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Pridwin: Private School Contracts, the Bill of Rights and a Missed Opportunity

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ABSTRACT: *AB and Another v Pridwin Preparatory School and Others* is a cause for both celebration and concern. The Court's conclusion that private schools are bound by the rights to basic education and the paramountcy of a child's best interests is an important development in South Africa's education jurisprudence. However, the majority judgment missed an opportunity to fully embrace the constitutionalisation of contract law through section 8 of the Constitution. By contrast, the minority's approach hints toward a promising pathway to demonstrating how section 8, when properly applied, can offer a coherent and balanced approach to the development of the common law in order to give effect to or justifiably limit the application of constitutional rights in contractual disputes.

KEYWORDS: basic education, best interests of the child, horizontal application, common law development, independent schools.

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I INTRODUCTION

Do private schools bear constitutional obligations in relation to the right to basic education? At first blush, the question may seem uncontroversial. Yet, as the *Pridwin CC*[1] case demonstrates, this has certainly been a contested issue.

The matter arose out of a dispute between wealthy parents and an elite private school in one of Johannesburg's plushest suburbs. Fed up with ongoing aggressive and outrageous conduct by the parents of two learners at the school, the school cancelled the parents' contract with the school. The result was that the children, who were model learners by all accounts, were required to leave their school by the following term. A legal battle ensued over whether the school's termination of the contract, without more, was constitutionally defensible.

Having taken more than a year to hand down judgment, the Constitutional Court clearly agonised over the case, which brings to life the complex interplay between contractual autonomy and constitutional rights, debates around the extent to which private entities can and should be bound by obligations under the Bill of Rights, as well as the scope and implications of children's rights to a basic education and to have their best interests considered paramount in every matter concerning them.

In this article we welcome the Constitutional Court's conclusion that private schools are bound by the right to basic education and the paramountcy of a child's best interests. However, while both the majority and minority judgments reach this conclusion through a horizontal application of rights, they diverged in their willingness to subject the impugned contractual provision itself to scrutiny under section 8(2) of the Constitution of the Republic of South Africa, 1996 (Constitution), which provides for the application of the Bill of Rights to natural and juristic persons. The majority, seeking to pay respect to the approach adopted in *Barkhuizen v Napier*,[2] entrenched the unhelpful divide between the so-called direct and indirect application of constitutional rights in contractual disputes. The perplexing and ironic result of the majority's approach in *Pridwin CC* is an artificial avoidance of the contractual relationship between the parties and a missed opportunity to develop the common law of contract having due regard to constitutional rights. By contrast, we argue that the minority's willingness to loosen the strictures of *Barkhuizen* should be embraced. The minority's approach in *Pridwin CC* hints toward a promising pathway to demonstrating how section 8, when properly applied, can offer a coherent and balanced approach to the development of the common law in order to give effect to or justifiably limit constitutional rights in contractual disputes.

II BACKGROUND

A The dispute – sins of the father

Pridwin Preparatory School (Pridwin) is an elite private school situated in one of Johannesburg's wealthiest suburbs. Parents pay substantial fees, the affordability of which is well beyond the reach of the great majority of South Africans.[3] The school's relationship with learners and their parents is regulated by a contract concluded prior to entry into Pridwin. It was the termination

[1] *AB &Another v Pridwin Preparatory School & Others* [2020] ZACC 12, 2020 (5) SA 327 (CC)('*Pridwin CC*').

[2] [2007] ZACC 5, 2007 (5) SA 323 (CC)('*Barkhuizen*')(A discussion of Barkhuizen follows at part IV below).

[3] For the 2020 school year, the tuition fees at Pridwin ranged from approximately R117 000 to R156 000. According to Statistics South Africa, in 2015 approximately 40 per cent of South Africans were living below the upper-bound poverty line of R995 per capita per month. Statistics South Africa 'Men, Women and Children:

of these parent contracts, following an intense and nasty dispute between the school and the parents of two young boys (aged six and ten years old), that took centre stage in a legal drama that eventually reached the Constitutional Court in 2019.[4]

Every judge who heard the matter accepted that, on the record, the dispute arose primarily from the perpetual and unreasonable demands, and unrelenting hostility of the children's father (AB) toward the school, 'aided and abetted' by his wife's (CB's) conduct.[5] The parents took particular issue with the quality of sports coaching at Pridwin, motivated by the belief that the natural sporting talent of their children was not being sufficiently nurtured by the school.[6] To this end, AB resorted to a range of pedantic interventions including, for example, analysing hard copy and electronic versions of cricket results to make sure that his sons' achievements were being properly recorded and obtaining the services of an actuary to challenge team selection processes.[7]

AB's pursuit of sporting excellence also manifested in outwardly aggressive behaviour. He demeaned, threatened and harassed umpires, coaches and staff when any adverse decision was made against his sons in sports matches. When his son was declared 'out' in a cricket match at a rival school, AB hurled expletives and verbal abuse at the umpire and, with a cricket bat in his hand, threatened to kill the umpire. On another occasion he verbally abused the school's cricket coach and made disparaging remarks about other children on the team. This prompted another parent at the school to complain about the adverse effect AB's conduct was having on her son.[8]

The parents and the principal agreed that AB would correct his behaviour at sporting events.[9] The resulting calm did not last long. Less than six months after the truce, AB arrived at a soccer match with his own coach in tow, who then sought to instruct the school's coach (during the match). This led to yet another argument with the school's principal, who in turn made it clear that AB had breached their prior agreement.[10] By 30 June 2016, the school had reached its limit. The school sent a letter to the parents terminating their contract with the school in relation to both children, and relying on the following termination clause:

> The School also has the right to cancel this Contract at any time, for any reason, provided that it gives you a full term's notice, in writing, of its decision to terminate this Contract. At the end of the term in question, you will be required to withdraw the Child from the School, and the School will

Findings of the Living Conditions Survey 2014/15' (2018), available at http://www.statssa.gov.za/publications/Report-03-10-02%20/Report-03-10-02%202015.pdf.

4 *AB & Another v Pridwin Preparatory School & Others* [2017] ZAGPJHC 186 ('*Pridwin HC*'); *AB & Another v Pridwin Preparatory School & Others* [2018] ZASCA 150, 2019 (1) SA 327 (SCA)('*Pridwin SCA*').

5 *Pridwin CC* (note 1 above) at para 10. See also: *Pridwin HC* (note 4 above) at paras 127–137; *Pridwin SCA* (note 4 above) at paras 9–22, 73 (majority) and 85 (minority); *Pridwin CC* (note 1 above) at paras 5, 10–31, 100. Following the Constitutional Court's judgment, CB (the mother of the children) penned an opinion piece refuting the 'caricature of the uncivilized brown person', which, she said, 'so successfully managed to capture the imagination of the media and the judiciary' (CB: 'I was the Barbarian at the Gate of Pridwin Preparatory School' *Daily Maverick* (19 June 2020), available at https://www.dailymaverick.co.za/article/2020-06-19-i-was-the-barbarian-at-the-gate-of-pridwin-preparatory-school).

6 *Pridwin CC* (note 1 above) at para 12.

7 *Pridwin SCA* (note 4 above) at para 11 and *Pridwin CC* (note 1 above) at para 12.

8 *Pridwin CC* (note 1 above) at paras 16–19.

9 Ibid at paras 20, 21.

10 Ibid at paras 26–29 and *Pridwin SCA* (note 4 above) at para 18.

> refund to you the amount of any fees pre-paid for a period after the end of the term less anything owing to the School by you.[11]

Five months after the contracts were terminated, the parents approached the High Court on an urgent basis to challenge the cancellation. The main issue before the court was whether the school's termination clause should be constrained by the rights of the two children who, as a result of the termination and through no fault of their own, would be excluded from the school.

B The broader context – expanding role of independent schools

A fight between badly behaved wealthy parents and an elite private school may not set the scene for a case with significant public interest implications. But the broader context matters.

Firstly, the specific termination clause at issue in the case is regularly utilised in *pro forma* contracts by member schools of the Independent Schools Association of South Africa (ISASA). ISASA's membership includes approximately 750 independent schools across South Africa servicing 167 000 pupils (of varying social and economic backgrounds).[12] Indeed, ISASA intervened in the matter as a respondent exactly because of the extensive consequences that the case had for its member schools. As it said: 'ISASA is the author of the Parent Contracts. The potential for far-reaching consequences arises from the fact that contracts similar to the Parent Contracts are used in a number of ISASA's other member schools.'[13]

Secondly, intervening as *amicus curiae*, Equal Education (EE), a social justice movement advocating for equal and quality education in South Africa, highlighted the significant growth of independent schools across the country over the previous two decades. Between 2000 and 2010 alone, enrolment at independent schools grew by 75.9 per cent.[14] Public school enrolment grew by only 1.4 per cent in that period.[15] Equal Education (EE) also pointed to the significant change in the demographics of children attending independent schools, from 'being mainly white and serving the rich' to 'being mainly black and the majority of schools now serving low- and middle-income learners'.[16] Independent schools are also not necessarily a beacon of highly-resourced educational opportunity. Instead, EE cited research indicating that low-fee independent schools are likely to be in 'abandoned factories and shacks to shopping centres' and may have smaller classes as well as fewer facilities than public schools.[17]

[11] *Pridwin CC* (note 1 above) at paras 97–98. About five months after the contract was terminated, the principal wrote to the provincial department of education seeking confirmation that the boys could be placed in a public school if the parents sought this option. The provincial department indicated that a place in a specific school could not be guaranteed and that at least one of the boys could be placed on a waiting list.

[12] Ibid at para 112.

[13] Ibid at para 113. See also *NM v John Wesley School & Another* [2018] ZAKZDHC 64, 2019 (2) SA 557 (KZD) ('*John Wesley*'), where a low-fee independent school, and member of ISASA, relied on an ISASA policy document when excluding a learner from the writing of examinations as a result of the parents' inability to pay school fees.

[14] Heads of Argument for EE in *Pridwin* (15 May 2019), available at https://eelawcentre.org.za/wp-content/uploads/second-amicus-curiaes-heads-of-argument.pdf, at para 6.1.

[15] Ibid.

[16] Heads of Argument for EE (note 14 above) at para 6.2.

[17] Ibid at para 6.3. See also T McKay, M Mafanya & A C Horn 'Johannesburg's Inner City Private Schools: The Teacher's Perspective' (2018) 38 *South African Journal of Education* 1, 1 where they indicate that a sample of teachers in Johannesburg's inner city private schools reported 'unhappiness with their low salaries, long working hours and poor working conditions' and 'lamented the lack of adequate teaching and learning materials, as well as negligible educational infrastructure such as libraries, laboratories and sports fields'; and J Brickhill & Y van

Thirdly, EE averred that the dramatic growth of private sector involvement in education is also not unique to South Africa. Globally, there have been similar trends,[18] prompting an international effort by various experts to consolidate international law principles on the regulation of private involvement in education. The resultant 'Abidjan Principles' emerged in response to the expansion of private sector involvement in education over the past two decades, which 'if left unchecked, could gravely impair the progress made in the realisation of the right to education.'[19]

As we discuss in more detail below, the Court in *Pridwin CC* specifically recognised the implications of the growth of the independent school sector for the rights of children. As Theron J, writing for the majority, put it: '[a]s the power and significance of the independent school sector continues to grow, so too does the need for constitutional protection.'[20] It was this question then – the extent of constitutional protection afforded to children in private schools – that was the key issue that had to be addressed throughout the litigation.

C Journey to the Constitutional Court – key issues

The initial urgent application was launched in the High Court in December 2016. Over the course of the three-year legal battle,[21] the children remained at Pridwin but eventually left the school in early 2019 (before the Constitutional Court hearing was due to take place).[22]

The thrust of the parents' challenge throughout the litigation was that Pridwin's authority to cancel the parent contracts was constrained by the rights of the two learners. In particular, Pridwin was required to have a reasonable basis for cancelling the contracts and could only do so after having considered representations on whether such cancellation would be in the best interests of the two children (who would be effectively expelled from the school). These obligations, it was argued, flowed from Pridwin's duties to respect the children's right to basic education (s 29(1)(a) of the Constitution) as well as the rights of the children to have their best interests taken into account (section 28(2) of the Constitution).[23] In the alternative to this direct reliance on sections 29(1)(a) and 28(2), the parents argued that the termination clause itself was contrary to public policy, unconstitutional and unenforceable to the extent that it allowed Pridwin to derogate from its duties under those constitutional provisions.

Leeve 'From the Classroom to the Courtroom: Litigating Education Rights in South Africa' in S Fredman, M Campbell & H Taylor eds *Human Rights and Equality in Education* (2018) 143, 146–147 where they argue that 'the perception that low-fee private institutions are able to provide a solution to challenges in the public education system is overstated.'

18 T Lowenthal '*AB v Pridwin Preparatory School*: progress and problems in horizontal human rights law' (2020) 36 *South African Journal on Human Rights*, 261, 265, for example, notes that '[t]here has in recent years been a mushrooming in the provision of education by private providers around the world, such that has attracted the attention of education researchers, as well as the former UN Special Rapporteur. These developments force a difficult balancing act for human rights law, between the rights of private schools on the one hand, and the rights of children on the other.'

19 See https://www.abidjanprinciples.org/en/background/overview.

20 *Pridwin CC* (note 1 above) at para 131.

21 There were various litigious detours over this period, including an unsuccessful attempt by the parents to appeal the High Court judgment directly to the Constitutional Court.

22 *Pridwin CC* (note 1 above) at para 109.

23 The parents also argued that the decision was in breach of procedural fairness obligations under the Promotion of Administrative Justice Act 3 of 2000. This argument was rejected by both the High Court and Supreme Court of Appeal. The Constitutional Court found it unnecessary to consider this point.

Equal Education (as *amicus curiae* in the High Court and Constitutional Court) and Centre for Child Law (as *amicus curiae* in the Constitutional Court) supported the argument that private schools bear constitutional obligations in relation to their learners. ISASA joined the proceedings as second respondent, in support of Pridwin.

Pridwin accepted that it was bound by section 28(2) of the Constitution but argued that this requirement had been met. Even though the principal had not specifically solicited representations on the best interests of the two boys, he had nonetheless taken their interests into account and appropriately weighted those interests against the other 445 children at the school.[24] In relation to section 29(1)(a), Pridwin and ISASA strenuously objected to the claim that the right to basic education imposed *any* obligations on private schools in respect of their learners.[25] The nub of their contention was that private schools do not provide basic education at all. On the contrary, the provision of basic education is a constitutional function which the state has a duty to provide. Since the state is the bearer of the positive obligation to provide basic education, it follows that basic education refers to *state* provided schooling and not to schooling by wholly independent private schools. To conclude otherwise, they said, would result in private schools being saddled with the constitutional duty to provide basic education to children.

The High Court and majority of the Supreme Court of Appeal[26] agreed with Pridwin and ISASA on all fronts, and upheld the parent contract in accordance with the principle of *pacta sunt servanda* (that parties should honour contracts that have been entered into freely and consciously).[27] This set the precedent that private schools are not bound by the right to basic education in relation to the learners who attend those schools, and that a private school can terminate parent contracts without having obtained representations on the best interests of the children who would be excluded as a result. The Court unanimously upended the approach of the courts a quo. Although both the minority and majority judgments applied section 8(2) of the Constitution through different routes, all the judges agreed that Pridwin was bound by obligations in relation to the right to basic education and the paramountcy of best interests of the child.

In the analysis that follows, we welcome the Court's reversal of the approach of the courts below and the assessment of Pridwin's obligations under section 8(2) of the Constitution. In doing so, the Court has developed the substantive content of rights in an education context and the obligations of private schools. However, by failing to follow the schema of section 8 in its entirety, the Court missed an opportunity to fully realise the transformative potential of the horizontal application of rights under section 8 of the Constitution in contractual relationships.

[24] *Pridwin SCA* (note 4 above) at paras 29, 31, *Pridwin CC* (note 1 above) at para 145.

[25] Heads of argument for the first to third respondents in *Pridwin CC* (18 April 2019) at paras 69–78, heads of argument for ISASA in *Pridwin CC* (29 April 2019) at paras 15–20.

[26] Mocumie JA wrote a dissenting judgment in the Supreme Court of Appeal.

[27] In *Barkhuizen* (note 2 above) at para 87, the Court described *pacta sunt servanda* maxim as 'a profoundly moral principle, on which the coherence of any society relies' and as 'a universally recognised legal principle.'

III THE COURT GETS IT RIGHT: PRIVATE SCHOOLS ARE BOUND BY THE BILL OF RIGHTS

A Private schools are bound by section 28(2) of the Constitution

Pridwin and the courts below accepted that private schools are bound by section 28(2) of the Constitution and are thus required to consider the best interests of the child as paramount in matters concerning them. Nonetheless, even though the High Court and Supreme Court of Appeal recognised that an assessment of the best interests of the child may necessitate a fair hearing in some circumstances, they also stressed that the paramountcy of a child's best interests is not necessarily a trump against all other interests. The courts were unwilling to hold that private schools have a general obligation to receive representations on the childrens' best interests before terminating a parent contract. They were also satisfied that, in this case, the principal of the school had (despite not obtaining specific representations) taken the interests of the two boys into account and properly balanced this against the interests of all the other learners at Pridwin.[28]

The Constitutional Court held that the courts below had erred in their assessment of whether the duty under section 28(2) had, in fact, been met in this case. The majority held that in the circumstances of the case 's 28(2) requires that a fair process be followed by an independent school when it takes a decision that affects the rights of children to a basic education.'[29] Significantly, an *oral* hearing is not necessarily required in all circumstances in order to satisfy the requirements of a fair process.[30] Justice Khampepe considered it necessary, in a concurring opinion, to emphasise that it is the *child* who has an independent and self-standing right (apart from their parents) to a fair process in the circumstances of a case as this one.[31]

The minority opinion of Nicholls AJ (with Mogoeng CJ, Cameron and Froneman JJ concurring), whilst not necessarily in disagreement with the majority, was more explicit in underscoring that the procedural right to a fair process when a private school contract is terminated does not hinge on section 28(2) by itself. Rather, it is because the decision or termination affects the right of a child to *basic education* that the obligation of private schools to solicit specific representations when terminating a parent contract is crystallized. As Nicholls AJ put it:

> If the Supreme Court of Appeal is correct that independent schools have no constitutional educational obligations towards those children attending them, it may be difficult to locate an obligation under section 28(2) paramountcy alone as the source of a constitutional right in favour of the children in the contractual arrangement between the School and the parents.[32]

We appreciate Nicholls AJ's emphasis on this point. The paramountcy of best interests under section 28(2), whilst significant, is not the only right grounding the necessity of a fair process in the circumstances of the case. Indeed, stretching the right in this way runs the risk of diluting the effectiveness of the principle itself. As Sachs J warned in *S v M*:

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[28] *Pridwin HC* at para 77, *Pridwin SCA* (note 4 above) at paras 31–33.

[29] *Pridwin CC* (note 1 above) at para 153.

[30] Ibid at para 151.

[31] Ibid at para 221. Khampepe J (at para 226) states: 'the procedural right forming part of the best interests of the child in this context is, first and foremost, a right given to the child, which may be exercised by a representative where children are not of sufficient age or maturity to make these representations themselves.'

[32] *Pridwin CC* (note 1 above) at para 75.

> If the paramountcy principle is spread too thin it risks being transformed from an effective instrument of child protection into an empty rhetorical phrase of weak application, thereby defeating rather than promoting the objective of section 28(2).[33]

Echoing this caution, child rights advocate, Professor Ann Skelton, has argued that the Court's 'love affair' with the best interests principle in some cases has led to an under-recognition and under-development of other substantive rights held by children.[34] She urges an approach instead where courts 'pronounce on a clear rights violation' and then 'use best interests to fill in any normative gaps'.[35] In other words, the right under section 28(2) plays an important role in an assessment of rights violations of children, but courts should be wary of placing all of the analytical weight on section 28(2).

The failure then of the courts below to recognise that section 28(2) requires a procedural component in this case must be assessed in relation to their stance that the children's right to *basic education* was not implicated. Moreover, it was the question of whether section 29(1)(a) binds private schools to any extent that was particularly contentious.

B Private schools are bound by section 29(1)(a) of the Constitution

Agreeing with the school and ISASA, the High Court and the Supreme Court of Appeal took the view that private schools are not bound by the right to basic education. Instead, the courts below held that section 29(1)(a) is concerned with *state*-provided public education and a private school may only be considered as providing a basic education under section 29(1)(a) if it is: (i) state-subsidised; or (ii) where there is otherwise a 'contractual nexus' with the state in terms of which the private school provides education.[36]

In our view, the interpretation of basic education as only referring to *state*-provided, *state*-subsidised, or *state*-contracted education is quite remarkable. This approach not only leaves private schools immune from constitutional control over the provisioning of the fundamental right to basic education, their core business,[37] but the reasoning of the Court also has dramatic implications for interpreting the scope of constitutional rights more generally. Indeed, the reluctance of the courts below to regard a private school as being bound by the right to basic education appears to have been animated by the anxiety that if private schools are bearers of obligations in terms of section 29(1)(a), then any private person involved in the provision of a constitutionally guaranteed right must also be similarly bound. The majority in the Supreme Court of Appeal were openly mortified by the prospect:

> If the appellants were correct that Pridwin, a non-subsidised independent educational institution, is providing a basic education, it would lead to remarkable consequences. It would mean that a private security company contracted to provide safety and security to a community is discharging

[33] *S v M* [2007] ZACC 18, 2008 (3) SA 232 (CC) at para 25.

[34] A Skelton 'Too Much of a Good Thing: Best Interests of the Child in South African Jurisprudence' (2019) 52 *De Jure*, 557, 557.

[35] Ibid at 579.

[36] *Pridwin HC* (note 4 above) at paras 27–28, 31–32, 38, *Pridwin SCA* (note 4 above) at paras 40–48.

[37] As J van der Walt 'Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-Operative Relation between Common-Law and Constitutional Jurisprudence' (2001) 17 *South African Journal on Human Rights* 341, 353, has noted in relation to socio-economic rights more broadly: 'It would be the irony of ironies if socio-economic rights were by definition not to apply to horizontal relations between private legal subjects in South Africa, given that the power relations between private individuals that have the potential to result in the violation of fundamental rights most often turn on socio-economic issues.'

> a constitutional function. So too would a private clinic that renders treatment to a patient, since the provision of health care services is also a state obligation.[38]

This proposition, said the majority of the Supreme Court of Appeal, 'simply cannot withstand the most basic scrutiny'.[39] In contrast, the Constitutional Court embraced the implications of private entities involved in the provision of a constitutionally guaranteed right attracting obligations under the Bill of Rights. Indeed, Theron J cautioned that the 'aversion to constitutional obligations' demonstrated by Pridwin and ISASA 'is out of step with section 8(2) of the Constitution and its transformative purpose to improve the lives of all citizens and undoing the status quo of entrenched inequality and disadvantage in our society.'[40]

Referring to the effect of section 8(2) as a 'transformation of private relations',[41] both the majority and minority of the Court impressed upon private entities such as Pridwin that they are not immune from constitutional obligations, and the Court was ultimately unanimous that private entities in the position of Pridwin are at least under an obligation not to interfere with or diminish the right which forms the subject of their services without appropriate justification. It is notable that the Court framed this obligation as a purely 'negative' one when, in fact, the substance of the Court's finding is that Pridwin bears an obligation, once it has enrolled a child, to ensure that the child's education is not diminished.[42]

The recognition that a private school has, at the very least, an obligation not to impede the education of a child at that school without appropriate justification is not novel. In *KwaZulu-Natal Joint Liaison Committee*,[43] the Constitutional Court recognised that the right to basic education extends to all learners, including learners at independent schools.[44] In that case the reduction of state subsidies to independent schools was held to involve 'the negative rights of those learners – the right not to have their right to a basic education impaired'.[45] In *Juma Musjid*,[46] the Constitutional Court recognised that a private trust that was not even involved in providing basic education had an obligation not to diminish the right to education of children attending school on the trust's property. In *Pridwin HC* the court sought to narrow the import of *KwaZulu-Natal Joint Liaison Committee* by contending that section 29(1)(a) applies to learners in state-subsidised independent schools.[47] The Supreme Court of Appeal sought to side-step *Juma Musjid* as distinguishable on the basis that the children were attending a *public* school, and the obligations attendant on the Trust in *Juma Musjid* were therefore not

[38] *Pridwin SCA* (note 4 above) at para 40.

[39] Ibid.

[40] *Pridwin CC* (note 1 above) at para 120.

[41] Ibid at para 131.

[42] M Finn 'Befriending the Bogeyman: Direct Horizontal Application in *AB v Pridwin*' (2020) 137 *South African Law Journal* 591, 602–604 argues that the differentiation between negative and positive obligations in *Pridwin* is unhelpful and suggests that '[t]he sharp, and seemingly normatively significant, distinction between negative and positive duties should be abandoned.' See also Lowenthal (note 18 above) at 269.

[43] *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal & Others* [2013] ZACC 10, 2013 (6) BCLR 615 (CC), 2013 (4) SA 262 (CC).

[44] Ibid at paras 38, 45.

[45] Ibid at para 45.

[46] *Governing Body of the Juma Musjid Primary School & Others v Essay NO & Others* [2011] ZACC 13, 2011 JDR 0343 (CC)('*Juma Musjid*')

[47] *Pridwin HC* (note 4 above) at paras 31–32.

at all relevant to Pridwin – since Pridwin had not interfered with the children's attendance at a *public* school.[48]

In our view the Court was correct in rejecting these approaches. Taking into consideration the scope of the duties imposed on private schools by the right to basic education in terms of section 8(2), the Court unanimously rejected the view that the right refers only to *state*-provided, *state*-subsidised, or *state*-contracted education. The Court diagnosed that this conclusion was based on the 'misconceived' premise that a person only provides a basic education where they have a positive constitutional duty to do so,[49] thereby conflating the 'content of basic education with the duty to provide it'.[50] As Nicholls AJ pointed out, this approach failed to recognise that the right to basic education contains both positive and negative obligations, which do not necessarily apply in the same way to all providers.[51] Aptly highlighting the flawed foundations to the reasoning of the courts below, Theron J stated that: 'Pridwin does not have to step into the shoes of the state in order to provide a basic education. And the state does not cease to provide basic education due to the operation of independent schools like Pridwin.'[52]

The lower courts' conflation of the *identity* of the provider of a basic right and the *content* of that right is also reflected in the hinging of whether a basic education is provided (or received) on a 'contractual nexus' with the state. Here, the respondents and courts below relied on the Constitutional Court's judgment in *AllPay*,[53] as authority for the proposition that private actors can only be considered as providers of a constitutional right when there is a contractual relationship with the state. We agree with Theron J that this reliance was 'misplaced'.[54] In *AllPay*, the Court held that a company, Cash Paymaster Services, had specifically undertaken constitutional obligations by virtue of its contract with the South African Social Security Agency. Having done so, it could not 'simply walk away' when that contract was declared invalid.[55] At no point does the *AllPay* judgment suggest that the only means by which a private entity may incur constitutional obligations is where there is a contractual relationship with the state. Instead, the case merely demonstrates that one of the ways in which private entities can assume constitutional obligations is through such a contract.[56] Similarly, the suggestion that constitutional obligations are assumed only when there is a state subsidy cannot be sustained. As Nicholls AJ highlighted, this reasoning would lead to the untenable conclusion that once the state stops payment of a subsidy, a child is no longer receiving a basic education.[57]

Pridwin and ISASA also sought to rely on section 29(3) of the Constitution to ground the argument that privately-provided education does not fall within the scope of section 29(1)(a). Section 29(3) expressly provides for the right of any person to establish and maintain

[48] *Pridwin SCA* (note 4 above) at paras 41–44.

[49] *Pridwin CC* (note 1 above) at para 177.

[50] Ibid at para 178.

[51] Ibid at para 86.

[52] Ibid at para 178.

[53] *Allpay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer of the South African Social Security Agency & Others* (No 2) [2014] ZACC 12, 2014 (4) SA 179 (CC)('*AllPay*').

[54] *Pridwin CC* (note 1 above) at para 177.

[55] *Allpay* (note 53 above) at para 66.

[56] It is worth noting that in *AllPay*, the Constitutional Court considered Cash Paymaster Services to be an organ of state under s 239 of the Constitution and was not concerned with the application of s 8. For a thorough analysis of this aspect of the *AllPay* judgment, see M Finn (2015) 31 'Organs of State: An Anatomy' *South African Journal on Human Rights* 631.

[57] *Pridwin CC* (note 1 above) at para 83.

independent educational institutions.[58] Pridwin argued that this must mean that privately-provided education is distinct from that provided by the state (under section 29(1)(a)). But this does not accord with the structure of section 29. As Theron J stressed, it is clear that the rights set out in sections 29(1) and 29(3) are not 'mutually exclusive' or 'bifurcated standards' but are rather 'cooperative', 'intertwined' and 'mutually reinforcing' provisions.[59] Section 29(1)(a) 'speaks to the right of children to be educated' and section 29(3) 'speaks to the freedom given to independent schools to provide education'.[60] The education which an independent school is entitled to provide is therefore either a basic or further education, as referred to under sub-sections 29(1)(a) and (b) respectively.[61] In addition, the standard of education provided by an independent school cannot be inferior to public schools (as required by section 29(3)(c)). The guidance provided to private schools by the Court here is important, as it is evident that some private schools have been under the impression that the right to establish an independent school under section 29(3) releases them from obligations under section 29(1).[62]

But if basic education includes privately-provided education, does this mean that the luxuries of a Pridwin education may be claimed as a guaranteed right? Indeed, one of the arguments advanced by Pridwin and ISASA was that schools such as Pridwin do not provide a mere *basic* education, but rather provide a *superior* education and should therefore fall beyond the net of any obligations under section 29(1)(a). Hartford AJ in the High Court was clearly persuaded by this concern when he reasoned that because '[a] Pridwin standard of education is not what is guaranteed in section 29(1)(a) of the Constitution', this must support the conclusion that private schools do not provide a basic education.[63]

In contrast, the Court was not persuaded by this concern. The Court held that there is a standard of basic education which the state is required to provide, and which independent schools must also maintain. Where a school provides more than that which is required, this does not mean that the rights and obligations under section 29(1)(a) are suddenly irrelevant. As Theron J put it:

> The quality of the education may, at times, extend beyond what section 29(1)(a) requires from the state. But that does not mean that children stop receiving a basic education the moment they enrol at these independent schools, nor do they lose constitutional protection against unjustified interferences with their education while they remain at these schools.[64]

Nicholls AJ went further and reasoned that the definitional scope of the concept of *basic* education is not determined in contradistinction to a *superior* education, but is rather defined as being distinct from further education (as set out in section 29(1)(b)).[65] Nicholls AJ also

[58] Section 29(3) provides: 'Everyone has the right to establish and maintain, at their own expense, independent educational institutions that (a) do not discriminate on the basis of race; (b) are registered with the state; and (c) maintain standards that are not inferior to standards at comparable public educational institutions.'

[59] *Pridwin CC* (note 1 above) at paras 157, 167.

[60] Ibid at para 157.

[61] Ibid at para 156.

[62] This trend is illustrated by the facts of *John Wesley* (note 13 above).

[63] *Pridwin HC* (note 4 above) at para 46. Hartford AJ (at para 33) went so far as to say that 'on a practical level, article 29(1)(a) does not guarantee a right to equal education for all people and nor does it guarantee a right to attend an independent school of one's choice. If this were the position, chaos would ensue.'

[64] *Pridwin CC* (note 1 above) at para 164.

[65] Ibid at para 79.

suggested that basic education may be coterminous with primary schooling,[66] but this is debatable (indeed doubtful).[67] By contrast, and preferably, Theron J adopted a more expansive and flexible understanding of the concept of basic education. She resisted equating basic education with primary schooling and specifically noted that international instruments have shifted away from the use of the terms 'primary' or 'elementary' education to the broader notion of 'basic education'.[68] The general thrust of Theron J's judgment endorses an understanding of basic education as '[i]n its broadest and most general sense' pertaining to that which is required in order to have 'one's basic learning needs met.'[69]

Notably, in *Moko*[70] (handed down after *Pridwin CC*), the Constitutional Court sought to clarify its approach to the scope of basic education under section 29(1)(a). Writing for a unanimous court, Khampepe J, in *Moko*, suggested that the thrust of Nicholls AJ's minority judgment in *Pridwin CC* was to indicate that 'primary school education *most certainly* falls within the definition of basic education' (emphasis in original).[71] In *Moko* Khampepe J held that a basic education is effectively school education until Grade 12 and that to limit basic education 'to only primary school education or education up until Grade nine or the age of 15' would be an 'an unduly narrow interpretation of the term'.[72]

A full critical assessment of the Court's approach to the right to basic education is beyond the scope of this article.[73] However, the point we have sought to highlight here is that, by directly addressing whether and to what extent private schools are bound by the right to basic education (under section 8(2) of the Constitution), the Constitutional Court provided important content and definitional scope to the right and, as Lowenthal noted, offers a 'welcome clarion call for the centrality and normative priority of the right of children to quality education'.[74] The Court confirmed that private schools can indeed be providers of basic education and that when they undertake to do so they are, at the very least, bound by the obligation not to interfere or diminish that right without appropriate justification. Together with the obligations arising from the paramountcy of children's best interests, the Court established that children cannot be excluded from private schools unless the school has met the requirements of substantive and procedural fairness. At a minimum, this requires private schools to receive representations on the best interests of the children who would be so excluded.

[66] Nicholls AJ is initially tentative on this point stating: '[w]hile it is difficult to establish where the line should be drawn between basic education and further education, it cannot be disputed that basic education includes what is commonly known as primary education.' However, she then goes on to suggest this more definitively when she says that the concept of basic education 'stands in contradistinction not to a superior education, but to a secondary or tertiary education'. *Pridwin* (note 1 above) at paras 78–79.

[67] Indeed, in *Juma Musjid* (note 46 above) at para 38, the Constitutional Court (with reference to relevant national legislation) recognised that basic education at least includes schooling from seven to 15 years of age or the ninth grade.

[68] *Pridwin* (note 1 above) at para 160.

[69] Ibid at para 166.

[70] *Moko v Acting Principal of Malusi Secondary School & Others* [2020] ZACC 30 ('*Moko*').

[71] Ibid at para 29.

[72] Ibid at paras 31–32.

[73] For a comprehensive assessment of the approach of courts to interpreting the right to basic education in South Africa, see F Veriava *Realising the Right to Basic Education in South Africa: The Role of the Courts and Civil Society* (2019).

[74] Lowenthal (note 18 above) at 265.

This is of significant practical importance. As noted earlier, the number of private schools in South Africa is growing and these new schools are increasingly more likely to provide education to learners from low-income households. As we argue below, the finding that private schools are bound by constitutional obligations arising from the right to basic education and the paramountcy of the best interests of the child ought to influence the contractual terms those schools are permitted to agree and enforce. Because of this, if private schools, absent agreements with or subsidies from the state, bear no constitutional obligations in respect of the children they enroll, the results would be perverse: a wholly independent private school catering to a poor community would have greater liberty to punish, exclude and expel learners, while its state-subsidised counterpart would be constrained. Learners at low-fee private schools in particular (whether state subsidised or not), who are more likely to struggle to quickly find a new school to attend, be provided with catch up plans, and be counseled through any trauma they might have experienced.

In summary then, we welcome the Court's assessment of rights under section 8(2) and its finding that private schools are bound by the right to basic education and the paramountcy of the best interests of the child. However, our enthusiasm for the Court's approach to the 'direct', horizontal application of rights is ultimately curbed. As we discuss below, by avoiding the contractual relationship between the parties, the *Pridwin CC* majority missed an opportunity to address the troubled legacy of *Barkhuizen* and to ensure that the transformative thrust of section 8 is used to develop the common law of contract in line with the Constitution.

IV THE COURT MISSES AN OPPORTUNITY: CONSTITUTIONAL CHALLENGES TO CONTRACTUAL DISPUTES AND THE DIRECT APPLICATION OF THE BILL OF RIGHTS

The availability of section 8(2) to parties challenging a provision of a contract has been the source of much controversy in South African law, particularly following the judgment of the Constitutional Court in *Barkhuizen*. It was this issue – whether the impugned school termination clause could be tested through direct application of rights under section 8(2) – that split the *Pridwin* Court.

The parents had cast their claim as a challenge, in the first instance, to the validity of the principal's decision to exercise the termination clause (thereby excluding the two children from Pridwin). This claim was premised on the assumption that the termination clause was capable of a constitutionally compliant construction (that is, one which required any decision to terminate the contract to be taken after having afforded a fair hearing and on a reasonable basis). To the extent that the termination clause was not considered capable of such a construction, the parents relied on their second claim: that the clause fell to be declared contrary to public policy, invalid and unconstitutional (for derogating from the rights contained in sub-sections 29(1)(a) and 28(2) of the Constitution).[75]

In light of the two boys having already left Pridwin by the time of the Constitutional Court hearing, Nicholls AJ, for the minority, would have held that the constitutionality of the principal's decision to terminate the contract in the circumstances of this specific case was moot. The question requiring resolution, and which would go 'far beyond the confines of

[75] Heads of Argument for the applicants in *Pridwin HC* (note 14 above)(16 March 2017) at paras 91–93, available at https://eelawcentre.org.za/wp-content/uploads/parents_hoa.pdf.

this case' with 'practical and far-reaching effects', said Nicholls AJ, was the constitutionality and enforceability of the termination clause. She would therefore only have granted leave to appeal in relation to that issue.[76] Having squarely focused her attention on the validity of the termination clause, Nicholls AJ approached this question through an enquiry under section 8(2) of the Constitution, ultimately concluding that the termination clause should be declared 'unconstitutional, contrary to public policy and unenforceable to the extent that it purports to allow Pridwin to cancel the Parent Contracts without following a fair procedure.'[77]

Theron J, writing for the majority, did not agree with this route. Addressing the divergence between the two judgments head on, Theron J disagreed with Nicholls AJ's willingness to apply section 8(2) in her consideration of the challenge to the contractual provision itself.[78] In Theron J's view, this approach was rejected in *Barkhuizen* and could not be countenanced. Instead, Theron J applied section 8(2) to the *decision* made by Pridwin to exclude the learners, a decision which she suggested could be de-linked from the contract entirely.[79]

As we argue below, the approach of the majority reflects and reinforces the unfortunate insulation of contract law from the full scope and benefit of constitutional development. We proceed by setting out the role and scope of section 8 of the Constitution and the uneasy legacy of *Barkhuizen*, before turning to an analysis of the opportunity presented by and missed in *Pridwin*.

A Section 8 of the Constitution and contracts: the trouble with *Barkhuizen*

The constitutional project imposes duties not only on the state, but on private individuals, corporations and other entities. The manifest constitutional aspiration of transforming society is one that is scarcely capable of being realised unless individuals are committed to the reconstruction of the ethical and material foundations of the country.[80] As the *Pridwin CC* court held, this transformative impulse is given expression in section 8 of the Constitution.

Section 8(1) is the starting point for the applicability and binding status of the Bill of Rights in relation to the state (so-called 'vertical' application). It says:

> The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary, and all organs of state.

Section 8(2) relates to the applicability and binding status of the Bill of rights in relation to private persons (so-called 'horizontal' application). It says:

> 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 the duty imposed by the right.

[76] *Pridwin CC* (note 1 above) at paras 49–59.

[77] Ibid at para 96.

[78] An undercurrent of frustration surfaces in Theron J's judgment, most noticeably when describing the efforts of Cameron and Froneman JJ to bridge the apparent chasm between the majority and minority. In response to their 'valiant attempt', Theron J simply states: 'I make no comment. The second judgment will speak for itself in this regard'. *Pridwin CC* (note 1 above) at para 104.

[79] *Pridwin CC* (note 1 above) at paras 102–107.

[80] K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 153; N Friedman 'The South African Common Law and the Constitution: Revisiting Horizontality' (2014) 30(1) *South African Law Journal* 63, 67.

While the Bill of Rights applies to private persons, the distinction between sections 8(1) and 8(2) makes clear that obligations do not bind them in the same way they do to the state. A provision in the Bill of Rights applies to private persons *if* it is applicable, and then *to the extent* that it is applicable. Both those questions – the applicability and the scope – are to be determined by assessing whether the right in question is capable of an interpretation which can ground a cause of action against a private party,[81] and with reference first to the nature of the right and the duty imposed by the right.

If a provision in the Bill of Rights binds a private person, we are directed to section 8(3). Section 8(3)(a) says that in order to give effect to a right, and in the absence of legislation that does so, a court must apply, or if necessary, develop the common law. Section 8(3)(b) permits courts to develop common law rules which limit the right, provided that the limitation is justifiable in terms of section 36(1).[82]

The process required under section 8(2) was well articulated in *Khumalo*.[83] There the Constitutional Court was tasked with assessing the applicability of the right of freedom of expression to private parties. The defendant in a defamation suit, a newspaper, argued that the plaintiff should have been required to allege that the defamatory publication was false, a requirement that was not captured in South African common law at the time. The newspaper submitted that the private law of defamation should be adapted so as to respect the right of media defendants to freedom of expression under section 16 of the Constitution.

With only private parties before her, O'Regan J, writing for the Court's majority, was tasked firstly with assessing whether there was some duty encapsulated in section 16 which applies to a person who is subject to defamatory publication – in other words, was the *if* requirement in section 8(2) satisfied. She noted that the 'print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas'. Turning to the parties before her, in the context of the right, O'Regan J contended that the media 'are key agents in ensuring that these aspects of the right to freedom of information are respected'. They bear both constitutional rights and constitutional obligations under section 16.[84] In light of the intensity of the right in question and the potential invasion of the right that could be occasioned by persons other than the state, O'Regan J concluded that freedom of expression found 'direct horizontal application' in the case before her.[85]

Having made that determination, the overall scheme of section 8 required that O'Regan J examine the common law of defamation and ask whether it unjustifiably limited the right to freedom of expression. If it did, the Court would be compelled to develop it. Ultimately, the Court held that the rule developed in *Bogoshi*,[86] recognising the availability of a reasonable publication defense where a publisher is accused of defamation, places the common law in a position which satisfies the section 36 limitations analysis.

[81] A Price 'The Influence of Human Rights on Private Common Law' (2012) 129 *South African Law Journal* 330, 335.

[82] For an analysis of the process required under s 8(3) see H Cheadle and D Davis 'The Application of the 1996 Constitution in the Private Sphere' (1997) 13(1) *South African Journal on Human Rights* 44, 61–65.

[83] *Khumalo & Others v Holomisa* [2002] ZACC 12, 2002 (5) SA 401 (CC)('*Khumalo*').

[84] Ibid at para 22.

[85] Ibid at para 33.

[86] *National Media Ltd & Others v Bogoshi* [1998] ZASCA 94, 1998(4) SA 1196 (SCA)('*Bogoshi*').

In stark contrast to the approach in *Khumalo*, the majority of the Court in the seminal (and fiercely criticised) decision of *Barkhuizen* were disinclined to examine the constitutionality of a contractual provision with reference to section 8(2). *Barkhuizen's* approach – of eschewing the applicability of section 8 and relying exclusively on section 39(2) as the 'portal'[87] through which to assess contractual disputes – is associated with 'indirect' as opposed to 'direct' application of the Bill of Rights. But there has also been considerable debate, indeed confusion, around the use and meanings of the terms 'direct' and 'indirect' horizontal application in South African jurisprudence and scholarship.[88] We do not rehash the nuances of those debates here; nor do we attempt to offer a definitive proposal on how the terms should be utilised.[89] Suffice it to state that for our (limited) purposes, we employ 'direct' application to refer to the resolution of a dispute by the application of constitutional rights via section 8 of the Constitution. Indirect application is used to refer to the application of constitutional values to the common law underlying the dispute via section 39(2) of the Constitution. As we will explain, we do not view these two approaches as necessarily mutually exclusive (which was the unfortunate view suggested in *Barkhuizen* and perpetuated in *Pridwin CC*).

While providing an important infusion of constitutional values into the assessment of public policy under the common law of contract, the majority judgment of Ngcobo J gave insufficient and unconvincing reasons for rejecting the applicability of section 8(2) and the approach adopted in *Khumalo*.[90] The core of Ngcobo J's discomfort on this score was centred on the concern that a specific contractual provision is not a law of general application, and therefore cannot ever meet the threshold requirement for any justifiable limitation of rights under section 36 of the Constitution.[91] But, as critics have noted, the Court failed to recognise that it is the underlying common law rules of contract (which are undoubtedly of general application) that are ultimately under scrutiny in any constitutional challenge to contractual provisions.[92] It follows that the common law rule of *pacta sunt servanda* subject to public policy can always be developed to say that in particular circumstances certain types of clauses must be

[87] D Bhana 'The Horizontal Application of the Bill of Rights: A Reconciliation of ss 8 and 39 of the Constitution' (2013) 29 *South African Journal on Human Rights* 351, 355.

[88] Bhana ibid at 354 notes that 'confusion abounds' in debates about direct and indirect horizontality; Friedman (note 80 above) at 88 argues that current debates on horizontal application 'damagingly conflates several discrete issues, and continues to sow confusion about how horizontality is supposed to work'; M Dafel 'The Directly Enforceable Constitution: Political Parties and the Horizontal Application of the Bill of Rights' (2015) 31 *South African Law Journal* 56, 57 refers to the 'labyrinth that has come to surround horizontality in South Africa'.

[89] For various proposals on this issue see, for example, C J Roederer 'Post-Matrix Legal Reasoning: Horizontality and the Rule of Values in South African law' (2003) 19 *South African Journal on Human Rights* 57, 70–71; Bhana (note 87 above); Friedman (note 80 above); F Du Bois 'Contractual Obligation and the Journey from Natural Law to Constitutional Law' (2015) 1 *Acta Juridica* 281; and most recently L Boonzaier 'Contractual fairness at the Crossroads' (2021) 11 *Constitutional Court Review* 229.

[90] S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762; Friedman (note 80 above).

[91] *Barkhuizen* (note 2 above) at paras 23–26.

[92] For example, see S Woolman and H Botha 'Limitations' in Woolman et al (ed) *Constitutional Law of South Africa* (2006) para 34.7(dd), where the authors assert that a rule constitutes a law of general application for the purposes of s 36(1) of the Constitution when it encapsulates 'parity of treatment, non-arbitrariness, precision and accessibility'. See also Woolman (note 90 above) at 774–775 and, more recently, I M Rautenbach 'Constitution and Contract: Indirect and Direct Application of the Bill of Rights on the Same Day and the Meaning of "in terms of law"' (2021) 1 *Tydskrif vir die Suid-Afrikaanse Reg* 379, 393–394.

taken as not offending public policy. In such circumstances, it would not be the contractual clause itself that limits the right, but an application of a legal rule of general application.

Moreover, to the extent that there is an undercurrent in *Barkhuizen* that suggests that section 39(2) operates only to the exclusion of section 8, it cannot be correct, and various commentators have convincingly dispelled this notion.[93] While section 8 situates all 'direct' applications of the Bill of Rights, both vertical and horizontal, section 39(2) articulates the need for all law to accord with the spirit, purport and objects of the Bill of Rights. On its own terms, section 39(2) applies whenever a court, tribunal or forum interprets legislation, or develops the common law or customary law.[94] Section 39(2) gives effect to a wide range of circumstances mandating normative constitutional interpretation, encapsulating the need for the values of the Bill of Rights to permeate all areas of law, including the regulation of private affairs.[95] However, where the process mandated in section 8 leads a court to develop the common law, section 39(2) also becomes operative. In other words, a section 39(2) enquiry is not only capable of being housed under section 8 but is in fact necessitated by it.

The majority in *Barkhuizen* were therefore misguided in suggesting that (a) sections 8 and 39(2) of the Constitution operate in a mutually exclusive manner, and (b) that section 8 is generally not a viable route by which to assess a constitutional challenge to contractual provisions. Indeed, in his separate concurring judgment, then Chief Justice Langa said he was not convinced that certain rights might not apply directly (through section 8) to contractual terms and the common law that underlies them.[96] Our contention is that *Pridwin CC* is precisely the type of case in which they should.

B A missed opportunity to clarify *Barkhuizen's* uneasy legacy – the trouble with *Pridwin CC*

Barkhuizen left in its wake the regrettable sense that contractual disputes must live outside the type of transformative application of fundamental constitutional obligations in private relations that section 8 inspires. However, searching for redemption and adopting a generous reading, it is arguable that *Barkhuizen* stopped short of expressly asserting that contractual provisions may *never* be considered under section 8. While it claimed that it 'ordinarily' ought to be an assessment undertaken by direct resort to the question of public policy,[97] the majority judgment, read with Langa CJ's short separate comment, left open the gap of a possibility that some contracts, which implicate the Bill of Rights directly, can be appropriately tested through an analysis under section 8(2).

In our view, *Pridwin CC* represents one of the most clear-cut cases of a contractual relationship, built on the foundation of constitutionally guaranteed rights, being able to squeeze into that gap. Here, children at school are (as the Constitutional Court in *Pridwin CC* rightly holds) clearly entitled to the right to basic education and are always protected by the section 28 injunction to advance the best interests of children. In addition, the very existence

[93] Friedman (note 80 above); D Bhana (note 87 above).
[94] Friedman (note 80 above) at 74–78.
[95] Friedman (note 80 above); Du Bois (note 89 above).
[96] *Barkhuizen* (note 2 above) at para 186.
[97] Ibid at 28.

of independent schools is encapsulated within the scheme of section 29.[98] As Mocumie JA, the lone dissenting judge in the Supreme Court of Appeal, put it:

> The context in which the contracts in issue were concluded between the parties, is distinctly different – not one of the normal day to day contracts in the commercial world. That is what distinguishes the facts of this case from all others referred to by counsel for the School, particularly the judgments of this Court, a distinction the high court seems to have missed.[99]

Given the 'extraordinary' nature of this type of contract, the *Pridwin CC* case then offered a particularly good opportunity to reassess the scope for direct application of the Bill of Rights to contractual questions. In her minority judgment, Nicholls AJ appeared to grasp that the occasion for loosening the conceptual straitjacket placed over section 8(2) by *Barkhuizen* had arrived. Seizing on Langa CJ's concurring judgment in *Barkhuizen*, Nicholls AJ sought to carve out at least some room for embracing section 8(2) as a viable route when assessing the constitutionality of contractual provisions, especially where the contractual relationship centres particular rights very clearly. Here she asserted:

> *Barkhuizen* clearly viewed the constitutionality of a contractual clause through the prism of public policy. However, where constitutional rights are directly at issue, I do not understand *Barkhuizen* to inhibit determining the enforceability of a contractual clause by direct application of the Bill of Rights to private persons in terms of ss 8(2) and 8(3).[100]

Even though Nicholls AJ did not carry through the s-8 analysis to its proper conclusion (a point we return to below) her recognition that contract law need not be immune to the direct application of constitutional rights is to be embraced. Unfortunately, Nicholls AJ did not prevail over the majority of the Court and, despite the opportunity at hand to soften *Barkhuizen's* uneasy legacy, the majority hardened its edges.

Unlike the minority, Theron J adopted an unimaginatively strict reading of *Barkhuizen* and uncritically held that there had been no room to subject the *contractual relationship* between Pridwin and the parents to a direct, horizontal application of rights under section 8(2). If the constitutionality and enforceability of the contractual provision were to have been assessed, Theron J contended, this had to proceed as a public policy challenge, which could not be housed under section 8. In drawing this distinction, the majority reinforced rather than corrected *Barkhuizen's* misguided view that there is a dividing line between direct horizontal application of the Bill of Rights and constitutional scrutiny of contracts. If the door to direct application in constitutional challenges to contracts was indeed left open by *Barkhuizen* (however slightly), Theron J closed it.

While disappointing, followed to its logical conclusion, one would have expected Theron J's reasoning to have led to an assessment of the enforceability of the school's termination clause through the public policy route. But this is where things become particularly perplexing. Despite her views on *Barkhuizen's* constraints, Theron J was eager to adopt direct application under section 8. Citing academic opinion and extra-curial judicial commentary critiquing the Constitutional Court's seeming preference for an 'indirect' application of rights and resultant failure to give 'identifiable content' to those rights (a critique which, notably, was directed

[98] Constitution s 29(3); see also Cheadle and Davis (note 82 above) at 59.

[99] *Pridwin SCA* (note 4 above) at para 92.

[100] *Pridwin CC* (note 1 above) at para 67.

in large part at *Barkhuizen*),[101] Theron J urged that direct horizontal application should be embraced. As she said: 'This Court should not avoid direct horizontal application where it appears to be the most appropriate means of resolving a constitutional dispute'.[102]

Caught in a dilemma of both wanting to respect *Barkhuizen* and apply section 8(2), Theron J bypassed the contractual relationship and simply subjected Pridwin's *decision* to terminate the contract to an analysis under section 8(2). But this effort to de-link the termination clause from the decision to cancel is unsustainable since, as Theron J acknowledged, the impugned conduct took place in terms of the contract.[103] By artificially ignoring the fact that the decision was an *instance* of the enforcement of a contractual provision, the majority side-stepped any consideration of whether the contractual provision was consistent with a constitutionally-infused understanding of public policy (i.e. the very approach that *Barkhuizen* mandated as being appropriate in constitutional challenges to contractual terms). Instead, she said that this exercise was 'rendered superfluous' with the analysis under section 8(2) being viewed as sufficient to produce the relevant outcome. However, this failed to account for the requirement under section 8(3) that a Court must, in the absence of applicable legislation, engage with the common law underlying the relationship between the parties (in this case, the common law of contract).[104] Ironically then, the majority's effort to uphold *Barkhuizen's* conclusion on the applicability of section 8 of the Constitution to contracts leads to avoidance of an assessment of the contract in terms of *Barkhuizen* altogether – an irony that is especially deepened when considering that on the same day as handing down *Pridwin CC*, Theron J authored the majority judgment in *Beadica*[105] which seemingly emphasised the importance of applying *Barkhuizen* in contractual disputes.[106]

Thus, even though we appreciate the majority's analysis of rights under section 8(2), the approach to direct application by Theron J was misguided and incomplete. At the same time, while Nicholls AJ's approach is preferable, it too is not entirely satisfying. While Nicholls AJ initially seemed on track to aligning the *Barkhuizen* test of constitutionally infused public policy with a fulsome undertaking of the process mandated by section 8,[107] strangely, she too did not follow section 8's schema to its conclusion. After finding that the school was subject to constitutional duties under section 8(2), Nicholls AJ erred by then asserting that those

[101] *Pridwin CC* (note 1 above) at para 130. Theron J referred to 'certain academics' having criticised the Constitutional Court's 'avoidance of direct application of the rights in the Bill of Rights' and proceeded to cite Woolman's 'The Amazing, Vanishing Bill of Rights' (note 90 above) in the corresponding footnote. However, Woolman's critique in the cited article is, in part, aimed at *Barkhuizen's* failure to apply section 8(2) in constitutional challenges to contracts. It is also noteworthy that Theron J cited Moseneke DCJ's extra-curial writing on direct application (*Pridwin CC* note 1 above at paras 127–129) but failed to recognise that Moseneke DCJ was specifically addressing the implications of direct application on the law of contract. See D Moseneke 'Transformative Constitutionalism: Its Implications for the Law of Contract' (2009) 20 *Stellenbosch Law Review* 3.

[102] *Pridwin CC* (note 1 above) at para 130.

[103] Ibid at para 98.

[104] Ibid at para 107 where Theron J stated: 'On this approach, and in light of the outcome reached by applying s 8(2), a decision in respect of the public policy challenge is rendered superfluous.'

[105] *Beadica 231 CC & Others v Trustees for the time being of the Oregon Trust & Others* [2020] ZACC 13, 2020 (5) SA 247 (CC).

[106] For a broader discussion on the Constitutional Court's judgment in *Beadica*, see Boonzaier (note 89 above).

[107] Nicholls AJ recognised that '[a]ll contractual agreements between private parties are governed by the principle of *pacta sunt servanda*, unless they offend public policy', and that the impugned provision in the parent contract 'must stand up to scrutiny, based on the test set out in Barkhuizen.' *Pridwin CC* (note 1 above) at para 61.

constitutional duties, quite aside from any assessment of the common law of contract under section 8(3), curtailed the contractual autonomy of the parties; and so, she said:

> In these instances, the enforcement of the contract must be subject to the constitutional precepts outlined above because of the direct applicability of rights in the Bill of Rights. *Even if the more general public policy approach is preferred*, the result will effectively be the same: it is against public policy to enforce a contractual claim that infringes the constitutional rights of children who are not parties to the contract. (Our emphasis)[108]

While not a model of clarity, we read Nicholls AJ to be indicating that the direct application of rights to the contractual provision is an alternative to and mutually exclusive from the public policy route. In this way, she appeared to revert to a suggestion that the direct application of rights under section 8(2) can be undertaken without any reference to an assessment of public policy; but this is exactly what section 8(3) requires.[109] This is also a confusing statement in light of Nicholls AJ's proposed order asserting that the parent contract was 'contrary to public policy'.[110] The separate judgment of Cameron and Froneman JJ speaks to the failure of both the minority and majority judgments to engage with section 8(3). Described by Theron J as making a 'valiant' effort to 'find common ground' between the diverging judgments,[111] Cameron and Froneman JJ emphasised that both judgments were correct in finding that Pridwin bore obligations in terms of sections 28 and 29 of the Constitution, but also point out that such a finding should have driven both judges to an assessment of the common law under section 8(3) of the Constitution.[112]

The confusion arising in *Pridwin* underscores the wisdom of the scheme of section 8 and the clarity it can offer in contractual disputes implicating fundamental rights. The structure of section 8 – when properly followed – would have compelled the Court to have undertaken a full assessment of the contractual law underpinning the dispute between Pridwin and the parents. After having correctly determined that the constitutional rights in question are capable of, and in fact necessitate, an interpretation which yields constitutional duties on the independent school (an analysis we have commended), the Court should have expressly engaged the process set out in section 8(3). In the absence of relevant legislation, the Court should then have considered whether there is applicable common law that gives effect to or limits the rights of the learners. The common law in question would be *pacta sunt servanda*, subject to a constitutionally infused notion of public policy. The correct approach would have then entailed an assessment of whether public policy could permit a private school to insert an

[108] *Pridwin CC* (note 1 above) at para 91.

[109] It should be noted that neither the applicants nor *amici* pleaded for the public policy inquiry to be housed under s 8(3), which may have contributed to Nicholls AJ's diversion. As Moseneke DCJ has written: '[a] judgment is an outcome of an intricate evaluation of the total legal materials presented by the parties. In our system, judges do not make cases for litigants; they have to make do with what is before them ... As is required in relation to any cause of action, a party seeking to rely on the horizontal application of a fundamental right or on the development of the common law has to plead its cause unequivocally', Moseneke (note 101 above) at 11.

[110] *Pridwin CC* (note 1 above) at para 96.

[111] *Pridwin CC* (note 1 above) at para 104.

[112] We note that Cameron and Froneman JJ also created some uncertainty when they indicated that despite the differences between the minority and majority judgments, they 'consider that the same result would have been reached, indirectly, by applying public policy considerations where clause 9.3 was sought to be enforced, and thus agree with the order the first judgment makes', *Pridwin CC* (note 1 above) at para 219. Whilst this also muddies the waters, what is clear is that both judges recognised the need to engage with s 8(3) once the direct application of rights under s 8(2) is undertaken.

open-ended contractual provision allowing it to summarily terminate its contract and thereby infringe the rights of the children (which, as the court established under section 8(2), bind the private school).

1. *Why the missed opportunity matters*

In our view, Nicholls AJ's judgment together with the refinement offered by Cameron and Froneman JJ could have paved the way toward a sound application of section 8 to constitutional challenges to contracts on a case-by-case basis. However, given our approval of the outcome of the case as set out earlier, one may ask why we consider this missed opportunity to have any real significance. In our view, following section 8's approach with its culmination in an assessment and, if necessary, development of the common law, is consequential for at least four interrelated reasons.

First, it represents a fidelity to the overall scheme of the Constitution and the imperative to transform the common law. By pointing us in the direction of common law where it exists, the scheme of section 8 affords due respect to the existence and value of the common law.[113] Simultaneously, and significantly, section 8 recognises the need to transform the common law with reference to fundamental rights. Theron J's approach, which attempts to usurp the question of the contract's validity as a matter of existing common law, is incorrect. If the contractual relationship between parties can be bypassed altogether, this raises a question over whether the existence of a contract and the principle of *pacta sunt servanda* have any relevance at all. Moreover, if the common law underpinning the contractual relationship is avoided, the transformative force of section 8 is undermined. As Davis and Cheadle have argued:

> The potential for horizontal application calls into question the private/public divide which previously lay at the centre of the legal system. But it does so not by creating a direct, separate constitutional cause of action, but rather by ensuring that the newly created constitutional action must be mediated through our common law. In this fashion, the legal apartheid between an egalitarian constitution and a laissez faire common law is destroyed.[114]

The common law ought to be engaged with, interpreted, developed, or rejected in accordance with the spirit, purport and objects of the Bill of Rights. By artificially avoiding the contractual relationship between the parties, the majority's method of direct application reinforces rather than destroys the 'legal apartheid' between contract law and the Constitution.[115] In this way, *Pridwin CC* lends to the ongoing failure by courts to fully embrace the constitutionalisation of contract law.

Second, section 8 offers a coherent path to constitutionally limiting rights between private persons. We have already discussed how *Barkhuizen* erred in reasoning that section 8 precludes an effective section 36 limitations analysis in contractual disputes. In fact, the scheme of

[113] The Constitutional Court in *Carmichele v Minister of Safety & Security* [2001] ZACC 22, 2001 (4) SA 938 (CC) at para 55, stated that a full appreciation of the manner in which fundamental constitutional values must, in terms of s 39(2), influence the common law, requires 'not only a proper appreciation of the Constitution and its objective, normative value system, but also a proper understanding of the common law… Not only must the common law be developed in a way which meets the s 39(2) objectives, but it must be done in a way most appropriate for the development of the common law within its own paradigm'.

[114] Cheadle and Davis (note 82 above) at 66.

[115] Finn (note 42 above) at 599 also argues that the *Pridwin* majority's approach 'perpetuates the idea that there are parallel systems of law, with the law of contract governed by the common law, and direct application governed by the Constitution.'

section 8 – by requiring an assessment of the underlying common law (the law of general application) in a dispute– explicitly anticipates and accommodates the need for a potential limitation of rights in line with section 36 of the Constitution.[116] By contrast, the majority's approach of applying section 8(2) to the *outcome* of contractual enforcement (without reference to legislation or common law) results in the very issue which *Barkhuizen* sought to avoid. Admitting that on her approach a limitation analysis 'is not possible due to the "law of general application" threshold,' Theron J purported to import the 'standard of appropriate justification' in *Hoërskool Ermelo*[117] as being 'equally applicable.'[118] But this stretches the reference to 'appropriate justification' in *Hoërskool Ermelo* beyond all contexts. In that case, the Court was explaining that once a person enjoys the benefit of a right then the duty-bearer (the State in that case) has an obligation not to interfere with the right without 'appropriate justification'.[119] It is difficult to read Moseneke DCJ's description of the scope of the right as a replacement of a limitations analysis under section 36. Nor would this be a sound approach; if a right is limited, then a limitations analysis must follow to consider whether the limitation is justifiable.[120] It should be noted that Nicholls AJ's judgment is equally perplexing on this score, leading Cameron and Froneman JJ to note that 'in fidelity to section 8(3)(b)' they consider that the appropriate route to any limitations analysis should be via section 36(1).[121]

The two points above have particular relevance in response to the *Pridwin CC* majority's approach to the direct application of rights under section 8(2) – which does not engage the common law nor a limitations analysis under section 36. However, one may well ask whether the route set out in *Barkhuizen* (i.e. considering public policy and section 39(2) without resort to section 8), nevertheless offers an adequate accommodation of these challenges? After all, *Barkhuizen* does still insist on the constitutionalisation of contract law, and the Court's reasoning avoided (albeit dubiously) an encounter with a section 36 limitations analysis. Does anything really turn then on whether the constitutionalisation of contract law takes place

[116] Section 8(3)(b).

[117] *Head of Department: Mpumalanga Department of Education & Another v Hoërskool Ermelo & Another* [2009] ZACC 32, 2010 (2) SA 415 (CC)('*Hoërskool Ermelo*').

[118] *Pridwin CC* (note 1 above) at para 197.

[119] *Hoërskool Ermelo* (note 117 above) at para 52. Even on its own terms, the *Pridwin CC* majority's 'appropriate justification' analysis lacks clarity. See, for example, Lowenthal (note 18 above) at 271–272 assesses of some of the shortcomings of the *Pridwin CC* majority's justification analysis.

[120] Rautenbach (note 92 above) at 390 goes so far as to suggest that, by adopting an 'appropriate justification' analysis (rather than engagement with s 36), the *Pridwin CC* majority was effectively engaged in an *indirect* application of rights. The avoidance of s 36, he argues, 'turned the [*Pridwin majority*] route into a detour for indirect application'. While framing the *Pridwin CC* majority's approach as indirect application may compound confusion around the use of direct/indirect application terminology, we agree that a full and proper engagement with s 8's schema would lead to an engagement with s 36 where rights are limited.

[121] *Pridwin CC* (note 1 above) at para 217. Significantly too, in an effort to find common ground between the majority and minority judgments, Cameron and Froneman JJ interpret Theron J as – in effect – developing the common law by recognising that independent schools cannot diminish or interfere with a child's right to basic education. According to the judges, this 'newly-established common law right' is then limited by the recognition that diminishment may occur where there is in-process and in-substance fairness. This limitation, suggests the judges, meets the s 36(1) threshold as mandated by s 8(3). Finn (note 42 above) at 606–607 has offered a compelling critique of Cameron and Froneman JJ's analysis, which she suggests 'raises as many questions as it purports to answer.' See also Lowenthal (note 18 above) at 270–271 who suggests that Cameron and Froneman JJ's approach does not resolve the uncertainty created by the *Pridwin CC* majority over the application of s 8(3).

'directly' (through the method set out in section 8) or 'indirectly' (through the method set out in *Barkhuizen*)?[122]

We think so. This leads us to the third reason why we consider the approach of the *Pridwin CC* majority (in reinforcing *Barkhuizen's* direct and indirect application binary in respect of contracts) to be a missed opportunity. As some scholars have argued, an engagement with constitutional rights through section 8(2) leads to a substantive interpretation of those rights, as opposed to sole reliance on the general 'spirit, purport and objects' of the Bill of Rights.[123] As Rautenbach notes, even if one assumes that the same outcomes may ultimately be reached via the direct and indirect application routes, '[t]he possibility that different methods could lead to different results can never be excluded, *because the focus on particular aspects of the investigation may differ*' (our emphasis).[124] In *Pridwin CC*, the Court's analysis of the rights to basic education and best interests of the child provides important clarity on the scope and content of those rights and, in turn, corresponding obligations on private schools. Indeed, as we have noted earlier, Theron J explicitly pursued direct application under section 8(2) in the hope of comforting critics who have charged the Court with eschewing the development of the substantive content of rights in favour of an 'over-reliance' on section 39(2).[125] The source of these commentators' angst has, in part, been rooted in *Barkhuizen*'s reticence to develop the contours of the relevant rights and corresponding obligations that exist between *contracting* parties. As we have discussed, we see no reason why the substantive assessment of rights which section 8(2) requires cannot be applied to the law of contract underpinning disputes. In doing so, courts can clearly establish the rights and duties of contracting parties.[126]

Delineating the nature and scope of rights in contractual disputes may also, we suggest, have important implications for the outcome of a case (and this is our final reason for lamenting *Pridwin CC* as a missed opportunity). Even though Langa CJ (in his concurring judgment in *Barkhuizen*) suggested that 'the distinction between direct and indirect application will seldom be outcome determinative',[127] the specific rights and obligations between parties give particular

[122] Friedman (note 80 above) at 64 notes that the academic debate over direct and indirect application 'lost steam' in part because 'it was unclear what was at stake between the direct and indirect models' with some declaring the distinction inconsequential. Roederer (note 89 above) at 79, for example, found it 'very difficult to see what the fuss about s 8 versus s 39 can possibly be about'. However, several commentators have challenged the view that the distinction between s 8 and s 39 is entirely redundant, including, for example, A Fagan 'The Secondary Role of the Spirit, Purport and Objects of the Bill of Rights in the Common Law's Development' (2010) 127 *South African Law Journal* 611; Friedman (note 80 above); and Rautenbach (note 92 above).

[123] Woolman (note 92 above) at 763, for example, has critiqued: 'By continually relying on s 39(2) of the Constitution to decide challenges both to rules of common law and to provisions of statutes, the court obviates the need to give the specific substantive rights in Chapter 2 the content necessary to determine the actual validity of the rule being challenged in the instant matter and of similar rules challenged in subsequent matters.'

[124] Comparing the Court's approach in *Pridwin* and *Beadica*, Rautenbach (note 92 above) at 395 argues that the indirect application route in the latter case resulted in less attention being paid to 'the impact of enforcing the contractual clause'. For this reason, and despite its deficiencies, Rautenbach indicates that the approach of the *Pridwin* Court on this score should be 'commended'.

[125] Note 101 above.

[126] In fact, the usefulness of a rights-based analysis is demonstrated by *Barkhuizen* itself, as the Court arguably did engage in an analysis of s 34 (right of access to courts). Woolman (note 92 above) at 777 makes the point that *Barkhuizen* 'says one thing and then does another' and that, despite its claim to indirect application, 'the language of *Barkhuizen* suggests that the court is, in fact, undertaking something akin to direct application of the Bill of Rights.'

[127] *Barkhuizen* (note 2 above) at para 186.

force to the need for and precise contours of public policy development. The question of what public policy requires in a particular contract may indeed be heavily influenced by a finding that one contracting party bears a relevant constitutional duty in terms of the Bill of Rights[128] As Bhana puts it, while sections 8(1) and 39(2) clearly subject all law, including the common law of contract, to the Bill of Rights, section 8(2) requires a judge to consider the extent of the application of the Bill of Rights to a particular matter and the contract law that ought to govern it.[129] Section 8(2) is thus 'a crucial precursor to the development that a judge may deem necessary in terms of section 8(3) of the Constitution'[130] and 'where the common law of contract appears to fall short, the relevant contract or contractual clause must similarly be assessed in terms of section 39(2) and/or section 8(2) of the Constitution, with a view to developing an appropriately constitutionalised body of contract law.'[131]

Section 8(2) focuses an enquiry on the particular context of the dispute before it, whether the nature of the right at issue and the nature of the duty imposed by it render it applicable, and then to what extent. The nature of the private parties before the court is also relevant. As Cockrell has expressed it, section 8(2):

> [P]roceeds on the assumption that constitutional rights might be agent-relative and context-sensitive, inasmuch as their direct application against private agencies will depend on the circumstances of the case and the characteristics of the particular person.[132]

This contextual approach to the applicability of section 8(2) finds favour in several decisions of the Constitutional Court. In *Khumalo*, O'Regan J suggested that the unique relationship between the media and the right to freedom of expression means that private persons are obligated to respect that right, and that the law of defamation must function with this constitutional requirement in mind. In *Daniels*,[133] the Court contended that the duty imposed by the right to security of tenure by its nature rests (in both the positive and negative sense) on private landowners, as a result of the nature of the relevant constitutional provision and its relationship to landowners.[134] So context informs the applicability of constitutional provisions to private persons, and the content of the obligations imposed by them. Grounding the assessment of public policy development in the specificity of rights obligations under section 8, with its agent-relative focus, also mitigates the floodgates concerns that can preoccupy judges when considering the development of the common law. This was indeed a significant concern for the High Court and Supreme Court of Appeal: if the best interests of children means Pridwin could not expel learners without a hearing, would that mean that no commercial party could ever do anything which might be to the detriment of children, without first having a

[128] Fagan's (note 122 above) at 617 analysis of the distinction between developing the common law on the basis of rights as compared to the spirit, purport and objects of the Bill of Rights is instructive here. As he argues: 'the objects of the Bill of Rights justify many more common law developments than do the rights therein'. Rights may therefore ground a more specific development of the common law than the broader spirit, purport and objects of the Bill of Rights.

[129] D Bhana 'The Development of a Basic Approach for the Constitutionalisation of our Common Law of Contract' 2015 26(1) *Stellenbosch Law Review* 3, 6–7

[130] Ibid at 7.

[131] Ibid.

[132] A Cockrell 'Private Law and the Bill of Rights: A Threshold Issue of "Horizontality"' in *Butterworths Bill of Rights Compendium* (RS 13 Oct 2003) Ch3A 13; see also the contextual questions for determining the applicability of a provision of the Bill of Rights advocated by Dafel (note 88 above) at 64.

[133] *Daniels v Scribante & Another* [2017] ZACC 13, 2017 (4) SA 341 (CC).

[134] Ibid at paras 43–51.

hearing?[135] Hartford AJ in the High Court thought that this would 'create an absurd situation and open the floodgates in relation to the termination, on notice, of all contracts involving children whether directly or indirectly'.[136] To illustrate this concern, Hartford AJ offered the example of parents defaulting on payments to a bank in terms of a credit agreement which was specifically for the purchase of a scooter that would transport their sons to school. If a common law rule were to require a hearing before the cancellation of contracts implicating children and their access to school then the bank would be required to afford the parents an opportunity to make representations before terminating the credit agreement. This, she said, would be absurd.[137]

An analysis of public policy that proceeded from a finding that both the best interests of the child principle and the right to basic education apply horizontally in the specific context of a private school could have eased Hartford JA's concern. The relationship between an independent school and parents and learners, and the nature of that school's duties in relation to the rights of a learner, may well be very different from the relationship between a bank and the same parties. These differing relationships may in turn bear heavily on the constitutionality of contractual arrangements. Nicholls AJ touched on this distinction in her critique of the Supreme Court of Appeal's floodgates concerns. Those concerns failed to account, Nicholls AJ wrote, 'for the peculiar nature of contracts that seek to impinge upon or regulate the fundamental educational rights of children under the Constitution'.[138] We agree. The textual framework of the Constitution provides a mechanism for asserting this distinction: section 8(2). When we have reached an interpretation of the common law via section 8(2), the spirit, purport and objects of the Bill of Rights may have different (and more specific) implications than circumstances in which no direct obligations exist.[139] It may not offend the common law, understood in light of section 39(2), for a bank to insert a termination provision in its scooter rental agreement where the implementation of that agreement might negate access to basic education, precisely because the s-39(2) exercise in that case might take place without a finding that a provision in section 29 binds the bank.

We should not be misunderstood. Our appreciation of the Court's analysis of the substantive rights in issue demonstrates the importance of a judicial embrace of the direct application of rights under section 8(2). However, the Court's well-intentioned leveraging of section 8 as a transformative constitutional tool will remain limited if the approach in *Pridwin* gains traction in future cases. First, the necessity of transforming the existing foundations of the common law in private relations will not be met. Second, the balanced and principled approach to the

[135] While Finn (note 42 above) at 601 and, similarly, Boonzaier (note 89 above) propose that the *Barkhuizen* approach would have yielded a similar outcome for the Applicants as that reached by the Constitutional Court, it is interesting (and perhaps instructive) that the approach was not ultimately successful for the Applicants in the High Court or Supreme Court of Appeal. We do not contend that the *Barkhuizen* approach was necessarily incapable of reaching this outcome (particularly if *Barkhuizen* is understood as offering a more robust rights-based analysis than it otherwise suggested – see note 126 above). However, we suggest that the development of the common law through a s 8 analysis could have mitigated some of the concerns raised in the lower courts and may impact the outcome in some cases.

[136] *Pridwin HC* (note 4 above) at para 89.

[137] Ibid.

[138] *Pridwin CC* (note 1 above) at paras 62–63.

[139] See reference to Fagan's analysis described at note 122 above. Finn (note 42 above) at 595 also notes that indirect application via s 39(2) 'will often have more far-reaching effects', whereas direct application via s 8, 'typically provides the impetus and justificatory basis for a more discrete legal rule'.

limitation of rights under section 36 of the Constitution will be negated. Third, opportunities for a context-sensitive, agent-relative and rights-specific development of the common law of contract will remain stunted.

V CONCLUSION

The *Pridwin CC* judgment is a cause for both celebration and concern. On the one hand, the Court's conclusion that private schools are bound by children's rights to basic education and the paramountcy of a child's best interests is an important step forward in education jurisprudence. With a rise in low-fee independent schools, activists and education lawyers will welcome the Constitutional Court's confirmation that private schools cannot ignore their obligations in providing the fundamental right to basic education. On the other hand, the missed opportunity to rectify the uneasy legacy of *Barkhuizen*, and to fully embrace the constitutionalisation of contract law is to be lamented. In this sense *Pridwin* has actually dealt a blow to the transformative potential of section 8 of the Constitution, which mandates a connection between the Constitution and the existing common law.