

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No: **294/2018**

SCA Case No: **1134/2017**

GJ Case No: **38670/2016**

In the matter between:

AB

First Applicant

(First Applicant in Court *a quo*)

CB

Second Applicant

(Second Applicant in Court *a quo*)

and

PRIDWIN PREPARATORY SCHOOL

First Respondent

(First Respondent in Court *a quo*)

SELWYN MARX

Second Respondent

(Second Respondent in Court *a quo*)

THE BOARD OF PRIDWIN

Third Respondent

PREPARATORY

(Third Respondent in Court *a quo*)

SCHOOL

THE MEMBER OF THE EXECUTIVE

Fourth Respondent

COUNCIL

(Fourth Respondent in Court *a quo*)

FOR EDUCATION, GAUTENG

THE INDEPENDENT SCHOOLS

Fifth Respondent

ASSOCIATION

OF SOUTHERN AFRICA

THE CENTRE FOR CHILD LAW

First Amicus Curiae

EQUAL EDUCATION

Second Amicus Curiae

WRITTEN SUBMISSIONS OF THE FIRST *AMICUS CURIAE*

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A INTRODUCTION AND THE SCHEME OF THE SUBMISSIONS

1. The Centre for Child Law (CCL) was admitted as *amicus curiae* in terms of this Court's Directions dated 16 April 2019.
2. In terms of the abovementioned Directions, the CCL is required to file submissions on the following specific issues:
 - 2.1. Whether **the matter before the court is rendered moot**, because the applicants' children are no longer attending Pridwin Preparatory School;
 - 2.2. Whether, if the matter is moot, **is it in the interests of justice** for the court to hear it; and
 - 2.3. The **practical effect** of the relief sought.
3. The CCL anticipates that once the court has considered the submissions on the abovementioned issues, we will be granted an opportunity to file further submissions on the substantive issues raised by this matter.
4. The facts leading to the present appeal are fully set out in the record and arguments of the Appellant and will, for the sake of brevity, not be repeated in these submissions.

B WHETHER THE MATTER BEFORE THE COURT IS MOOT

5. The principle of mootness is aimed at avoiding the court concerning itself with cases that no longer affect the interests of the parties concerned.¹ The mootness doctrine is relevant to cases in which the issues underlying the dispute have been resolved.²
6. A case is moot when it fails to present, “*an existing or live controversy or the prejudice, or threat of prejudice, to the plaintiff no longer exists.*”³ The principle that underlies this doctrine is that it is not the role of the courts to spend time adjudicating matters that are conjectural and of little or no relevance to the resolution of a legal dispute.
7. The Constitutional Court has held that mootness is a possible bar to relief when there are no other triable issues in the case.⁴ Mootness can only be an ultimate bar to relief when the constitutional issue is not only moot as between the parties but is also moot relative to society and the greater public interest. However, where there are considerations of compelling public interest that require the court to

¹ Skelton A “Constitutional Protection of Children’s Rights” in Boezaart T (ed) *Child Law in South Africa* (2017) p 331.

² Loots C “Ripeness and Mootness” in S Woolman, M Bishop (ed) *Constitutional Law of South Africa* p 7-19.

³ *Ibid.*

⁴ Loots C “Ripeness and Mootness” p 7-20.

reach a decision, an argument that the matter is moot is unlikely to succeed.⁵

8. In the case before this Court the children who stood to be directly prejudiced by the cancellation of the parent contract, are no longer attending Pridwin Preparatory School and have been enrolled in another school. Despite this development, which is not to say that the children have not suffered prejudice, there are constitutional issues raised by this matter which remain relevant.
9. The issues before the Court which remain undecided include:
 - 9.1. Whether section 28(2) of the Constitution affords a right to a hearing on the best interests of the child when an independent school decides to terminate a schooling contract;
 - 9.2. How the constitutional obligation to respect a learner's right to basic education as provided for in section 29(1)(a) of the Constitution should be interpreted in so far independent schools are concerned;

⁵Loots C "Ripeness and Mootness" p 7-21.

- 9.3. Whether a decision to terminate a schooling contract and expel learners is subject to the Promotion and Administration of Justice Act;
- 9.4. Whether there is a duty on independent schools to act reasonably or to consider alternative sanctions before terminating a schooling contract on notice; and
- 9.5. Whether clause 9.3 of the Parent Contract is valid, even though it is accepted that this clause permits the termination of the contract without a hearing for any reason.
10. In *J T Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others*,⁶ an order was sought from the Constitutional Court declaring two pieces of legislation to be unconstitutional. When the matter came before the Constitutional Court, new legislation repealing the impugned legislation had been passed by Parliament. The Court refused to hear the matter on the grounds that it was moot and held the following:

“[T]here can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest but an

⁶ 1997 (3) SA 514 (CC).

*historical one, than those on which our ruling is wanted have now become.*⁷

11. The above case illustrates that in matters where the entirety of the dispute has been resolved and where no effect can be achieved by hearing the case, the case becomes moot.
12. The matter before the Court is of a vitally different nature. There are five outstanding issues relevant to society at large, which involve considerations of compelling public interest. If the aforementioned issues are not decided on, the findings of the Supreme Court of Appeal will have the practical effect of prejudicing children.

C WHETHER THE MATTER BEFORE THE COURT IS IN THE INTERESTS OF JUSTICE

13. In *MEC for Education KwaZulu-Natal v Pillay*,⁸ the learner's whose rights had been infringed matriculated before the matter reached the Constitutional Court. Chief Justice Langa found that it was in the interests of justice for the Court to consider the matter because of the impact the decision would have on schools across the country.

⁷ Para 17.

⁸ 2008 (1) SA 474 (CC) para 35.

14. In *AD and Another v DW and Others*⁹ the Constitutional Court found it to be in the interests of justice to hear a matter where the parties had reached a settlement in relation to the particular child who had been at the heart of the litigation. In the words of the court:

*“In the first place, the Supreme Court of Appeal divided sharply on the question whether a High Court has jurisdiction to hear an application for sole custody and sole guardianship with a view to facilitating an adoption in a foreign country. The issue could well arise again, and it is appropriate that this Court resolve the matter.”*¹⁰

15. In *S v Manamela and Another*¹¹, the Constitutional Court held that it will decide a case where it is in the public interest despite the argument of mootness.¹²
16. The Constitutional Court has held that for mootness to be a bar to relief, the constitutional issues not only need to be moot *inter partes* but also moot relative to society at large. In addition to this, there

⁹ 2008 (3) SA 183 (CC).

¹⁰ Para 20.

¹¹ 2000 (3) SA 1 (CC).

¹² Para 11.

should be no considerations of compelling public interest that require the court to reach a conclusion.¹³

17. The outstanding issues before the Court deal with two fundamental sections of the Bill of Rights; section 28(2) and section 29(1)(a). The interpretation and application of the best interest standard serves to protect the rights and interests of all children not merely a distinct set of children.
18. Further, the right to a basic education and whether a negative obligation not to infringe this right can be discretely applied to juristic persons also has a significant effect on children.
19. For these reasons, there is a prospect of the infringement complained of in the current case being repeated in the future.
20. The undecided issues have the ability to transcend the immediate facts of the present case. For example, independent schools can terminate contracts on lesser reasons than parents' discourteous conduct and more notably, need not supply a reason for termination of a child's schooling. This affords the potential to mask prejudices and abuses of process.

¹³ S Heleba 2012(15)5 *PER/PELJ* 567 at 638.

21. The principles in question that are applied by independent schools can be applied elsewhere in society thereby creating the potential of further transgressions on the rights of children.
22. The matter has been traversed in both the High Court and the Supreme Court of Appeal having now reached the Constitutional Court.
23. The issues before the Honourable Court have attracted the attention of two *amici curiae* whose respective interests are the development of child law, the realisation of children's rights in South Africa and equality in South African education. In the premises, it can be seen that the points at issue are of significant public interest as they do not merely affect children in private schools – they affect all children.
24. A failure to decide on the outstanding issues, in particular the interpretation and application of section 28(2) will create legal uncertainty. This state of affairs poses a threat of future infringements on the rights in issue and thus for the Court to decide the case will benefit society.

D PRACTICAL EFFECT OF RELIEF SOUGHT

25. Whether the argument that the matter is moot is persuasive depends on whether the judgment or order will have a practical

effect or result. In *Western Cape Department and Another v George*,¹⁴ the court held that the practical effect need not be restricted to the position between the parties but can also include a practical effect on a matter of public interest or to resolve conflicting High Court judgments.¹⁵

26. The Constitutional Court has held that its discretion must be exercised according to what the interests of justice require. In the case of the *Independent Electoral Commission v Langeberg Municipality*,¹⁶ this Court held the following:

*“A prerequisite for the exercise of discretion is that any order which this court may make will have some practical effect either on the parties or on others.”*¹⁷

27. The Court held further that relevant factors in utilising its discretion may include the practical effect an order may have, the importance of the issue, its complexity and the fullness or otherwise of the argument advanced.¹⁸

¹⁴ 2001 (3) SA 925 (CC).

¹⁵ S Woolman, M Bishop, (2013) 7-21.

¹⁶ 2001 (3) SA 925 (CC).

¹⁷ Para 11.

¹⁸ *Ibid.*

28. The matter currently before the court, is complex in nature as it narrates the relationship between fundamental human rights and the obligations of private entities to respect such rights. The complexity of the matter is expounded on through the applicability of multiple sources of law, such as the Constitution, the Children's Act, the Promotion of Administrative Justice Act and the Common Law.
29. Ultimately, the practical effect of an order which this court may make will serve to allow for the court to engage in a proportionality analysis in the context of the best interests of a child and delineate the correct manner in which section 28(2) is to be applied. In addition, any order which this court may make will provide clarity on whether an independent school can be considered a juristic person for the purpose of interpreting section 8(2) of the Constitution.

E CONCLUSION

30. The CCL is of the view that the outstanding constitutional issues are of immense public interest as they directly deal with the constitutional rights of children.
31. Lastly, it is imperative for the outstanding issues to be decided on by the Constitutional Court in order to ensure legal certainty and to prevent further infringements on the constitutional rights of children.

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PRETORIA

26 APRIL 2019