

Short notes on:

INDEPENDENT SCHOOLS AND EXPULSION – CONTRACT AND THE CONSTITUTION

Introduction

As of 9 January 2019, and estimated 402 141 students were enrolled in the 1966 independent schools scattered throughout South Africa.¹ As such, 3% of all students are in attendance at independent schools. No statistic could be found indicating how many students left the independent school curriculum. However, case law suggests independent schools have the ability to very quickly and without much difficulty expel a student. This article aims to explore the status quo and how an independent school might expel a child and what the parents can do to protect the best interest of their child.

Comparing Public and Private Schools

The regulatory framework consists of national legislation in the form of the Schools Act 84 of 1996, as amended, (from now on referred to as 'the Act'), and an array of provincial regulations governing each province.

Public schools are heavily regulated. Each school must provide a code of conduct to which the school and students must adhere, and which must contain a disciplinary code of conduct. Although each school has a code of conduct, it must conform with the minimum requirements as provided for by the Act and whichever provincial regulation is applicable.

Importantly the Act provides in detail the process a school must follow before a child can be expelled. The final decision to expel a student can be made by the Provincial Head of Department of Education and only if that student is found guilty of serious misconduct. The Student must be given notice provided with an opportunity to defend the allegations during a formal disciplinary hearing.

The situation is vastly different for Independent Schools. The Act merely recognises the existence of Independent Schools but does not dictate in any detail how an independent school should be

¹ <https://www.southafricanmi.com/education-statistics.html>

governed and managed. The Act is silent as to the specific policy and procedures applicable when an independent school intends to suspend or expel a student.

Provincial regulation demands that the School must provide a constitution,² the exact content of which depends on the owner or manager of the school as well as approval by the provincial MEC. Provincial regulations also provide that independent schools must maintain standards equitable to those of public schools in each province.³

What is the Practical Effect – Case Law

However, these regulations do not have any real practical impact as case law provides that Independent Schools are independent of any regulatory oversight. Upon minimum compliance with the Act, an independent school may apply its disciplinary code of conduct as it deems fit.

In matters like that of *Brink and others v Diocesan School for Girls and others* the parents attempted to seek redress against the school for expelling the student in an instance where the evidence indicated serious misconduct as defined in the school's written code of conduct.⁴ The court found that the tribunal had been fair, impartial, honest and had conducted itself within reason. It was doubtful that another tribunal would have come to a different conclusion.⁵

In other words, although Independent Schools must adhere to the dictates of 'natural justice', society's *boni mores* and the principles enshrined in the Constitution, the process for expelling a child from an independent school is akin to the termination of a contract.

In the case of *AB v Pridwin Preparatory School* the school expelled the child by terminating the contract which governed the relationship between the parties on the basis that the parent had verbally assaulted third parties and members of the governing body.⁶ The Court confirmed that contractual principles do not give rise to an implied right to be heard at a disciplinary hearing and that such an implied right cannot be used to limit a party's right to terminate a contract on notice

² *The Eastern Cape Schools Education Act 1 of 1999 of: Regulations Relating to Independent Schools* s3(2)(a)

³ Regulation 3.(3)(b)

⁴ *Brink and others v Diocesan School for Girls and others* [2012] JOL 29362 (ECG)

⁵ In that matter, the court was asked to review the decision reached by the school despite the school complying with its internal disciplinary process. The court found that *the Promotion of Access to Justice Act 3 of 2000* (hereinafter referred to as 'PAJA') was not applicable as the decision by the school was without public impact.

⁶ *AB and another v Pridwin Preparatory School and others* (Equal Education as amicus curiae) [2019] 1 All SA 1 (SCA)

owing to the apparent absurdity.⁷ Considering the content of the written agreement, the court found that the school did not have a duty to act fairly or reasonably.⁸

The Court also provided that when terminating an agreement, the school is obliged to consider the best interest's principle, but that these considerations do not preclude the school from cancelling a contract as a result of the actions of parents.⁹

Importantly, the Court found that independent schools, unlike public schools, have no positive constitutional duty to provide basic education. Thus, an independent school can expel a child and not infringe on the child's right to basic education as the child can still attend a public school. In other words, education at an independent school is entirely conditional and subject to the rights flowing from whatever agreement was entered into between the parents and the school.

What does this mean for the Parent and the Child?

It is essential to obtain a copy of the school's constitution and to determine the disciplinary procedures which the school follows when meting out discipline. Find out whether the school will issue out warnings, provide notice before expelling a child and whether it will conduct a disciplinary hearing. Further, find out under what circumstances the school considering serious enough to warrant immediate expulsion.

Considering that case law views the relationship between parent, student and independent school as that of one flowing out of the law of contract, it then becomes necessary to keep in mind that a school can simply terminate the relationship based on any form of Breach which includes non-payment of school accounts.

With the above in mind, despite no regulatory oversight, the principals of natural justice still do apply in some circumstances. Further, when dealing with a minor child in almost all instances, no person can't make a decision which would significantly prejudice the best interests of a child. Further, the law of contract may be useful and will go a long way, in some instances, in protecting your child.

⁷ AB v Pridwin at para 33

⁸ AB v Pridwin at para 69

⁹ AB v Pridwin at para 68

Additionally, bear in mind that each school is required to perform certain administrative functions. These include, but are not limited to, providing you and your child with a Transfer Form to allow the Student to be enrolled in a new school.¹⁰

Conclusion

If you feel that you or your child are being treated to any form of unfairness, impartiality, lack of transparency or dishonesty, be sure to seek legal advice.

¹⁰ WCED Policy for the Management of Admission and Registration of Learners at Ordinary Public Schools (accessed at: https://wcedonline.westerncape.gov.za/circulars/circulars10/e26_10.pdf) on page 9