

Private schools in South Africa: Pay the bill for the child's best interests? Terms and conditions apply

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Summary: *In South Africa, the right to basic education is immediately realisable as set out in the Constitution and confirmed in the case of Governing Body of the Juma Masjid Primary School & Others v Essay NO & Others. Another contentious point recently seen being developed in courts is the role and duties of a private school. Private schools, unlike public schools, can suspend a student due to failure to pay their school fees. However, in the case of a private school, the question arises as to the constitutional and human rights duties of a private party to give effect to the right to basic education. In the case of AB & Another v Pridwin Preparatory School & Others the Court definitively pronounced that private schools have constitutional obligations to give effect to the right to basic education. However, much uncertainty remains on the effect this has on a private school's ability to suspend or expel a learner for failure to pay school fees.*

Key words: *basic education; public power; private schools; horizontal application*

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1 Introduction

The extent to which private entities bear constitutional duties has long been debated in our constitutional democracy. Section 8 of the South African Constitution imposes duties on juristic persons such as a school if and to the extent applicable as well as the nature of the right.¹ A prominent and, as some may argue, superior right such as the right to basic education could impose certain obligations on a private school.² There is a fine line between the left-wing pushing to impose as many obligations as possible, the right separating the private and public sphere completely, and the midpoint.

This debate has become even more topical due to the *Juma Masjid* and *Pridwin* cases.³ On the one hand, a subsidised public school on private land; on the other, a private school seeking to expel students due to the sins of their fathers. The common denominator in both cases is the importance of protecting the right to basic education of children.

If a student is unable to pay their school fees at a public school, the school cannot expel them.⁴ However, it is uncertain if that is the case with a private school. The question then arises as to the extent to which a private school bears obligations in relation to providing and protecting a child's right and access to education and their right to property, respectively.

In order to answer these questions, the article first considers recent developments in our law in relation to the right to basic education. Second, this contribution critically evaluates the *Pridwin* decision and its implications for private schools' ability to suspend or expel learners due to non-payment of school fees. Third, the article outlines the negative obligations of a private school and, finally, it is argued that

1 Sec 8 Constitution of the Republic of South Africa, 1996.

2 T Boezaart 'A constitutional perspective on the rights of children with disabilities in an educational context' (2012) 27 *South African Public Law Journal* 456; R Roithmayr 'Access, adequacy and equality: The constitutionality of school fee financing in public education' (2003) 19 *South African Journal on Human Rights* 422; sec 39(2) of the Constitution also requires the law to be developed to promote the spirit, purport and objects of the Bill of Rights. Considering how prominent the right to basic education is and the fact that it is immediately realisable together with the best interests of the child, the protection of such a right should be protected, which may temporarily diminish a private party's rights.

3 *AB & Another v Pridwin Preparatory School & Others* 2020 (5) SA 327 (CC); *Governing Body of the Juma Masjid Primary School & Others v Essay NO & Others* 2011 (8) BCLR 761 (CC) (*Juma Masjid*).

4 Sec 41(7) South African Schools Act 84 of 1996; Regulations relating to the exemption of parents from payment of school fees in public schools.

the school's obligation to give effect to the right to basic education places a limitation on its ability to suspend or expel such learners.

2 The right to basic education

The concept of basic education has long eluded a precise definition. The Constitution does not provide clarity either and merely distinguishes between the right to basic education, which is immediately realisable, and the right to further education, which is progressively realisable.⁵ Liebenberg explains that basic education is afforded heightened protection as it is the foundation of all future learning and affects a person's ability to earn a living.⁶ Without a basic education, a person's ability to participate in the political and economic life of a society is compromised.⁷ Therefore, education is an enabler of multiple other rights. The World Declaration on Education for All explains that education is necessary to survive and develop their full capacities and to live and work with dignity.⁸

The state guarantees the right to basic education. However, where a private school provides such an education, the state must ensure that the private school respects the objectives and the standards set in international human rights law instruments.⁹ In South Africa, a private school is merely a school that is not (entirely) operated by the state. However, such schools still provide a basic education, whether subsidised or not.¹⁰

A definition of basic education is not provided in terms of legislation. However, the concept of further education is defined in legislation such as the General and Further Education and Training Quality Assurance Act.¹¹ In terms of this Act, further education would include all qualifications obtained post-grade 9, effectively meaning that basic education would end at the ninth grade.¹²

A similar argument was advanced in the *Moko* case where it was argued that the Schools Act only makes attendance compulsory

5 *Moko v Acting Principal of Malusi Secondary School* 2021 (3) SA 323 (CC) para 27.

6 S Liebenberg 'Socio-economic rights: Adjudication under a Transformative Constitution' (2010) 24 *European Journal of International Law* 244-245.

7 As above.

8 United Nations Educational, Scientific and Cultural Organisation World Declaration on Education for All.

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

10 Second *amicus curiae* heads of argument of the *Pridwin* case para 18.

11 General and Further Education and Training Quality Assurance Act 58 of 2001.

12 Sec 1 General and Further Education and Training Quality Assurance Act.

until grade 9, alluding thereto that basic education only extends to education up until the ninth grade.¹³ However, the Court rightly held that legislation cannot be used to interpret the constitutional provisions. This has long been accepted by our courts, given that legislation derives its force from the Constitution. Interpreting the Constitution through the prism of legislation will have the proverbial effect of 'the tail wagging the dog'.¹⁴ The court is duty bound to derive its own independent interpretation of what the concept of basic education entails.

In the *Moko* judgment Khampepe J cautions against interpreting the concept of basic education within the confines of either primary school education or education up to grade 9 or the age of 15, as this represents an excessively narrow understanding of the term. Such an interpretation, in her opinion, fails to align with the transformative purpose and historical context of the right to education.¹⁵ To illustrate, she highlights the potential adverse consequences for the school system and society if section 29(1)(a) were so narrowly construed to obligate the state solely to provide desks for primary school learners, excluding those in secondary schools or beyond grade 9.¹⁶ Khampepe J further argues against a restricted interpretation by pointing out the absurd outcome to which it would lead, such as in the *Welkom High School* case, where school policies penalising pregnant learners would only be deemed a violation of their fundamental right to basic education if they were in grade 9 or below.¹⁷

This has seen a move towards defining basic education with reference to the content of the education provided. While this is broader than a strict limit to the grade in question, courts have now accepted that every person 'that provides non-secondary or non-tertiary education is necessarily simultaneously engaged in providing those attending it a basic education'.¹⁸ This would mean that the provision of education to primary school learners and high school learners would *per se* amount to basic education.

There is a burden on the state to provide basic education to children. In accordance with section 8 of the Constitution, a private school has a duty not to interfere with or diminish a learner's right

13 *Moko* (n 5) para 27.

14 *South African Broadcasting Corporation Soc Ltd & Others v Democratic Alliance* 2015 (4) All SA 719 (SCA) para 43.

15 *Moko* (n 5) para 32.

16 As above.

17 As above.

18 *AB & Another v Pridwin Preparatory School & Others* 2020 (5) SA 327 (CC) (*Pridwin CC*) para 80.

to education if such education is already being provided due to the non-payment of school fees. This is prohibited by the Schools Act for public schools, but no such express prohibition exists in the case of private schools. Therefore, private schools attempt to transform the issue of providing education into a contractual issue. However, providing education to children is a particularly important right and not merely an ordinary commercial service being rendered.¹⁹

3 The *Pridwin* decision: A tremor before the quake

In the *Pridwin* case²⁰ the school cancelled the parent contract between the parents and the school, which resulted in the children, aged six and ten, having to find a new school. The school, in this regard, cancelled the contract without meeting with parents or attempting to come to some other agreement. The students were expelled purely because of their father's conduct, and the children were described as nothing short of model students.²¹

The parents approached the High Court to set aside the decision by the school to cancel the contract. The parents challenged the constitutionality of the contract. However, the Court found it to be valid and entered into freely by the parties.²²

The parents first submitted that the cancellation of the contract infringed on the children's right to education in section 29 of the Constitution.²³ It was argued that the state has a duty to provide for education and that *Pridwin* has a negative obligation to not diminish that right or act unreasonably.²⁴ *Pridwin*, they argued, was performing a constitutional function and, as a private institution, had a duty to not impair the children's access to education,²⁵ unless the school, in fact, were exercising a public power and would then be fulfilling a constitutional duty.²⁶ The High Court found that *Pridwin* had no constitutional duty to provide basic education as it is not the state or a public school, and there is no contract between it and the state to perform such a function.²⁷

19 ESCR Committee General Comment 13 on the International Covenant on Economic, Social and Cultural Rights.

20 *AB and Another v Pridwin Preparatory School and Others* (38670/2016) [2017] ZAGPJHC 186 (3 July 2017) (*Pridwin HC* case).

21 *Pridwin CC* (n 18) para 10.

22 *Pridwin HC* (n 20) paras 14-15.

23 *Pridwin HC* (n 20) para 17.

24 As above.

25 *Pridwin HC* (n 20) para 18.

26 Sec 239 Constitution of the Republic of South Africa, 1996.

27 *Pridwin HC* (n 20) para 26.

The High Court held that there was no right to equal education and there was no right to attend a private school.²⁸ Additionally, the Court held that the school had no negative duty towards the children to not diminish their right to education as the state did not provide them with a subsidy.²⁹ Pridwin also wrote to the Department of Education to secure places for the two minor children in public schools for the following year.³⁰ The Court stated that by doing this, Pridwin complied with its obligation, if any at all.³¹

The second submission by the parents was that the school breached the best interests of the child by cancelling the parent contract.³² Section 28(2) provides that when a decision is being taken concerning a child, their best interests must enjoy paramount importance.³³ The parents contended that this obligation entails giving the parents an opportunity to make representations on the best interests of the child, whereas the school, while agreeing that they are bound by this provision, stated that it merely obliges them to take into account the best interest of the child.³⁴ The Court found that the school did give appropriate consideration to the best interests of the child in balancing their rights with those of the other children in the school.³⁵

Third, the parents argued that the termination of the parent contract was procedurally unfair as they did not have an opportunity to make representations before the decision was taken.³⁶ However, this application was not made in terms of the Promotion of Administrative Justice Act (PAJA).³⁷ The judge held that because this was not an administrative action, there was no obligation on the school to give the parents a hearing before taking a decision, especially as this matter concerned a commercial contract and doing so would open the floodgates.³⁸

Fourth, the parents contended that the contract gave them a right to be heard in line with the principle of natural justice.³⁹ According to the Court, the principle of natural justice only has a role to play

28 *Pridwin HC* (n 20) para 34.

29 *Pridwin HC* (n 20) para 38.

30 *Pridwin HC* (n 20) para 40.

31 *Pridwin HC* (n 20) para 42.

32 *Pridwin HC* (n 20) para 49.

33 *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development & Others* 2009 (4) SA 222 (CC) para 73.

34 *Pridwin HC* (n 20) para 53.

35 *Pridwin HC* (n 20) para 77.

36 *Pridwin HC* (n 20) para 78.

37 *Pridwin HC* (n 20) para 80.

38 *Pridwin HC* (n 20) paras 88-89.

39 *Pridwin HC* (n 20) para 94.

if it is incorporated into the contract itself.⁴⁰ However, there was no implied or express incorporation of this principle in terms of the termination of the parent contract.

Finally, the parents argued that the decision by the school was substantially unlawful. The parents argued that the 'sins of the father', that is, the actions of the father should not negatively affect their children's access to education.⁴¹ If a contract is not fair, this does not make it invalid.⁴² A contract will only be unenforceable if it is against public policy or constitutional values.⁴³ For a contract to be against public policy, it must be contrary to the values enshrined in the Constitution.⁴⁴ The judge found that ultimately the school acted reasonably in terminating the contract.⁴⁵

Before the Constitutional Court and the Supreme Court of Appel (SCA) the applicants stated that the primary challenge was not to the validity of the clause on its face, but to the manner in which it was enforced without affording the parties a hearing.⁴⁶ The Supreme Court reasoned that, since one is dealing with a private power, no right to be heard arises.⁴⁷ The SCA explained that '[t]o preclude a party from relying on a breach clause before cancelling any contract without a hearing on the best interests of the child, would lead to an absurd result'.⁴⁸

The Constitutional Court held that such an approach fails to account for the fact that this is not a mere commercial contract but one governing the fundamental right of basic education of children.⁴⁹ Such contracts are special in nature and have different interests at stake compared to a lessee and lessor.⁵⁰ The Court held that the issue was not the cancellation clause itself, but rather the effects of the enforcement of such clause on the children.⁵¹ The Constitutional Court, therefore, had to determine whether the school had a constitutional duty and to what extent.

The Court held that although no private institution can be forced to establish and maintain a private school, once they have

40 *Pridwin HC* (n 20) para 96.

41 *Pridwin HC* (n 20) para 109.

42 *Pridwin HC* (n 20) para 112.

43 As above.

44 *Pridwin HC* (n 20) para 121.

45 *Pridwin HC* (n 20) para 137.

46 *Pridwin CC* (n 18) para 60.

47 *Pridwin CC* (n 18) para 62.

48 As above.

49 *Pridwin CC* (n 18) para 63.

50 As above.

51 *Pridwin CC* (n 18) para 66.

done so voluntarily, they will inevitably take on some constitutional obligations.⁵² The Court held that although the private school did not necessarily have a positive obligation, it had a negative obligation not to diminish the children's rights.⁵³ The Court also held that once a private school has provided education, it has a negative obligation not to interfere with such education, which includes the right to be heard before discontinuing the education.⁵⁴ Additionally, once a child receives private education, the school cannot take away or diminish the right without proper justification.⁵⁵

In the second judgment Theron J pointed out that the rights in section 29 are not mutually-exclusive rights. Section 29(1) created obligations to provide education and section 29(3) gives independent/private schools the ability to provide such education.⁵⁶ In providing this education, private schools have a negative obligation to not interfere with that right and a positive obligation to maintain standards not inferior to that of comparable public schools.⁵⁷ The learned judge explained that the education private schools provide may be more than 'basic', but in order to have advanced education, basic education is a component of this.⁵⁸ Thus, independent schools do provide basic education, perhaps not merely basic education.

From the case it is accordingly clear that private schools can no longer argue that the education provided by them is not basic education. Sections 29(1) and (3) are evidently not mutually exclusive but rather complimentary. It is now beyond dispute that where private schools voluntarily undertake educational responsibilities, they inherit certain constitutional obligations. Nevertheless, the precise content of these obligations may still give rise to some debate, an issue explored in more detail in the part that follows.

4 Role and duties of a private school

In *Governing Body of the Juma Masjid Primary School & Others v Essay NO & Others* the Constitutional Court confirmed that section

52 *Pridwin CC* (n 18) para 85.

53 *Pridwin CC* (n 18) para 86.

54 *Pridwin CC* (n 18) para 88.

55 *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo 2010 (2) SA 415 (CC)* para 52.

56 *Pridwin CC* (n 18) para 157. In the case of *Jaftha v Schoeman & Others, Van Rooyen v Stoltz & Others 2005 (2) SA 140 (CC)* it is explained what a negative duty is: 'at the very least, any measure which permits a person to be deprived of existing access to adequate housing', whereas a positive duty entails promoting releasing a right.

57 *Pridwin CC* (n 18) para 157.

58 *Pridwin CC* (n 18) para 178.

8(2) may impose negative obligations upon a juristic person.⁵⁹ In that case, the Court pointed out that a trust had the constitutional obligation 'not to impair the learners' right to a basic education'.⁶⁰

Nevertheless, the Court emphasised that this duty does not aim to burden private entities with the same extensive responsibilities as the state in protecting constitutional rights. Instead, it is focused on ensuring that private parties do not hinder or diminish the enjoyment of the right to basic education. The application of this duty depends on factors such as the importance of the constitutional right and the potential for its infringement by non-state actors.

In the *Daniels* case the Court held that section 8(2) of the Constitution must not be misconstrued to say that a private institution can never have positive obligations in terms of the Bill of Rights.⁶¹ Additionally, as Liebenberg pointed out, private parties have positive obligations, for example, in legislation. At times the legislature can effect change better through legislation than by courts expanding how private persons relate to one another.⁶² Thus, it is not as obscure as some might think to impose such obligations.

As pointed out by the Court, the reluctance to confirm that independent schools do in fact provide a basic education is premised on the idea that a person will only provide a basic education if they have a positive constitutional obligation to do so,⁶³ thereby conflating what the right entails with who has the duty to provide such a right.⁶⁴

Ally and Linde point out that the lower courts in *Pridwin* conflate the content of the right with the identity of the provider by stating that there would only be such an obligation if contained in a contract such as in *All Pay*.⁶⁵ A duty to provide a constitutional right or obligation does not arise only if there is a contract with the state requiring the private party to do so.⁶⁶ Thus, a private school does provide a basic education to learners and the legal entitlement to

59 *Juma Masjid* (n 3).

60 *Juma Masjid* (n 3) para 65.

61 *Daniels v Scribante & Another* 2017 (4) SA 341 (CC) (*Daniels*) paras 37-48.

62 M Finn 'Befriending the bogeyman: Direct horizontal application in *AB v Pridwin*' (2020) 137 *South African Law Journal* 13.

63 *Pridwin* CC (n 18) para 177.

64 *Pridwin* CC (n 18) para 178.

65 N Ally & D Linde '*Pridwin*: Private school contracts, the Bill of Rights and a missed opportunity' (2021) 11 *Constitutional Court Review* 10.

66 As above.

basic education does not cease to exist the moment a learner is enrolled in a private school.⁶⁷

Fredman argues that the obligation in section 29(3) of the Constitution to maintain standards that are not inferior to those at public schools imposes a general duty on a private school not to obstruct a learner's ability to obtain a basic education.⁶⁸ This argument is supported by reliance on the jurisprudence of the European Court of Human Rights, in particular the case of *Costello-Roberts v the United Kingdom*, in which the Court held that

[f]unctions relating to the internal administration of a school, such as discipline, cannot be said to be merely ancillary to the educational process ... The fundamental right of everyone to education is a right guaranteed equally to pupils in state and independent schools, no distinction being made between the two.⁶⁹

Fredman uses this dictum to argue that every policy affecting a learner's ability to obtain a basic education is a standard for purposes of section 29(3)(c) of the Constitution.⁷⁰ As a consequence, any policy by a private school that obstructs a child's access to basic education would breach its constitutional duty to maintain standards comparable to those of public schools.⁷¹ While the Court in *Pridwin* was not called upon to address a similar argument, the Court accepted that the school's 'obligations are reinforced by section 29(3)(c)'.⁷² This purposive reading of section 29 as a whole supports the argument by Fredman.

The author acknowledges that some controversy may arise with this interpretation, particularly surrounding the meaning of the term 'standards'. Ally appears to suggest that the term 'standards' in section 29(3)(c) refers to standards of education.⁷³ Her interpretation would align with one accepted meaning of the term 'standards' as defined in the *Oxford dictionary* as 'a level of quality, especially one that people think is acceptable'.⁷⁴ However, the ordinary meaning of standards is not restricted to the level of quality, but includes 'a unit of measurement that is officially used; an official rule used when producing something'.⁷⁵

67 *Pridwin CC* (n 18) para 164.

68 S Fredman and others *Obligations of independent schools in South Africa* (2013) 12.

69 *Costello-Roberts v the United Kingdom* App 13134/87 ECHR 25 March 1993.

70 Fredman and others (n 68) 12.

71 Fredman and others (n 68) 13.

72 *Pridwin CC* (n 18) para 167.

73 Ally & Linde (n 65) 11.

74 *Oxford learner dictionary*, https://www.oxfordlearnersdictionaries.com/definition/english/standard_1 (accessed 28 February 2024).

75 As above.

It is submitted that the provision accordingly is capable of two reasonable interpretations. However, the argument by Fredman would be better aligned with international law, and where any reasonable interpretation consistent with international law can be adopted, this interpretation should be preferred. In the author's view, the broader interpretation advanced by Fredman should accordingly be adopted.

In the *AllPay* case the contract concluded between Cash Pay Master and SASSA made clear that the former undertook constitutional obligations.⁷⁶ The Court, however, did not come to the conclusion that Cash Pay Master (CPM) had a positive obligation solely because of the contract concluded with SASSA. CPM's obligations outlived the contract as the contract was terminated, and yet CPM had to provide social grants as they had assumed the role of the state and by ceasing to perform their function, they would be breaching a social grant recipient's rights.⁷⁷ Thus, the obligation of providing basic education flows from the performance of a constitutional function rather than the existence of a contract.

In the *AllPay II* case⁷⁸ the Constitutional Court developed this approach further, albeit in the context of the right to social assistance. It also re-affirmed the position as set out in *Juma Musjid* and added that '[w]here an entity has performed a constitutional function for a significant period already ... considerations of obstructing private autonomy by imposing the duties of the state to protect constitutional rights on private parties, do not feature prominently, if at all'.

In the case of *Pridwin*, it has been voluntarily providing education since 1923.⁷⁹ A private entity cannot be forced or obliged to provide education or admit a certain learner. However, once a private school voluntarily admits a student, the school still bears certain obligations towards that learner. Once a learner receives education from a private institution, access to education cannot be taken away without justification and a fair procedure.

If such a right is taken away without appropriate justification, it is a regression of a child's right to basic education. The Constitutional Court has stated that a socio-economic right can be negatively

76 *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (1) SA 604 (CC) (*AllPay I*).

77 *Pridwin CC* (n 18) para 179.

78 *AllPay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer of the South African Social Security Agency & Others (No 2)* 2014 (4) SA 179 (CC) (*AllPay II*) para 66.

79 *Pridwin CC* (n 18) para 40.

protected from improper infringement, such as not taking measures to protect the existing right and allowing it to be diminished.⁸⁰ The duty of a private party is to not diminish or interfere with a right that the child already had, that is, their access to education.⁸¹

In *Equal Education v Minister of Basic Education*⁸² the High Court had to determine whether the Department of Basic Education breached its constitutional and statutory duties when it elected to bring to an unprecedented halt a national nutrition programme that provided meals to learners on a daily basis during a period where the schools were temporarily closed. The Court considered the CRC Committee in General Comment 19, which states that no deliberate regressive measures should be taken in relation to a child's economic, cultural and social rights unless, during an economic crisis, there is no other alternative.⁸³

The Court concluded that the state had taken regressive measures towards the children by taking away their access to daily meals as not all other options were considered.⁸⁴ Even though this is in the context of a state's obligations, a private party exercising a public power, as discussed below, has an obligation not to diminish a student's existing access to education unless there are no other alternatives.

This would entail, as an example, that a private school endures a limitation of the right to property for a certain duration if a student is unable to pay school fees in order to prevent the regression of a child's right to education, especially if they have had access to such a right for a period of time.⁸⁵

5 The suspension of a learner as the exercise of public power

Every exercise of public power is constrained by the principle of legality. In a South African context, administrative law is not limited to constraining the exercise of public power by the state only, but extends to any natural or juristic person exercising such powers as well.⁸⁶ The principle of legality is read into the Constitution as an

80 *Juma Masjid* (n 3) para 58.

81 As above.

82 *Equal Education & Others v Minister of Basic Education* 2021 (1) SA 198 (GP) (*Equal Education*) para 26.

83 *Equal Education* (n 82) para 57.

84 *Equal Education* (n 82) para 60.

85 This will be discussed under heading 6.

86 *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* 1983 (3) SA 344 (W).

incident of the rule of law and requires the exercise of any public power to be lawful and reasonable.⁸⁷ However, the principle of legality is itself dependent upon the exercise of the power in question being the exercise of a public power.⁸⁸ In *AAA Investments* the Court held that if an entity performs a public function, it is subject to the principle of legality.⁸⁹

In order for a decision to be seen as an administrative action, a juristic or natural person must be exercising a public power or performing a public function in terms of an empowering provision.⁹⁰ To determine whether a public power is being exercised, we consider how the power is being exercised rather than by whom. In this respect, the Court has emphasized that what is relevant is the function rather than the functionary.⁹¹

Private schools conclude a contract with parents to provide their children with education and, as discussed earlier, this includes basic education. Thus, a private school, such as Pridwin, was providing education to the students enrolled,⁹² a function that would otherwise have been performed by the state. In *AllPay* one of the factors the Court took into account was the fact that Cash Pay Master had effectively assumed the role of the state in relation to the payment of social grants. Similarly, a private school assumed the role of the state in relation to the learners enrolled in their institution. It is argued that this would make the provision of education through a private school an inherently-public power.

In the case of *Mlawuli v St Francis College*⁹³ the High Court held that a private school does not exercise a public power. It explained that because the Minister of Education does not prescribe which learners or how many are admitted, it does not exercise a public function.⁹⁴ The Court argued that a public school provides education to the public in general compared to a private school, which only provides education to a child because of a contractual obligation.⁹⁵ The judge also explained that as the contract does not give any indication to incorporate the requirements of an administrative action, PAJA is

87 *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 49.

88 *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC) (*AAA Investments*) para 68.

89 *AAA Investments* (n 88) paras 40-41.

90 Prof Hoexter's criticism of the statutory definition of 'administrative action' in ch 4 of her book *Administrative law in South Africa* (2017) 218.

91 *President of the Republic of South Africa & Others v South African Rugby Football Union and Others* 2000 (1) SA 1.

92 This is also in terms of the South African Schools Act, ch 5.

93 *Mlawuli v St Francis College* (1102/2016) 2016 ZAKZDHC 17 (20 April 2016).

94 *Mlawuli* (n 93) para 5.

95 *Mlawuli* (n 93) para 6.

not applicable.⁹⁶ The judge also noted that a child's rights, dignity and best interests have nothing to do with what contractual and administrative remedies are available.⁹⁷

The High Court's findings in this respect are clearly flawed for various reasons, including the over-emphasis on the school's power to decide who it admits. The mere fact that a private school decides who they admit does not mean that once the students are admitted, the school does not exercise a public power. The Constitutional Court in *Pridwin* held that a contract with a private school to provide an education is not a mere commercial contract but one governing the fundamental right of basic education of children.⁹⁸ In *Masetlha* the Constitutional Court held that

[t]he contractual element in the powers of the President must therefore not be allowed to obscure the fact that the President's powers are derived from the Constitution and the provisions of the applicable statutes and therefore subject to constitutional constraints in their exercise.⁹⁹

Private schools similarly derive the right to their establishment from section 29(3) of the Constitution. Therefore, notwithstanding the contractual elements, the exercise of powers conferred by the Constitution and legislation should clearly be subject to public law constraints.

The concept of an empowering provision is much broader than just the Constitution or legislation and is defined to encompass 'a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken'.¹⁰⁰ In *South African National Parks v MTO Forestry*¹⁰¹ the SCA confirmed that an empowering provision can include a contract. Rogers J held that when reviewing the decision by the state, the empowering provision must be in terms of the Constitution, provincial constitution or legislation.¹⁰² However, if a private party is exercising a public function, a contract can be seen as an empowering provision from which they derive power.¹⁰³ *Pridwin* alleges that their power to expel the learners is derived from

96 *Mlawuli* (n 93) para 7.

97 *Mlawuli* (n 93) para 10.

98 *Pridwin CC* (n 18) para 63.

99 *Masetlha v President of the Republic of South Africa & Another* 2008 (1) SA 566 (CC).

100 Sec 1 Promotion of Administrative Justice Act (PAJA).

101 *South African National Parks v MTO Forestry (Pty) Ltd* 2018 (5) SA 177 (SCA) (*MTO Forestry*) para 27.

102 *MTO Forestry* (n 101) para 49.

103 *MTO Forestry* (n 101) para 54.

the parent contract and, therefore, it is the empowering provision in the dispute.

Equal Education submitted to the Court that Pridwin was a member of the Independent Schools Association of South Africa (ISASA), and the clause in dispute is from the model contract provided by ISASA.¹⁰⁴ This model contract is provided by ISASA as standardised precedents used in a number of its member schools.¹⁰⁵ Thus, the consequences of the *Pridwin* decision will be far-reaching as many independent schools' parent contracts include such a clause. ISASA stated that it has a member base of over 760 schools.¹⁰⁶ This is relevant as it informs the broader context of the power being exercised and the potential impact of the contractual clause.¹⁰⁷

A fundamental aspect of a lawful exercise of public power involves a fair procedure. In *Pridwin* the Centre of Child Law made submissions regarding the effect of section 28(2) of the Constitution on the right to a fair procedure in relation to the termination of a contract with a learner's parents.

Section 28(2) dictates that a fair and determinable process must be followed whenever a decision is taken concerning children.¹⁰⁸ This may not necessarily amount to an oral hearing. In the case of *C v Department of Health and Social Development, Gauteng* the Constitutional Court held that section 28(2) of the Constitution includes a procedural component of the child having a fair hearing when their interests are at stake.¹⁰⁹ Some would distinguish this case by arguing that it was in the context of a public power being performed. However, in *Pridwin* the school was exercising a public power.

The school argued that they did not have an obligation to have a hearing before expelling the students. In this regard, the majority in *Pridwin* came to the following conclusion regarding the duty of a private school:¹¹⁰

In most circumstances, this would entail alerting the parents involved to the proposed termination; providing reasons therefor; and affording an opportunity for a fair and appropriate hearing. Of course, this would

104 Second *amicus curiae* heads of argument of the *Pridwin* case para 7.

105 As above.

106 As above.

107 As above; *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) para 85.

108 *Pridwin* CC (n 18) para 151.

109 *C v Department of Health and Social Development, Gauteng* 2012 (2) SA 208 (CC) para 27.

110 *Pridwin* CC (n 18) para 93-94.

entail giving the children themselves the opportunity to express their views on a matter that concerns them, where this would be appropriate ... The constitutional requirement is that there should be both substantive and procedural fairness before any child is excluded from a school.

Therefore, when a decision to expel students from a private school is being contemplated, the school must give either the students or their parents as representatives the opportunity to be heard on the issue, as when a person is given the opportunity to be heard, a better, well-informed decision can be taken. Where children are involved, this should be of even greater significance to ensure that their right and access to education is not arbitrarily being taken away. Section 28(2) also recognises the particular vulnerability of children and the additional protection required where they are concerned, as emphasised in the *Teddy Bear* case.¹¹¹

Section 10 of the Children's Act confers a specific right on children to participate in all decisions affecting them.¹¹² Section 6(3) of the Children's Act provides for the right of family members, for example, their parents, to express their views concerning the interests of children.¹¹³ These provisions give effect to South Africa's international law obligations. Both the Constitution and the African Charter on the Rights and Welfare of the Child (African Children's Charter) recognises children's rights to be heard, either in person or through representatives, in decisions affecting their interests. Therefore, a child has a right to be heard and, inevitably, procedural fairness when a decision is taken affecting their interests, such as expelling them from school.

The United Nations Committee on the Rights of the Child has described the procedural element of the best interests standard, in the following terms: 'Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account.'¹¹⁴

Therefore, in order for the decision maker, in the present example *Pridwin's* decision, to be lawful under the principle of legality, it must comply with fairness, especially because the Constitution and the

111 *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC) para 1.

112 Sec 10 Children's Act 38 of 2005.

113 Sec 6(3) Children's Act 38 of 2005.

114 United Nations Committee on the Rights of the Child General Comment 14 (2013) on the right of a child to have his or her best interests taken as a primary consideration (adopted 29 May 2013) 4 (art 3 para 1).

Children's Act afford children the right to a fair procedure when a decision affecting their interests is being taken. If a private school does not allow a child to make representations, such a decision can be reviewed and set aside by a court.

6 Everyone has the right to basic education (terms and conditions apply)

A private school's ability to suspend a learner for failure to pay school fees is an infringement of their right to basic education.

In *Port Elizabeth Municipality v Various Occupiers*¹¹⁵ the Constitutional Court emphasised that the Constitution introduces new responsibilities for the courts regarding property rights, which were not previously recognised under common law.¹¹⁶ It introduces a new and equally significant right to not be arbitrarily deprived of a home, in addition to the traditional rights of possession, use, and occupation.¹¹⁷ The Court acknowledged that conflicts may arise between the expectations associated with property ownership and the genuine needs of individuals in desperate need of housing.¹¹⁸ In such cases, the judicial role is not to prioritise one set of rights over the other, but rather to carefully balance and reconcile the conflicting claims, considering all relevant interests and specific factors in each case.¹¹⁹

The courts have observed that in striking a balance between these competing interests, there certainly are instances where a private landowner may need to endure the limitation on access to their property for a reasonable period.¹²⁰ This is particularly where the landowner was aware of the presence of unlawful occupiers at the time of purchasing the land.¹²¹ The courts have accepted that while it is not feasible to expect a property owner to indefinitely provide free housing, there are circumstances such as these where the owner may need to be patient and recognise that the right to occupation may be temporarily restricted.¹²²

115 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

116 *PE Municipality* (n 115) para 23.

117 As above.

118 As above.

119 As above.

120 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* (CC) 2012 (2) BCLR 150 (CC) para 40.

121 *Blue Moonlight* (n 120) para 40.

122 As above.

In both the *Pridwin* and *Juma Masjid* cases the parties were not compelled to provide basic education. However, they voluntarily did so and with that comes certain risks such as a learner not being able to pay their school fees.¹²³ When a school admits students, certain risks, such as a student not being able to pay school fees, is a foreseeable risk and, therefore, the school should endure the limitation of their right to property to a certain extent.

It may be argued that requiring the school to continue providing education to a non-paying learner indirectly imposes a positive obligation on the school to fulfil the right to basic education. In this respect, it must be emphasised that the Constitution does not state that a private party can never bear a positive obligation. This was reflected upon by the Court in *Daniels v Scribante*, where the respondents argued that allowing an occupier the right to effect improvements would essentially place a positive obligation on a private person to fund improvements given that section 13 of the Extension of Security of Tenure Act (ESTA) allows a court to order compensation for occupier-made improvements.¹²⁴

The respondents asserted that in line with the jurisprudence of the Constitutional Court and, in particular, the *Juma Masjid* case, the imposition of such a positive duty on a private party is not permissible.¹²⁵ However, the Court rejected this line of argumentation and held that after weighing up the relevant factors, if a court concludes that a private party bears a positive obligation, they may be duty bound to impose such an obligation.¹²⁶ The Court emphasised that *Juma Masjid* clearly did not say that a private party can never bear a positive obligation but rather that the primary positive obligation in that case rested upon the state.¹²⁷

Recently the High Court saw this issue playing out in the *Mhlongo v John Wesley School* case.¹²⁸ The case involved a private school that barred the applicant's son from writing examinations as well as separated him from his peers because his parents did not pay overdue school fees in the amount of R3 000.¹²⁹ The school similarly relied on an ISASA exclusion policy that condoned such sanctions.

123 T Lowenthal 'AB v Pridwin Preparatory School: Progress and problems in horizontal human rights law' (2020) 36 *South African Journal on Human Rights* 268.

124 *Daniels* (n 61) para 37.

125 *Daniels* (n 61) para 37.

126 *Daniels* (n 61) para 39.

127 *Daniels* (n 61) para 44.

128 *Mhlongo v John Wesley School & Another* [2018] ZAKZDHC 64 (19 December 2018).

129 *Mhlongo* (n 128) paras 8-9.

The applicant attempted to enter an agreement to pay the outstanding fees on a schedule, but the school rejected such an agreement, stating that fees are due and no negotiation will take place.¹³⁰ The applicant argued that rather than excluding the learner from writing examinations, the school could have entered into a settlement agreement or instituted legal proceedings against the applicant as ultimately the harsh actions by the school severely impacted their son, and the responsibility to pay the fees is on the parents.¹³¹

Significantly, the High Court held that '[s]ince the Constitution require[s] private parties or bodies not to interfere with or diminish the right to basic education, independent schools must act in a manner that minimises any harm on the learner's right to basic education'.¹³²

However, by separating the applicant's son, the school's actions were humiliating, degrading and inhumane,¹³³ especially because other measures could have been used that would reduce the harm, such as retaining the student's report card. It was also of an inferior standard compared to public schools, contrary to section 29(3) of the Constitution.¹³⁴

The High Court held that although it was not prohibited to exclude students due to failure to pay fees, this must be accompanied by a fair procedure while considering the best interests of the child.¹³⁵ The Court concluded that such a standard was applicable whether it is a private or a public school.¹³⁶ The Court explained that excluding or suspending a student due to non-payment of school fees was not in line with section 28(2) of the Constitution.¹³⁷ The Court therefore concluded that the exclusion policy and conduct by the school was unconstitutional and invalid.¹³⁸

Therefore, it is argued that the school's obligation to give effect to the right to basic education places a limitation on its ability to suspend or expel such learners. Drawing on eviction law as an example, in certain circumstances a private party needs to endure limitations of their rights for a reasonable period to give effect to the

130 *Mhlongo* (n 128) para 13.

131 *Mhlongo* (n 128) para 18.

132 *Mhlongo* (n 128) para 69.

133 *Mhlongo* (n 128) para 82.

134 *Mhlongo* (n 128) para 84.

135 *Mhlongo* (n 128) para 77.

136 As above.

137 *Mhlongo* (n 128) para 80.

138 *Mhlongo* (n 128) para 84.

socio-economic rights of others. Therefore, it is argued that a private school cannot immediately suspend or expel a student who is unable to pay their fees.

7 Conclusion

The debate surrounding the constitutional duties of private entities, particularly private schools, has been a longstanding and contentious issue in our constitutional democracy. The recent *Pridwin* and *Juma Masjid* cases have brought this debate to the forefront, emphasising the importance of protecting the right to basic education of children.

The central question revolves around the extent to which private schools bear obligations in providing and safeguarding a child's right to education. In the *Pridwin* decision the High Court held that private schools did not have a constitutional duty to provide basic education. However, the subsequent Constitutional Court ruling nuanced this stance, recognising that once a private school voluntarily provides education, it assumes certain constitutional obligations, particularly a negative obligation not to interfere with a child's right to education.

From this article it becomes clear that while private schools are not burdened with the same extensive responsibilities as the state, they are obligated to uphold certain standards and not act in a manner that undermines a child's right to education. If the state is of the opinion that private schools should have positive obligations, it can enforce such responsibilities through legislation. In this respect, the article argues that the principle of legality, applicable to any entity exercising public power, applies to private schools, whose provision of education constitutes an inherently-public power. Therefore, private schools, despite being private entities, are subject to certain public law constraints, including the requirement for a fair procedure when making decisions affecting learners.

In light of these considerations, it is argued that a private school's obligation to give effect to the right to basic education places limitations on their ability to suspend or expel learners, especially in cases where non-payment of fees is a foreseeable risk. The recent *Mhlongo v John Wesley School* case further reinforces this perspective, highlighting the importance of fair procedures and the best interests of the child in decisions related to non-payment of school fees.