IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Court *a quo* Case Number 11611/2016
Constitutional Court Case No: 218/18

In the matter between: -

DEVERAJH MOODLEY	Applicant
and	
KENMONT SCHOOL	First Respondent
KENMONT SCHOOL GOVERNING BODY	Second Respondent
PROVINCIAL HEAD OF THE DEPARTMENT OF EDUCATION, KWAZULU NATAL	Third Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION, KWAZULU-NATAL	Fourth Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Fifth Respondent
MINISTER OF BASIC EDUCATION	Sixth Respondent
and	
CENTRE FOR CHILD LAW	*Amicus Curiae*

SUBMISSIONS OF THE CENTRE FOR CHILD LAW

INTRODUCTION

1. This matter concerns three distinct but interrelated and intertwined issues, namely:

1.1. One, whether the adverse cost orders[1] made against the first and second respondents (collectively "**Kenmont**") fall within the indemnification and/or warranty provision provided by section 60(1)(a) of the South African Schools Act 84 of 1996 ("**SASA**")?[2]

1.2. Two, if they do not, whether this court should confirm the declaration of constitutional invalidity of section 58A(4) of the SASA ("**the impugned provision**") made by the court *a quo*?[3]

1.3. Three, and regardless of the answers in respect of either of the two issues mentioned, what the appropriate remedy would be in the circumstances of this case?[4]

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1 The cost orders are those granted against Kenmont by both the KwaZulu-Natal High Court, Durban in the matter of *Moodley v Kenmont School* (828/2010) [2012] ZAKZDHC 23 (30 March 2012), in particular order (c), and the Supreme Court of Appeal in the matter of *Kenmont School v Moodley* (454/12) [2013] ZASCA 79 (30 May 2013), in particular, para 14.

2 See, Kenmont Submissions para 1.4, pg. 3; para 5.9, pg. 15; para 6.16, pg. 20; and para 6.17, pg. 21. The argument

3 The only party that persists with this course of action is, understandably, the applicant. See, Applicant Submissions, para 9, pgs. 16 – 19. The respondents all, for various reasons, oppose the confirmation.

4 It is trite that courts are duty bound to grant appropriate relief where a constitutional breach has bene established. See, generally, *Modder East Squatters v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* [2004] 3 All SA 169 (SCA) at para 18.

2. The *amicus* will demonstrate, during the course of these submissions, and in answer to these issues, that: -

2.1. adverse cost orders granted against a public school (and its governing body) do not fall within the ambit of the indemnification and/or warranty provided for in section 60(1)(a) of the SASA in instances where it arises from them exercising their exclusive powers under the SASA;

2.2. the absolute prohibition against the attachment of assets of a public school, as provided for by the impugned provision, is both reasonable and justifiable in an open and democratic society that is based on human dignity, equality and freedom; and

2.3. the applicant has an effective and appropriate remedy to hold Kenmont (and for the avoidance of doubt its governing body) to account.

3. The *amicus* will also, and in addition to dealing with the pertinent issues that arise in this matter, deal more generally with the relevant considerations in awarding costs (and particularly adverse cost orders) against public schools and their governing bodies.

THE STATUTORY SCHEME

4. The SASA, and the National Education Policy Act 27 of 1996, were introduced to transform the education system and realise the constitutional right to a basic education for all. Its preamble provides that:

> *"W[hereas] this country requires a new national system for schools which will redress past injustices in educational provision, provide an education of progressively high quality for all leaners and in so doing lay a strong foundation for the development of all our people's talents and capabilities, advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance, contribute to the eradication of poverty and the economic well-being of society, protect and advance our diverse cultures and languages, uphold the rights of all learners, parents and educators, and promote their acceptance of responsibility for the organisation, governance and funding of schools in partnership with the State …"*[5] (own emphasis added)

5. In furtherance of its objective to promote learners', parents' and educators' acceptance of responsibility for their (public) school, the SASA makes provision for the establishment of governing bodies and cloaks them with certain (exclusive) competencies.[6] These competencies include, inter alia, the following: -

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5 Preamble, of the SASA.

6 See, generally, sec. 16 read with sec. 23 of the SASA, regarding the establishment and composition of governing bodies, generally, and sec. 20 of the SASA regarding the functions of governing bodies.

5.1. the formulation of the school's admission policy;[7]

5.2. the determination of the school's language policy;[8] and

5.3. the formulation, and adoption, of the school's code of conduct.[9]

6. The SASA also, and in addition hereto, provides certain protections to public schools (and their governing bodies). Importantly, for present purposes, are the following provisions:

6.1. Section 58A(4) of the SASA that provides:

> *"The assets of a public school may not be attached as a result of any legal action taken against the school."* (own emphasis added)

6.2. Section 60 of the SASA that provides, in relevant part, as follows:

> *"(1)*
>
> *(a) Subject to paragraph (b), the State is liable for any delictual or contractual damage or loss caused as a result of any act or omission in connection with any school activity conducted by a public school and for which such public school would have been liable but for the provisions of this section.*
>
> *(b) Where a public school has taken out insurance and the school activity is an eventuality covered by the insurance policy, the liability of the State is limited to the extent that*

7 Sec. 5(5) of the SASA.
8 Sec. 6(2) of the SASA.
9 Sec. 8(1) of the SASA

the damage or loss has been compensated in terms of the policy.

(2) The provisions of the State Liability Act, 1957 (Act No. 20 of 1957), apply to any claim under subsection (1).”

(own emphasis added)

6.3. The term “school activity” is defined in section 1 to mean *“any official educational, cultural, recreational or social activity of the school within or outside the school premises”*.

7. The scheme of the SASA is accordingly to provide for an inclusive and carefully calibrated system of power sharing that allows for the right to education to be realised in the most efficient (and progressive) way.

INTERPRETING THE INDEMNITY/WARRANTY PROVISION OF SASA

8. The principles of statutory interpretation are well-known (and well-settled). They were, most recently, summed up by this court in the matter of *Road Traffic Management Corporation* as follows:

> *“… In Endumeni, the Supreme Court of Appeal authoritatively restated the proper approach to statutory interpretation. The Supreme Court of Appeal explained that statutory interpretation is the objective process of attributing meaning to words used in legislation. This process, it emphasised, entails a simultaneous consideration of –*
>
> *(a) the language used in the light of the ordinary rules of grammar and syntax;*
>
> *(b) the context in which the provision appears; and*

(c) the apparent purpose to which it is directed.

… What this Court said in Cool Ideas in the context of statutory interpretation is particular apposite. It said:

> *'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:*
>
> *(a) the statutory provision should always be interpreted purposively;*
>
> *(b) the relevant statutory provision must be properly contextualised; and*
>
> *(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso is closely related to the purposive approach referred to in (a).'*

… Where a provision is ambiguous, its possible meaning must be weighed against each other given these factors. For example, a meaning that frustrates the apparent purpose of the statute or leads to unbusinesslike results is not to be preferred. Neither is one that unduly strains the ordinary, clear meaning of words. That text, context and purpose must always be considered at the same time when interpreting legislation has been affirmed on various occasions by this Court.

… Allied to these factors, courts must also interpret legislation to promote the spirit, purport and object of the Bill of Rights. Again, courts should not unduly strain the reasonable meaning of words when doing so. But this obligation entails understanding statutes to 'lay the foundation for a democratic and open society, improve the quality of life for all and build a united and democratic South Africa'."[10] (footnotes omitted)

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[10] *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd* [2018]

9. If these principles of interpretation are applied to the propositions advanced by Kenmont it is plain that the conclusion sought to be drawn by it are patently incorrect.

9.1. In the first instance, it is incorrect and misplaced to suggest that the formulation (and amendment) of an admission policy constitutes an *"official educational activity"*.[11] It does not. It does not for at least three reasons:

9.1.1. Firstly, the term *"educational activity"* denotes the action or process of educating or being educated.[12] The formulation of an admission policy most certainly does not meet this requirement.

9.1.2. Secondly, in terms of the SASA the formulation of an admission policy (as well as other policy documents) rests with the governing body. They are accountable for such a document, not the State, and hence several reported judgments dealing with the powers of the one and the other.[13]

ZACC 12.

11 The proposition is to be found at pars 6.3 – 6.5, pg. 18 of the Kenmont Submissions.

12 See, https://www.merriam-webster.com/dictionary/education.

13 See, for example, *HOD of Education, Free State v Welkom High School; HOD of Education, Free State v Harmony High School* 2013 (9) BCLR 989 (CC).

9.1.3. Thirdly, the provision, section 60(1)(a) of the SASA, is plainly aimed at indemnifying a public school against civil claims sounding in money and not adverse cost orders granted against them where the lawfulness of their actions have been challenged.

9.2. In the second instance, it is incorrect and misplaced to suggest that an adverse cost order constitutes delictual damages.[14] This simply needs be stated to be rejected.

9.3. In the third, and final instance, it is incorrect and misplaced to suggest that the term *"loss"* must read disjunctively from *"delictual or contractual damages"*.[15] It is, simply, illogical.

10. In the premise, it is submitted that third and/or fourth and/or sixth respondent are not liable, in terms of section 60(1)(a) of the SASA, for the adverse cost orders granted against Kenmont.

11. It is perhaps important to point out, before moving onto the constitutionality of the impugned provision, that as much as the *amicus* does not agree with the contentions of Kenmont on this issue

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14 Kenmont Submissions, para 6.16, pg. 20.

15 Kenmont Submissions, para 6.17, pg. 21.

it also does not agree with those of the applicant or the remaining respondents.

12. In this regard the *amicus* contends that, properly interpreted, the provision plainly indemnifies a public school (and its governing body) against any justiciable claim for damages (whether it be found in delict or contract) that arises from a school activity. This indemnification and/or warranty would include any cost order made against the school and/or its governing body in defending the claim and would apply regardless of whether (or not) the third and/or fourth and/or sixth respondent gave its permission.

THE CONSTITUTIONALITY OF THE IMPUGNED PROVISION

13. There can be no debate that section 58A(4) of the SASA, on every conceivable interpretation, absolutely proscribes the attachment of assets belonging to a school as a result of any legal action taken against it. The question that arises is whether (or not) this prohibition is constitutional.

14. The test regarding the constitutionality of a statutory provision is well known and was articulated in the matter of *South African Defence Union* as follows:

> *"The first question to be asked is whether the provision in question infringes the rights protected by the substantive clauses of the Bill of Rights. If it does, the next question that arises will be whether that infringement is justifiable. At the second stage of the constitutional enquiry, the relevant questions are what is the purpose of the impugned provision, what is its effect on constitutional rights and is the provision well-tailored to that purpose."*[16] *(own emphasis added)*

15. The starting point, accordingly, is to determine first-and-foremost whether the impugned provision infringes any of the applicant's constitutional rights. It evidently (and admittedly) does limit his constitutional right to equality.[17]

16. That being the case, the next question is whether the limitation of the right is justifiable. This entails an assessment of, inter alia: -

16.1. the importance of the purpose of the limitation;

16.2. the relationship between the limitation and its purpose; and

16.3. whether there are less restrictive means to achieve the purpose.

17. The importance of the limitation cannot be gainsaid. In this regard, the following bears emphasis:

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16 *South African National Defence Union v Minister of Defence and Another* 1999 (6) BCLR 615 (CC) at para 18.

17 The right to equality is enshrined in section 9(1) of the Constitution. It has been cited in full by the applicant in his submissions, Applicant Submissions, para 9.7, pgs. 17 – 18, and is accordingly not repeated.

17.1. The right to a basic education is a critical right.[18] It is the right throughout which other rights are realised. Its foundational character has been described as follows:

> *"Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitation and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognised as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence."*[19]

17.2. The right to a basic education is not merely a promise (or an ideal) that we must strive to fulfil. On the contrary, it has very real and

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[18] The right to a basic education is provided for in section 29(1) of the Constitution and reads as follows: *"[e]veryone has the right to a basic education"*. The importance of the right has been discussed in several decisions of this court, in particular: *Governing Body of the Juma Musjid Primary School v Essay N.N.O (Centre for Child Law and Socio-Economic Rights Institute of South Africa as Amici Curiae)* 2011 (8) BCLR 761 (CC) ("***Juma Musjid***"); See also, *MEC for Education, Gauteng v Governing Body of Rivonia Primary School* 2013 (12) BCLR 1365 (CC) (*"**Rivonia**"*) and *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (3) BCLR 177 (CC) ("***Ermelo***").

[19] ICESCR Committee General Comment 13 (21st Session, 1999) "The Right to Education (art 13) UN Doc E/C.12/1999/10 at para 1. Cited with approval in inter alia *Juma Musjid* (above n 1) at para 41 and *Section 27 v Minister of Basic Education* 2013 (2) BCLR 237 (GNP) at para 4.

very specific obligations attached to it. These obligations include, inter alia, the right (and concomitant obligation) to: -

17.2.1. be provided with adequate facilities;[20]

17.2.2. be provided with textbooks;[21]

17.2.3. be provided with furniture and desks;[22]

17.2.4. be provided with teachers and other staff members; and[23]

17.2.5. be provided with transport.[24]

17.3. The right to a basic education, moreover, must be negatively protected from invasion. This was made plain in *Juma Masjid* where it was held that:

> *"This Court, in Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, made it clear that socio-economic rights (like the right to a basic education) may be negatively protected from improper invasion. Breach of this obligation occurs directly when there is a failure to respect the right, or indirectly, when there is a failure to prevent the direct infringement of the right by another or a failure to respect the existing protection of the right by taking measures that diminish that protection. It needs to be stressed however that the purpose of section*

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20 See, generally, SJ Kamga *"The Right to a Basic Education"* in T Boezaart (ed.) 'Child Law in South Africa' (2017) pgs. 525 – 527 and the cases mentioned therein.

21 *Section 27 v Minister of Education* (above n 19).

22 *Madzodzo v Minister of Basic Education* [2014] 2 All SA 339 (ECM).

23 *Centre for Child Law v Minister for Basic Education* [2012] 4 All SA 35 (ECG).

24 *Tripartie Steering Committee v Minister of Basic Education* [2015] 3 All SA 718 (ECG).

8(2) of the Constitution is not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights. It is rather to require private parties not to interfere with or diminish the enjoyment of a right. Its application also depends on the 'intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the State or organs of State."[25]

17.4. The purpose of the impugned provision, accordingly, must be seen and understood against this backdrop. It is meant to protect the scarce (and invaluable) resources available to public schools so as to ensure that learners are provided with an education of a progressively higher quality. The attachment (and alienation) of assets threatens this and is therefore absolutely prohibited.

18. It is plain then that the impugned provision seeks to achieve a legitimate purpose. The question that remains is whether there are, however, less restrictive means to achieve this purpose. It is submitted that there are not.

18.1. There are very few assets (if any) that belong to a school that are not fundamentally important to providing a learner with a basic education. This is self-evident if one simply thinks of what assets would be found in a school: -

[25] *Juma Masjid* (above n 19) at pars 57-8.

18.1.1. desks and chairs (for both learners and teachers);

18.1.2. computer and lab equipment;

18.1.3. vehicles to transport the learners either to and from their homes or to and from school activities;

18.1.4. sporting and other extra-mural equipment; and

18.1.5. money held at a financial institution that is likely to be earmarked and budgeted for providing service (e.g. feeding programmes) or paying teachers and other administrative staff not paid for by the State.

18.2. Those assets that may not be essential to providing a learner with a basic education (that we cannot think of one) will most likely be of little value and hardly enough to satisfy any judgment debt (or adverse cost order).

18.3. It follows that it would be almost impossible to carve out a list of items that may (or may not) be attached in the execution of a judgment debt and that, consequently, there are no less restrictive means available to protect the rights of a learner to a basic education.

18.4. It is perhaps worth noting, before moving to address the remaining issues, that prohibitions of this kind are not unique. Our law, and courts, have long recognised that there may be a need to either put certain assets above execution or to at least limit the impact the execution may have on the rights of a judgment debtor. In this regard, and without being prescriptive, the following bears emphasis:

18.4.1. One, in *Nyathi* this court recognised, and accepted, that there may well be assets of the State that would disrupt service delivery and therefore ought not be attached.[26]

18.4.2. Two, section 67 of the Magistrates' Court Act 32 of 1944 likewise serves to limit a person's movables that be attached and sold in execution.[27] These include inter alia: -

18.4.2.1. necessary beds, bedding, and wearing apparel;

18.4.2.2. necessary furniture and household utensil;

18.4.2.3. stock, tools and agriculture equipment of a farmer; and

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[26] *Nyathi v MEC for the Department of Health, Gauteng* 1997 (6) BCLR (CC) at para 51.

[27] See, generally, *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (1) BCLR 78 (CC).

18.4.2.4. professional books, documents or instruments necessarily used by the judgment debtor.

18.4.3. Three, the General Pensions Act 29 of 1979 provides that no annuity or benefit or rights in respect of an annuity or benefit payable under a pension law shall be liable to be attached or subjected to any form of execution under a judgment debt or order of court.[28]

19. It is therefore incorrect to simply assume, without more, that public schools and their governing bodies are somehow 'above reproach' and are somehow different from other litigants.

COST ORDERS AGAINST PUBLIC SCHOOLS AND THEIR GOVERNING BODIES

20. Although not entirely at issue in the present matter, it is important to make some preliminary remarks regarding, generally, cost orders being made against public schools and their governing bodies.

[28] Similar provisions may be found in sec. 37A of the Pension Funds Act 24 of 1958; sec. 2(1) of the Statutory Pensions Protection Act 21 of 1962; sec. 14 of the Aged Persons Act 8 of 1967; sec. 11 of the Blind Person Act 26 of 1968; sec. 9 of the War Veterans' Pension Act 25 of 1968; and sec. 9 of the Disability Grants Act 27 of 1968.

21. The award of costs is a matter within the discretion of the court considering the issue. This has been repeatedly confirmed by our courts. In *Kruger & Wasserman* Innes J said:

> *"the rule of our law is that all costs – unless expressly otherwise enacted – are in the discretion of the Judge. His discretion must be judicially exercised, but it cannot be challenged, taken alone and apart from the main order, without his permission."*[29]

22. In recent years this has been confirmed and qualified. In respect of constitutional litigation this court, in *Affordable Medicines*, held that:

> *"The award of costs is a matter which is within discretion of the court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations. One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. The rationale for this rule is that an award for costs might have a chilling effect on litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule."*[30]

23. The problem in so far as public schools (and their governing bodies are concerned) is that general rule exists granting them the same or similar protection. This despite, in the exercise of a court's discretion,

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29 *Kruger & Wasserman v Ruskin* 1918 AD 63 at 69. See also, *Graham v Odendaal* 1972 (2) SA 611 (A); *Steynberg v Labuschagne* [1998] 3 All SA 384 (O) *Intercontinental Exports* (*Pty*) *Ltd v Fowles* 1999 (2) SA 1045 (SCA); *Coetzee v National Commissioner of Police* 2011 (2) SA 227 (GNP); *Weare v Ndebele* 2009 (4) BCLR 370 (CC).

30 *Affordable Medicines Trust v Minister of Health* 2005 (6) BCLR 529 (CC) at para 138. See also, *Hotz v University of Cape Town* 2017 (7) BCLR 815 (CC) at para 21.

it is duty bound to consider that its order may impact in such instances on inter alia: -

23.1. the right of the child learners at the schools to have their best interests considered of paramount importance;[31] and

23.2. their right to a basic education.

24. That is not to say that a school (and its governing body) may never be mulcted with a court order. Indeed, even in regard to constitutional litigation, this is not the case as was made plain by Ngcobo CJ where it was said that:

> *"There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the court which may influence the court to order the unsuccessful litigant to pay costs. The ultimate goal is to that which is just having regard to the facts and circumstances of the case."*[32]

25. It is moreover important to stress that even where a public school and/or its governing body has been frivolous or vexatious that a court should not default to simply ordering it to pay. This, yet again,

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31 For the importance of this right in respect of exercising a discretion see, for example, and generally, *S v M* 2007 (12) BCLR 1312 (CC).

32 *Affordable Medicines* (above n 31) at para 138.

undermines the rights of the learners. In such cases a court would be well within its rights to consider a cost *de boniis propriis* order against the principal or members of the governing body.[33]

26. The unfortunate reality is that it would seem that these considerations are not taken into account. In the present matter the review decision did not engage (at least not adequately) with the competing interests; neither did the judgment declaring the impugned provision unconstitutional. In both instances the court appears, with no regard to constitutional ramifications of the decision, to default to the ordinary rule that costs follow the result. This is a material misdirection by our courts and must be remedied.

APPROPRIATE REMEDY

27. In conclusion, it is submitted that: -

27.1. section 60(1)(a) of the SASA, properly interpreted, does not provide an indemnification and/or warrant for the adverse cost orders granted against Kenmont; and

[33] See generally, *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC as Intervening Party) (Corruption Watch and another as amici curiae)* 2017 (9) BCLR 1089 (CC).

27.2. the impugned provision is constitutionally defensible, and the declaration of constitutional invalidity should not be confirmed.

28. That leaves then the issue of the unpaid adverse costs. This court has wide remedial powers. It is suggested, considering that there does not appear to be a contention by Kenmont that it does not have the money or that by paying it over would detract from the provision of a basic education to its learners that the court issue a *mandamus* requiring them to make payment of those cost orders within a reasonable time.

CONDONATION AND CONCLUSION

29. These submissions have been served one day late. It is submitted that the reasons advanced in the application for condonation are reasonable and the delay slight, and as such, the condonation application should be granted.

30. Then, and in conclusion, it is submitted that we support the respondent's contention that the declaration of constitutional invalidity should not be confirmed, albeit for different reasons.

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R M Courtenay
Counsel for the Amicus Curiae

03 May 2019