor any evidence provided to show that it was part of the context in which the parent contracts were drawn up. In any event, clause 8 of the document refers to a termination for breach, but does not refer to a termination on notice, as was the case here.'[42]

[56] CB has also filed a further supplementary affidavit. The appellants now realise that their contention in the high court that the document was part of the context, which must have been in the minds of the contracting parties when they contracted, is not sustainable. Undeterred, they now say that it is irrelevant whether or not it is binding; it is nonetheless 'indicative of a strong governmental interest in independent schools' decisions to exclude learners, they assert.

[57] In this court the appellants found another ground to impute a governmental interest in order to justify a right to a hearing under PAJA: Regulations 6(1)(i) and 6(2) of the Gauteng Regulations.[43] They cannot do so; the regulations were not specifically part of their case in the founding or supplementary affidavits in the high court and the respondents had no opportunity to respond to them. I shall nonetheless deal with them. They provide:

'**Post-registration obligations of an independent school**

6.(1) Once an independent school has been registered with the Department, the following post registration requirements must be adhered to:

. . .

(h) allow unannounced visits by the Department for the purpose of monitoring the leadership, management, curriculum delivery and governance of the school; and

(i) not expel or suspend a learner during an academic year or withhold the learner's progress report due to non-adherence to contractual obligations between the parent and the school.

[42] Judgment fn 2 para 104.

[43] Registration and Subsidy of Independent Schools, Notice 2919 of 2013, Gauteng *Provincial Gazette* No 303, 25 October 2013. This notice was promulgated by the Gauteng MEC for Education, pursuant to his powers under sections 46(2) and 50(1)*(d)* of the South African Schools Act 84 of 1996.

(2) Where the board of an independent school and the parent cannot reach an agreement on contractual obligation as contemplated in subparagraph 6(1)(i) the board must escalate the matter to the Directorate responsible for independent schools in the Department.'

[58] The appellants say that the R&R document and the regulations show that independent schools are, to extract some features from the governmental interest test expounded in *Calibre Clinical*, woven into a system of governmental control under the Constitution and the statutory scheme governing school education. Government inspects the performance of these schools and subjects them to exacting standards failing which their registration may be withdrawn. The provision of an education, they continue, is also a task for which the public, in the shape of the state, has assumed responsibility and education is inextricably linked to the functions and powers of government.

[59] Before I deal with the governmental interest test, it is evident that there is a difference between clause 8 of the R & R document and the regulations now sought to be relied upon to justify a hearing. The former says that there should be a fair procedure before a learner is excluded following a 'broken contract', which presumably means a breach of the contract by the parents. The regulations, which were promulgated long after the communication protocol, say nothing of the sort. Regulation 6(1)(i) is mainly concerned that the child's academic year must not be disrupted as a result of 'non-adherence to contractual obligations'. It does purport to prescribe what the content of the terms of a parent contract should be, much less prescribe a fair procedure for termination. The regulations have the force of law but the R & R document does not.

[60] Furthermore, neither the R & R document, nor the regulations deal with termination of contracts on notice. In so far as there is any governmental interest in the exclusion of a learner on any ground it goes no further than to impose an obligation on a school to ensure that it complies with the regulations. It bears mentioning that Pridwin met any potential governmental concern in the exclusion of the children by allowing them to remain until the end of the academic year after the contracts had been cancelled.

[61] In any event the appellants misuse the 'governmental interest' test. In *Calibre Clinical Consultants* Nugent JA made clear that the question whether there was a 'governmental interest in the decision making power in question' was not of universal application to determine whether PAJA applies.[44] As Hoexter points out '[o]ther considerations . . . include the source of the power, whether it is exercised consensually or coercively and its effect on the public . . . [A] mere interest in the activity on the part of the public is unlikely to play a decisive role'.[45] And citing *De Smith's Judicial Review*, she adds that a broad and flexible approach is indicated rather than mechanical or formulaic reliance on one or more of these criteria.[46] Here, the power to terminate the contracts – concluded consensually – arises from the contracts themselves, not from the coercive power of the School or the state. The termination also has no effect on the broader public.

[62] Importantly, as Nugent JA emphasised, the utility of the inquiry is aimed at determining whether or not the decision-maker is accountable to the public for its actions, as this is what PAJA is concerned with. It is, he explained:

'…[a]bout accountability to those with whom the functionary or body has no special relationship other than that they are adversely affected by its conduct and the question in each case will be whether it can properly be said to be accountable notwithstanding the absence of any special relationship.'[47]

[63] Pridwin is not accountable to the public for a decision to terminate a parent contract. Neither is it answerable to any public authority for the manner in which it terminates its parent contracts. Its accountability is limited only to those with whom it has a 'special relationship' by virtue of the contracts: the appellants in this case (and perhaps the other parents, who have contracts with the School). It follows that there are simply no grounds for the appellants' contention that either the R & R document or the regulations are indicative of a governmental interest in the cancellation of the contracts, which constitutes an exercise of a public power, as envisaged in PAJA.

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[44] *Calibre Clinical Consultants (Pty) Ltd & another v National Bargaining Council for the Road Freight Industry & another* 2010 (5) SA 457 (SCA) para 40.
[45] Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) 4-5.
[46] Ibid p 5.
[47] *Calibre Clinical Consultants (Pty) Ltd & another v National Bargaining Council for the Road Freight Industry & another* 2010 (5) SA 457 (SCA) para 40.

Substantive breaches.

[64] Apart from the appellants' complaint that Pridwin breached their procedural right to fairness, they also say that the cancellation was substantively unlawful. They ground this claim in what the Constitutional Court said in *S v M*[48] about the effect of the best interests principle as presupposing that 'the sins and traumas of fathers and mothers should not be visited on their children'.[49] Relying on this case, they contend that because the two children are innocent, they should not be excluded from the School only because of their parents' misconduct. There would have to be, they say, 'extraordinary circumstances' before a school would be entitled to do this.

[65] The School therefore had a duty, they say, to act reasonably before terminating the contracts, not only arising from the best interests principle in s 28(2), but also from the negative duty imposed upon it by s 29(1)*(a)*. This entailed, they continue, an obligation on the School to act to consider 'alternative sanctions' before taking the drastic action that it did.

[66] It is apposite to remind ourselves what the Constitutional Court said about the best interests principle in *S v M*: if 'spread too thin it risks being transformed from an effective instrument of child protection into an empty rhetorical phrase of weak application'.[50] This caution is even more pertinent to an attempt to elevate the idea of the 'sins of the father', which has biblical resonance, to a legal rule of general application.

[67] *S v M* concerned the sentencing of a mother for fraud. She was the primary care-giver of her three dependent children. The question was whether a custodial sentence imposed by the lower courts under s 276(1)(i) of the Criminal Procedure Act 51 of 1977, (the CPA) in terms of which she would be eligible for release after serving eight months' imprisonment, should stand. Having regard to the best interests of her children, the court, in a split decision, ordered that she be placed under correctional supervision in terms of s 276(1)*(h)* of the CPA.[51] It is, however, quite clear that the

[48] *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC).
[49] Ibid para 18.
[50] Ibid para 25.
[51] Moseneke DCJ, Mokgoro J, Ngcobo J, O'Regan J, Skweyiya J and Van der Westhuizen J, concurred in the judgment of Sachs J. Nkabinde J and Navsa AJ concurred in the judgment of Madala J.

court would have arrived at this conclusion by simply relying on the 'best interests' principle without referring to the 'sins of the (mother)'. It is equally clear that where the nature of the crime is so serious as to warrant a lengthy prison sentence, the best interests principle has little utility, if any.

[68] In the same vein, when a parent contract is terminated a school is obliged to consider the best interests principle, but it cannot be precluded from cancelling a contract only for fear of visiting the indiscretions of the parents on the children. This brings me to the complaint that the duty to act reasonably required Pridwin to have considered alternative sanctions before the cancellation.

[69] I have already concluded that the duty to act fairly or reasonably cannot be imported into the terms of the contracts. So that is really the end of the fairness and reasonableness challenges. But assuming, in favour of the appellants, that there is such a duty arising from the failure of Mr Marx to comply with the best interests principle, or from s 29(1), the simple test to be applied on review is whether the decision is one that a reasonable decision-maker could not reach. Among the factors the courts consider in this exercise are:

'[T]he nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.'[52]

[70] Against the factual background I have described earlier the high court concluded that Mr Marx had acted 'eminently reasonably' in terminating the contract. The learned judge continued:

'[D]espite being entitled to terminate DB and EB's attendance at the school immediately for the first applicant's material breach in terms of clause 9.4, specifically taking the children's interests in the school, he decided not only not to terminate forthwith, but rather to allow the children to remain longer than even the term's notice set out in clause 9.3, namely until the end of the year.'[53]

[52] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 45; See generally Hoexter pp 346-350.
[53] Judgment fn 2 para 138.

[71] I concur with her reasoning. She need not have gone further. But she proceeded to deal with the argument relating to the failure to consider other alternatives. She reasoned thus:

'[The appellants] . . . stated that Marx had at least four options open to him, including issuing a final written warning, banning the first applicant from attending sport practices, banning him from addressing or conversing with the staff members and barring his children from the sporting programme at Pridwin.

However, Marx had already attempted to impose a lesser sanction by entering into the agreement with the first applicant on 28 January 2016 which the first applicant subsequently breached. He had accordingly already given the first applicant a full opportunity to desist in his behaviour. Furthermore, the suggestion by the applicants that their children should have been barred from the sporting programme at Pridwin is surprising as, in my view, that option would have caused ongoing distress and harm to their children on a daily basis whenever their friends went off to engage in sporting activities whilst they were not permitted to do so. This suggestion is accordingly rejected.'[54]

[72] Here too, her reasoning cannot be faulted. I accordingly find that the attack on the substantive lawfulness of the termination is also ill-founded.

[73] One would have thought that the judgment of the high court would have had a salutary effect on the appellants' conduct. Alas, this was not to be. Two further incidents occurred after the judgment, which resulted in Pridwin obtaining an interdict against them in the Gauteng Division of the High Court, Johannesburg, on 19 February 2018.[55] In the first, on 6 October 2017, CB wrote to Mr Marx following a regular newsletter he distributed to parents to which she had taken umbrage. She accused him, astonishingly, of being 'a sociopath and narcissist' who had failed her children, which was reminiscent of similar unbecoming remarks she had made about Mr Joubert, earlier. The second incident on, 22 January 2018, resulted in a verbal confrontation between AB and Mr Marx. The court found that AB's conduct was 'aggressive . . . and seeking out conflict'. The facts pertaining to both incidents are described in the judgment of the high court, and need not be repeated here.[56]

[54] Judgment fn 2 paras 140-141.
[55] Case No 38670/2016.
[56] Ibid paras 10-17.

[74] In granting the interdict against the appellants the court found that both CB and AB had breached their contractual obligations to maintain a constructive and courteous relationship with the School, and specifically with the principal.[57] The evidence of these subsequent events that resulted in the interdict is of course not relevant to determine the lawfulness of the termination. But, as the appellants have framed their case as a constitutional matter, involving as it does the applications of s 28 and s 29 to parent contracts, the subsequent events are relevant to determine any 'just and equitable' relief that may be appropriate in terms of s 172(1)*(b)* of the Constitution.

The Public Policy Challenge.

[75] I return to the appellants' public policy challenge to the termination clause, the legal principles of which I have set out earlier.[58] In the high court the appellants sought a declaration that both the clause itself and its enforcement are contrary to public policy because the clause does not provide for a fair procedure or reasonable decision. This was also the stance adopted in their written submissions to this court prepared by their previous counsel. However, I did not understand their newly appointed counsel, Mr Marcus, to persist with the attack on the terms of the clause; his submissions focussed on the enforcement of the clause. In other words it is not the clause itself that is impugned, but the fact that it was enforced, without a prior hearing or reasonably, which is said to be inimical to public policy.

[76] Now I have already found that there are no grounds for importing a duty to act fairly or reasonably into the termination clause from s 28(2) and s 29(1) of the Constitution, or from PAJA. And, because fairness and reasonableness are not free standing grounds to impugn the terms of a contract the attempt to invalidate the terms of the contract has no merit. There is nothing on the face of clause, or intrinsically, that offends any constitutional value or principle or is otherwise contrary to public policy. It is certainly not immoral. No facts have been placed before us to suggest otherwise.

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[57] Ibid para 34.
[58] Above para 27.

[77] As the high court pointed out this type of clause is a common feature of commercial contracts. Many may affect children, for example an ordinary lease, as alluded to earlier. The consequence of a finding that such clauses are invalid because of some indirect effect they may have on children would be catastrophic.[59] Mr Marcus rightly did not persist with this line.

[78] Instead, he concentrated his attack on the enforcement of the contracts as being contrary to public policy, the argument being that public policy, as determined by the legal convictions of the 'legal policy makers community of the community' imposed a duty on Pridwin to hear the appellants and to act reasonably before terminating the contracts. Once again the R & R document was enlisted to support this argument. However, I have earlier dealt with the fact that it is a mere communications protocol. It is not a policy document that independent schools affiliated to ISASA, such as Pridwin are obliged to apply. It can, therefore, form no basis for public policy. And as I have also pointed out earlier, reg 6(1)(i), incorrectly relied upon to support a right to hearing under PAJA, contains no injunction for independent schools to apply a fair procedure before terminating a parent contract.

[79] The appellants provide no other facts to support their case that the enforcement of the termination clause offends public policy in the circumstances of this case, much less showing that any substantial harm to the public or the children will result from the cancellation. The facts show the contrary. Mr Marx's conduct, in contrast to the appellants', was exemplary. He allowed the two children to remain for five months, until the end of the academic year. There are several other public schools at which they may be enrolled. The truth, however, is that the appellants wish to send their children to another private school of equivalent standard to Pridwin, as the facts show, but also to keep their children there until they achieve this. There are no public policy grounds for indulging this need.

[80] The facts also show that the appellants concluded these contracts in which their attention was specifically drawn to certain clauses, including those that set out the standard of conduct expected of them, the consequences for breach and the mutual

[59] See judgment fn 2 para 122.

right to terminate on notice. The contracts are not one sided or unduly onerous on one of the parties. The appellants concluded the contracts freely, as autonomous individuals, alive to the consequences of what they were signing. Public policy demands that they be held to their terms.

Conclusion

[81] The appellants sought, in the main, to make a case that they ought to have been heard before the termination clauses were invoked. There were no constitutional or other public policy grounds to justify this. Nor was their attempt to find a basis in PAJA for it. The challenge to clause 9.3 of the contracts on public policy grounds was also unmeritorious. The School, on the other hand, was acutely aware of its constitutional duties not only to the appellants' children but to all the affected parties in cancelling the contracts. Its reason for doing so, though not relevant, was unimpeachable, given the extraordinary behaviour of the appellants. The high court correctly dismissed their application. Furthermore, having regard to their subsequent behaviour, which another court has again found to have been in breach of their contracts, it can hardly be in the best interests of all concerned for this family to remain at the School.

[82] In the result the following order is made:

The appeal is dismissed with costs, including those of two counsel.

A Cachalia

Judge of Appeal

Mocumie JA (dissenting)

[83] I have read the well-crafted judgment of my colleague, Cachalia JA. I am grateful for his narration of the background, with which I agree. He would dismiss the appeal and confirm the judgment and order of the high court upholding the common law principle of *pacta sunt servanda*. I am in respectful disagreement with this outcome

[84] In my view clause 9.3 of the Parents Contracts (the contracts) on which Pridwin Preparatory School (the School) relied when on 30 June 2016 it terminated the contracts of the parents of the two young learners(the appellants), aged 11 and 9 (DB and EB), is unconstitutional, contrary to public policy and unenforceable to the extent that it purports to allow the School to terminate the contracts without following fair procedure; and without the views of DB and EB being given due and appropriate consideration. Accordingly, I would uphold the appeal with costs and set aside the order of the high court. What follows are my reasons for reaching this conclusion.

[85] For purposes of the conclusion I reach, it is convenient that I only highlight, very briefly, two aspects of this litigation: the conduct of the appellants on the one hand and that of the School on the other. As detailed in the main judgment[60], there were several incidents by the father (AB) of DB and EB which were considered by the School as threatening and intimidating to educators and coaches of sports and not in the best interests of all learners enrolled at the School including DB and EB. The conduct of AB, the School complained, also brought disrepute to the School which has been in existence since 1923. Several attempts were embarked upon to resolve this conduct including intervention by the School Board and interdictory proceedings. All these attempts came to naught for reasons which I will traverse later in this judgment. When an amicable solution could not be reached, the School opted to terminate the contracts. This, inevitably and as provided for in the contracts, led to the expulsion of DB and EB

[86] The appellants approached the high court on an urgent basis to review and set aside the decision of the School on the basis that the termination of the contracts under the circumstances was unconstitutional and contrary to public policy as they were not

[60] Paras 17-26.

given a hearing prior to the termination of the contracts. This was more so, it was argued before us, because the termination of the contracts led to the expulsion of DB and EB without them as learners at the School affected adversely by the decision, without being given a hearing prior to the termination of the contracts.[61] The School stuck to its guns. It relied on the wording of clause 9.3 of the contracts. It cited what the main judgment describe in several paragraphs as '. . .a sorry tale of misconduct on their part spanning eight months. . . .' which '. . . created a toxic and intolerable atmosphere.' The School insisted that the appellants knew when they signed the contracts what they were agreeing to. The decision to expel DB and EB flowed from a breach of the contracts by AB. It maintained that it also took into consideration the best interests of DB and EB by not expelling them immediately as it was entitled to in terms of the contracts but by allowing them to remain in the School until the end of the term in December 2016. The Principal (Mr Marx) assisted the appellants to look for alternative accommodation at a school of a similar status as Pridwin, namely, St John. He even engaged with a Member of the Executive Council of Education, Gauteng (the MEC), who assured him that DB and EB could be accommodated at any of three public schools in the vicinity of their residential area in the next academic year.

[87] Having considered the submissions by the parties, the high court found in favour of the School. It held that 'on the facts both parties contracted freely and voluntarily. The plain language of clause 9.3 is clear. Prima facie, the notice given by Pridwin under clause 9.3 is valid.' The high court pointed to the fact that the contracts made no provision for a hearing prior to the termination. With reference to the best interests of DB and EB under s 28(2) of the Constitution, the high court reasoned that the School, represented by Mr Marx, acted in the best interests of DB and EB as indicated in the letter of termination of the contracts and also took into consideration the best interests of other learners enrolled at the same School. Relying on the

[61] It is appropriate to mention that this argument was made in its expanded form including reference to judgments of this Court, the Constitutional Court and the United Nations Convention on the Rights of the Child, 1989 only in this Court. Counsel for the School diligently responded to this argument in this Court when it was raised – although maintaining the case for the School ie upholding the principle of *pacta sunt servanda* being a moral principle consistent with the constitutional values and principles as enunciated in cases such as *Sasfin (Pty) Ltd vs Beukes* 1989 (1) SA 1 (A). The issue was raised by the court and both counsel addressed this as it happened in *Brooks and another v National Director of Public Prosecutions* [2017] ZASCA 42; 2017 (1) SACR 701 (SCA); [2017] 2 All SA 690 (SCA) where this Court *mero motu* raised the issue of 'the best interests of the children' which both parties did not raise in the high court or in their heads of argument before this Court.

judgment of this court in *Bredenkamp v Standard Bank of South Africa Ltd*,[62] it concluded that the sanctity of a contract between parties had to prevail.[63]

[88] In this Court, counsel for the appellants did not attack the general validity and applicability of the time-honoured contractual doctrine that agreements solemnly entered into should be honoured and enforced (*pacta sunt servanda*). Nor did he raise the issue of the development of the common law under s 39(2) of the Constitution, correctly so, as this case is not about the development of the common law principle that agreements are binding in the strict sense; where the appellants would have been expected to have pleaded s 39(2) of the Constitution and accordingly afforded the School the opportunity to rebut that case as made out in the papers (see *Barkhuizen* and *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*).[64] He however submitted, that when taking into account the spirit, purport and object of the Constitution when interpreting contracts and legislation, the School acted unreasonably and contrary to its duty and responsibility not only to hear the appellants before the expulsions of DB and EB but also to hear DB and EB who, he contended, were to be treated as separate individuals from their parents. These two, he argued, had the right to be heard before any decision which affects them is taken by anyone as provided in the Children's Act 38, 2005 (the Children's Act) – premised on the United Nations Convention on the Rights of the Child, 1989 (the UN Convention on the Rights of the Child).[65] Relying on the *Governing Body of the Juma Musjid Primary School & others v* Essay *N.O. and others*,[66] he argued that s 29(1) of the Constitution imposed a negative duty on the School not to diminish the constitutionally entrenched right to basic education of DB and EB.[67] Its decision which led to the expulsion of the two impacted negatively on that right.

[89] Counsel for the School submitted that although it admitted the import of s 28(2) of the Constitution and its applicability on these facts, the best interests of a child are

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[62] *Bredenkamp v Standard Bank of South Africa Ltd* [2010] ZASCA 75; 2010 (4) SA 468 (SCA); 2010 (9) BCLR 892 (SCA); [2010] 4 All SA 113 (SCA).
[63] *Bredenkamp* paras 27-28 and 50-54.
[64] *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30.
[65] Article 12 of the United Nations Convention on the Rights of the Child, 1989.
[66] *Governing Body of the Juma Musjid Primary School & others v Essay N.O. and others* [2011] ZACC 13; 2011 (8) BCLR 761 (CC).
[67] See footnote 2 above.

not absolute against the interests of others. In this instance, he argued, the School took into consideration the best interests of not only DB and EB but the interests of the four hundred-plus other learners enrolled in the same school. Those interests and those of other stakeholders had to be taken into consideration in the balancing of the conflicting interests. He submitted further that to that extent the Constitutional Court has warned in *S v M*[68] that:

'This Court, far from holding that section 28 [of the Constitution] acts as an overbearing and unrealistic trump of other rights, has declared that the best interests injunction is capable of limitation. In *Fitzpatrick* this Court found that no persuasive justifications under section 36 of the Constitution were put forward to support the ban on foreign persons adopting South African-born children, which was contrary to the best interests of the child. In *De Reuck*, in the context of deciding whether the definition and criminalisation of child pornography was constitutional, this Court determined that section 28(2) cannot be said to assume dominance over other constitutional rights. It emphasised that

". . . constitutional rights are mutually interrelated and interdependent and form a single constitutional value system. This Court has held that s 28(2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with s 36."

Accordingly, the fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights in the Bill of Rights their operation has to take account of their relationship to other rights, which might require that their ambit be limited.' (Footnotes omitted)

The law

[90] In South Africa, the principle of sanctity of contracts, *pacta sunt servanda,* is one of the fundamental ideas that underpin the modern law of contract. Freedom of contract and the concept of good faith are other fundamental concepts of contract law.[69] Authors in the field have begun to reflect on the extended definition of good faith

[68] *S v M* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) paras 25-26.
[69] Dale Hutchison & Chris – James Pretorius (eds) *The Law of Contract in South Africa* 2 ed (2012) para 1.8.

which, they argue, include components of fairness and equity influenced by the values underpinning the Constitution.[70]

[91] The infusion of constitutional values when interpreting a contract, inevitably constitutes a limitation of the right of the parties to freely contract with each other, which is protected by the values of equality before the law in s 9 of the Constitution, freedom of human dignity in s 10 of the Constitution in conjunction with the right to freedom of association under s 18 of the Constitution. Over and above deciding whether Mr Marx was obliged to give the parties a hearing prior to terminating the contracts, the crucial issue to keep in mind is whether the limitation sought is reasonable and justifiable in terms of s 36 of the Constitution – in line with the proportionality analysis. Section 36 of the Constitution provides as follows:

'(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;

(*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.'

Application of the law to the facts

[92] I accept that agreements solemnly made should be honoured and enforced. In my view, it would however be contrary to widely accepted jurisprudence to look at the contracts in issue exclusively on the basis of the old-age sanctity of contract as the high court did without the proportionality analysis embarked upon in *S v Makwanyane*[71] in the context of 'the best interests of a child.' The context in which the

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[70] See Brand FDC, *'The role of good faith, equity and fairness in the South African law of contract: the influence of the common law and the Constitution'* (2009) 126 SALJ 1 at 73 where he makes the point in support of the doctrine of *pacta sunt servanda* – that good faith is not an independent basis to invalidate contracts. This is the position this Court has adopted in the clearest of terms in a number of its judgments referred to in this judgment.

[71] *S v Makwanyane and another* [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1.

contracts in issue were concluded between the parties, is distinctly different – not one of the normal day to day contracts in the commercial world. That is what distinguishes the facts of this case from all others referred to by counsel for the School, particularly the judgments of this Court, a distinction the high court seems to have missed. Having said that, I however must still consider whether the clause indeed infringed upon s 28(2) and s 29(1) of the Constitution as I do hereafter. For the conclusion that I reach premised on s 28(2) and s 29(1), it is not necessary to make any conclusive finding on whether the decision made by Mr Marx was administrative in nature under the Promotion of Access to Justice Act 3 of 2000.

Whether the termination of the contracts infringed section 29(1) of the Constitution

[93] Section 29(1) of the Constitution stipulates that the State must provide each child with basic education. Section 29(3) obliges independent schools to 'maintain standards that are not inferior to standards at comparable public educational institutions.' The high court, relying on *Musjid* and *KwaZulu Natal Joint Liaison Committee v MEC Department of Education, KwaZulu Natal and others*[72] and other cases of local divisions, found that 'whilst everyone is entitled to basic education in terms of section 29(1) of the Constitution, this basic education must be provided by the State either through public schools or independent schools subsidised by the State.' It sought to distinguish this case from *KwaZulu Natal Joint Liaison Committee* and *Musjid* on the narrow distinction between independent schools which are subsidised by the State on the one hand and those not subsidised on the other. On that basis it found 'that Pridwin receives no subsidies from the State at all …I cannot find that Pridwin, as a wholly independent school, has the obligation to provide a basic education…'

[94] That is the fallacy that ran through this litigation in the high court and in this Court, which I do not deem necessary to traverse at length in this judgment for the reason that the appellants' case is distinctly and deeply embedded in section 28(2) and public policy. Suffice to say the following. Section 29(1) of the Constitution indeed places a positive obligation on the State to provide basic education. In 2013 the Centre

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[72] *KwaZulu Natal Joint Liaison Committee v MEC Department of Education, Kwazulu Natal and others* 2013 (4) SA 202 (CC).

for Child Law, University of Pretoria conducted a research on obligations of independent schools in respect of children's right to basic education. In its conclusion, it made the submission that:

'In *Juma Musjid*, the [Constitutional] Court emphasised that the primary duty to provide a basic education falls on the state:

It is clear that there is no primary positive obligation on the Trust to provide basic education to the learners. That primary positive obligation rests on the MEC.

As a result, it stressed that the Trust was not obliged to continue to make its land available to the public school for all time. *However, the Court recognised that the Trust was subject to a duty to minimise the impact of an eviction order on the learners*:

At most, the Trust's constitutional obligation, once it had allowed the school to be conducted on its property, was to minimise the potential impairment of the learners' right to a basic education.'[73](Emphasis added)

[95] This research strengthens my resolute view that the underlying tone of the Constitutional Court in *Musjid*, read within the framework of the South African Schools Act, 84 of 1996 (the Schools Act) and taking into account the values underpinning our Constitution which not only promotes but protects equality of all under s 9; s29 (1), imposes a negative obligation on independent schools not to diminish the right to basic education. Noel Zaal & Ann Skelton[74], make the point persuasively that there is a constitutional distinction between 'basic' and 'further' education, which makes school attendance compulsory for learners from the age of seven years until the age of 15 years or until the learner reaches the ninth grade, whichever occurs first.[75] Their informed opinion, which I share, is that basic education is widely accepted as compulsory education.[76] This much was accepted by the high court in its judgment when it stated that 'even if Pridwin does have a negative constitutional obligation not to impair DB and EB's right to basic education by terminating the contract[s], Pridwin

[73] *Oxford Pro Bono Publico of Independent Schools in South Africa* page 10.
[74]Noel Zaal & Ann Skelton '*Providing effective representation for children in a new constitutional era: Lawyers in the criminal and children's courts'* (1998) 14 SAJHR 539 at 554.
[75] Section 3(1) of the Schools Act makes school attendance compulsory for learners from the age of seven years until the age of 15 years or until the learner reaches the ninth grade, whichever occurs first.
[76] *Musjid* para 58.

did not breach this obligation on the facts' because '[a]fter terminating the contract[s] Pridwin wrote to the Department of Education and secured a written undertaking from the Chief Director, School Management, that both DB and EB would be guaranteed at a public school in 2017, immediately after the children were to leave Pridwin.' This, however does not detract from the fact that once a school, independent as Pridwin, had taken the responsibility of providing 'an environment in which each child may develop a lively, enquiring mind and positive attitudes towards learning', as well as promoting 'in each child respect and empathy for others and the environment through the encouragement of good manners, discipline, responsibility, leadership and service',[77] it cannot diminish that right because of the wrong doings of their father. The main judgment recognises in para [41] – that 'interference with a negatively protectable right occurs when the wrong doing party itself is not under an obligation to provide service – basic education, here – but its actions indirectly have that effect…'

I am led, inescapably, to come to the conclusion that the actions of the School indirectly had that negative effect on DB and EB. As a result, it indeed acted unreasonably in terminating the contracts.

Whether the termination of the contracts infringed section 28(2) of the Constitution, 1996.

[96] Section 28(2) of the Constitution provides that in every matter that affects the child, the best interests of the child must be taken into consideration. Our Constitution is unique and amongst the best in the world. Distinct from other progressive Constitutions around the world is the fact that it holds the best interests of the child to be of paramountcy in every matter that affects the child; separate from all other protective rights in the Bill of Rights. The basic principle laid down in determining what 'taking into consideration the best interest of the child' entails is emphatically stated by the Constitutional Court in *C v Department of Health*[78] *albeit* in the context of medical treatment as follows:

'Section 28(2) of the Constitution requires an *appropriate degree* of consideration of the best interests of the child. Removal of a child from family care, therefore, requires *adequate*

[77] See the Mission and Values Statement of Pridwin Independent School.

[78] *C and others v Department of Health and Social Development, Gauteng and others* [2012] ZACC 1; 2012 (2) SA 208 (CC); 2012 (4) BCLR 329 (CC) para 27.

consideration. As a minimum, the family and particularly the child concerned, must be given an opportunity to make representations on whether removal is in the child's best interests.' (Emphasis added)

[97] Subsequently in *J v NDPP*[79] the Constitutional Court emphasised three principles which arise when considering 'the best interests of the child' under s 28(2) of the Constitution. The court stated:

'A third principle is that the child or her representative must be afforded an *appropriate and adequate opportunity* to make representations and to be heard at every stage of the justice process, giving due weight to the age and maturity of the child'. (Emphasis added.)

One common thread that can be discerned from these two judgments is the *appropriate* and *adequate opportunity* to be heard and make representation before any decision affecting a child can be taken. It is noteworthy that the Constitutional Court did not make any distinction when it made these pronouncements on these two occasions and others not referred to in this judgment.

[98] As in *Christian Education South Africa v Minister of Education*,[80] both in the high court and this Court if we have had the assistance of a *curator ad litem* to represent the interests of the children, the curator could have made sensitive enquiries so as to enable their voices to be heard. As the Constitutional Court stated '[t]heir actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue, and the factual and experiential foundations for the balancing exercise in this difficult matter would have been more secure.' The School, admittedly, on their case, did not afford DB and EB appropriate and adequate opportunity to be heard and make representations before terminating the contracts which led to their expulsion. Courts are encouraged to be wiser and have a curator ad litem appointed in all matters of this nature and magnitude even where the parties do not make an application to that effect.

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[79] *J v National Director of Public Prosecutions and another* [2014] ZACC 13; 2014 (2) SACR 1 (CC); 2014 (7) BCLR 764 (CC) para 40.

[80] *Christian Education South Africa v Minister of Education* [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 para 53.

[99] On the value of affording people procedural fairness, the Constitutional Court stated in *Joseph and others v City of Johannesburg and others*[81] as follows:

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

As my colleague correctly points out, these cases are distinguishable on their facts from the facts of this matter before us. But the overarching principle derived from them remains ie that 'the best interests of the child' are to be of paramountcy in every matter that affects the child. And flowing from that, that a child of appropriate age must be given an appropriate and adequate opportunity to be heard and to make representations before any decision affecting him or her can be taken.

[100] To indicate that Mr Marx took into consideration the best interests of DB and EB and balanced them against those of the other four hundred-plus learners enrolled at the same School, he simply stated that he did so in the letter of termination of the contracts and repeated same in his answering affidavit. He added that he also took into consideration the parents of the four hundred-plus learners as well as the long standing and prestigious reputation of the School in the context of the circumstances prevailing at the time. It is only his *ipse dixit* that he indeed took the best interests of DB and EB into consideration when he terminated the contracts. In the light of the arguments raised by the appellants in this Court, I find that such assertion is not supported by any evidence. It therefore begs the question, on these facts, what did he do that points to such an exercise been undertaken?

[101] I appreciate that this could not have been an easy task due to the unprecedented conduct of a parent at such a school. At best, in this case, Mr Marx did not expel DB and EB summarily but extended their stay until end of term 'in the interests only of your sons' who he regarded as model learners. This is later repeated in the answering affidavit. But considering the drastic results of the termination of the contracts on DB and EB, his say so alone would not be sufficient. A prudent and

[81] *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC) para 42.

considerate Principal, who has the best interests of all his learners, as Mr Marx portrayed himself to be, would have taken into consideration many other relevant factors which I will allude to hereafter. Instead, the record is replete only with the incidents of the unacceptable conduct of AB. What is obviously lacking in his purported balancing of interests of the two against four hundred-plus learners, shorn off all extras (the prestigious reputation of 95 years of the School and the rights of other parents and stakeholders) is the following:

a) Mr Marx makes no reference to when such exercise was undertaken. For instance, did the School Board take part or not? If not, why, when AB had suggested the intervention by the School Board which inexplicably did not happen. There are no minutes of a meeting of the School Board where the best interests of the set of interests were considered and a decision was taken to sacrifice them and why this was in their best interests. The minutes would have been filed with the papers when the appellants attacked the process that the School followed.
b) Who participated in the exercise? – ie of the four hundred-plus learners;
c) Whether the continued presence of DB and EB threatened the lives of the other four hundred-plus learners, made them uncomfortable or had any bad impact on their safety, education and development at the School;
d) Whether DB and EB were disrespectful to him as the Principal, educators who taught them or any other persons in a position of authority or even the same four hundred-plus learners including their leaders, Representatives of Learners Council members or a body of similar stature.

[102] To the contrary, it is on record that DB and EB are model learners. The eldest of the two, the 11 year old, will be completing his preparatory phase at the School in 2019. One can safely assume that from the time they were enrolled at the School, they have never been disciplined for any serious infraction in general, against Mr Marx, educators at the School and against their peers.

[103] In contrast the impact of what Mr Marx terms, in his strange wisdom, ‘in the best interests’ of DB and EB is the opposite and not in the least in their best interests. The results are that amongst all advantages of independents schools as the appellant irrefutably lamented in their founding affidavit inter alia:

'85.1 he effectively expelled two model students with deep attachment to the staff, learners and culture of Pridwin;
85.2 he was not appraised of DB's or EB's feelings and or attachments towards Pridwin;
85.3 he did not consider the emotional and psychological impact that being removed from the school would have on DB or EB;
85.4 …
85.5 …'

This is against the background that none of the four hundred-plus learners nor their parents for that matter, except an odd parent, have said anything adverse about DB and EB. Otherwise the School would have filed confirmatory affidavits of all those who disapproved strongly of the appellants' conduct to the extent that they would condone the expulsion of two innocent children for 'the sins of the father.'

[104] On these facts, it is clear that Mr Marx did not undertake the above exercise. What he did is an afterthought and a ruse to justify terminating the contracts which had the devastating effect of the expulsion of DB and EB without taking into consideration their best interests or their views. There is no indication that available legal processes at the disposal of the School which were initiated against AB were followed through. One instance where the court did not find him in contempt of the court order, cannot be the answer to expel DB and EB from the School. Proportionally, the nature of the rights at stake, 'the best interests of the child', are just too important to be limited unjustifiably under s 36 (1) of the Constitution by the right of the parties to freely contract with each other or even resile from such contract when any one of them failed to comply with any of the terms and conditions. I say proportionally, to make the point that, as much as the bests interests of the other four hundred –plus learners at the School are just as important and of paramountcy in every matter that affects them, on these facts, the rights of DB and EB were more at stake than theirs. As I have demonstrated in the preceding paragraphs, the impact of the decision to terminate the contracts had a more devastating effect on the two as opposed to retaining them at the School, than on the four hundred – plus other learners.

[105] This Court in *Centre for Child Law v Governing Body of Hoërskool Fochville*[82] with reference to authors in the area of child justice[83] dedicated six paragraphs on 'the best interests of the child' to illustrate and emphatically make the point that in every weighing up of rights and interests and any value judgment, the best interests of the child would have to be the paramount consideration. In my view, this approach cannot be overemphasised enough because that is how fair procedure and processes operate in any civil and democratic society. It would be astonishing that any institution – no matter how independent – in a democratic society such as South Africa with its recent history of abuse of power by institutions as it happened in not so far a past, would be allowed to operate unchecked even when it affected the rights of the most vulnerable of our society, children. To do otherwise would amount to an arbitrary injunction on the rights of DB and EB to compulsory education (s29 (1) and s 3(1) of the Schools Act).[84]

[106] Looking at other jurisdictions, in *Re D [2007] 1 AC 619*, Baroness Hale in the UK provide the following seminal articulation of the importance of listening to children in the context of litigation that touches and concerns their lives which we should take to heart:

'There is a growing understanding of the importance of listening to children involved in children's cases, it is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more reason for failing to hear what the child has to say than that it is for refusing to hear the parents view.'

[107] It is on this basis that I find that clause 9.3 is unconstitutional as it is conflict with s 28(2) and s 29(1) of the Constitution to the extent that it entitled the School to terminate the contracts without affording DB and EB appropriate opportunity to make

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[82] *Centre for Child Law v The Governing Body of Hoërskool Fochville* [2015] ZASCA 155; [2015] 4 All SA 571 (SCA); 2016 (2) SA 121 (SCA) para 19-25.
[83] Noel Zaal & Ann Skelton '*Providing effective representation for children in a new constitutional era: Lawyers in the criminal and children's courts'* (1998) 14 SAJHR 539 at 554.
[84] The Act came into operation on 1 January 1997. Section 3(1) makes school attendance compulsory for learners from the age of seven years until the age of 15 years or until the learner reaches the ninth grade, whichever occurs first:

representations and be heard before it took the decision to terminate the contracts which led to their expulsion from the School.

Public policy

[108] The appellant's prayer which remains is the question whether clause 9.3 of the contracts is unlawful, contrary to public policy and unenforceable to the extent that it purports to allow Pridwin to cancel the parents contracts without following a fair procedure and/or without a reasonable decision.'

[109] At para 27 of the main judgment, my colleague sets out important 'learning from our courts' on the jurisprudence of private contracts and public policy which I embrace and will not repeat for the sake of brevity. I however deem it necessary to state the following as a starting point. Over three decades ago in *Magna Alloys*[85] this Court held that the mere fact that an agreement operated in an unfair or unreasonable manner would not ordinarily constitute a ground on which to challenge such an agreement.[86] As expressed in the recent judgment of *Maphango and* others *v Aengus Lifestyle Properties (Pty) Ltd*[87] twenty seven years later that unless and until the Constitutional Court holds otherwise, the law is therefore as stated by this Court, for example, in *South African Forestry Co*[88]*, Brisley*[89]*, and Bredenkamp*[90]*.* Accordingly, 'a court cannot refuse to give effect to the implementation of a contract simply because that implementation is regarded by the individual judge to be unreasonable and unfair'.

[110] In its wisdom to align the interpretation of contracts with the constitutional values underpinning our Constitution, the Constitutional Court, Ngcobo J, writing for the majority in *Barkhuizen*, stated that '. . . the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights.'[91] He warned that although this left 'space for the doctrine

[85] *Magna Allloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A).
[86] *Magna Alloys* para 893H.
[87] *Maphango and others v Aengus Lifestyle Properties (Pty) Ltd* [2012] ZACC 2; 2012 (3) SA 531 (CC); 2012 (5) BCLR 449 (CC).
[88] *South African Forestry Company Ltd v York Timbers Ltd* [2004] ZASCA 72; [2004] 4 All SA 168 (SCA).
[89] *Brisley v Drotsky* [2002] ZASCA 35.
[90] *Bredenkamp* above.
[91] *Barkhuizen* para 30.

of *pacta sunt servanda* to operate . . . [it] allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though parties may have consented to them.'[92] He reasoned that the concept of fairness, justice, equity and reasonableness could not be isolated from public policy and that the concept of *ubuntu* would play a role.[93] The Constitutional Court recently reiterated this nuanced development of the jurisprudence of contract law in *Everfresh Green Market Virginia (Pty Ltd) v Shoprite Checkers (Pty) Ltd*[94] where, Moseneke DCJ, writing for the majority, stated '[i]ndeed, it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of *ubuntu*, which inspire much of our constitutional compact. On a number of occasions in the past this Court has had regard to the meaning and content of the concept of ubuntu. It emphasises the communal nature of society and "carries in it the ideas of humaneness, social justice and fairness" and envelopes "the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity."'

[111] In *Barkhuizen* the Constitutional court stated that to determine whether contract is fair, a two pronged enquiry had to be embarked upon.[95] It held:

'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.

The first question involves the weighing-up of two considerations. On the one hand, public policy, as informed by the Constitution, requires, in general, that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt servanda* which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity. The other consideration is that all persons have a right to seek judicial redress. These considerations express the constitutional values which must now inform all laws, including the common law principles of contract.

[92] *Barkhuizen* para 30.
[93] *Barkhuizen* para 51.
[94] *Everfresh* above para 71.
[95] The two staged enquiry was recently restated in *Bredenkamp* above para 44.

The second question involves an inquiry into the circumstances that prevented compliance with the clause. It was unreasonable to insist on compliance with the clause or impossible for the person to comply with the time limitation clause. Naturally, the onus is upon the party seeking to avoid the enforcement of the time limitation clause. What this means in practical terms is that once it is accepted that the clause does not violate public policy and non-compliance with it is established, the claimant is required to show that, in the circumstances of the case there was a good reason why there was a failure to comply.'[96]

[112] Applying this two staged enquiry to this case, the first enquiry is whether the notice clause in the contracts is in itself unconstitutional; and if not the second enquiry is whether the termination on notice is unconstitutional in the light of the circumstances prevailing at the time.

[113] As a starting point, the first enquiry must be directed at the objective terms of the contract. If it is found that the objective terms are not inconsistent with public policy on their face, the further question will then arise, which is, whether the terms are contrary to public policy in the light of the prevailing circumstances then.

Is clause 9.3 unconstitutional and contrary to public policy?

[114] Clause 9.3 of the Contracts reads:

'The school 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 to you of any fees pre-paid for a period after the end of the term less anything owing to the school by you.'[97] (Emphasis added)

[115] The first flaw with this provision is that the contracts are clearly between private individuals and the School. Despite the context in which they were concluded ie the values underpinning our Constitution (the other consideration is that all persons have a right to seek judicial redress)[98] and in particular the best interests of DB and EB, *ex facie* it makes no provision for a hearing before the School terminates the contracts. It makes no provision for a child to be heard before he or she is expelled in conflict with

[96] *Barkhuizen* paras 56, 57 and 58.
[97] Annexure Q Record Vol 1, page 133.
[98] *Barkhuizen* above.

the Children's Act, the UN Convention of the Right of the Child as well as the African Charter on the Rights and Welfare of the Child,1990 (ACRWC)[99]. It makes no provision for any fair procedure to be adopted before the decision to expel is taken and implemented.

[116] The second flaw is, the terms of the contracts are overbroad ie termination for *'any reason'*. I take cognisance of the fact that although this is a common provision in commercial contracts, the appellants' case is that the enforcement of the clause is unlawful and contrary to the mores of our society and natural justice. My view is that these overbroad terms and the enforcement thereof infringe on the right of the child to basic education (s 29(1) of the Constitution) in the context of independent schools which as the Constitutional Court held in *Musjid*[100] have a negative obligation not to diminish a child's basic right to education. The right to basic education is accepted universally as a right to compulsory education which any institution which has taken the responsibility of the State whether private and partly subsidised or independent cannot diminish as I have found earlier. It is different from further education. What is of extreme concern is that a decision of such serious implications was taken by Mr Marx on his own, without the wisdom of the broadly representative School Board which would in most likelihood have the capacity, expertise, objective and untainted responsibility to deal with a disciplinary action of this magnitude and conflicting interests. The hearing by the School Board which I dealt with earlier, related to a request by AB for its intervention on the very decision to expel DB and EB. Such intervention never materialised. The intervention which the School Board was involved in, was in connection with a complaint laid by AB against a Mr Fourie who he alleged had defamed him and CB, which is obviously not relevant for the determination of whether cause 9.3 of the contracts is against public policy.

[117] The third and most critical flaw - the approach of the School on the best interests of DB and EB. The submission on behalf of the School that it took the best interests

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[99] *The African Charter on the Rights and Welfare of the Child*, 1990 article 4(1) provides:
'In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.'
[100] *Musjid* above.

of DB and EB in issue into consideration is not borne out by the facts. In the letter of termination of the contracts and expulsion of DB and EB, Mr Marx explains why he was supposedly constrained to take this drastic step. He cites all the incidents including the incident which AB allegedly physically threatened a coach hardly a day after he had made another undertaking on 27 June 2016 to refrain from unbecoming conduct. In his answering affidavit, Mr Marx states that he took the best interests of DB and EB into consideration. It was argued that, in terms of the clear provisions of the contracts, he could have invoked the summary expulsion stipulation in the light of the repeated unbecoming conduct of AB. But, he opted to give the appellants notice until the end of the year to find alternative accommodation at another school and that 'in the interests only of your sons, I have instead, in my sole discretion, elected to invoke clause 9.3 of the Contract.' This is so, in my view, because he regarded DB and EB as model learners.' He even asked the Chief Director to give an undertaking, as the high court observed, that DB and EB will be accommodated in public schools in their area in the next academic year. In my view, contrary to what the high court and my colleague found in the main judgment at para [31] that '…he (referring to Mr Marx) said, he had balanced their rights against those of all other children as well as other stake holders, in coming to his decision… ', in my view, is only his *ipse dixet* – which is not supported by any other evidence despite being repeated.

[118] Reverting to the issue before us, considering that the provision makes no room for a hearing before a decision to terminate the contracts which results in the expulsion of children from the School, the contracts are manifestly unconstitutional, unfair and offends public policy. It would be unlikely even in these circumstances, to imagine that a society such as ours, protective of its children, would approve of a clause in a contract between parents and a school, which expels a child from a school out of no wrongdoing on his or her part but that of their parents. It can never be in the best interests of a child where the school fails to use all measures available to deal decisively with parents, to resort to such unconscionable intrusion into the right to compulsory education of a child, under the guise of the 'sanctity of a contract'. In the worst case scenario, even in the law of contracts the appellants cannot be heard to have waived the rights of DB and EB to compulsory education or to be heard on the basis which is clearly contrary to their best interests and public policy This Court in

Bafana Finance Mabopane v Makwakwa[101] ,Cachalia JA writing for the majority, *albeit* in different circumstances and in the context of a piece of legislation, stated 'an agreement whereby a party purports to waive the benefits conferred upon him or her by statute will be contra bonos mores, and therefore not enforceable, if it can be shown that such agreement would deprive the party of protection which the legislature considered it should as a matter of policy be afforded by law. An agreement is contrary to public policy, according to Wille:

". . .if it is opposed to the interests of the state ,or justice, or of the public."'

[119] For the reasons set out in the preceding paras, clause 9.3 of the contracts stands to be declared unconstitutional, contrary to public policy and unenforceable to the extent that it does not make provision for a hearing or representations prior to expelling any child on the basis of a breach of the contracts on the part of the parents. The Children's Act 38 of 2005[102] demands this. The Schools Act demands this. The UN Convention on the Rights of the Child entrenches the right of the child to participate makes it obligatory on all States Parties to assure to the child that his or her views shall be given due weight according to the age and maturity of the child. The School is left with the option to correct itself by infusing fair processes into the contract. This is a less restrictive means to achieve the purpose of ensuring that the best interests of DB and EB in these circumstances are protected and are of paramountcy in all matters affecting them.

[120] Lest I be misunderstood, I appreciate that independent schools somewhat like public schools emphasise the best interests of the schools (s 20(1) of the Schools Act). But they must realise that they are evolving and not static or insular entities. They cannot be cocooned from the fair processes specifically provided for under the Schools Act which governs them. Nor can they operate outside the obligations imposed by the Constitution on any institution, be it public or private to uphold the best interests of the child. That is why the Department of Education and relevant stakeholders including the National Alliance of Independent Schools (NAISA), Independent Schools Association of South Africa (ISASA) which is a member of

[101] *Bafana Finance Mabopane v Makwakwa and another* [2006] ZASCA 46; 2006 (4) SA 581 (SCA); [2006] 4 All SA 1 (SCA) para 10.
[102] Sections 10, 14 and 15.

NAISA to which the School in this matter is affiliated, deemed it necessary to conclude the Rights and Responsibilities of Independent Schools document which provides guidance to all parties on how to go about when they deal with expulsion of learners. Clause 8 thereof provides that '*whenever an independent school seeks to exclude a learner.*' I must add in my view, even if it refers to 'on the basis of failure to pay fees'- the same is applicable to expulsion on any other reason- *'a fair procedure must be followed and the best interests of the child should always be adhered to.'* (Emphasis added.)

[121] My colleague in the main judgment holds as the School argued strenuously that the document is not binding on all the parties as it is unsigned and was pulled from the internet the day before the hearing in the high court. And it is irrelevant to determine a basis for public policy. I do not declare that this document is binding on the parties. Nor do I declare that it is relevant for the purpose alluded to. I refer to it to demonstrate the commitment of the Department of Education and all concerned to strive to ensure that the Constitution is not undermined in the process of protecting and promoting the independence and autonomy of independent schools – and that the best interests of the child are promoted and protected in all matters which affect them, especially expulsion.

[122] This is in line with the approach adopted by this Court in interpreting legislations and contracts in this era as evidenced in *Malcolm v Premier, Western Cape Government N.O.*[103] where it is stated:

'There is obvious sense in this approach when a court is confronted with a novel situation that could not have been in the contemplation of the legislature at the time the legislation was enacted. Courts can then, in the light of the broad purpose of the legislation, current social conditions and technological development, determine whether the new situation can properly, as a matter of interpretation, be encompassed by the language. But, as Lord Bingham pointed out in *Quintavalle*, by way of example, they cannot use the principle to extend legislation relating to dogs to cats, however desirable such an extension may seem. In other words the principle has limits, but subject to that qualification and the case by case working out of those limits, I see no reason why, in appropriate cases, South African courts should not invoke it,

[103] *Malcolm v Premier, Western Cape Government N.O.[103]* (207/2013) [2014] ZASCA 9; 2014 (3) SA 177 (SCA); [2014] 2 All SA 251 (SCA) (14 March 2014) para 11-12.

particularly in the light of our present constitutional order in terms of which statutes are to be construed in the light of constitutional values.

The Constitution enjoins us to interpret legislation in accordance with the spirit, purport and objects of the Bill of Rights. Where a previous interpretation of a statute is no longer consistent with those values then we are obliged to depart from it. In this case there are relevant provisions of the Constitution, to some extent those relating to children, but in particular s 10, which guarantees the right to dignity and provides that everyone is entitled to have their dignity protected and respected. This is a core value of our Constitution.' (Footnotes omitted.)

[123] In conclusion, the world has changed dramatically in line with international trends and international instruments on how it treats children in matters which affect them. South Africa as a signatory to many such instruments, in particular the UN Convention on the Rights of the Child, is no exception that is why the legislature chose to use the words of the Convention when it promulgated the Children's Act with reference to the right of the child to be heard in matters that affect him or her. As the Constitutional Court held in *Christian Schools*[104] in the context of religion, 'Courts throughout the world have shown special solicitude for protecting children from what they have regarded as the potentially injurious consequences of their parents' religious practices. It is now widely accepted that in every matter concerning the child, the child's best interests must be of paramount importance. This Court has recently reaffirmed the significance of this right which every child has. The principle is not excluded in cases where the religious rights of the parent are involved. As L'Heureux-Dube J pointed out in the Canadian case of *P v S*:[105]

'[I]n ruling on a child's best interests, a court is not putting religion on trial nor its exercise by a parent for himself or herself, but is merely examining the way in which the exercise of a given religion by a parent throughout his or her right to access affects the child's best interests.'

So too, by analogy, the right of the appellants to conclude contracts freely with the School are not put on trial in this matter, but courts are bound to examine the way in which the exercise of such freedom to contract with each other affects the best interests of DB and EB. Such right cannot trump the best interests of DB and EB in these circumstances. Simply put, the right to be heard before any decision which affects the child is taken, is more precious in the context of our Constitution than the

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[104] *Christian Schools* above para 41.
[105] *P v S* 4 (1993) SCR 141.

right to freedom of contract, more so when it amounts to expulsion of young learners on no wrong doing on their part.

[124] To hold otherwise – in the context of this case and its facts – the values underpinning our Constitution – particularly 'the best interests of the child'– would be too formalistic and against the provisions of s 31(2) of the Constitution which provides that 'the rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights'. It will also not be in line with the constitutional obligation on courts to develop the principles of, in this instance, the law of contract so as to promote the values that underpin our Constitution as courts are obligated by the Constitution to do in s 39(2).

[125] Having found that clause 9.3 of the contracts is not reasonable and justifiable under s 36(1), I find that the specific clause, not the common law principle that agreement are binding (*pacta sunt servanda*), falls foul of ss 28(2) and 29(1) of the Constitution as I have interpreted both sections in this judgment, but in particular s 28(2).

[126] In the result, I would have made the following order.

1 The appeal is upheld with costs, including the costs of two counsel.

B C Mocumie

Judge of Appeal

Appearances:

For Appellant:	G Marcus SC (With him C McConnachie) Instructed by: Knowles Husain Lindsay Inc, Sandton Lovius Block, Bloemfontein
For First to Third Respondents:	A E Franklin SC (with him A Bishop) Instructed by: Webber Wentzel, Johannesburg Honey Attorneys, Bloemfontein
For Fifth Respondent:	Instructed by: Bowman Gilfillan Inc, Johannesburg McIntyre & Van der Post, Bloemfontein
Amicus Curiae:	Equal Education Law Centre, Khayelitsha Webbers Attorneys, Bloemfontein