

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 29/10  
[2011] ZACC 13

In the matter between:

GOVERNING BODY OF THE JUMA MUSJID  
PRIMARY SCHOOL

First Applicant

BEATRICE KISHETA KYUBWA AND OTHERS

Second and Further Applicants

and

AHMED ASRUFF ESSAY N.O.

First Respondent

ABOObAKER JOOSAB NOOR MOHAMED N.O.

Second Respondent

ABDUL VALLY MAHOMED N.O.

Third Respondent

ABDUL RAHIM MALEK N.O.

Fourth Respondent

HAROUN MAHOMED GANIE N.O.

Fifth Respondent

MAHOMED ABDOOL GAFFAR JOOSAB N.O.

Sixth Respondent

OMAR ABOObAKER MOOSA N.O.

Seventh Respondent

GOOLAM ALLY GAFFOOR N.O.

Eighth Respondent

AHMED YUSSUF LOCKHAT N.O.

Ninth Respondent

MEMBER OF THE EXECUTIVE COUNCIL  
FOR EDUCATION FOR THE PROVINCE OF  
KWAZULU-NATAL

Tenth Respondent

SUPERINTENDENT GENERAL OF THE  
DEPARTMENT OF EDUCATION FOR THE  
PROVINCE OF KWAZULU-NATAL

Eleventh Respondent

MINISTER FOR EDUCATION

Twelfth Respondent

together with

CENTRE FOR CHILD LAW

First Amicus Curiae

SOCIO-ECONOMIC RIGHTS INSTITUTE  
OF SOUTH AFRICA

Second Amicus Curiae

Heard on : 31 August 2010  
25 November 2010

Decided on : 11 April 2011

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## JUDGMENT

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NKABINDE J:

### *Introduction*

[1] This is an application for leave to appeal against the decision of the KwaZulu-Natal High Court, Pietermaritzburg (High Court).<sup>1</sup> The order of the High Court authorised the eviction, effectively, of a public school conducted on private property.<sup>2</sup>

The dispute is between the Juma Musjid Trust (Trust), the owner of the private property,

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<sup>1</sup> *Ahmed Asruff Essay N.O. and Eight Others v The MEC for Education KwaZulu-Natal and Four Others*, Case No. 10230/2008, KwaZulu-Natal High Court, Pietermaritzburg, 16 September 2009, unreported.

<sup>2</sup> The order is set out in full at n 13 below.

and the Member of the Executive Council for Education for KwaZulu-Natal (MEC)<sup>3</sup> as well as the School Governing Body (SGB). The impasse arose when the MEC failed to conclude an agreement as required by certain provisions of the South African Schools Act<sup>4</sup> (Act) setting out the tenancy terms and conditions. The standoff culminated in a successful eviction claim by the Trust in the High Court. This was followed by an unsuccessful attempt to appeal to the Supreme Court of Appeal. Hence the present proceedings.

[2] After the first hearing, this Court was satisfied that:

- “(a) The Trustees (first to ninth respondents) have a constitutional duty to respect the learners’ right to a basic education in terms of section 29(1) of the Constitution;
- (b) Having regard to all the circumstances of the case, including this obligation, the Trustees acted reasonably in seeking an order for eviction; and
- (c) In considering the Trustees’ application and in granting the order of eviction, the High Court did not properly consider the best interests of the learners under section 28(2) and their right to a basic education under section 29(1) of the Constitution.”

[3] However, the finding that the Trustees had acted reasonably in seeking the order for eviction did not entitle the High Court to make an order for eviction, because the order had an impact on the learners’ right to a basic education under section 29(1) of the

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<sup>3</sup> When these proceedings commenced in the High Court, the MEC was Ms Catherina Magdalena Cronjé. When the application was lodged in this Court, Mr Senzo Mchunu was the MEC. It is for this reason that this judgment, in the proceedings before the High Court refers to the MEC as “she/her” and in the proceedings before this Court, the MEC is referred to as “he/him”.

<sup>4</sup> 84 of 1996. The Act came into operation on 1 January 1997.

Constitution and on the learners' best interests under section 28 of the Constitution. Therefore, the High Court ought to have required the MEC to provide it with information regarding the steps she had taken to ensure that the learners would have schools at which they would be enrolled for the 2011 academic year. As this had not happened, the order of the High Court was set aside and the provisional order dated 7 September 2010 was made.<sup>5</sup> The provisional order required the MEC and the Trustees to endeavour to

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<sup>5</sup> The provisional order reads:

“Having heard argument on behalf of the applicants, respondents and amici curiae, and having considered the application for leave to appeal, the Court is satisfied that—

- (a) The Trustees (first to ninth respondents) have a constitutional duty to respect the learners' right to a basic education in terms of section 29(1) of the Constitution;
- (b) Having regard to all the circumstances of the case, including this obligation, the Trustees acted reasonably in seeking an order for eviction; and
- (c) In considering the Trustees' application and in granting the order of eviction, the High Court did not properly consider the best interests of the learners under section 28(2) and their right to a basic education under section 29(1) of the Constitution.

In view of the urgency of the matter, the following provisional order is made, for which reasons will in due course be furnished:

1. The application for leave to appeal is granted.
2. The application for condonation for the late filing of the record is granted.
3. The application by the first to ninth respondents for condonation for the late filing of their supplementary written submissions is granted.
4. The order of the High Court dated 16 September 2009 is set aside.
5. In its place, the following provisional order is granted:
  - (a) The Tenth Respondent, Member of the Executive Council for Education for the Province of KwaZulu-Natal (MEC), is ordered to engage meaningfully with the first to ninth respondents (Trustees) and the first applicant (School Governing Body) in an effort to resolve the questions arising from the dispute before the Court, and the options available for its resolution, including—
    - (i) whether it is possible for the MEC to conclude an agreement in terms of section 14 of the South African Schools Act 84 of 1996 with the Trustees for the continued operation of the school; and, if not,
    - (ii) what steps the MEC has taken to secure alternative placements for the learners enrolled at the school in accordance with the learners' right to a basic education.
  - (b) The MEC is required to file a written report with this Court by no later than Friday 8 October 2010 setting out—

conclude a section 14 agreement in terms of the Act which might have rendered the application for eviction unnecessary and saved the school from closure. The Trustees were granted leave to apply directly to this Court on supplemented papers for an order that would be just and equitable, including an order for eviction.

[4] Following the information furnished to this Court pursuant to the provisional order as will appear later in this judgment, it became clear that the closure of the school had become inevitable. The dispute remained unresolved. As a result, the Trustees applied for an eviction order. On 11 November 2010, the MEC then arranged a meeting to discuss the process concerning the closure of the school. On the morning of the same day, the applicants unsuccessfully sought urgent relief to stop the meeting from taking place.<sup>6</sup> On 25 November 2010 a further order,<sup>7</sup> which was designed to ensure that the MEC complied with his obligation to provide information on alternative schooling for the children, was made.

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- (i) the efforts undertaken in terms of paragraph (a) of this order;
  - (ii) the conclusions to which the MEC has come; and
  - (iii) the reasons for those conclusions.
- (c) In the light of the MEC's report, the Trustees are granted leave to apply directly to this Court before Friday 29 October 2010, on the papers as suitably supplemented, and on notice to the other parties, for an order that will be just and equitable, including an order for eviction."

<sup>6</sup> The order dated 11 November 2010 reads:

"The Constitutional Court has considered the urgent application filed on 11 November 2010. It has concluded that the application should be dismissed.

Order:

- (1) The application is dismissed.
- (2) Costs are reserved for decision on 25 November 2010 at 10:00 am."

<sup>7</sup> The order dated 25 November 2010 is set out in full at n 87 below.

[5] Upon considering the reports and further information furnished as a result of the order of 25 November 2010, this Court was satisfied that the Trustees had made out a case for eviction and that satisfactory arrangements had been made by the MEC to ensure that all learners will be accommodated at other schools during the 2011 school-year. Accordingly, on 10 December 2010 this Court granted an eviction order.<sup>8</sup>

[6] In this judgment, we provide reasons for this Court's provisional order dated 7 September 2010 and for the eviction order we granted on 10 December 2010. We also address the remaining issue relating to costs.

[7] Broadly, the issues relate to: (a) whether the MEC fulfilled the constitutional obligations in relation to the learners' right to a basic education; (b) whether the Trustees, when vindicating their property rights had any constitutional obligations *vis-à-vis* the learners' right to a basic education and, if so; (c) whether the common law remedy of *rei vindicatio* ought to have been developed in circumstances where the learners' right to a basic education was likely not to be given effect to as a result of an eviction. These questions involve balancing competing rights: the right to a basic education on the one hand and property rights on the other.

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<sup>8</sup> The order dated 10 December 2010 is set out in full at n 88 below.

*Parties*

[8] Leave to appeal is sought by the first applicant, the SGB of the Juma Masjid Primary School (school), and the second and further applicants. The second and further applicants are parents, guardians and caregivers whose children were enrolled as learners at the school for the 2010 school-year. These applicants are collectively referred to as the applicants.

[9] The first to ninth respondents are the Trustees of the Juma Masjid Trust (Trustees). They oppose the application for leave to appeal. The tenth, eleventh, and twelfth respondents (state respondents) are: the MEC; the Superintendent General of the Department of Education for KwaZulu-Natal (Department) and the then-Minister for Education (Minister), respectively.

[10] The Centre for Child Law and the Socio-Economic Rights Institute (SERI) were admitted as amici curiae.<sup>9</sup> This Court is indebted to them for their valuable submissions.

*Factual background*

[11] The school was officially established in 1957 as a government-aided school and a Madressa,<sup>10</sup> an Islamic school established to offer education with a distinctive religious

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<sup>9</sup> The Centre for Child Law (admitted as the first amicus curiae), is a registered law clinic of the University of Pretoria. SERI (admitted as the second amicus curiae), is a non-profit organisation providing professional, dedicated and expert socio-economic rights assistance to individuals, communities and social movements in South Africa. SERI conducts research, engages with government, advocates for policy and legal reform, facilitates civil society coordination and mobilisation, and litigates in the public interest. Its thematic areas are housing and evictions; basic services (water, sanitation, electricity); and migrant rights and livelihoods.

character, for children in Grades 1 to 9. During 1997, the Trust permitted the Department to enlist the school as a public school with an Islamic religious ethos<sup>11</sup> on its property in terms of section 14(1) of the Act.<sup>12</sup> The permission, according to the Trustees, was subject to the conclusion of a written agreement between themselves and the MEC under section 14(1). Although the agreement was never concluded, the school was conducted on the Trust's property as a public school. The Trust paid for certain expenses associated with the running of the school. These payments were made allegedly on the understanding that the Department would reimburse the Trust.

[12] On 28 January 1999, the Trust and the SGB concluded a written agreement titled "Moral Deed of Agreement" (Moral Deed). In paragraph A of its preamble, it appears

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<sup>10</sup> A Madressa is a place of religious learning for followers of the Islamic faith. The school is seemingly the only public school in the central business district of Durban that provides education in line with the Islamic faith.

<sup>11</sup> Section 57 of the Act deals with transitional provisions relating to private property owned by religious organisations. It provides:

"If the owner of the private property referred to in section 56 is a religious organisation, such owner may require that the agreement contemplated in section 14 must recognise, in an appropriate manner consistent with *this Act*, the distinctive religious character of the *school*."

A pro forma agreement in terms of section 14, inter alia, provides:

"Whereas the MEC and the Owner have agreed to enter into this agreement pursuant to sections 14(1) and 57 of the South African Schools Act (Act No. 84 of 1996) (hereafter referred to as 'the Act'), whereby the school is *established/deemed* to be established as a public school on private property." (Emphasis added.)

Provision is made in the pro forma agreement for the proprietary rights held by the school, that the owner gives the right of use of the property for the sole purpose of education in a public school on the property and that the owner lets the property to the MEC for a certain amount per month/year. It also makes provision for the recognition by the MEC of the distinctive religious character of the school if the owner of the private property has exercised his or her rights as contemplated in section 57 of the Act.

<sup>12</sup> Section 14(1) provides:

"Subject to the *Constitution* and an expropriation in terms of section 58 of land or a real right to use the property on which the *public school* is situated, a *public school* may be provided on private property only in terms of an agreement between the *Member of the Executive Council* and the owner of the private property."



that the coming into operation of the Moral Deed was dependent upon the conclusion of a section 14(1) agreement by the MEC and the Trust. On 9 October 2002, the Trust caused a letter to be sent to the Department indicating that it had taken a decision to establish an independent school on the property and that it would, in due course, afford the Department notice to “close” the existing school. A copy of the letter was sent to the SGB. On 24 October 2002, the SGB wrote to the Department noting its concerns about the letter received from the Trust. In the same month the Department responded, stating that if the school were to be evicted from the premises, the Department would either relocate the school to other premises or close it.

[13] On 17 July 2003, the Trust sent a notice terminating the Department’s right of occupation with effect from 31 December 2004. The Department undertook to vacate the premises. It did not. It appears that invoices for expenses incurred by the Trust were sent to the Department from 5 December 2005. On 11 January 2007, the Department further undertook to pay rentals backdated to 1998, but this too did not happen.

[14] Between February and November 2007, the Department again undertook to pay rentals and the Trust’s out-of-pocket expenses incurred by the latter for the benefit of the school. Once more, the Department failed to fulfil its undertaking. The Trustees then asked the Department to indicate when it would vacate the premises. Instead of doing so, the Department asked for a meeting. The Trustees then launched the application in the High Court on 28 July 2008 for the eviction of the school from its property.

*Proceedings in the High Court and Supreme Court of Appeal*

[15] In the High Court the Trustees sought and were granted an eviction order<sup>13</sup> against the SGB and the state respondents. The eviction application was based on the common law remedy of *rei vindicatio*.<sup>14</sup> In the alternative, the Trustees claimed that the MEC had failed to fulfil the various undertakings she had made and to comply with her tenancy obligations.<sup>15</sup>

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<sup>13</sup> The High Court order reads:

- “1. The respondents and any and all persons occupying by, through or under the respondents, are hereby directed to vacate the premises described as the Juma Masjid Primary School (including all buildings and any land occupied by the said School) situated at 62–64 Cathedral Road, Durban, on or before 15 December 2009;
2. In the event of the respondents or any person or persons failing, refusing or neglecting to comply with the order granted in terms of (1) above, then the Sheriff of this Honourable Court or his duly authorised deputy is hereby authorised and directed to eject the respondents and any other such person or persons from the aforesaid premises and to hand vacant possession of the premises from which the respondents and any other person or persons have been ejected to the applicants;
3. The third respondent is directed to pay the applicants’ costs of this application including the costs of senior counsel, on the party and party scale;
4. The first respondent is directed to pay the costs of this application subsequent to 9 October 2008 including the costs of senior counsel, on the scale as between attorney and client;
5. The costs order in paragraph 3, insofar as it relates to costs incurred after 9 October 2008, will be joint with the costs order in paragraph 4;
6. No order for costs is made in respect of the opposition by the intervening respondents.”

<sup>14</sup> The *rei vindicatio* remedy is available to an owner to claim back property in possession of another. In order for the Trustees to invoke this remedy they had to prove (a) ownership and (b) that the respondents were in possession of the property at the time of instituting the proceedings. In defending the vindicatory claim, the respondent bears the onus to justify continued occupation or possession of the property. See in this regard LTC Harms *Amler’s Precedents of Pleadings* (3ed) (Butterworths, Durban 1989) 304-5.

<sup>15</sup> In effect, the applicants’ alternative claim was that the MEC breached the lease agreement which they duly terminated on reasonable notice. The Trustees averred that if the applicants and the state respondents contend that the agreement existed, they would be entitled to an eviction order on the basis that: (a) the Department had breached the terms of the agreement by failing to pay rentals and other charges and costs and (b) no finite period for occupancy had been discussed or agreed upon. On that basis, the Trustees contended that they were entitled to terminate the tenancy on reasonable notice that was duly given.

[16] The SGB opposed the application on the basis that the school had occupied the premises before the Act came into operation.<sup>16</sup> It argued that the school was entitled to remain on the property because: (a) by providing the premises to a public school, the Trust was performing a public function within the definition of “administrative action” in terms of the Promotion of Administrative Justice Act<sup>17</sup> (PAJA); (b) that as a first step towards resolving the disputes between the MEC and the Trust, recourse should have been had to the provisions of the Moral Deed; and (c) by analogy, the remedies provided for in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act<sup>18</sup> (PIE) should be utilised to assist the Court in determining the appropriate remedy. The SGB therefore contended that the Trustees should have afforded it a hearing prior to a decision to evict the school.

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<sup>16</sup> Above n 4. According to the SGB the requirement of reducing the agreement to writing was introduced, in terms of the South African Schools Act Regulations GG 18566 GN R1738, 19 December 1997.

<sup>17</sup> 3 of 2000. Section 1 defines an administrative “decision” as—

“any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to—

- (a) making, suspending, revoking or refusing to make an order, award or determination;
- (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
- (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
- (d) imposing a condition or restriction;
- (e) making a declaration, demand or requirement;
- (f) retaining, or refusing to deliver up, an article; or
- (g) doing or refusing to do any other act or thing of an administrative nature,

and a reference to a failure to take a decision must be construed accordingly”.

<sup>18</sup> 19 of 1998.

[17] The intervening parties (the parents, guardians and caregivers of the learners who were enrolled at the school) opposed the eviction application and contended that the MEC had abdicated her constitutional responsibility of ensuring that the children's best interests were accorded their due importance.

[18] Save for the costs order sought against the MEC, the MEC did not oppose the eviction application. The MEC pointed out that although draft agreements in terms of section 14(1) had been exchanged, the effort to finalise them failed because of the Trustees' insistence on the payment of certain expenses.<sup>19</sup> The MEC maintained that in terms of her departmental policy, she was not obliged to pay these expenses and therefore insisted on paying a nominal rental in the sum of R3 000 per annum to the Trust. In addition, the MEC undertook to pay arrear rentals and contribute to the payment of rates. She pointed out that an investigation into possible alternative premises for occupation by the school had been conducted, and that no alternative vacant school building within the central or greater Durban area had been found to accommodate all the learners.

[19] The MEC acknowledged the state's constitutional obligations and undertook to ensure that the learners' basic education would continue to be provided and facilitated without restrictions. She urged the High Court to qualify the eviction order sought by suspending its execution to enable the Department to finalise a process of closing the school.

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<sup>19</sup> These expenses relate to cleaning, sanitation, electricity, refuse removal, telephone, water, insurance and others.

[20] The High Court held that the existence of the Moral Deed was not raised by the SGB as a defence against the eviction of the school and that the Moral Deed did not comply with the requirements of regulation 2(1),<sup>20</sup> (2),<sup>21</sup> and (5)<sup>22</sup> under the Act.<sup>23</sup> It further held that the moral deed had never been given effect to because its enforceability was dependent on a section 14(1) agreement. Therefore, the argument that the Moral Deed operated independently had to fail.

[21] In rejecting the applicants' argument that the Trust performed a public function, the High Court held that the obligation to provide basic education is the responsibility of the Department and not that of the Trust. The High Court held:

“The Trust owes no constitutional obligation to the first respondent or to the learners at the school. It has its own constitutional rights to property recognised in terms of section 25 of the Constitution. The obligation to provide compulsory education is an obligation of the Department of Education. The intervening respondents and their children may have relied on the existence of the school and have an expectation of education for their children. The Trust has the power and is at liberty to make its property available for that

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<sup>20</sup> Regulation 2(1) provides:

“In terms of section 14 (1) of the Act a public school may be provided on private property only in terms of an agreement.”

<sup>21</sup> Regulation 2(2) provides:

“An agreement between the State and the owner which existed prior to the commencement of the Act remains in force to the extent that it is consistent with the Act, and may be amended by agreement between the [MEC] and the owner.”

<sup>22</sup> Regulation 2(5) provides:

“An agreement and all amendments thereto must be in writing and signed by both the [MEC] and the owner.”

<sup>23</sup> Above n 1 at para 14-5.

purpose, but it is not, on my reading of the Trust deed, obliged or compelled to do so. Making premises available for education is merely one of the objectives in a range of objectives of the Trust, which the Trustees may choose to give effect to from time to time.”<sup>24</sup>

[22] The High Court went on to hold that:

“The intervening respondents and/or the learners would clearly be entitled to enforce their constitutional rights to education by claiming appropriate relief, but they must do so against the [MEC] and/or [the Minister] and any other necessary parties.”<sup>25</sup>

It held that the eviction of the school from the property does not constitute a closure of the school in terms of section 33<sup>26</sup> of the Act. The High Court further held that the argument that it had to analogously apply the provisions of PIE had to fail.

[23] As to costs, the High Court mulcted the MEC with costs on an attorney and client scale because they failed to provide relevant information to the Court and to comply with their constitutional obligations. The SGB was ordered to pay costs on a party and party scale because its opposition, albeit in good faith, was misplaced. No order as to costs was made in respect of the intervening parties. The eviction order as sought by the Trustees was granted.

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<sup>24</sup> Id at para 23.

<sup>25</sup> Id at para 26.

<sup>26</sup> The text of section 33 is set out in full at n 56 below.

[24] The applicants applied for leave to appeal to the Full Court of the High Court. That application was dismissed with costs on the basis that the applicants sought to advance new grounds on appeal. They then sought leave to appeal in the Supreme Court of Appeal. This application was also dismissed with costs.

*Proceedings in this Court*

[25] The applicants challenged the eviction order on the basis that the Trust, when performing a public function, was constrained by the requirements of fairness in terms of PAJA. Whilst the Trust maintained that the decision of the High Court was correct, the SGB argued that the High Court had a duty to develop the common law to ensure that a common law right which violates a fundamental right is only exercised: (a) when the requirements of procedural fairness are complied with; (b) where meaningful engagement has taken place; and (c) where no other reasonable remedy is available.

[26] It was contended that the High Court failed to give appropriate consideration to the impact of its decision upon the rights of the learners. The applicants argued that both the Trust and the High Court failed to appreciate their constitutional duties. They submitted further that the High Court failed to exercise judicial oversight over the eviction application to give effect to the rights of the learners and to have regard to the paramountcy of the best interests of the children.

[27] Relying on *Khumalo and Others v Holomisa*<sup>27</sup> the amici curiae contended that the negative duty not to impair existing access to basic education binds the Trust. They argued that the Trust's decision to evict was unjustifiable.

[28] The Trustees took a point *in limine* and sought an order striking-out certain evidence in the applicants' founding papers. Given the conclusion I reach, it is unnecessary to decide this matter. The Trustees argued that the Trust, as the sole and exclusive owner of the property, was entitled to deal with the property as it saw fit in accordance with the Deed of Trust and that the applicants had not made out a case for the development of the common law.

[29] The MEC urged this Court to suspend the execution of the eviction order if it were minded to grant the application for leave to appeal. This, according to him, would have enabled the parties to complete the process concerning the closure of the school in terms of section 33 of the Act and to arrange for the alternative placement of the learners before the beginning of a new school term.

*Leave to appeal*

[30] It is settled principle that two questions present themselves when leave to appeal is sought in this Court. The first relates to the jurisdiction of the Court and the second, once

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<sup>27</sup> [2002] ZACC 12; 2002 (8) BCLR 771 (CC); 2002 (5) SA 401 (CC).



a constitutional issue has been established,<sup>28</sup> is whether the interests of justice warrant the granting of leave to appeal. The interests of justice depend on a number of relevant factors including the prospects of success which, albeit important, is not necessarily decisive.<sup>29</sup>

[31] There can be no doubt that this case raises important constitutional issues of public interest. The right to a basic education,<sup>30</sup> property rights<sup>31</sup> and the paramountcy of the child's best interests<sup>32</sup> are implicated. In addition, the negative obligations of a juristic person in terms of the Constitution not to impair rights in the Bill of Rights, and of a court to develop the common law to give effect to the rights of the learners, require examination.

[32] Given the important constitutional issues at stake and the impact of the eviction order made by the High Court on the rights of the learners, the interests of justice

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<sup>28</sup> Section 167(3)(b) of the Constitution provides that the Court “may decide only constitutional matters, and issues connected with decisions on constitutional matters”.

<sup>29</sup> *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2010] ZACC 4; 2010 (5) BCLR 391 (CC); 2010 (3) SA 293 (CC) at para 29; *Phumelela Gaming and Leisure Ltd v Gründlingh and Others* [2006] ZACC 6; 2006 (8) BCLR 883 (CC); 2007 (6) SA 350 (CC) at para 24; *S v Boesak* [2000] ZACC 25; 2001 (1) BCLR 36 (CC); 2001 (1) SA 912 (CC) at para 12; and *Fraser v Naude and Others* [1998] ZACC 13; 1998 (11) BCLR 1357 (CC); 1999 (1) SA 1 (CC) at para 7.

<sup>30</sup> Section 29(1)(a) of the Constitution is set out in full at [36] below.

<sup>31</sup> Section 25(1) of the Constitution provides:

“No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”

<sup>32</sup> Section 28(2) of the Constitution is set out at [66] below.

warranted the granting of leave to appeal by this Court.<sup>33</sup> The next preliminary issue relates to the applications for condonation.

*Condonation applications*

[33] In the directions issued by the Chief Justice dated 3 June 2010, the applicants were directed to lodge the record by 21 June 2010. They failed to comply but applied for condonation and an extension of time for the late filing of the record. The explanation for the delay, that the transcribers were unable to meet the deadline in the time allocated, is satisfactory. None of the respondents were prejudiced by the late filing of the record. More importantly, neither the Trust nor the state respondents opposed the application. For these reasons, condonation for the late filing of the record by the applicants was granted.<sup>34</sup>

[34] The Trustees also sought and were granted condonation for the late filing of their supplementary written submissions. They filed their supplementary written submissions on 24 August 2010, instead of 20 August 2010. The delay was occasioned by their failure to file a sufficient number of copies and an electronic version of their supplementary written submissions. The application was not opposed and neither of the parties suffered prejudice as a result of the lateness of the submissions. The delay was, in

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<sup>33</sup> Above n 5 at para 1.

<sup>34</sup> Id at para 2.

any event, short. Accordingly, this Court condoned the late filing of the supplementary submissions.<sup>35</sup>

[35] Before discussing the main issues, it is convenient to set out the legal framework and address the importance of the right to education, with specific reference to international law.

*The right to education*

[36] Section 29(1) of the Constitution provides:

- “(1) Everyone has the right—
- (a) to a basic education, including adult basic education; and
  - (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.”

[37] It is important, for the purpose of this judgment, to understand the nature of the right to “a basic education” under section 29(1)(a). Unlike some of the other socio-economic rights,<sup>36</sup> this right is immediately realisable. There is no internal limitation requiring that the right be “progressively realised” within “available resources” subject to “reasonable legislative measures”. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is “reasonable and

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<sup>35</sup> Id at para 3.

<sup>36</sup> For example, the right to have access to adequate housing under section 26(1) of the Constitution and the right to have access to health care services, sufficient food and water, and social security under section 27 of the Constitution. These rights are subject to an internal limitation that the state must take reasonable legislative measures, within its available resources, to achieve the progressive realisation of the right.

justifiable in an open and democratic society based on human dignity, equality and freedom”.<sup>37</sup> This right is therefore distinct from the right to “further education” provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education “progressively available and accessible.”

[38] Section 3(1) of the Act, following the constitutional distinction between “basic” and “further” education, makes school attendance compulsory for learners from the age of seven years until the age of 15 years or until the learner reaches the ninth grade, whichever occurs first. Section 3(3) of the Act enjoins the MEC to ensure that there are enough school places so that every child who lives in his or her province attends school as required by section 3(1) of that Act. These statutory provisions which make school attendance compulsory for learners from ages seven to 15, read together with the entrenched right to basic education in the Constitution signify the importance of the right to basic education for the transformation of our society.

[39] The MEC is enjoined in terms of section 12 of the Act, to provide public schools. Section 12(1) and (2) provides:

“(1) The *Member of the Executive Council* must provide *public schools* for the education of *learners* out of funds appropriated for this purpose by the *provincial legislature*.

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<sup>37</sup> Section 36(1) of the Constitution.

- (2) The provision of public schools referred to in subsection (1) may include the provision of hostels for the residential accommodation of learners.”

[40] The right to education is recognised in both regional<sup>38</sup> and international instruments. Specifically, the Universal Declaration of Human Rights<sup>39</sup> (UDHR) and the

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<sup>38</sup> At a regional level, the promotion and protection of human rights in Africa is underpinned by the Organisation of African Unity (OAU) African Charter on Human and Peoples’ Rights (Banjul Charter), 21 ILM 58 (1982). The Banjul Charter was adopted on 27 June 1981 and entered into force on 21 October 1986. Article 17 provides that “[e]very individual shall have the right to education.” State parties are obliged, in terms of Article 1, to adopt legislative or other measures to give effect to the Charter’s rights. Another key instrument under the African human rights system is the OAU African Charter on the Rights and Welfare of the Child (Child Welfare Charter), OAU Doc CAB/LEG/24.9/49 (1990). The Child Welfare Charter was adopted on 11 July 1990 and entered into force on 29 November 1999.

Article 11(2) and (3) of the Child Welfare Charter provides:

- “(2) The education of the child shall be directed to:
- (a) the promotion and development of the child’s personality, talents and mental and physical abilities to their fullest potential;
  - (b) fostering respect for human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments on human and peoples’ rights and international human rights declarations and conventions;
  - (c) the preservation and strengthening of positive African morals, traditional values and cultures;
  - (d) the preparation of the child for responsible life in a free society, in the spirit of understanding tolerance, dialogue, mutual respect and friendship among all peoples ethnic, tribal and religious groups;
  - (e) the preservation of national independence and territorial integrity;
  - (f) the promotion and achievements of African Unity and Solidarity;
  - (g) the development of respect for the environment and natural resources;
  - (h) the promotion of the child’s understanding of primary health care.”
- (3) State Parties to the present Charter shall take all appropriate measures with a view to achieving the full realisation of this right and shall in particular:
- (a) provide free and compulsory basic education”.

<sup>39</sup> UDHR, GA Res 217A (III), UN Doc A/810 at 71 (1948), concluded on 10 December 1948.

Article 26 provides:

- “1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

International Covenant on Economic, Social and Cultural Rights<sup>40</sup> (ICESCR) recognise the right to education without qualification. The United Nations Convention on the Rights of the Child<sup>41</sup> (Child Rights Convention) also recognises the right of the child to education. In General Comment No 3 on the national implementation of the International Covenant on Civil and Political Rights (ICCPR),<sup>42</sup> the United Nations Human Rights

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2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
  3. Parents have a prior right to choose the kind of education that shall be given to their children.”

<sup>40</sup> 6 ILM 360 (1967); 993 UNTS 3; adopted on 16 December 1966, entered into force on 3 January 1976.

Article 13(1) provides:

“The State Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.”

Article 14 provides:

“Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.”

<sup>41</sup> 28 ILM 1456 (1989), 1577 UNTS 3; adopted on 20 November 1989, entered into force on 2 September 1990. The Child Rights Convention was ratified by South Africa on 16 June 1995.

Article 28(1)(a) and (b) provides:

- “1. State Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
  - (a) Make primary education compulsory and available free to all;
  - (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need”.

<sup>42</sup> 6 ILM 368 (1967); 999 UNTS 171; adopted on 16 December 1966, entered into force on 23 March 1976.

Committee (UNHRC) extends obligations of the state under the ICCPR to include undertaking specific activities to realise their rights.<sup>43</sup>

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

“Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitation and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognised as one of the best financial investments States can make. But the importance of education is not just practical: a well educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.”<sup>44</sup>

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<sup>43</sup> UNHRC “General Comment 3, Article 2 Implementation at the national level” (13<sup>th</sup> Session, 1981), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.1 at 4 (1994). In General Comment 3 it is stated that:

“The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individual under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights. This is obvious in a number of articles . . . but in principle this undertaking relates to all rights set forth in the Covenant.”

<sup>44</sup> ICESCR Committee General Comment 13 (21<sup>st</sup> Session, 1999) “The Right to Education (art 13)” UN Doc E/C.12/1999/10 at para 1.

[42] The significance of education, in particular basic education<sup>45</sup> for individual and societal development in our democratic dispensation in the light of the legacy of apartheid,<sup>46</sup> cannot be overlooked. The inadequacy of schooling facilities, particularly for many blacks<sup>47</sup> was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners.

[43] Indeed, basic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential.<sup>48</sup> Basic education also provides a foundation for a

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<sup>45</sup> As enshrined in section 29(1) of the Constitution.

<sup>46</sup> As pointed out by Berger in 'The Rights to Education under the South African Constitution' (Apr 2003) vol 103, No 3 *Columbia Law Review*, 616, the separatist national education policy under apartheid, manifested in the Bantu Education Act 47 of 1953, was an integral part of apartheid's segregationist objective.

<sup>47</sup> Blacks here also denoting Indians and Coloureds.

<sup>48</sup> See also Article 29(1) of the Child Rights Convention, which provides—

“States Parties agree that the education of the child shall be directed to:

- (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
- (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
- (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
- (e) The development of respect for the natural environment.”



child’s lifetime learning and work opportunities. To this end, access to school – an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right.

[44] The importance of the right to a basic education is also foreshadowed by the fact that any failure by a parent to cause a child to attend school renders that parent guilty of an offence and liable, on conviction, to a fine or imprisonment for a period not exceeding six months.<sup>49</sup> Furthermore, “[a]ny other person who, without just cause, prevents a *learner* who is subject to compulsory attendance from attending *school* is also guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months.”<sup>50</sup> It is against this framework, having regard to the facts of this case, that the question whether the MEC has fulfilled the constitutional mandate must be determined.

*Did the MEC fulfil the constitutional obligation?*

[45] The answer is clearly in the negative. The MEC has a positive obligation in terms of the Constitution to “respect, protect, promote and fulfil the rights in the Bill of Rights.”<sup>51</sup> More specifically, for the purpose of this judgment, the MEC must “respect,

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<sup>49</sup> Section 3(6)(a) of the Act provides—

“any *parent* who, without just cause and after a written notice from the *Head of Department*, fails to comply with subsection (1), is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months”.

<sup>50</sup> Section 3(6)(b) of the Act.

<sup>51</sup> Section 7(2) of the Constitution.

protect, promote and fulfil” the learners’ right to a basic education. The source of this positive obligation is section 8(1) of the Constitution which states that “[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.”<sup>52</sup> The MEC also has a duty in terms of section 12 of the Act to provide public schools for the education of the learners.<sup>53</sup>

[46] The MEC adopted an indifferent approach, despite having made numerous promises between October 2002 and December 2008 to pay arrear rentals<sup>54</sup> and maintenance expenses incurred by the Trust. Notably, in the affidavit before the High Court, she pointed out that she is acutely aware of the state’s constitutional obligations. She undertook to pay all outstanding rentals and any amount payable in respect of expenditure incurred in maintaining the building, provided the expenses fell within the category of section 14 expenses.<sup>55</sup> These undertakings came to naught.

[47] The MEC stated that if the school was to be evicted, there would, effectively, be no other school into which the current and prospective learners could be absorbed. According to her, she would be obliged to close the school in terms of section 33<sup>56</sup> of the

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<sup>52</sup> Section 8 of the Constitution is set out in full at [56] below.

<sup>53</sup> Section 12 of the Act is set out in full at [39] above.

<sup>54</sup> The rentals amounted to merely R3 000 per annum.

<sup>55</sup> These expenses excluded insurance premiums and expenses relating to cleaning and sanitation, electricity, refuse removal, telephone and water charges.

<sup>56</sup> Section 33 of the Act provides:

“Closure of public schools

Act, if this application were to be dismissed. It is worth pointing out that although the MEC considered that the dispute could have been resolved in the best interests of the learners, she held the view that the school could either be relocated to other premises or closed. The MEC's mere acknowledgement of the state's constitutional obligations does not suffice. She ought to have taken adequate steps to make alternative arrangements for the learners. The MEC failed to do so. Had she done so, the need for the eviction application might not have arisen.

[48] In the High Court, the MEC had the opportunity to place relevant evidence, including a plan setting out the details of how she was going to provide alternative education to the affected learners, before the Court. The MEC failed to do so. More importantly, the MEC neglected to take reasonable measures to conclude a section 14(1) agreement.<sup>57</sup>

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- (1) The [MEC] may, by notice in the Provincial Gazette, close a public school.
  - (2) The [MEC] may not act under subsection (1) unless he or she has—
    - (a) informed the governing body of the school of his or her intention so to act and his or her reasons therefor;
    - (b) granted the governing body of the school a reasonable opportunity to make representations to him or her in relation to such action;
    - (c) conducted a public hearing on reasonable notice, to enable the community to make representations to him or her in relation to such actions; and
    - (d) given due consideration to any such representations received.
  - (3) If a public school is closed in terms of subsection (1) all assets and liabilities of such school must, subject to the conditions of any donation, bequest or trust contemplated in section 37(4), devolve on the State unless otherwise agreed between the [MEC] and the governing body of the school.”

<sup>57</sup> Section 56 deals with transitional provisions relating to public schools on private property. It reads:

“If an agreement contemplated in section 14 does not exist at the commencement of *this Act* in respect of a *school*, standing on private property and which is deemed to be a *public school* in

[49] I therefore share the reproach expressed by the High Court that:

“It is unacceptable for the State to fail to put up relevant information and more importantly to take steps to comply with its constitutional obligations where a dispute pertains to the relevant State department’s performance of its constitutional mandate. Much time and effort has been wasted due to, it seems, the [MEC’s] failure to deal decisively with the issue of the continued occupation by the school of the property on terms mutually acceptable . . . . If the parties could not agree on mutually acceptable terms, then the [Department] should have taken steps a long time ago to make alternative arrangements, but to at least deal with the issue. If that was done in accordance with the provisions of the Act with proper regard to the department’s constitutional mandate, then the need for the present application would probably never have arisen.”<sup>58</sup>

[50] This Court in *S v Williams and Others*,<sup>59</sup> quoted with approval the passage in *Olmstead et al. v. United States*<sup>60</sup> that: “Our government is the potent, the omni-present teacher. For good or for ill, it teaches the whole people by its example.”<sup>61</sup> Although these remarks were made in the context of crime, they apply equally here. The MEC has failed to teach by example.

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terms of section 52(1), the [MEC] must take reasonable measures to conclude such an agreement within six months of the commencement of *this Act*.”

<sup>58</sup> Above n 1 at para 28.

<sup>59</sup> [1995] ZACC 6; 1995 (7) BCLR 861 (CC); 1995 (3) SA 632 (CC) at para 47.

<sup>60</sup> 277 U.S. 438 (1928).

<sup>61</sup> Above n 59 at para 47.

[51] The intervening parties stated that no alternative arrangements had been made for the continued education of the learners. By not providing a public school<sup>62</sup> and failing to ensure that there are enough school places available in the affected areas, as required under section 3(3)<sup>63</sup> of the Act, and simply informing the High Court that there are no other schools in which to absorb all the learners, the MEC failed to discharge her constitutional obligation, to “respect, protect, promote and fulfil”<sup>64</sup> the learners’ right to a basic education.

[52] The conduct of the MEC on the facts of this case thus fell below the standard required by the Constitution and the relevant statutory provisions.

[53] I now return to the three findings in the provisional order, namely, that: (a) the Trustees have a constitutional duty to respect the learners’ right to a basic education; (b) the Trustees acted reasonably in seeking an order for eviction; and (c) in considering the Trustees’ application and in granting the eviction order, the High Court did not properly consider the best interests of the learners under section 28(2) and their right to a basic education under section 29(1) of the Constitution.

*The Trustees’ constitutional duty in relation to the learners’ right to a basic education*

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<sup>62</sup> As required under section 12 of the Act.

<sup>63</sup> Above [38].

<sup>64</sup> Above n 51.

[54] The High Court concluded that the Trust owed no constitutional obligations to the learners at the school. This finding was based squarely on pre-constitutional common law principles. There is no indication that the High Court had proper regard to section 8(2) of the Constitution and the impact the eviction would have had on the learners' rights.

[55] Traditionally, because of the clear distinction between public law and private law realms,<sup>65</sup> a private owner could evict any tenant provided that the requirements of *rei vindicatio* were satisfied. Private entities were held to be free to engage in their economic and social interests without state interference.<sup>66</sup> As a result, over emphasis on the differences between the exercise of private and public power often sheltered private power used for public purposes.<sup>67</sup>

[56] Section 8 of the Constitution deals with the application and binding nature of the Bill of Rights. It provides:

- “(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

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<sup>65</sup> Certain authors point out that the distinction is untenable in the realm of constitutional rights. See Woolman et al *Constitutional Law of South Africa* (2 ed) vol 1 (Juta, Cape Town 2006) 31–26-8. See also, in general, Cockrell “Can You Paradigm?”—Another Perspective on the Public Law/Private Law Divide” (1993) *Acta Juridica* 227.

<sup>66</sup> See Woolman above n 65.

<sup>67</sup> Hoexter *Administrative Law in South Africa* (Juta, Cape Town 2007) 150.

- (3) When applying a provision of the Bill of rights to a natural or juristic person in terms of subsection (2), a court—
  - (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
  - (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).
- (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.”

[57] In order to determine whether the right to a basic education in terms of section 29(1)(a) binds the Trust, section 8(2) requires that the nature of the right of the learners to a basic education and the duty imposed by that right be taken into account. From the discussion in the previous paragraphs of the general nature of the right and the MEC’s obligation in relation to it, the form of the duty that the right to a basic education imposed on the Trustees emerges. It is clear that there is no primary positive obligation on the Trust to provide basic education to the learners. That primary positive obligation rests on the MEC. There was also no obligation on the Trust to make its property available to the MEC for use as a public school. A private landowner may do so, however, in accordance with section 14(1) of the Act which provides that a public school may be provided on private property only in terms of an agreement between the MEC and the owner of the property.<sup>68</sup>

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<sup>68</sup> Section 14(1) of the Act is set out in full at n 12 above.

[58] This Court, in *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*,<sup>69</sup> made it clear that socio-economic rights (like the right to a basic education) may be negatively protected from improper invasion.<sup>70</sup> Breach of this obligation occurs directly when there is a failure to respect the right, or indirectly, when there is a failure to prevent the direct infringement of the right by another<sup>71</sup> or a failure to respect the existing protection of the right by taking measures that diminish that protection.<sup>72</sup> It needs to be stressed however that the purpose of section 8(2) of the Constitution is not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights. It is rather to require private parties not to interfere with or diminish the enjoyment of a right. Its application also depends on the “intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the State or organs of State”.<sup>73</sup>

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<sup>69</sup> [1996] ZACC 26; 1996 (10) BCLR 1253 (CC); 1996 (4) SA 744 (CC).

<sup>70</sup> Id at para 78. See also *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* [2004] ZACC 25; 2005 (1) BCLR 78 (CC); 2005 (2) SA 140 (CC) at paras 33-4; *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 2005 (4) BCLR 301 (CC); 2005 (2) SA 359 (CC) at paras 68-71; *Minister of Health and Others v Treatment Action Campaign and Others (1)* [2002] ZACC 15; 2002 (10) BCLR 1033 (CC); 2002 (5) SA 721 (CC) at para 46; *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC) at para 34; and *Van Eeden v Minister of Safety and Security (Women’s Legal Centre Trust, as Amicus Curiae)* 2003 (1) SA 389 (SCA) at paras 13. Other rights may also carry the same kind of obligation: *S v Baloyi (Minister of Justice and Another Intervening)* [1999] ZACC 19; 2000 (1) BCLR 86 (CC); 2000 (2) SA 425 (CC) at para 11.

<sup>71</sup> See *Baloyi* above n 70 at para 11 and *Rail Commuters Action Group* Id.

<sup>72</sup> See *Jaftha* above n 70 at para 33-4.

<sup>73</sup> *Khumalo* above n 27 at para 33.



[59] The Trust permitted the Department to enlist the school as a public school on its property with a distinctive religious character in accordance with sections 56<sup>74</sup> and 57<sup>75</sup> of the Act. It also performed the public function of managing, conducting and transacting all affairs of the Madressas in the most advantageous manner, including the payment of the costs of various items which the SGB and the Department ought to have provided.<sup>76</sup> By making contributions towards expenses associated with the running of a public school, the Trust acted consistently with its duties: to erect, maintain, control and manage the school in terms of the Deed of Trust.<sup>77</sup> Notably, counsel for the Trustees conceded

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<sup>74</sup> Section 56 of the Act is set out in full at n 57 above.

<sup>75</sup> Section 57 of the Act is set out in full at n 11 above.

<sup>76</sup> These items included religious text books, salaries of teachers and cleaners, charges in respect of lift maintenance, repairs and maintenance of the building generally and cleaning and sanitation, rates and insurance and other expenses usually associated with the running of a school.

<sup>77</sup> Its objects in terms of the Deed of Trust include the following:

- “(a) To own and continue the control and administration of the Grey Street JUMA MUSJID for the benefit of the followers of the Sunni Muslim religious faith.  
 . . . .
- (c) To continue to hold as owners the property both immovable and movable presently owned and held by the Trust.
- (d) To erect, maintain, control and manage Mosques, Madressas (schools of religious instruction) and/or schools for religious vernacular or secular education.  
 . . . .
- (h) To acquire by purchase, lease, exchange, donation or otherwise any land or buildings of any tenure or description in the Union of South Africa and any rights over or connected with land or buildings so situated; and to acquire by purchase, lease, exchange, donation or otherwise any furniture, equipment or other movable property necessary or desirable for the purpose of carrying on the objects of the Trust.  
 . . . .
- (j) To improve, manage, turn to account, let on rent, grant licenses, easements and other rights of and over any of the property rights and assets for the time being of the Trust (subject to sub-clauses (i) and (k) hereof) upon such terms for such consideration as the Trust may think fit; and to utilise any of the property rights and assets for the time being of the Trust in the best interests of the Trust and with power to demolish or reconstruct any buildings and erect new buildings.”

during oral argument that the Trust had a duty not to impair the learners' right to a basic education. This concession was properly made.

[60] The High Court therefore misdirected itself in finding that the Trustees had no obligation in relation to the learners' right to a basic education. Accordingly, I conclude that the Trust does have a negative constitutional obligation not to impair the learners' right to a basic education. The next finding in the provisional order relates to the reasonableness of the Trustees' action in seeking an order for eviction in the High Court.

*The reasonableness of the Trustees' action in seeking an order for eviction*

[61] It is necessary to acknowledge at the outset that paragraph (b) of the provisional order, which states that we were satisfied that “[h]aving regard to all the circumstances of the case, including this obligation [the Trust’s constitutional obligation to respect the learners’ right to a basic education], the Trustees acted reasonably in seeking an order for eviction”, is not as clear as it should have been. Accepting that the Trustees acted reasonably did not imply that they were entitled to an eviction order, as the rest of the provisional order made plain by setting aside the High Court order granted in their favour, and by indicating that the High Court did not properly consider the learners’ best interests. The Trust, as the owner of the property, was entitled to seek eviction in view of their efforts to engage the MEC to alleviate the position of learners affected by the proposed eviction.

[62] In order to assess whether the Trustees acted reasonably in seeking an order for eviction, one has to be mindful that the primary obligation in respect of the learners' right to a basic education is that of the state. The Trust's obligation is secondary and, important to remember, arises only from its willingness to allow the property to be used as a public school and to enter into a section 14 agreement. It did not give up its rights of ownership of the property. At most, the Trust's constitutional obligation, once it had allowed the school to be conducted on its property, was to minimise the potential impairment of the learners' right to a basic education.

[63] For many years the Trust was willing to enter into a section 14 agreement with the Department but the latter dragged its feet. It is evident from the record that the Trust had extensive negotiations with the Department before the eviction order was sought in the High Court. I mention but a few examples of the steps taken by the Trustees. First, on 9 October 2002 the Trust notified the MEC of its intention to establish an independent school on the property and that it would give her notice in due course. The SGB was aware of this letter. In the letter dated 24 October 2002 the principal expressed concerns about the intended closure of the school and stated that the Department had an obligation to provide alternative premises. In her response dated 31 October 2002, the MEC informed the Trust that it may refuse to sign an agreement and eject the Department from its property. Secondly, when the section 14 agreement could not be concluded, the Trust gave notice to the Department and the SGB to vacate the property by no later than 31 December 2004. The Department promised to vacate but failed to do so. Thirdly, in

December 2005 the Trust submitted a schedule to the Department explaining outstanding payments owed by the latter. Fourthly, the Department confirmed delivery of the schedule reflecting the Trust's claims in August 2006. Finally, on 23 February 2007 the Trust's attorneys notified the Department that the period of grace afforded to the school for the payment of outstanding amounts had expired and they were to vacate the property within seven days. But Department did not.

[64] The purpose of these negotiations, even though not stated in these terms, was to minimise the impairment of the rights of the learners. More importantly, although the application for eviction was lodged in July 2008, the Trust did not seek to evict the MEC and the school with immediate effect.<sup>78</sup> The Department assumed an uncompromising attitude regarding the payment of outstanding rentals and the Trust's out-of-pocket expenses. It could not have been expected of the Trust to continue with the negotiations indefinitely. In the circumstances, it could hardly be said that the Trust failed to act reasonably before seeking an order for eviction.

[65] Having regard to all the circumstances including the obligation not to impair the learners' right to a basic education, the Trustees acted reasonably in seeking the order for eviction. I now turn to the third finding in the provisional order, which relates to whether the High Court properly considered the best interests of the children and their right to a

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<sup>78</sup> In its application in the High Court, the Trust asked that the MEC and all persons occupying the property be evicted by 19 December 2008.

basic education. Connected to this finding is whether the High Court was obliged to develop the common law remedy of *rei vindicatio*. I start with the latter.

*Did the High Court properly consider the best interests of the learners?*

[66] In my view, the High Court failed to give efficacy to guaranteed rights in sections 29(1) and 28(2) of the Constitution. Section 28(2) provides that “[a] child’s best interests are of paramount importance in every matter concerning the child.”<sup>79</sup>

[67] In *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others*,<sup>80</sup> this Court held that although it is neither necessary nor desirable to define the content of the right in section 28(2), the right in that subsection “imposes an obligation on all those who make decisions concerning a child to ensure that the best interests of the child enjoy paramount importance in their decisions.”<sup>81</sup> This Court stressed in *S v M*<sup>82</sup> that:

“While section 28 undoubtedly serves as a general guideline to the courts, its normative force does not stop there. On the contrary, as this Court has held in *De Reuck; Sonderup*;

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<sup>79</sup> Notably, Article 3(1) of the Child Rights Convention, above n 41, provides that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” Article 4(1) of the Child Welfare Charter, above n 38, provides that “[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.”

<sup>80</sup> [2009] ZACC 8; 2009 (7) BCLR 637 (CC); 2009 (4) SA 222 (CC) at para 73.

<sup>81</sup> *Id.* See also *Centre for Child Law v Minister for Justice and Constitutional Development and Others (NICRO as amicus curiae)* [2009] ZACC 18; 2009 (11) BCLR 1105 (CC); 2009 (6) SA 632 (CC) at paras 25-7 where this Court, per Cameron J, held that the protections in section 28 are not merely “interpretive guides”, nor “advisory” nor are “they exhortatory . . . [but] . . . are enforceable precepts determining how officials and judicial officers should treat children.”

<sup>82</sup> *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC).

and *Fitzpatrick*, section 28(2), read with section 28(1), establishes a set of children's rights that courts are obliged to enforce . . . .

The ambit of the provisions is undoubtedly wide. The comprehensive and emphatic language of section 28 indicates that just as law enforcement must always be gender-sensitive, so must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interest of children; and that courts must function in a manner which at all times shows due respect for children's rights. As Sloth-Nielsen pointed out:

'(T)he inclusion of a general standard ('the best interest of a child') for the protection of children's rights in the Constitution can become a benchmark for review of all proceedings in which decisions are taken regarding children. Courts and administrative authorities will be constitutionally bound to give consideration to the effect their decisions will have on children's lives.'<sup>83</sup> (Footnotes omitted.)

[68] In opposing the eviction the applicants were, no doubt, acting in the interests of the learners and to the benefit of their children. It is evident that the High Court failed to give consideration to the impact that the eviction order would have had on the learners and their interests. Had the High Court considered the character and nature of the occupants and the mechanism in terms of which the school obtained occupation of the private property, considerations which the High Court regarded as irrelevant, it would not have ordered the eviction.

[69] Although the High Court correctly recognised the constitutional obligation on the part of the MEC, it erred by approaching the matter narrowly in neglecting to ask the

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<sup>83</sup> Id at paras 14-5.

MEC to provide information on how the constitutional mandate of providing a basic education was to be fulfilled.

[70] The remarks made by this Court, per Sachs J in *Port Elizabeth Municipality v Various Occupiers*,<sup>84</sup> regarding the role of our courts when confronted with competing rights find resonance here. The Court elaborated that the Constitution—

“imposes new obligations on the courts concerning rights relating to property . . . . It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home . . . . The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather, it is to balance out and reconcile the opposed claims in as just a manner as possible, taking account of all the interests involved and the specific factors relevant in each particular case.”<sup>85</sup> (Footnote omitted.)

Although these remarks were made in relation to housing rights, I consider that their analogous application to this case is justified. Indeed, normal ownership rights are not counterposed only to constitutional housing rights, but also, as this case shows, to other fundamental rights. What must be weighed against the right of ownership, in each case, will depend on the content of each specific countervailing right.

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<sup>84</sup> [2004] ZACC 7; 2004 (12) BCLR 1268 (CC); 2005 (1) SA 217 (CC).

<sup>85</sup> *Id* at para 23.

[71] Here, the High Court privileged the right to property over the learners' right to a basic education. In doing so, the Court failed to accord sufficient weight to the entrenched rights of the learners and to the paramount importance of their best interests.

[72] For all these reasons the order of the High Court was set aside and the provisional order granted. The question then remains why this Court nevertheless considered the eviction to be a just and equitable remedy in the circumstances.

*Reasons for eviction*

[73] When deciding a constitutional matter, this Court may make any order that is just and equitable.<sup>86</sup> Following the provisional order we granted on 10 December 2010, we granted an order of eviction in favour of the Trustees.

[74] The provisional order setting aside the eviction order by the High Court was intended to enable the MEC, the Trustees and the SGB to engage meaningfully with one another, consider various options regarding the conclusion of an agreement in terms of section 14(1) of the Act and take steps to secure alternative placement for the learners in

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<sup>86</sup> Section 172(1)(b) provides:

- “(1) When deciding a constitutional matter within its power, a court—
- (b) may make any order that is just and equitable, including—
- (i) an order limiting the retrospective effect of the declaration of invalidity; and
- (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”



accordance with their right to a basic education. The order was made in view of the imminent end of the 2010 school-year.

[75] On 8 October 2010 the MEC, in observance of the provisional order, filed a report, the full details of which need not be mentioned. It suffices to mention that the engagement took place but that the parties were unable to conclude the agreement. The report reiterated that learners were to be accommodated at Anjuman Islam, Clayton and Colleevale primary schools. The MEC stressed his desire to close the school, a process he anticipated to be completed by the end of 2010. As part of the intended closure process, the MEC scheduled a public meeting for 11 November 2010 at 17h00 to discuss the process.

[76] Having regard to the way in which the events ultimately unfolded, it is unnecessary to recount everything that happened after the provisional order. Suffice it to say that the provisional order sought to direct the parties to engage with a view to concluding a section 14 agreement, which did not eventuate. On 25 November 2010 the Court ordered the MEC to indicate what steps had been taken to accommodate the learners in new schools for the 2011 school-year.<sup>87</sup>

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<sup>87</sup> The order dated 25 November 2010 reads:

- “1. The Department of Education (Department) is directed to send on Friday, 26 November 2010, through the principal of the school, to all parents and guardians of the learners currently enrolled at the school, a letter to which is attached a form substantially in the format and content of that is found at page 1274 of Volume 13 of the record.
2. The Department is directed, on Monday, 29 November 2010, to establish a dedicated office at the school to enable the parents and guardians to engage with officials of the

[77] Indeed, the MEC filed a report to this Court on 7 December 2010 indicating that he had received information from the various schools showing the number of children and grades at which they could be enrolled at those schools. The report also stated that there were a number of schools that could accommodate any remaining learners and that those schools were chosen by the parents because they are closest to their places of residence. Ultimately, the report concluded that because of these preferences by the parents, the need to provide transport for the learners did not arise.

[78] There can be no doubt that the MEC had taken reasonable steps to secure alternative placements of the learners for the 2011 school-year. The complaints about transport and siblings being split to attend different schools and travelling at different times, and in different buses, cannot stand. It may well be ideal for siblings to attend the same school and to travel together in the same bus. However, the applicants did not

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Department on the enrolment of their children at new schools for the 2011 school year, including such schools that may be closest to the learners' residential addresses.

3. The parents and guardians are directed to return completed forms referred to in paragraph 1 above by noon on Tuesday, 30 November 2010 to the principal of the school, which the Department must collect from the principal on the same day.
4. The Department is directed to consider the information in the forms by Friday, 3 December 2010.
5. On Tuesday, 7 December 2010—
  - (a) the Department must notify all parents and guardians of the schools at which each learner may be enrolled for the 2011 school year and what arrangements will be made for the transport of the learners to the new schools; and
  - (b) the MEC for Education for KwaZulu-Natal must file a report in this Court regarding the steps taken pursuant to this order.
6. The Trustees and the School Governing Body may each file a response to the report required in paragraph 5(b) on Wednesday, 8 December 2010.
7. After considering the report, this Court will make an order that is just and equitable.”

persuade this Court that the MEC was constitutionally obliged to provide transportation for the convenience of each parent and learner.

[79] For these reasons, this Court concluded that it was just and equitable to grant an eviction order<sup>88</sup> on 10 December 2010.

[80] In the view I take of the matter, it is not necessary to canvass the applicants' contentions regarding PAJA and the analogous application of PIE. The remaining issue for determination relates to costs of this litigation.

### *Costs*

[81] The High Court ordered the MEC to pay the Trustees' costs of the application incurred subsequent to 9 October 2008, on an attorney and client scale, including costs of senior counsel. The reason for the punitive costs order was that the MEC failed to provide relevant information and to comply with its constitutional obligations. The SGB was directed to pay the costs of the eviction application, including the costs of senior

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<sup>88</sup> The order on the 10 December 2010 reads:

“Having read the papers in the application for eviction by the first to ninth respondents and having considered the report by the tenth respondent and the response by the applicants, the Court grants the following order (for which reasons will later be supplied):

1. The [MEC] for the Province of KwaZulu-Natal (MEC) together with any and all persons who claim a right to occupy by, through or under the MEC, are ordered to vacate the premises known as the Juma Masjid Primary School situated at 62-64 Cathedral Road, Durban by no later than 31 December 2010.
2. Failing compliance with paragraph 1 of this order, the Sheriff of the High Court, Durban, or his or her Deputy is authorised and directed to take all such steps as may be necessary to give effect to the order.”

counsel, on a party and party scale. The High Court held that the SGB's opposition to the eviction application, albeit in good faith, was misplaced. No order for costs was made in respect of the opposition of the application by the parents and guardians.

[82] Relying on *Biowatch Trust v Registrar Genetics Resources and Others*<sup>89</sup> (*Biowatch*), the applicants appeal the order of costs made against them. They maintain, correctly, that they stood in a position of trust towards the school<sup>90</sup> and acted in the best interests of the learners when they opposed the eviction application and appealed the decision of the High Court. The applicants submitted that the MEC should bear the costs in the High Court, Supreme Court of Appeal and this Court on a punitive scale for having failed to manage the crisis at the school and to take appropriate steps to safeguard and protect the rights of the learners.

[83] The Trustees sought to defend the High Court costs order but submitted, in the alternative, that the MEC should be ordered to pay the Trust's costs, including all costs in the High Court, Supreme Court of Appeal and this Court. As to the eviction application, the Trustees contended that the MEC's obstructive conduct warrants costs at a punitive scale against the MEC.

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<sup>89</sup> [2009] ZACC 14; 2009 (10) BCLR 1014 (CC); 2009 (6) SA 232 (CC).

<sup>90</sup> In terms of section 16(2) of the Act. See also section 20(1)(a) of the Act in terms of which the SGB must—

“promote the best interests of the *school* and strive to ensure its development through the provision of quality education for all *learners* at the *school*”.

[84] In *Biowatch*, this Court held that the point of departure where the state is shown to have failed to fulfil its constitutional and statutory obligations, and where different private parties are affected, as is the case in this matter, it is for the state to bear the costs of successful litigants. The Court held:

“[O]rdinarily there should be no costs orders against any private litigants who have become involved. This approach locates the risk for costs at the correct door—at the end of the day, it was the State that had control over its conduct.”<sup>91</sup>

[85] In this case, the Trustees have successfully vindicated their property rights. Had the state acted in accordance with its constitutional obligation before the High Court, the impasse would have been resolved without further demur by the applicants. Indeed, the eviction could not be granted without this Court’s oversight in ensuring that the learners’ rights in terms of sections 29(1) and 28(2) of the Constitution were safeguarded.

[86] The High Court clearly misdirected itself by holding that the SGB’s opposition of the eviction application was misplaced. It was not. As mentioned above, the SGB had a duty in terms of the Act to ensure that the rights of the learners are given effect to. In any event, as correctly submitted by the SGB, no conceivable purpose can be achieved by mulcting the applicants with any costs order.

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<sup>91</sup> *Biowatch* above n 89 at para 56.

[87] The Department had full control of the situation, but continually adopted an uncompromising stance despite the numerous undertakings to pay rentals and out-of-pocket expenses incurred by the Trustees for the upkeep of the school. However, this conduct does not warrant mulcting the MEC with a costs order as contended for by the SGB and the Trustees. During oral argument, counsel for the MEC correctly tendered to pay the costs of all parties on a party and party scale. The order we make below reflects this, which will supersede the punitive order granted against the MEC in the High Court. There should be no order as to costs in relation to the applicants' unsuccessful urgent application.

*Order*

[88] In the event, we make the following order, which supersedes the provisional order of 7 September 2010 and the eviction order of 10 December 2010:

- (1) Leave to appeal is granted.
- (2) Condonation for the late filing of the record is granted.
- (3) Condonation for the late filing of supplementary written submissions is granted.
- (4) The order of the KwaZulu-Natal High Court, Pietermaritzburg dated 16 September 2009 is set aside.
- (5) The Member of the Executive Committee for Education for the Province of KwaZulu-Natal (MEC) together with any and all persons who claim a right to occupy by, through or under the MEC, are ordered to vacate the premises

known as the Juma Masjid Primary School situated at 62-64 Cathedral Road, Durban by no later than 31 December 2010.

- (6) Failing compliance with paragraph 5 of this order, the Sheriff of the High Court, Durban, or his or her Deputy is authorised and directed to take all such steps as may be necessary to give effect to the order.
- (7) The MEC is ordered to pay the costs of the proceedings in the KwaZulu-Natal High Court, Pietermaritzburg; in the Supreme Court of Appeal and in this Court, on a party and party scale.
- (8) The costs referred to in paragraph 7, above, should include costs consequent upon the employment of two counsel.
- (9) There is no order as to costs in respect of the urgent application lodged on 11 November 2010.

Ngcobo CJ, Moseneke DCJ, Brand AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mogoeng J and Skweyiya J concur in the judgment of Nkabinde J.

For the Applicants:

Advocates GJ Marcus SC and M du Plessis  
Instructed by the Legal Resources Centre, Durban.

For the First to Ninth Respondents:

Advocate VI Gajoo SC  
Instructed by JH Nicholson, Stiller and Geshen.

For the Tenth Respondent:

Advocate AG Jeffrey SC  
Instructed by the State Attorney, KwaZulu-Natal.

For the Amici Curiae:

Advocate S Budlender  
Instructed by the Centre for Child Law and the Socio-Economic Rights Institute.