ANNEXURE B

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 38670/2016

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

25 MAY 2017
DATE

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MODIBA J

In the matter between:

AB	First Applicant
CB	Second Applicant
and	
PRIDWIN PREPARATORY SCHOOL	First Respondent
SELWYN MARX	Second Respondent
THE BOARD OF PRIDWIN PREPARATORY SCHOOL	Third Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION, GAUTENG	Fourth Respondent

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REASONS

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[1] On 1 December 2016 I granted an order in the following terms:

> "1 *In terms of Rule 6(12) of the Rules of this Court, the ordinary rules for service and the ordinary time-limits provided are dispensed with and the matter is dealt with as one of urgency.*
>
> "2 *It is directed that:*
>
> 2.1 *DB and EB are entitled to remain as pupils at Pridwin Preparatory School ('Pridwin');*
>
> 2.2 *AB and CB must continue to fulfil their obligations towards Pridwin, including the timeous payment of school fees; and*
>
> 2.3 *AB must comply with the terms of the agreement reached between him, CB and the second respondent on 28 January 2016 regarding sports activities at Pridwin.*
>
> "3 *It is directed that the order in paragraph 2 above is an interim order, which will operate only:*
>
> 3.1 *Pending the final determination of Part B of this application (including the determination of any appeals, such appeals to be proceeded with on an expedited basis); and*
>
> 3.2 *Should it be contended by the first to third respondents that the question of whether the decision by the second respondent to cancel the Parent contracts must be referred to mediation and/or arbitration, pending the final determination of any such mediation or arbitration proceedings.*
>
> 4 *The costs of this Part A of this application, including the costs of two counsel, are to be paid jointly and severally by any respondents opposing it."*

[2] As evident from paragraph 1 of the above order, I dealt with the above matter as one of urgency. Subsequently the first, second and third respondents (the respondents) addressed a letter to me dated 1 December 2016, asking for reasons. The reality of serving in a busy division such as the Gauteng Local Division is that it is not always possible to deal with such requests expeditiously. When it became apparent that I would not be able to attend to this request before the end of the first court term of 2017, I met with counsel for the parties to determine the reason why the respondents sought reasons and the urgency thereof, particularly because the order in respect of which the reasons are sought is an interim one and for that reason, would ordinarily not be appealable. Counsel for the respondents intimated that his clients are considering appealing the cost order, which unlike paragraph 2 of the order, is not subject to the condition in respect of interim operation, as set out in paragraph 3.

[3] In these circumstances, courtesy warrants that I extend an apology to the parties for the inconvenience, if any, occasioned by the inordinate delay in meeting the respondents' request for reasons. As already mentioned the demands of a busy division from time to time render such delays inevitable.

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[4] I set out the requested reasons below.

[5] This application concerns the fundamental constitutional rights of children DB and EB's, of access to education, and to have their interests be paramount in all matters concerning them. It is brought in two parts. Part A relates to an interim relief on an urgent basis. This is the order that I granted on 1 December 2016. Part B relates to a final declaratory and review relief in the ordinary course.

[6] The application is brought by the children's parents as co-applicants. To protect their identity, their attorneys concealed the applicants and the children's names by abbreviating them in the papers filed. I follow the same pattern in these reasons.

[7] The first respondent is Pridwin Preparatory School ("*Pridwin*" or "*the School*"), an independent "*all boys*" primary school registered as such in terms of section 46 of the South African Schools Act 84 of 1996.

[8] The second respondent is Selwyn Marx ("*Mr Marx*"), cited in his official capacity. He is the headmaster of Pridwin and at all material times acted in that capacity.

[9] The third respondent is the Board of Pridwin. It is responsible for the governance of Pridwin. Mr Marx and the Board of Pridwin opposed both the urgency and the interim relief sought by the applicants.

[10] The fourth respondent is the Member of the Executive Council responsible for Education in Gauteng ("*the MEC*"). He is responsible for the control, functioning, operation and management of the Gauteng Department of Education. The applicants cited the MEC for the interest he may have in this matter. Pridwin falls under his jurisdiction. The applicants have lodged a formal complaint with the Gauteng Department of Education in an effort to resolve their dispute with Pridwin. He did not oppose the application when Part A served before me. The applicants only sought relief from him in respect of costs in the event of opposition.

[11] On 30 June 2016, Mr Marx communicated a decision to the applicants to cancel the parent contracts between the applicants and Pridwin (the parent contract) with effect from the end of the 2016 school year ("*the decision*"). The decision was foreshadowed by allegations of improper behaviour on the part of the children's father (AB), relating to incidents that occurred on the sports ground in November

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2015, January 2016 and June 2016, during which amongst others, AB allegedly interfered with coaching decisions. Mr Marx and the Board also record that on 28 January 2016, AB agreed not to interfere with refereeing selection and coaching decisions. On that date, AB also communicated the applicants' dissatisfaction with the delivery of sports at Pridwin and expressed their intention to remove the children from the school. Mr Marx and the Board allege that the incident that occurred in June 2016 was in breach of that agreement.

[12] The applicants contend that the decision is unconstitutional; unfair and/or illegal; and as such, the decision is reviewable and may be set aside on the grounds set out in the Promotion of Administrative Justice Act 3 of 2000 ("*PAJA*"); or on common law grounds of review, in that the laws of natural justice apply.

[13] The respondents disagree. They contend that the school is an independent school. Its relationship with the parents and their children is governed by the parent contract. The parent contracts prescribe when Pridwin may terminate a parent contract, being "*at any time, for any reason*" provided a full term's notice is given; or immediately, where there is material misconduct on the part of a child or a parent.

[14] The respondents further contend that the school has an unfettered discretion when enforcing or terminating the parent contracts. Such decisions, however, should be taken bearing in mind that "*a child's best interests are of paramount importance in every matter concerning the child*"[1]. Pridwin took the decision, after considering the rights of not only the applicants' children, but of all other 445 children at the school at the same time.

[15] What rendered this application urgent was that unless an order is granted preserving DB and EB's current enrolment at Pridwin, after the conclusion of the 2016 academic year, which occurred on 7 December 2016, there was a high probability that they would not be enrolled at a suitable alternative school when the 2017 academic year commences. That eventuality would render the decision to be contrary to the children's best interests. It would also place their right to education in jeopardy.

[16] I found that although AB and CB were given notice of termination of the parent contract as far back as June 2016, and that they launched the current application only on 2 November 2016; the 5 months delay in bringing the application

[1] Section 28(2) The Constitution of the Republic of South Africa, 1996.

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did not dilute its urgency. This is so despite the fact that AB and CB had expressed their discontent with the quality of education and sports activities afforded DB and EB at Pridwin, and had expressed their intention to move them to another school even before Pridwin terminated the contract. That when AB and CB received notice of termination of the parent contract, they seemed to have accepted it, also did not dilute the urgency of the relief sought under Part A. The urgency was sustained by the measures they took to resolve their dispute with Pridwin and to seek placement at an alternative school. When both measures failed, the probability of the children not being enrolled at a suitable alternative school had they left Pridwin at the end of 2016 also birthed a new ground of urgency.

[17] Several courts, including the Constitutional Court, have repeatedly ruled that if an applicant took efforts to resolve the matter without going to court, resulting in a delay in launching an urgent application, such a delay will not result in the dismissal of an application due to self-created urgency.[2]

[18] They attempted to place the children in private schools in their area of residence without success. Had they succeeded in this endeavour, this application would not have arisen. It was necessitated by the probability that the children would not be enrolled at a private school when the 2017 academic year commenced in January 2017.

[19] In the 5 months that lapsed after the notice of termination of the parent contract was issued and the launching of this application, AB and CB were not passive. In addition to attempting to place the children at a comparable private school, they sought legal advice.

[20] They resorted to litigation as a matter of last resort because they were aware that having the matter resolved through litigation would not be in their interests, the school's interests or, their children's interests. They sought legal advice and were advised to seek further clarification on the reasons for and the nature of the decision. They did so on 5 August 2016, just over a month after the decision. This was within the time period afforded by the Promotion of Administrative Justice Act 3 of 2000 ("*PAJA*") for reasons for an administrative decision to be sought. Pridwin replied a

[2] *See Nelson Mandela Metropolitan Municipality v Greyvenouw CC and Others* 2004 (2) SA 81 (SECLD) at paras [32] to [34]; *Stock v Minister of Housing* 2007 (2) SA 9 (C) at [13]; SA *Informal Traders Forum v City of Johannesburg* 2014 (4) SA 371 (CC) at [30]). Both of these cases were endorsed by this Court in *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite* (Pty) Ltd 2011 JDR 1832 (GSJ).

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month later on 6 September 2015. On 15 September 2016, AB and CB approached the GDE for assistance. Initially, they did so informally. They only lodged a formal complaint on 10 October 2016, when it became clear that this was the only way that Pridwin might be forced to respond and engage further on the termination of the parent contract. When it became clear on 26 October 2016 – after a conversation between Mr Chatergoon of the GDE and Mr Marx – that this matter would not be resolved without litigation, AB and CB launched the application less than a week thereafter on 2 November 2016. They gave the respondents less than three weeks to respond to the application.

[21] What brought considerable weight to bear in the mind of this Court, to exercise its discretion in favour of AB and CB, to hear the application on an urgent basis, is the fact that if Part A was heard in the ordinary course, AB and CB would be denied substantive redress. The probability of DB and EB not being placed in January 2017 was high. The incomparable prejudice DB and EB stood to suffer if the interdict was not granted against the prejudice Pridwin stood to duffer if the interdict is granted is the second reason why Part A was accorded the status of an urgent application. I elaborate on the nature of this prejudice in paragraphs 25 and 26 below. Affording them a hearing on an urgent basis would save them from this prejudice. It holds grave consequences for their education and development. If AB and CB succeed in Part B, the prejudice to DB and EB that would result from not hearing Part A on an urgent basis would be unwarranted.

[22] It is trite that to succeed in Part A of this application, AB and CB must establish a *prima facie* right, whether there would be irreparable harm to the applicant if the interdict is not granted, the balance of convenience and any alternative remedies.[3] The stronger the balance of convenience in the AB and CB's favour, the less the need for prospects of success to favour him or her, and vice-versa.[4]

[23] There is a strong probability on the facts before the court that if the children's current enrolment at Pridwin was not preserved, the children would not be enrolled at a comparable school at the start of the 2017 academic year. Under these

[3] See *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383E-F.
[4] See *Cipla Medpro (Pty) Ltd v Aventis Pharma SA & Related Appeal* 2013 (4) SA 579 (SCA) at [40] where the SCA set out the approach to determining whether an applicant has met the requirements of an interim interdict. It held that it is important, that the requirements balance against each other. The stronger the balance of convenience in the applicant's favour, the less the need for prospects of success to favour him or her, and *vice-versa*.

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circumstances, if the decision to terminate the parent contract with effect from the end of the 2016 academic year was given effect to, and was not kept in abeyance pending the determination of Part B or any subsequent appeal, the rights of DB and EB to education, and the right to have their best interest enjoy paramountcy in any matter affecting them, would be placed in jeopardy.

[24] The only possible prejudice that Pridwin stands to suffer from the granting of Part A of the application, is the remote possibility of AB breaching his promise not to disrupt the school activities. He has not breached this promise since AB and CB were served with a termination notice. He included a prayer in the notice of motion in respect of Part A, binding him to that agreement. I granted that prayer in paragraph 2.3 of the interim order. Mr Marx demonstrated that Pridwin stood to suffer less prejudice when he allowed the children to remain at Pridwin until the end of the 2016 academic year. This decision accorded with the children's best interest. Mr Marx, in promoting the children's best interests, was willing to trust AB to behave appropriately when he gave him a considerable notice period for the termination of the parent contract, notwithstanding that the parent contract permits him to terminate a parent contract immediately on occasion of misconduct on the part of a parent or learner. On the facts before this court, there is no reasonable basis why he would not extend the same trust to AB in the best interests of the children, pending the determination of part B. In these circumstances, the best interests of other learners at Pridwin, which Pridwin alleged is a strong factor that led to the termination of the parent contract, on the probabilities, remotely face jeopardy if the interdict is granted.

[25] On the other hand, DB and EB stood to suffer irreparable harm if the interdict was not granted. If the interdict was not granted, DB and EB had to leave Pridwin at the end of 2016. They were unable to secure a place at a suitable alternative school. AB and CB tried to place them at other independent schools in the area. None have any space. They made an election to send their children to a private school, at considerable cost, because they considered that this would be best for their development. Placement at a government school, even if it was possible, would not serve the children's best interests. If their enrolment at Pridwin was not preserved, they would have been forced to leave Pridwin to be accommodated at already overburdened government schools.

[26] I considered that their placement at a government school in 2017 may not occur. The deadline to apply for admission to government schools for 2017 expired on 1 June 2016, before AB and CB were served with a termination notice. The GDE

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placed all learners by 7 September 2016. The government schools in their residential area were already full. Greenside Primary could potentially accommodate DB. After applying for placement at Greenside Primary, they would be placed on the lower priority B list because they live outside the Greenside area. They would then await the outcome. AB and CB contended that home schooling is not an appropriate alternative remedy because it is not the model of school that the children were following. If Part B of the applicant succeeds, DB and EB would be entitled to carry on as pupils of Pridwin. For DB and EB to be forced to leave Pridwin pending Part B, to undergo home schooling or attend another school, then to return when Part B succeeds would be extremely disruptive to their schooling and to the relationships they had established both with teachers and learners. Leaving Pridwin at the end of 2016 would therefore not serve their best interests.

[27] In the premises, the balance of convenience overwhelmingly favours AB and CB.

[28] In *S v M*[5], the Constitutional Court expressed itself as follows concerning the best interests of minor children:

> "*While section 28 undoubtedly serves as a general guideline to the courts, its normative force does not stop here. On the contrary, as this Court has held in De Reuck, 13 Sonderup14 and Fitzpatrick, 15 section 28(2), read with section 28(1), establishes a set of children's rights that courts are obliged to enforce. I deal with these cases later. At this stage I merely point out that the question is not whether section 28 creates enforceable legal rules, which it clearly does, but what reasonable limits can be imposed on their application.*
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> *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 interests 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.'*"

[29] In *Welkom*, Froneman and Skweyiya JJ (with Moseneke DCJ and Van der Westhuizen J concurring) held as follows:

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[5] 2008 (3) SA 232 (CC) at [14]-[15].

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> *"The considerations in favour of granting such an order in this case can be characterised as follows: the rights of children are implicated and section 28(2) of the Constitution requires that their best interests be of paramount importance in deciding the appropriate relief."*

[30] Therefore this Court is required in exercising its discretion regarding whether to grant an interim interdict, to "*function in a manner which at all times shows due respect for children's rights*", to "*give consideration to the effect that* [its] *decisions will have on children's lives*" and to craft appropriate relief that recognizes the paramount importance of the children's best interests. On the facts before this case, the best interests of the children reinforce the overwhelming basis for the interdict to be granted.

[31] Forcing CB and DB to leave Pridwin under circumstances where they had not found placement at a suitable alternative school, where they had not been placed in a government school, where AB had not breached the agreement he reached with Pridwin not to interrupt school activities for a period of 5 months since he was served with a termination notice; and where Mr Marx had elected to give AB and CB notice and not terminate the parent contract immediately where contractually he could have done, is not in the children's best interests.

[32] This application would not have been necessary had Pridwin, in the best interests of DB and EB, and in respect of their right to education, further extended the termination notice pending the determination of Part B. By refusing to extend the notice, Pridwin did not act in the best interests of the children. Notwithstanding the outcome of Part B, extending the notice would alleviate the overwhelming prejudice that the children would suffer if they were forced to leave Pridwin and subsequently succeed in Part B. Lack of appreciation of what is in the best interests of the minor children on the part of Pridwin and failure to act in accordance with that appreciation in circumstances where the probability of the best interests of the other learners at Pridwin being prejudiced by DB and EBs continued enrolment is remote, is what rendered their opposition of Part A of this application unreasonable. It is for that reason that this Court found it appropriate to order Pridwin to pay the applicant's costs of Part A of the application.

[33] Given the reasons for granting a cost order against the respondents in respect of Part A, the outcome of Part B, regardless of who succeeds in that application, in my view, has no bearing on the cost order. The issues that arise in Part B and the test that AB and CB have to overcome to succeed in Part B is entirely

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different from that in Part A. Pridwin asserts a contractual right as an independent school to act as it chooses. It contends that it is not bound by section 29 of the Constitution, PAJA and the rules of natural justice in respect of procedural fairness. It further contends that the GDE had no power to deal with this issue and that the school does not fall under any jurisdiction of the MEC for Education or GDE. It also contends that it is constitutionally permissible to prejudice two children, aged 6 and 10, due to the alleged misconduct of their father.

[34] In Part B the court will weigh the rights that Pridwin seeks to assert against the children's best interests, right of to education and the parent's rights to procedural fairness in terms of PAJA. In Part B, when balancing the rights of the parties, the court will apply section 36 of the Constitution by limiting the rights of any of the parties. These issues and the question of the limitation of rights bear no relevant in Part A. They will be determined in Part B. Given the novelty of the issues that arise in this matter, it would be an impossible task to even attempt to determine AB and CB's prospects of success in Part B. The test in respect of Part A is the one articulated in paragraph 22 above. For the reasons set out above, I granted the order set out in paragraph 1, being satisfied that AB and CB met the test for the interim relief that they sought in Part A. It.

[35] In the premises, the order granted on 1 December 2016 is confirmed.

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JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARENCES:

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Instructed by:	Webber Wentzel Attorneys
Date heard:	1 December 2016
Date reasons furnished:	25 May 2017

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