CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 281/18

In the matter between:

DEVERAJH MOODLEY	Applicant
and	
KENMONT SCHOOL	First Respondent
KENMONT SCHOOL GOVERNING BODY	Second Respondent
HEAD OF DEPARTMENT, 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

Neutral citation:	*Moodley v Kenmont School and Others* [2019] ZACC 37
Coram:	Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ and Theron J.
Judgments:	Madlanga J (unanimous)

Heard on: 14 May 2019

Decided on: 9 October 2019

ORDER

On appeal for confirmation of the order of the High Court of South Africa, KwaZulu-Natal Local Division, Durban:

1. The declaration by the High Court of South Africa, KwaZulu-Natal Local Division, Durban that section 58A(4) of the South African Schools Act 84 of 1996 is constitutionally invalid is not confirmed.
2. Kenmont School must pay Mr Deverajh Moodley's taxed Supreme Court of Appeal and High Court costs in the respective amounts of R173 530.61 and R403 876.78, including accrued interest, not later than three months from the date of this order.
3. Members of the Kenmont School Governing Body must, individually or collectively, immediately take all steps that are necessary to ensure that the payment referred to in paragraph 2 does take place.
4. The appeal by Kenmont School and the Kenmont School Governing Body is upheld to the extent set out in paragraphs 1 and 5.
5. The costs order granted by the High Court against Kenmont School and the Kenmont School Governing Body is set aside.

JUDGMENT

MADLANGA J (Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Ledwaba AJ, Mhlantla J, Nicholls AJ and Theron J concurring):

Introduction

[1] *Bagotywa bebatsha.*[1] This old siXhosa adage signifies how important and effective it is to impart education, life skills and knowledge in the early years of childhood. I am no expert in childhood development, but I dare say both the receptive and retentive power of the mind is at its best in our youth. It must be in the best interests of children then not to miss out on the opportunity to imbibe a wholesome, undisturbed education in their early years. You interfere unduly with this opportunity, you imperil the education that children sorely need. Education does not advance only individual children, it also advances the common good, who we are and must be as a nation. This finds apt expression in the Sesotho saying *thuto ke lesedi la setjhaba*,[2] which Ms Judith Sephuma completes with the exhortation *ha re ruteng bana ba rona.*[3]

[2] At the heart of this matter are two important constitutional rights: the right that decrees that "[a] child's best interests are of paramount importance in every matter concerning the child";[4] and the right to basic education.[5] Section 58A(4) of the South African Schools Act[6] (Schools Act) provides that "[t]he assets of a public school may not be attached as a result of any legal action taken against the school". The High Court

[1] They are better teachable whilst they are young.

[2] Education is the light of the nation. This is rendered also in *Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng* [2016] ZACC 14; 2016 (4) SA 546 (CC); 2016 (8) BCLR 1050 (CC) (*FEDSAS*) at para 1, although – for "*setjhaba*" – Moseneke DCJ uses the old Sesotho orthography.

[3] Let us educate our children. This is from her song *Iya iyo* in her album *A cry a smile a dance.*

[4] Section 28(2) of the Constitution.

[5] Section 29(1)(a) of the Constitution provides that "[e]veryone has the right . . . to a basic education".

[6] 84 of 1996.

of South Africa, KwaZulu-Natal Local Division, Durban (High Court) declared this section constitutionally invalid. Must we confirm that declaration?[7] That's the question.

Background

[3] Kenmont School, the first respondent, is a school for learners with special learning needs. Whilst Remano,[8] the son of Mr Deverajh Moodley, the applicant, was enrolled at the school, he was subjected to a disciplinary enquiry for allegedly attacking another learner with a pair of scissors. During the course of the enquiry, Remano was forced to spend every break outside the school principal's office. This meant that at break time Remano could not interact with other children. According to the school, the reason for this was that he was posing a danger to the other children. Mr Moodley launched an urgent application in the High Court. The High Court ordered by consent that the school: appoint a member of staff to supervise Remano's movement and activities at the school in a manner that would not isolate him; and proceed with and conclude the disciplinary enquiry by a specified date. The application was then postponed indefinitely. It was never set down again.

[4] Instead of finalising the disciplinary hearing, the Kenmont School Governing Body, the second respondent before us, amended the school's admission policy. The amended policy provided for the automatic re-admission of children who were already in the school's books. An exception was to not re-admit a child who had demonstrated "behavioural problems or conduct which . . . seriously interfered with [the] education of the other learners [or] . . . endangered the psychological health of the other learners or educators". The school advised Mr Moodley of this development by means of a letter. The letter stated that the school was of the view that the new policy

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[7] Section 172(2)(a) of the Constitution provides:

> "The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

[8] Remano is now an adult.

disqualified Remano from re-admission. It invited Mr Moodley to make representations as to why Remano should be re-admitted.

[5] Mr Moodley made no such. Instead, he brought urgent proceedings in the High Court seeking the review and setting aside of the policy. In addition to the school and governing body (school respondents), he cited the Head of Department, Department of Education, KwaZulu-Natal (HOD) and the Member of the Executive Council for Education, KwaZulu-Natal (MEC). He sought no relief against the HOD and MEC. Before us they are the third and fourth respondents, respectively. The two filed a notice to abide the judgment of the Court. The Court denied the challenge that the policy was unlawful. What it adjudged unlawful and set aside with costs was the decision not to re-admit Remano. By then Remano was in matric. The school respondents took the matter on appeal to the Supreme Court of Appeal.

[6] By the time Mr Moodley's heads of argument were filed in that Court, Remano had matriculated and was no longer at the school. Mr Moodley's heads of argument mentioned this fact. Consequently, the Supreme Court of Appeal issued a notice in terms of which it required the school respondents "to address argument on the preliminary question . . . whether the appeal and any order made thereon would, within the meaning of section 21A of the Supreme Court Act 59 of 1959, have any practical effect or result".[9] After hearing argument on this question, the Supreme Court of Appeal dismissed the appeal in terms of this section. It ordered the school respondents to pay Mr Moodley's costs of appeal.

[7] At taxation the High Court Taxing Master allowed costs in an amount of R403 876.78. After unsuccessful attempts to get the school respondents to settle this amount, the Registrar of the High Court issued a warrant of execution. The Sheriff

[9] Section 21A(1) of the Supreme Court Act 59 of 1959 provided:

> "When at the hearing of any civil appeal to the [Supreme Court of Appeal] or any . . . division of the [High Court] the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone."

The Supreme Court Act has since been repealed by the Superior Courts Act 10 of 2013.

attached a school bus and a sum of R386 710 in the school's bank account held at ABSA Bank Limited.

[8] The school respondents approached the High Court on an urgent basis for an order setting aside the warrant of execution and attachment. The HOD and MEC were joined as respondents, but only nominally. The school respondents relied on the prohibition – by section 58A(4) of the Schools Act – of the attachment of assets of a public school as a result of a legal action taken against the school.

[9] Mr Moodley opposed this application and launched a counter-application. The main relief sought in the counter-application was that the school and governing body must pay the High Court's taxed costs totalling R403 876.78 plus accrued interest. In the alternative, Mr Moodley asked that this payment be made by the MEC. Mr Moodley also sought – against the school and the governing body and, alternatively, against the MEC – payment of the Supreme Court of Appeal costs plus interest within 30 days of taxation. At that stage, the bill of costs in respect of the Supreme Court of Appeal proceedings had not been taxed. It has since been taxed and R173 530.61 was allowed. That means Mr Moodley is owed a total of R577 409.39 in costs.

[10] Further, Mr Moodley asked for an order declaring section 58A(4) unconstitutional. For this he relied on section 9(1) of the Constitution.[10] He added to the litigants who had already been cited the Minister of Justice and Correctional Services and the Minister of Basic Education, the fifth and sixth respondents before us. I refer to these respondents, the HOD and MEC as the government respondents.

[11] The High Court made the declaration of constitutional invalidity. It did this on the basis of section 9(1) and section 165(5) of the Constitution. The latter section provides that "[a]n order or decision issued by a court binds all persons to whom and organs of state to which it applies". In addition, the Court ordered that to cure the

[10] I quote this section in n 12 below.

constitutional defect, the following words were to be added after the word "school": "without 30 days' notice being provided to the school and the State".[11] It awarded costs in Mr Moodley's favour against the school respondents.

[12] Mr Moodley then approached the Constitutional Court for confirmation of the declaration of invalidity. He contends: that the differential treatment of a public school with regard to the attachment of assets to satisfy a judgment debt infringes his right to equality in contravention of section 9(1) of the Constitution;[12] and that his inability to derive a benefit from the favourable costs order constitutes a violation of his section 10 right, the right to dignity.[13]

[13] The school respondents have filed an appeal against the declaration of constitutional invalidity and the adverse costs order. They counter Mr Moodley's contentions by arguing that: the impugned section 58A(4) must be read in conjunction with section 60(1) of the Schools Act; in terms of section 60(1) the state is liable for any delictual or contractual damage or loss resulting from a school activity;[14] under this section Mr Moodley does have redress against the government respondents with the result that it is not necessary to have section 58A(4) declared constitutionally invalid; the further consequence is that section 58A(4) does not infringe section 9 of the Constitution; the conjoined reading of sections 58A(4) and 60(1) upholds the right to education and – at the same time – averts the invalidation of section 58A(4); and, in terms of section 39(2) of the Constitution, that reading must trump a reading that results in the invalidation of section 58A(4).[15]

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[11] Although the word "school" appears twice in section 58A(4), the insertion ordered by the High Court can only make sense if it is to come after the second "school". This means the section was meant to read:

> "The assets of a public school may not be attached as a result of any legal action taken against the school without 30 days' notice being provided to the school and the State."

[12] This section provides:

> "Everyone is equal before the law and has the right to equal protection and benefit of the law."

[13] Section 10 of the Constitution provides that "[e]veryone has inherent dignity and the right to have their dignity respected".

[14] The section is quoted fully later.

[15] Section 39(2) provides: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[14] The government respondents submit that the contention by the school respondents that Mr Moodley's costs must be paid by the state is misconceived as no costs order was awarded against them. In particular, they lay emphasis on the fact that the school respondents had been cautioned against engaging in the litigation as their decision to amend the school policy exceeded the school's powers.[16] The government respondents do share the school respondents' view that section 58A(4) ought not to be declared constitutionally invalid.

[15] The Centre for Child Law has been admitted as an amicus curiae. It submits that: under section 60(1) of the Schools Act the government respondents can only be liable in respect of delictual or contractual damage or loss resulting from any act or omission in connection with a school activity; the costs awarded pursuant to litigation that arose from the amendment of the school admission policy are not delictual or contractual damage or loss, nor is the amendment of the school admission policy a "school activity" as envisaged in section 60(1); therefore, the school respondents' suggestion that section 60(1) affords Mr Moodley redress is misconceived; the right to basic education is so important that there are no less restrictive means to protect it; and, the declaration of invalidity should not be confirmed.

[16] The written submissions of the Centre for Child Law were one day late. It seeks condonation. It has given a reasonable explanation for the lateness, which has not prejudiced anybody. Condonation is granted.

Is section 58A(4) constitutionally invalid?

[17] In answering this question, the starting point must be a brief background on statutory prohibitions against the attachment of state assets. On that I borrow liberally from this Court's judgment in *Nyathi*.[17] According to that judgment, in South Africa

[16] To use the usual legalese, the decision was *ultra vires*.

[17] See *Nyathi v Member of the Executive Council for the Department of Health Gauteng* [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC) at para 16.

these prohibitions were first provided for in the Crown Liabilities Act.[18] The section of that Act relating to the attachment of state assets is similar in content to section 3 of the State Liability Act[19] as it read when *Nyathi* was decided. The section provided:

> "No execution, attachment or like process shall be issued against the defendant or respondent in any such action or proceedings or against any property of the state, but the amount, if any, which may be required to satisfy any judgment or order given or made against the nominal defendant or respondent in any such action or proceedings may be paid out of the National Revenue Fund or a Provincial Revenue Fund as the case may require."

[18] In a constitutional democracy like ours where the rule of law, a founding value of our Constitution,[20] reigns supreme, one would have expected the state always to satisfy judgments. Unfortunately, that has not been the case. As this Court's judgment observed in *Nyathi*, "courts have grappled with the issue over many years; however, it is only in recent years that the courts have been faced with a flood of litigation of this magnitude in respect of unsatisfied court orders".[21] Unsurprisingly, the Court declared section 3 of the State Liability Act constitutionally invalid. It held that the differential treatment of private litigants, on the one hand, and the state, on the other, constitutes a limitation of the right to equality. This was so because it was at variance with sections 8(1), 34 and 165(5) of the Constitution. In terms of section 8(1) "[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state". Section 34 enshrines the right of access to court.[22] Section 165(5) provides

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[18] 1 of 1910.

[19] 20 of 1957.

[20] Section 1 of the Constitution provides:

> "The Republic of South Africa is one sovereign, democratic state founded on the following values:
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> . . .
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> (c) Supremacy of the Constitution and the rule of law."

[21] *Nyathi* above n 17 at para 16.

[22] Section 34 provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

that "[a]n order or decision issued by a court binds all persons to whom and organs of state to which it applies".

[19] The effect of section 3 was that despite the injunction in section 8(1), an order sounding in money made against the state could well mean empty victory as the successful litigant could not attach, nor could she or he resort to contempt proceedings.[23] Effectively, this left private litigants at the mercy of state officials who satisfied judgment debts as and when they pleased. This is highlighted by Madala J who said:

> "But we now have some officials who have become a law unto themselves and openly violate people's rights in a manner that shows disdain for the law, in the belief that as state officials they cannot be held responsible for their actions or inaction. Courts have had to spend too much time in trying to ensure that court orders are enforceable against the state precisely because a straightforward procedure is not available."[24]

[20] In those instances where attachment would have been necessary and – in the case of judgment debtors who are private persons – available, this rendered the right of access to court illusory. Indeed, the *Nyathi* judgment quoted with approval Jafta J who said in *Mjeni*:[25]

> "The constitutional right of access to courts would remain an illusion unless orders made by the courts are capable of being enforced by those in whose favour such orders were made. The process of adjudication and the resolution of disputes in courts of law is not an end in itself but only a means thereto; the end being the enforcement of rights or obligations defined in the court order. To a great extent section 3 of Act 20 of 1957 encroaches upon that enforcement of rights against the state by judgment creditors."

[21] *Nyathi* concluded that section 3 failed to treat judgment creditors as equal before the law, thus limiting the right to equality under section 9(1) of the Constitution.[26] It

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[23] *Nyathi* above n 17 at paras 59-63.

[24] Id at para 63.

[25] *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (Tk) at 452G-H and 453C-D.

[26] *Nyathi* above n 17 above at para 47.

also concluded that section 3 constituted a limitation of the right to dignity protected by section 10 of the Constitution.[27]

[22] The Court went on to hold that the limitation of the two rights was not reasonable and justifiable in terms of section 36(1) of the Constitution.[28] The result was that section 3 was held to be inconsistent with the Constitution "to the extent that it [did] not allow for execution or attachment against the state and that it [did] not provide for an express procedure for the satisfaction of judgment debts".[29]

[23] I cannot conceive of any reasons on the basis of which the *Nyathi* reasoning on the limitation of the fundamental rights guaranteed in sections 9(1) and 10 of the Constitution cannot apply to section 58A(4) of the Schools Act. Put simply, section 58A(4) also limits the rights to equality and dignity. The question is whether this limitation too is not reasonable and justifiable under section 36(1).

[24] The two rights at issue – the rights to equality and dignity – are important. And this is particularly so in the South African context where inequality was ingrained into

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[27] Id at paras 45-7.

[28] Id at para 50. Section 36(1) provides:

> "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—
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> (a) the nature of the right;
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> (b) the importance of the purpose of the limitation;
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> (c) the nature and extent of the limitation;
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> (d) the relation between the limitation and its purpose; and
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> (e) less restrictive means to achieve the purpose."

[29] *Nyathi* id at para 92. Parliament subsequently amended section 3. Now the section provides for an extensive procedure – containing no less than 16 subsections – in accordance with which judgment debts must be satisfied. Although the procedure does sanction the attachment of movable state assets, this is a last resort. Notwithstanding this innovation, the effect of section 58A(4) of the Schools Act is to still bar the attachment of school assets.

the legal system;[30] and where only the dignity of white people mattered and that of the majority of the population counted for nothing.[31] But why do we have the limitation?

[25] As I said right at the beginning, this matter concerns two crucial constitutional rights: the right that decrees that "[a] child's best interests are of paramount importance in every matter concerning the child";[32] and the right to basic education.[33] Of particular significance in the present context is the right to basic education. The purpose of the limitation brought about by section 58A(4) is to avert any adverse effects that could be caused by the attachment of school assets.

[26] There is no denying that a significant number of South African public schools operate under conditions of extreme deprivation. Largely, these are schools that service communities disadvantaged by South Africa's colonial and apartheid past. If what meagre resources they have were to be liable to be attached to satisfy judgment debts, untold misery would be visited upon the already disadvantaged school children. Imagine a school bereft of all materials necessary for education such as desks, chairs or benches, laboratory apparatus, books, computers, school buses and other vehicles, and the like. Imagine the spectre of school children who – because of the lack of desks and chairs or benches – have to sit on the floor and write on their laps. Imagine a school

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[30] See *Prinsloo v Van der Linde* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 at para 20 where this Court observed:

> "Our country has diverse communities with different historical experiences and living conditions. Until recently, very many areas of public and private life were invaded by systematic legal separateness coupled with legally enforced advantage and disadvantage. The impact of structured and vast inequality is still with us despite the arrival of the new constitutional order. It is the majority, and not the minority, which has suffered from this legal separateness and disadvantage."

[31] See *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 329 where the following appears:

> "Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new constitution."

[32] Section 28(2) of the Constitution.

[33] Section 29(1)(a) of the Constitution provides that "[e]veryone has the right to a basic education".

that has lost its meagre financial resources to an attachment and cannot buy the barest of necessities.

[27] Yes, it is painfully true that the imagination I am evoking is – at best – close to the everyday reality of some of our most disadvantaged schools. That does not mean those schools must be at risk of further deprivation. But I should not be misunderstood. The availability of attachment to satisfy judgment debts would certainly have devastating effects even on better resourced schools. They too could be denied the ability to provide a wholesome education.

[28] You interfere with the basic education of children, you put at risk its potential to unleash in every child the ability to set her- or himself on the path to a successful, meaningful, wholesome life. After all, as the hackneyed phrase tells us, education opens all doors. Quite aptly, the world renowned late statesman, President Nelson Mandela, said:

> "Education is the great engine of personal development. It is through education that the daughter of a peasant can become a doctor, that the son of a mineworker can become the head of the mine, that a child of a farmworker can become the president of a great nation. It is what we make out of what we have, not what we are given, that separates one person from another."[34]

[29] It is also fitting to quote *Juma Musjid,* which in turn quotes the Committee on Economic, Social and Cultural Rights:

> "[T]he ICESCR through the Committee on Economic, Social and Cultural Rights, monitors socio-economic rights, including the right to education. It has issued comments giving content to [the right to education], stressing its importance. General Comment 13 states:

[34] Quoted in *FEDSAS* above n 2 at para 2.

> '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 exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment. . . . 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.'"[35]

[30] Axiomatically, therefore, the proscription in section 58A(4) of the Schools Act of the attachment of the assets of public schools is meant to protect this very important right, the right to basic education. It averts the obvious harm that would surely eventuate if school assets could be attached.

[31] Although in nature and extent the limitation is absolute, in the light of the right that it seeks to protect, that is the right to basic education, the limitation is understandable. Add to this the cognate right, the right that "[a] child's best interests are of paramount importance in every matter concerning the child".[36] This is by no means making light of the importance of the rights to dignity and equality, both of which are – as I have said – of particular significance in the South African context. The reality is that the right that the limitation is seeking to advance cries out for protection. And that is a cry which we cannot but heed.

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[35] *Governing Body of the Juma Musjid Primary School v Kyubwa* [2011] ZACC 13; 2011 JDR 0343 (CC); 2011 (8) BCLR 761 (CC) (*Juma Musjid*) at para 41, quoting ICESCR Committee General Comment 13 (21st Session, 1999) "The Right to Education (art 13)" UN Doc E/C.12/1999/10 at para 1.

[36] Section 28(2) of the Constitution.

[32] The limitation is well-tailored to its purpose. And I cannot conceive of any less restrictive means to achieve this purpose. Even if there were, the section 36(1) justification exercise is not about ticking boxes;[37] it is a weighing-up or balancing exercise.[38] It is about determining whether overall the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. And I conclude that it is.

[33] Does this conclusion mean Mr Moodley cannot recover the costs awarded by the High Court and Supreme Court of Appeal in the proceedings whose subject was the review of the school's amended admission policy?

The fate of Mr Moodley's costs awards

[34] Two things must not be conflated. What section 58A(4) proscribes is the attachment of the assets of a public school. It does not outlaw the grant of orders sounding in money, including costs orders, against public schools.

[35] The central theme of the school respondents' case is: the school can only use its funds for school activities; payment of costs in terms of the costs orders is not a school activity; in terms of section 60(1) of the Schools Act it is the state that is liable to pay costs of this nature; and, therefore, it is to the government respondents that Mr Moodley must look to recover his costs.

[36] Crucially, the school respondents adopt this stance in the face of the costs orders. The orders stand; they have not been appealed. I cannot but again refer to section 165(5) of the Constitution which provides that "[a]n order or decision issued by a court binds all persons to whom and organs of state to which it applies". This is of singular importance under our constitutional dispensation which is founded on, amongst others,

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[37] See *S v Manamela* [2000] ZACC 5; 2000 (1) SACR 414 (CC); 2000 (5) BCLR 491 (CC) at para 32.

[38] Id at para 33. See also *Makwanyane* above n 31 at para 104.

the rule of law. The judicial authority of the Republic vests in the courts.[39] Thus courts are final arbiters on all legal disputes, including constitutional disputes. If their orders were to be obeyed at will, that would not only be "a recipe for a constitutional crisis of great magnitude",[40] "[i]t [would] strike at the very foundations of the rule of law"[41] and of our constitutional democracy. *Nyathi* says:

> "Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously . . . In a state predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy. That, in my view, means at the very least that there should be strict compliance with court orders."[42]

[37] Non-observance of court orders would also render nugatory the right of access to court. Of this, *Mjeni*[43] tells us:

> "A deliberate non-compliance or disobedience of a court order by the state through its officials amounts to a breach of [a] constitutional duty [imposed by section 165 of the Constitution]. Such conduct impacts negatively upon the dignity and effectiveness of the Courts."

[38] Not even cases like *Changing Tides*[44] and *Motala*[45] which were referred to in this Court's judgment in *Tsoga*[46] suggest that persons – natural or juristic – or organs of state have an entitlement to ignore court orders based on their understanding of their lawfulness. According to *Changing Tides* and *Motala*, it is a court that declares an order

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[39] Section 165(1) of the Constitution.

[40] *Nyathi* above n 17 at para 80.

[41] *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at para 65.

[42] *Nyathi* above n 17 at para 80.

[43] *Mjeni* above n 25 at 452G-H.

[44] *City of Johannesburg v Changing Tides 74 (Pty) Ltd* [2012] ZASCA 116; 2012 (6) SA 294 (SCA) (*Changing Tides*).

[45] *The Master of the High Court NGP v Motala N.O.* [2011] ZASCA 238; 2012 (3) SA 325 (SCA) (*Motala*).

[46] *Provincial Government North West v Tsoga Developers CC* [2016] ZACC 9; 2016 JDR 0553 (CC); 2016 (5) BCLR 687 (CC) (*Tsoga*) at paras 48-50.

previously granted and against which there is no appeal a nullity. In terms of section 165(5) persons and organs of state just must obey court orders whatever their view of them might be, subject, of course, to their exercise of the right of appeal.

[39] In *Tsoga*, without pronouncing one way or the other on what they held, we distinguished *Changing Tides* and *Motala*. Yet again, I do not propose to make a pronouncement in that regard. What I will do instead is to determine whether there is any substance in the central theme of the school respondents' case. This I do because of the view I take of this central theme, not because I am suggesting that it was competent for the school respondents to ignore the costs awards. Nor am I suggesting that they could have approached a court to have them declared nullities.

[40] To recapitulate, the primary submission by the school respondents is that the costs orders were incompetent. Were they? Section 15 of the Schools Act provides that "every public school is a juristic person, with legal capacity to perform its functions in terms of [the Schools] Act". The idea of juristic personality ordinarily implies legal capacity to sue and be sued in one's own name.[47] I read section 15 to confer that legal capacity. It cannot be that the words "with legal capacity to perform its functions in terms of this Act" serve to limit the juristic personality of public schools to performance of functions in terms of the Schools Act to the exclusion of suing or being sued. Otherwise the section would simply have read: "Every public school has capacity to perform its functions in terms of this Act." Now it doesn't; it makes specific reference to juristic personality. We all know what that means. Parliament is presumed to know the law.[48] Nothing suggests that in section 15 the notion of juristic personality was not meant to carry its ordinary meaning.

[41] Implicit in a public school's legal capacity to sue and be sued in its own name is the power to engage legal representatives to assist it in litigation. That, in turn, must

[47] Boezaart *Law of Persons* 6 ed (Juta, Claremont 2016) at 4-8.

[48] *Road Accident Fund v Monjane* [2007] ZASCA 57; 2010 (3) SA 641 (SCA) at para 12.

mean it has the power to pay the attendant legal costs. In addition, in terms of section 16(1) of the Schools Act the governance of a public school is vested in its governing body. Surely, deciding to sue or oppose litigation is an exercise of the governance function. Therefore, in terms of section 37(6)(c) the governing body of a public school is empowered to pay legal costs. This section provides that the school fund may be used for "the performance of the functions of the governing body".

[42] Thus far reference has been to the public school's own legal costs. It is worth noting that an adverse court order that directs a litigant to pay the costs of an adversary is commonplace in litigation. By being afforded juristic personality, public schools are – by implication – empowered to pay the opposing side's costs if so ordered by a court. In the absence of a stipulation to the contrary, public schools cannot possibly be empowered to sue and be sued, but be immune from what is often a real possibility; an adverse costs order. There is no stipulation to the contrary.

[43] In sum, the costs orders are competent and the governing body has the statutory mandate to settle Mr Moodley's bills of costs that were taxed pursuant to the orders.

[44] This conclusion notwithstanding, does section 60(1) of the Schools Act absolve public schools from liability for litigation costs? Section 60 is headed "Liability of State". It provides:

> "(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 the damage or loss has not been compensated in terms of the policy.
>
> (2) The provisions of the State Liability Act . . . apply to any claim under subsection (1).
>
> (3) Any claim for damage or loss contemplated in subsection (1) must be instituted against the Member of the Executive Council concerned.

> (4) Despite the provisions of subsection (1), the State is not liable for any damage or loss caused as a result of any act or omission in connection with any enterprise or business operated under the authority of a public school for purposes of supplementing the resources of the school as contemplated in section 36, including the offering of practical educational activities relating to that enterprise or business.
>
> (5) Any legal proceedings against a public school for any damage or loss contemplated in subsection (4), or in respect of any act or omission relating to its contractual responsibility as employer as contemplated in section 20(10), may only be instituted after written notice of the intention to institute proceedings against the school has been given to the Head of Department for his or her information."[49]

[45] Going back to whence the costs orders arose, Mr Moodley sought the review of the amendment of the school's admission policy. The review of an adverse decision is ill-suited to the notion of liability for damage or loss. It would be a perversion of language to say when a litigant is seeking the review of a decision, she or he is claiming "damage" or "loss". It matters not that the decision may potentially cause damage or loss to the party seeking a review; the review proceedings are still not a "claim for damage or loss". In terms of section 60(3) a claim for damage or loss as envisaged in section 60(1) *must* – from the onset[50] – be instituted against the MEC concerned. On the other hand, the obvious and primary target of proceedings for the review of administrative action is the act itself; and the proceedings are instituted against the decision-maker, in this instance the school.[51] The decision-maker may not be the MEC.

[46] My discussion of what section 60 means or does not mean does not purport to hold that under no circumstances may vicarious liability attach to the state under the State Liability Act in respect of legal costs arising from litigation involving public schools. That wider question is not before us.

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[49] Section 20(10) empowers public schools to employ teachers and other staff additional to the establishment determined in terms of the Educators' Employment Act 138 of 1994 and the Public Service Act, Proclamation 103 of 1994, respectively.

[50] This is not a pronouncement against joinder where that may be warranted.

[51] See de Ville *Judicial Review of Administrative Action in South Africa* (LexisNexis Butterworths, Durban 2003) at 305.

[47] What remains is the school's claim that it does not have funds to pay the costs. This claim is rather half-hearted. It is made in addition to the main point raised by the school respondents; that is the point I have referred to as the central theme of their case. It is this central theme that the school respondents protested the most. As I have held, that is untenable.

[48] When the HOD and MEC made an assertion that, despite having litigated on a large scale, the school did not take the High Court into its confidence and disclose how it had funded this litigation, the school responded:

> "[The school respondents] dispute that they ought to disclose the costs expended by them and to disclose the method and source of payment of these costs. These matters are not relevant in respect of [Mr Moodley's] unlawful conduct and are not relevant when considering [the state's] duty to effect payment of the costs orders. The provisions of the [Schools] Act are relevant and not the [school's] past conduct."[52]

[49] This does not address the sting in the assertion by the HOD and MEC: how, if the school lacks funds, did it fund the large scale litigation?[53] The sting is particularly significant regard being had to the fact that in that litigation the school, on occasion, engaged two counsel; that does not come cheap.

[50] More directly, Mr Moodley averred that the school has "considerable financial reserves". The school respondents were content to say only that this assertion lost sight of the fact that school funds may be used only for the purposes specified in section 37(6) of the Schools Act. This is not a denial of the fact that the school has considerable financial reserves. That the school could fund its own litigation in respect of the several litigious skirmishes between the parties does indicate that it is not as impecunious as it would want us to believe.

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[52] The unlawful conduct referred to is Mr Moodley's attachment of the school's assets.

[53] The litigation was Mr Moodley's challenge of Remano's isolation at break time, the High Court review of the school's amendment of the admission policy, the appeal by the school to the Supreme Court of Appeal and the school's High Court challenge of the attachment.

[51] Thus I do not accept the school's claim of lack of funds.

Remedy

[52] Obviously, we must decline to confirm the High Court's declaration of constitutional invalidity.

[53] A matter that requires more attention is how we are to deal with the school respondents' recalcitrance to settle Mr Moodley's bills of costs. It has now become necessary to place the school on terms to pay Mr Moodley's costs within a specified time. I think three months is a sufficient period. To avert a recurrence of the recalcitrance, a mandamus must be issued requiring all members of the governing body to take necessary steps to ensure that payment is made. Once the order has been issued, members are at risk of committal for contempt of court, should the school continue not to pay. The common law rule that contempt proceedings cannot be used to enforce court orders sounding in money[54] does not stand in the way of the proposed order. I say so because *Nyathi* appears to have accepted that contempt proceedings could be invoked if a mandamus was first obtained against a specific state functionary. Here is what the Court said:

> "In regard to the possibility of contempt proceedings being instituted against state functionaries, one must bear in mind that these proceedings would have to be instituted by the judgment creditor once the relevant state functionary fails to pay the monies owed. The judgment creditor would have to obtain a *mandamus* order and if the state functionary does not comply with the *mandamus* then he or she would be held in contempt of court. This process is a tedious one which places an onerous burden on the judgment creditor and does not translate into money in the pocket for the judgment creditor. Once a litigant is in possession of a judgment debt, he or she should not be expected to pursue the payment thereof *ad infinitum*. One cannot expect the creditor who has already gone to a great deal of trouble, and spent both time and money in litigation, to launch contempt of court proceedings against the defaulting state official

[54] *Hofmeyr v Fourie; B J B S Contractors (Pty) Limited v Lategan* 1975 (2) SA 590 (C); 1975 (2) All SA 438 (C).

> in the knowledge that such proceedings are unlikely to ensure that the debt is ultimately paid. This is too onerous a burden to place upon a successful litigant."[55]

[54] The Court chose not to subject successful litigants, in respect of orders sounding in money, to the trouble and expense identified in this quote because the invalidation of section 3 of the State Liability Act was an available option. On the contrary, the invalidation of section 58A(4) of the Schools Act is not an available option.

Costs

[55] Although Mr Moodley is successful before us on what this litigation is really about,[56] the school respondents have successfully resisted confirmation of the declaration of constitutional invalidity. It is fitting that there should be no order as to costs in the proceedings before us.

[56] The award of costs in the High Court followed on Mr Moodley's success in the challenge that sought the invalidation of section 58A(4). Now that we are not confirming that invalidation, it seems to me that the High Court costs order must be set aside. That means the school respondents' appeal in this regard succeeds. But that should not translate to Mr Moodley having to pay the school respondents' High Court costs. On the authority of *Biowatch,*[57] the school respondents are not entitled to costs against Mr Moodley. In addition, the school's obstinate refusal to comply with the costs orders placed Mr Moodley in a difficult position. The school should not be allowed to benefit from this conduct. Thus, there should be no order as to costs in respect of the High Court proceedings as well.

Order

[57] In the result, the following order is made:

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[55] *Nyathi* above n 17 at para 75.

[56] That is, getting redress on the costs orders.

[57] *Biowatch Trust v Registrar, Genetic Resources*\ [2009] ZACC 14; 2009 (6) SA 232 (CC); (2009) (10) BCLR 1014 (*Biowatch*).

1. The declaration by the High Court of South Africa, KwaZulu-Natal Local Division, Durban that section 58A(4) of the South African Schools Act 84 of 1996 is constitutionally invalid is not confirmed.
2. Kenmont School must pay Mr Deverajh Moodley's taxed Supreme Court of Appeal and High Court costs in the respective amounts of R173 530.61 and R403 876.78, including accrued interest, not later than three months from the date of this order.
3. Members of the Kenmont School Governing Body must, individually or collectively, immediately take all steps that are necessary to ensure that the payment referred to in paragraph 2 does take place.
4. The appeal by Kenmont School and the Kenmont School Governing Body is upheld to the extent set out in paragraphs 1 and 5.
5. The costs order granted by the High Court against Kenmont School and the Kenmont School Governing Body is set aside.

For the Applicant:	J Nxusani SC and D Naidoo instructed by Viren Singh Attorneys, Notaries & Conveyancers Incorporated
For the First and Second Respondents:	C J Pammenter SC and G M Harrison instructed by Jailall & Associates Incorporated
For the Third to Sixth Respondents:	R B G Choudree SC and A Moodley instructed by the State Attorney, KwaZulu-Natal
For the Amicus Curiae:	R M Courtenay instructed by Centre for Child Law