

IS THE SANCTITY OF CONTRACT CAST IN STONE? AN EVALUATION OF

AB v Pridwin Preparatory School
(1134/2017) [2018] ZASCA 150; [2019] 1 All SA 1 (SCA); 2019 (1) SA 327 (SCA) (1 November 2018)

1 Introduction

This matter involves an appeal by AB (father) and CB (mother) (parents of DB and EB) against a decision of the South Gauteng High Court. The High Court found that the decision of the first respondent (Pridwin Preparatory School) to terminate a contract that had been concluded between it and the appellants was constitutional and acceptable, and thus found in favour of the respondents. This meant that the two children had to find another school to attend. The school based its action on a termination clause in paragraph 9.3 of the contract that had been concluded between the parties.

The appellants (AB and CB) failed to gain direct access to the Constitutional Court¹ and were granted leave to approach the Supreme Court of Appeal (*AB v Pridwin Preparatory School* (1134/2017) [2018] ZASCA 150; [2019] 1 All SA 1 (SCA); 2019 (1) SA 327 (SCA) (1 November 2018)). This discussion focuses on the Supreme Court of Appeal judgment. The appeal was dismissed with costs, four of the five judges concurring, and one judge, Mocumie JA, offering a dissenting judgment.

Five respondents were cited in this appeal: Pridwin Preparatory School, its principal (Mr Marx), the school's board, the Gauteng Education Department, and the Independent Schools Association of Southern Africa.

The appellants based their appeal on various grounds. Their fundamental argument rested on the claim that the termination clause that the school relied on was unconstitutional for various reasons, which meant that the school had no right to exclude the two children from attending the said school.

¹ Subsequently the matter reached the Constitutional Court (*AB v Pridwin Preparatory School* (CCT294/18) [2020] ZACC 12 (17 June 2020)) where the Court found in favour of the Applicants (AB and CB) and in their judgment echoed many of the sentiments expressed in this article. In paragraph 248 of the ConCourt judgment it was specifically stated that Pridwin's decision to expel DB and EB was, based on constitutional, international and legislative instruments, unacceptable since Pridwin Preparatory School did not fulfil its negative obligation not to interfere with the basic right to education of DB and EB without a fair process, and additionally omitted to give them the opportunity of being heard and expressing their views in this matter.

The appellants argued that: the school had a constitutional obligation to act reasonably and afford the appellants a hearing before cancelling the contracts; the school did not adhere to the Promotion of Administrative Justice Act (3 of 2000 (PAJA)); and the contract (specifically the termination clause invoked by the school) was unconstitutional based on public policy (par 2 of the judgment).

2 Majority judgment

Cachalia JA's majority judgment provides a thorough discussion of all the elements of the case, and Mocomie JA, in the dissenting judgment, rightly refers to this judgment of Cachalia JA as a "well-crafted judgment" (par 83). Cachalia JA deals extensively with section 28 of the Constitution of the Republic of South Africa (1996, the Constitution) (best interests of the child) and with section 29 (right to basic education), as well as with the application of PAJA in this matter and the application of public policy with regard to the interpretation of contracts. This discussion focuses on the latter – namely, the application of public policy when interpreting contracts.

The appellants and the school entered into a contract (the relevant sections being highlighted in clauses 5–8 of the agreement), which contained the heading: "Parent ... Declaration and Contract of Enrolment". It was followed by this statement:

"[T]he rights and obligations contained in this Contract are binding ... and must be carried out in order for the Child to be successfully enrolled and retained at the School." (par 5 of the judgment)

The contract also contained a paragraph headed "Important notice", which specifically stated:

"By ... entering into this Contract you agree to the conditions contained in this document as well as any terms and conditions contained in the Policies of the School, which forms part of this Contract. It is important that you read and understand these Policies as they have important legal consequences for you. If there is any provision in this Contract that you do not fully understand, please ask for an explanation before signing." (par 6 of the judgment)

The agreement specifically highlighted certain clauses, and sections of clauses as indicated in this text.

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

There are also other sections that are particularly highlighted and to which the parties' attention is drawn. These include "General Obligations of the School", "Parent's General Obligations" and "Termination and Notice Requirements" (par 7). Under "General Obligations", it is especially important to note that the "Head" (principal of the school) "may at his/her

sole discretion, cancel enrolment in accordance with the rules” (par 7 of the judgment; clause 2.1 of the agreement) and that the agreement:

“regulates the enrolment and admission of your child to the school and also regulates the relationship between the School, your Child, yourself and/or a Third party once your child is admitted and enrolled with the School.” (par 7 of the judgment; clause 2.2 of the agreement)

At clause 4.2, the parents’ obligations were highlighted:

“[Y]ou are required to: fulfil your own obligations under these terms and conditions; ... maintain a courteous and constructive relationship with School staff”. (par 7 of the judgment)

Clause 4.3 endowed the Head with discretion to:

“remove or ... suspend or expel your child if your behaviour is in the reasonable opinion of the Head so unreasonable as to affect or likely to affect the progress of your child or another child (or other children) at the School or the well-being of the School Staff or to bring the School into disrepute.” (par 7 of the judgment)

The “Termination and Notice Requirements” indicate that parents can cancel the agreement “at any time and for any reason, provided that you give the School a term’s notice”. Clause 9.3 (the clause the school invoked to cancel the agreement and thus bar DB and EB from further attendance at the school) stated:

“The School also has the right to cancel this Contract at any time, for any reason, provided that it gives you a full term’s notice, in writing, of its decision to terminate this Contract. At the end of the term in question, you will be required to withdraw the Child from the School, and the School will refund to you the amount of any fees pre-paid for a period after the end of the term less anything owing to the School by you.” (par 7 of the judgment)

In terms of clause 9.4 of the agreement, the school retained the right (without prejudice to other remedies) to:

“cancel this Contract immediately and has no obligation to return any Deposit or pre-paid fees to you if you are in material breach of any of your obligations and have not (in the case of a breach which is capable of remedy) remedied the material breach within twenty (20) business days of a notice from the School requiring you to remedy the breach.” (par 7 of the judgment)

At clause 9.5, the contract explained what was seen as a material breach, which included (among other things) failure to “uphold the Policies and/or Rules of the School.” (par 7 of the judgment; clause 9.5.1 of the agreement)

For purposes of this case, clause 9.5.5 was also of importance. It continued the explanation of material breach and stated that a material breach also occurred when a parent or the parents:

“act in such a way that you or the Child become seriously and unreasonably uncooperative with the School and in the opinion of the Head, your or your Child’s behaviour negatively affects your Child’s or other children’s progress at the School, the well-being of School staff, or brings the School into disrepute.” (par 7 of the judgment)

The school invoked clause 9.3 specifically in order to cancel the agreement, but accepted that such termination was also subject to constitutional scrutiny and maintained that they did indeed adhere to constitutional values (par 8 of the judgment).

The events that led to the cancellation of the agreement are detailed in paragraphs 9–22 of the judgment and centre on what was considered to be abusive, uncooperative and unacceptable behaviour by the appellants (especially the father AB) in dealings with the school (par 9–22). Eventually, the school, together with the second respondent, Mr Marx as the principal of the school, had had enough and cancelled the contract based on clauses 4.3 and 9.5 read together and in terms of clause 9.3 (termination and notice provision) (par 22 of the judgment). The school believed that a material breach had been committed by the appellants (in fact various breaches, stretched over an extended period and which were clearly listed by the school) and that the appellants had acted in such a manner that they had become “seriously and unreasonably uncooperative with the School and in the opinion of the Head, your behaviour negatively affects your child’s or other children’s progress at the School, the well-being of School staff, or brings the School into disrepute” (par 22 of the judgment).

The court also pointed out that the appellants were well aware of the content of the contract and that if there were any provisions or clauses they did not understand, they had been offered the option of having these uncertainties explained to them, an opportunity they had not used. They were also well aware that they had to adhere to a certain standard of conduct and that there was no recourse to a hearing or lesser sanctions imposed by the school. Additionally, it is important to note that the appellants had twice signed the contract within the space of four years (par 23–24). This had happened each time the parents had enrolled a child at the school. The court pointed out that despite this, the appellants persisted with their claims.

As mentioned, the focus of this discussion is the application of public policy with regard to the interpretation of a contract. In paragraphs 26 and 27 of the judgment, Cachalia JA refers to the appellants’ argument that:

“the termination clause (clause 9.3) be declared unconstitutional, contrary to public policy and unenforceable to the extent that it purports to allow Pridwin to cancel the parent contracts without following a fair procedure and/or without taking a reasonable decision”. (par 26)

In paragraph 27, the majority judgment outlines the main aspects to be considered when applying public policy to the interpretation of a contract, the most salient points being that a contract “that is *prima facie* inimical to a constitutional value or principle, or otherwise contrary to public policy” (*Barkhuizen v Napier* 2007 (5) SA 323 (CC) par 28; *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) par 46 and 47) will be declared invalid. Where a contract is “not *prima facie* contrary to public policy if its enforcement in particular circumstances is, a court will not enforce it” (*Bredenkamp v Standard Bank of South Africa Ltd supra* par 47). Another consideration was that a court must use this power sparingly, and

only in the “clearest of cases in which harm to the public is substantially incontestable” and this judgment should not “depend on the idiosyncratic inferences of a few judicial minds” (*Bredenkamp v Standard Bank of South Africa Ltd supra* par 47). The court also referred to the fact that direct reliance on “abstract values of fairness and reasonableness in order to escape the consequences of a contract because there are not substantive rules that may be used for this purpose will not be entertained by a court” (*Potgieter v Potgieter NO 2012 (1) SA 637 (SCA) par 32–34*). Importantly, it was also added that the appellants did “not attack the enforcement of the contracts by relying directly upon the School’s failure to act fairly and reasonably. What they do, instead, is attempt to import this duty through sections 28(2) and 29(1)(a) of the Constitution” (par 28 of the judgment).

At paragraphs 75–80, Cachalia JA reverts to the public policy challenge and finds that there are no grounds for “importing a duty to act fairly or reasonably into the termination clause from section 28(2) and section 29(1) of the Constitution, or from PAJA” (par 76).

Cachalia JA adds that fairness and reasonableness cannot be utilised as “free standing grounds to impugn the terms of a contract in an attempt to invalidate the terms of the contract” and such an argument would have no merit (par 76). According to Cachalia JA, the clause does not at face value, or intrinsically, offend any constitutional value or principle; nor is it contrary to public policy. Furthermore, the appellants had offered no facts to suggest the contrary (par 76). Cachalia JA also states that this is an example of a common feature of commercial contracts and offers nothing untoward (par 77).

Cachalia JA deals with the appellants’ argument that the enforcement of the contract is contrary to public policy since the legal convictions place a duty on Pridwin Primary (first respondent) to afford the appellants an opportunity to be heard and also obligate the first respondent to act reasonably towards the appellants. (They offered a document signed by the Department of Education and the National Association of Independent Schools (NAISA) (of which ISASA is a part) styled the “Rights and Responsibilities of Independent Schools” in support of their argument.) This was dismissed since it was only seen as a communications report and not a policy document for independent schools that are affiliated to ISASA to be obliged to follow and therefore formed no basis for public policy.

Additionally Cachalia JA points out that the appellants’ attempt to rely on Regulation 6(1)(i) (PAJA Regulations 6(1)(i) and 6(2) of the Gauteng Regulations. Registration and Subsidy of Independent Schools, GN 2919 in GG 308 of 2013-10-25) in order to support a right to a hearing under PAJA, “contains no injunction for independent schools to apply a fair procedure before terminating a parent contract” (par 78). He adds that no other facts were offered by the appellants to indicate that enforcement of the termination clauses indeed offends public policy (par 79). Indeed, he praises Mr Marx, the principal, for his exemplary conduct in this matter. He adds that the parents were fully aware of what the contract entailed (see par 80). The application was dismissed with costs, including the costs of the two counsel, with four of the five judges concurring.

Cachalia JA thus seems to highlight two aspects when dealing with the appellants' claim that public policy has been offended in this matter. Dealing first with the claim that the enforcement of the contract offends public policy since it does not allow for a hearing before expulsion, Cachalia JA finds that this action of enforcement was not contrary to public policy; this was a commercial contract – the appellants were fully aware of its content and the consequences of breach, and concluded it freely and autonomously (see par 80). Furthermore, the contract was not one sided or unduly onerous on one of the parties (par 80). Cachalia JA also finds that to try and import this duty (to afford the parents a hearing), via sections 28 and 29 of the Constitution and regulation 6 under PAJA, would be intolerable and unacceptable.

Secondly, on the face of it or even intrinsically, the clause (9.3) contained nothing unconstitutional or contrary to public policy (par 76). So the clause itself does not offend public policy, according to Cachalia JA. However, it gives the school the right to cancel the contract for any reason, at any time (as long as it gives a full term's notice) and then at the end of the said term, the child must be withdrawn from the school since the contract has been cancelled (clause 9.3 of the contract), which is clearly not constitutional or in line with public policy.

3 Minority judgment

Mocumie JA, in her minority judgment, offers a dissenting judgment. She is of the view that the school did not consider the best interests of the child, as required by section 28 (see par 96–107) and is also of the opinion that the SA Schools Act and the Constitution impose “a negative obligation on independent schools not to diminish the right to basic education” (par 95). She does not find it necessary to address the appellants' claim that PAJA should be applied in the matter, since she finds the clause to be unconstitutional in light of the application of sections 28 and 29. She also holds that it was unconstitutional with regard to the application of public policy (par 108–119). Mocumie JA spends a significant time explaining the need to reconsider the decision in *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* (1984 (4) SA 874 (A)), where it was decided that “an agreement operated in an unfair or unreasonable manner would not ordinarily constitute a ground on which to challenge such an agreement” (paragraph 109 of the judgment). (She refers to *South African Forestry Company Ltd v York Timbers Ltd* [2004] ZASCA 72; [2004] 4 All SA 168 (SCA); and *Brisley v Drotzky* [2002] ZASCA 35, which support the statement in *Maphango v Aengus Lifestyle Properties (Pty) Ltd* ([2012] ZACC 2; 2012 (3) SA 531 (CC); 2012 (5) BCLR 449 (CC)) – that because an individual judge finds the implementation of a contract unfair, it is not to say that it can be deemed as such.) In contrast, she cites Ngcobo J's judgment in *Barkhuizen v Napier* ((CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (4 April 2007)), which indicates that:

“the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights.” (par 30)

Mocumie JA suggests that this is the route the majority judgment in this case should also have followed. Additionally, she points out that the law of contract should be infused with constitutional values, which would include values of *ubuntu* and this should supersede a mere dogmatic application of *pacta sunt servanda* (confirmed by Moseneke J's comments in the recent case of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30).

In the past, the dogmatic application of *pacta sunt servanda* has ruled the roost in our court rooms but the court in *Natal Joint Municipal Pension Fund v Endumeni Municipality* ((920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Natal Pension Fund*) adopted a different approach to the interpretation of documents. This approach has been used consistently by our courts since the *Natal Pension Fund* decision. In this approach, interpretation involves the process of attributing meaning to the words used in a document (be it legislation, some other statutory instrument, or a contract), while “having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence” (*Natal Pension Fund supra* par 18).

Irrespective of the nature of the document, the court held that the language of the document must be considered in the light of:

“the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.” (par 18)

All these factors must be considered; and the process is objective in nature, not subjective, with a sensible meaning being preferred to one that leads to an insensible or “unbusinesslike” result, or an interpretation that undermines the apparent purpose of the document (par 8). The language of the provision is the undisputed starting point, but the provision must be read in context, while having regard to the purpose of the document and without losing sight of the background preparation and production of said document (par 8).

In terms of the *Natal Pension Fund* judgment, much more is considered during interpretation than just the language and what is stated on a pure linguistic level. It is not that the *pacta sunt servanda* principle is disregarded, but the court looks wider in its interpretation and does not slavishly adhere to this principle.

In paragraphs 111–113, Mocumie JA explains the approach followed when applying public policy to the law of contract. This comes down to two questions: whether the clause is reasonable, and if so, whether it should be enforced in light of the specific circumstances that prevented compliance (*Barkhuizen v Napier supra* par 56, 57 and 58). Mocumie JA then, in paragraphs 114–119, applies this approach to the *Pridwin* case, and comes to the conclusion that clause 9.3 (the termination clause) is unreasonable (the first step in the approach), mainly because

“it makes no provision for a hearing or representations prior to expelling any child on the basis of a breach of the contracts on the part of the parents.” (par 119)

The dissenting judgment also indicates a “second flaw” – namely, that “the terms of the contracts are overbroad ie termination for ‘any reason’” (par 116). Mocumie JA states in paragraph 118:

“It would be unlikely even in these circumstances, to imagine that a society such as ours, protective of its children, would approve of a clause in a contract between parents and a school, which expels a child from a school out of no wrongdoing on his or her part but that of their parents. It can never be in the best interests of a child where the school fails to use all measures available to deal decisively with parents, to resort to such unconscionable intrusion into the right to compulsory education of a child, under the guise of the ‘sanctity of a contract’. In the worst case scenario, even in the law of contracts the appellants cannot be heard to have waived the rights of DB and EB to compulsory education or to be heard on the basis which is clearly contrary to their best interests and public policy.” (par 118)

Mocumie JA also refers to *Bafana Finance Mabopane v Makwakwa* ([2006] ZASCA 46; 2006 (4) SA 581 (SCA); [2006] 4 All SA 1 (SCA) par 10) to reiterate that a party cannot be expected to waive the protection to which they are entitled according to legislature, even if they have signed an agreement to this end. This is what has happened in this case, according to Mocumie JA, since enforcement of the contract would mean that EB and DB have waived their rights to a hearing or a fair trial.

According to the dissenting judgment, clause 9.3 is contrary to public policy and is unconstitutional and unenforceable (par 119). Mocumie JA is clearly of the view that a clause such as 9.3, which affords the child no recourse or even an option for a hearing, cannot be accepted as being in line with public policy. Additionally it also gives the school far too much leeway in the application of their policy with regard to expulsion, since the terms of the contract are so wide and “overbroad” (par 118). It also disregards the best interests of the child, which are expressly provided for in terms of section 28 of the Constitution in favour of sanctity of contract. Mocumie JA is also of the opinion that owing to the enforcement of clause 9.3, the children’s rights to compulsory education and the right to be heard were waived.

4 Application of public policy

The application of public policy is no easy task. Kruger points out that applying the test to determine public policy is problematic for various reasons (Kruger “The Role of Public Policy in the Law of Contract, Revisited” 2011 128(4) *SALJ* 712–740). He indicates that there is no clear test for public policy, and a general inability to delineate clearly the various considerations that help to shape a public policy analysis. Additionally, the relationship between what is constitutional, and the principles that have always regulated the analysis and application of public policy in the past, is also problematic. Then there is also the difficulty of applying this effectively on a case-to-case basis. However, it must be done. Moseneke J, in his

minority judgment in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd (supra)*, refers to the fact that the “concept of *ubuntu* and the necessity to do simple justice between individuals have been recognised as informing public policy in a contractual context” (*Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd supra* par 61).

South African case law indicates that the enforcement of contractual terms may be upheld, even if these terms have been agreed to by parties in a voluntary manner (*Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173; *Magna Alloys and Research (SA) (Pty) Ltd v Ellis supra* par 891; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); *Napier v Barkhuizen* 2006 (4) SA 1 (SCA)). Cachalia JA, in this case, could have followed that route and found that the fact that the school, by means of the principal, can expel a child for *any reason*, without offering the said child/children any opportunity for a hearing, does not conform to public policy. As absurd as it may sound, strict enforcement of the contract means that the principal has neither to explain nor rationalise his or her decision; he or she may expel a child simply because he or she does not like the child’s face (“any reason” means exactly that – any reason). Obviously, in this matter, the principal felt that the events leading up to the cancellation of the contract warranted his decision to cancel the contract and to expel the two children, but the wording of the contract gives him or her *carte blanche* when it comes to expulsion. Nonetheless, Cachalia JA did not find this to be against public policy or onerous or unconstitutional. It must be asked how this can promote simple justice between individuals, as called for by Moseneke J. And how does this serve the best interests of the child? Or promote constitutional values, as required by public policy.

It is submitted that the appellants should also have referred the court to section 36 of the Constitution, which calls for all relevant factors to be taken into account to determine if a limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. These are: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose (see s 36 of the Constitution of South Africa, 1996). If one considers section 36 and its application, then the court might have come to a different conclusion. Section 36(2) provides that except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights

The two rights that seem paramount in this case are the best interests of the child and the right to education. The effect of the limitation (from the school’s side) seems to be to exclude the children from obtaining education at the particular institution due to the conduct (or misconduct) of the parents, which the school also felt impacted on other children and was thus not in the best interests of the children (the other children). The extent of this limitation means that the children are not able to attend this educational institution.

Then of course questions must be asked as to the relation between the limitation and its purpose (s 36(1)(d)), and whether a less restrictive means is available and applicable in order to achieve the same purpose (s 36(1)(e)).

The school basically expelled two children because of the actions and conduct of the parents. The school believed the parents' conduct breached the agreement in place between the parties. The parents did not adjust or amend their actions and cooperate with the school as requested and the school believed this was to the detriment of the other children; by expelling DB and EB, the school saw itself as acting in the best interests of the other children.

From the school's side, the purpose of limiting the right to education was to serve the best interests of the children (all the children other than DB and EB) and this made it justifiable. But it should be asked whether a restraining order against the parents, especially the father, could not have been sought to prevent him antagonising and terrorising the educators and coaches as he did. Would such a (less restrictive) limitation, not also have served the purpose of serving the best interests of the children, including DB and EB?

It is submitted that the context of the situation – that these are children and that this matter involves schooling and education – should surely also make the court think twice before deciding such a clause does not fly in the face of public policy. Cachalia JA mentions that such a clause is a common one in commercial contracts and that the indirect effect it would have on the children should not be offered as reason to declare it contrary to public policy. (He refers to the cancellation of a lease agreement as a similar example of the “sins of the fathers” being visited on the children, since the breach of parents causes children (who are innocent) to suffer.) Cachalia JA uses an interesting example – that of a lease agreement that lapses, affecting children whose actions did not contribute to the situation at all. A lease agreement is a commercial agreement and Cachalia JA sees the agreement between the parents and the school as a purely commercial agreement as well. But can it be seen as exactly the same?

Breen states:

“Arguably, the standard of the best interests of the child is the universal principle guiding the adjudication of all matters concerning the welfare of the child.” (Breen *The Standard of the Best Interests of the Child: A Western Tradition in International and Comparative Law* (2002) 1)

The Constitution has elevated the “best interests of the child” to a fundamental right and reiterates that it should be of paramount importance in any matter that concerns the child. This is echoed in the Convention on the Rights of the Child, (s 28 of the Constitution of South Africa, art 3(1) of the Convention). This principle must also be considered if any other constitutional or legal right of a child is affected (see *Kotzé v Kotzé* 2003 (3) SA 628 (T); *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 (4) SA 160 (T)). The best interests of the child have to be “determined in every individual case on the basis of all relevant facts and considerations” (Malherbe “The Constitutional Dimension

of the Best Interests of the Child as Applied in Education” 2008 2 *Journal of South African Law / Tydskrif vir die Suid-Afrikaanse Reg* 268).

If this standard is applied in the case at hand, it is clear that Cachalia JA's reference to a lease agreement cannot be equated with an agreement that involves the education of children which directly involves the best interests of the child (of DB and EB in this case). Expelling children from school because of the parents' behaviour is not in the best interests of the child and flies in the face of public policy, and therefore has a far greater impact on the children one would argue than the cancellation of a lease agreement.

Furthermore, it is submitted that clause 9.3, which gives the school (and specifically the principal) *carte blanche* as far as expelling children is concerned – the only proviso being the giving of a term's notice – is also contrary to public policy. According to the agreement, no reason has to be provided (which does not even happen with the cancellation of a lease agreement) and there is no recourse for the expelled children or their parents.

Mocumie JA in the minority judgment certainly makes valid points that the majority either disregarded or dealt with in an unsatisfactory manner, which, it is submitted, has led to the incorrect decision by the court. This leads to the conclusion that public policy was not served by the majority judgment in this case; sanctity of contract has been protected to the detriment of constitutional values.

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