THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 156/2015

In the matter between:

CENTRE FOR CHILD LAW **APPELLANT**

And

THE GOVERNING BODY OF HOËRSKOOL FOCHVILLE **FIRST RESPONDENT**

HOËRSKOOL FOCHVILLE **SECOND RESPONDENT**

Neutral citation: *Centre for Child Law v The Governing Body of Hoërskool Fochville* (156/2015) [2015] ZASCA 155 (8 October 2015)

Bench: Ponnan, Theron, Majiedt and Mbha JJA and Gorven AJA

Heard: **28 September 2015**

Delivered: **8 October 2015**

Summary: Appeal – mootness – discrete point of interpretation – production of documents – Uniform rule 30A applicable when rule 35(12) not complied with – court must try to strike a proper balance in the exercise of its general discretion – interests of children must be accorded adequate weight.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Sutherland J, sitting as court of first instance): reported *sub nom Governing Body, Hoërskool Fochville & others v Centre for Child Law* 2014 (6) SA 561 (GJ).

The appeal succeeds and the order of the court below is set aside and replaced with: 'The application is dismissed'.

JUDGMENT

Ponnan JA (Theron, Majiedt and Mbha JJA and Gorven AJA concurring):

[1] On 1 December 2011 the respondents in the present appeal, the Governing Body of Hoërskool Fochville, as the first applicant, and Hoërskool Fochville, as the second (collectively referred to as the School) approached the Gauteng Local Division of the High Court, Johannesburg for relief in two parts. Under Part A, an urgent interim order was sought interdicting, what for convenience may be described as the relevant authorities,[1] from admitting or directing the principal of the School to admit any additional learners (the additional learners) for the 2012 academic year. Under Part B, an order was sought, inter alia, reviewing and setting aside the admission, by or at the instance of the relevant authorities, of any additional learners in circumstances where such admission would result in the total number of learners admitted exceeding the

[1] Cited as the first to fourth respondents respectively, they were: the Member of the Executive Council: Education, Gauteng Province; the Head of Department: Gauteng Department of Education; Mr Peter Skosana, the District Director of the Gauteng Department of Education; and Ms Judith N Dube, the Chief Education Specialist: Institutional Development of the Gauteng Department of Education.

capacity of the School as determined in its admission policy. Although no relief was sought against them, each of the parents or guardians of the additional learners were cited as the further respondents 'by virtue of an interest that they or their minor children whom they represent, might have in the outcome of the application'.

[2] In support of that application (the main application) it was stated on behalf of the School that the relevant authorities had directed the principal to admit the additional learners to the School for the 2012 academic year, notwithstanding the fact that it had already reached its capacity for that year. As a result, so it was asserted, the admission of the additional learners would result in severe overcrowding and materially prejudice all of the learners at the School, including the additional learners. The relevant authorities contended, notwithstanding the School's protest to the contrary, that the School had the capacity to accommodate the additional learners.

[3] The urgent application failed and in January 2012 the additional learners were duly enrolled as the first Grade 8 English language medium class at the School, which since its inception had been an Afrikaans medium school. On 14 December 2012 the relevant authorities launched a counter-application seeking to change the School's language policy from Afrikaans medium to dual medium. On 19 December 2012 the present appellant, the Centre for Chid Law (CCL),[2] applied for leave to intervene as the third applicant in the main application (the intervention application). In support of the intervention application, Ms Carina Du Toit, an attorney at the CCL, stated:

'26. In order to establish the interests of the children in this matter we drove to Kokosi township on 3 November 2012 to meet with the children.

27. The initial introduction of our team to the children took place in the presence of some of their parents, who supported the idea of the children being separately represented in the matter. The children were enthusiastic about the idea of being given a chance to have their own views and wishes heard by the court. The children's parents were not present during the interviews.

28. We divided the children into groups of approximately six to eight learners. Each child was asked to complete a questionnaire. They were permitted to complete the questionnaire

[2] The main objective of the CCL is to establish and promote child law and to uphold the rights of children in South Africa in terms of clause 3 of its Constitution.

without affixing their names to it. The questionnaire listed specific questions but the children could also write additional comments.'

[4] On 25 January 2013 the School gave notice of its intention to oppose the CCL's intervention application. But, before filing an answering affidavit, on 1 February 2013 it first served a notice in terms of Uniform rule 35(12) requiring the CCL to produce for inspection, inter alia, 'all questionnaires completed by the learners' as referred to in paragraph 28 of Ms Du Toit's affidavit. On 15 February 2013 the CCL replied to the School's rule 35(12) notice that it refused to:

'produce or make available for inspection the questionnaires completed by the learners on the basis that these documents are privileged as they amount to statements and/or communication between Attorney and Client and between Attorney and Advocate. In addition an undertaking was made to the learners that these documents will remain confidential.'

[5] On 25 April 2013 the School applied to the court a quo for an order:

'1. Compelling the [CCL] to comply with the applicants' rule 35(12) notice dated 1 February 2013, within five days of this order;

2. Ordering the [CCL] to deliver true copies of the questionnaires to which it refers in paragraph 28 of its founding affidavit in its application to intervene, to the applicants' attorney within five days of this order;

3. Ordering the [CCL] to pay the applicants' costs of this application'.

[6] In support of that application (the application to compel) Mr Erasmus, the School's attorney, stated:

'4. [T]he Centre for Child Law – seeks leave to intervene as a third party in its own right, to represent the interests of the learners who are already before the court as the fifth to fifty third respondents. The [CCL] also purports to represent the interests of an unspecific class of other minors who are not already parties to this litigation.

5. In support of its application to intervene, the [CCL] has delivered a 55 page affidavit (excluding annexures), 21 pages of which summarise alleged statements of the learners attacking the School, for discriminating against them in various ways, including racially. The [CCL] expressly alleges that these summaries are based on questionnaires completed by the

learners, but refuses to produce them, despite delivery of a rule 35(12) notice. The [CCL] claims privilege.

6. The purpose of the application is to compel the [CCL] to produce the questionnaires completed by learners referred to in paragraph 28 in the application to intervene.

7. The applicants are not in a position to answer fairly and meaningfully to the [CCL]'s affidavit, without production of the questionnaires which are at the heart of the [CCL]'s application to intervene.

8. This situation creates a difficulty for the applicants, since the applicants dispute not only the [CCL]'s right to intervene, but also that it has the legal personality required to be a party to litigation (as opposed to an amicus curiae). This defence will be raised in answering affidavit, which cannot, however, be settled before these questionnaires are produced. The applicants' citation of the [CCL], as the respondent in this interlocutory application, is not intended to and should not be construed as a waiver of the applicant's right to contest the [CCL]'s legal personality and *locus standi* in the intervention applications.'

[7] In opposing the application to compel, Ms Du Toit, on behalf of the CCL, stated:

'10. The CCL acts on behalf of the children as a group instead of citing each individual child for the following reasons:

10.1 There are 37 children actively involved in the litigation who wanted to express their views and participate in the litigation. This means that there are nuanced and varied views from each of the children. If CCL or the Legal Resources Centre ("LRC") simply represented the children as their attorneys, each child would have to be cited in their individual capacity and depose to his or her own affidavit.

10.2 By allowing them to fill-in the questionnaires individually and consulting with them in small groups we could collate the children's views and experiences in one affidavit. This would allow the court to get a full range of views without having to read through thirty seven affidavits.

10.3 Most fundamentally, this approach is more protective of the children. The children described victimisation within the school, especially by other children, and it was our professional opinion that if the children were cited individually and deposed to their own affidavits they would be placed in a vulnerable position. We therefore decided to act on behalf of, and in the interests of, the children as CCL in order to put their views before the court and to protect their best interests.

. . .

13.1 At the outset I should point out that the affidavit is not based only on the information contained in the questionnaires. The questionnaires were merely one tool to facilitate the process of consultation. An employee of either the LRC or the CCL sat with each group of children in order to conduct the consultation. In addition, I personally consulted with each group of children on more than one occasion and asked questions not contained in the questionnaire. I also obtained further explanations of answers provided to the questionnaire. During these discussions the children were encouraged to express themselves fully and freely on the express understanding that the questionnaires themselves would not be provided to the applicants and that certain information disclosed by the children would be confidential, if they so requested.

13.2 In this regard, the questionnaires are no different in substance to correspondence directed to adult clients, which may be one method of taking instructions from adult clients, in addition to consultations in person.

. . .

13.4 Furthermore, the children do not seek any relief in respect of the incidents of racism or bullying they have experienced. The applicants are therefore not called on to answer each and every allegation and do not need to know the exact details of incidents of abuse experienced by the children. In addition, by excluding the limited information that would identify individual victims or perpetrators in respect of these incidents of racism and bullying, the CCL has avoided the threat of harm to individual reputation and relationships that may require specific, detailed responses to the allegations.

. . .

20. It is denied that the applicants are not in a position to answer fairly and meaningfully to the CCL's founding affidavit. The applicants are not called upon to answer each and every allegation made by the children, nor is it necessary for a determination of the issues in the main matter. In any event, all of the information obtained through the questionnaires, save for information that may lead to the identification of the children or is confidential by agreement with the children, is enclosed in annexure "CDT 2" of the CCL's affidavit. The applicants will not be placed in a better position to answer the allegations should they be given access to the questionnaires. This is also because the purpose of the consultations with the children was not to discuss specific incidents but to record the children's experiences in an perspectives of Hoërskool Fochville. We did not explore in any detail the facts surrounding specific incidents and they are therefore not contained in the questionnaires.

. . .

25. The applicants quite simply fail to understand the legal representation of children separate from their parents and as a group. The CCL acts on behalf of the minor children involved and in the public interest. We do so for the reasons advanced above and in our founding affidavit in the application to intervene.

. . .

27. CCL acts as a vehicle for the children to participate and be legally represented in the matter. The children are represented by the LRC as their attorneys through the CCL who is assisting them in bringing this litigation and act on their behalf'.

[8] The application to compel came before Sutherland J, who, on 19 November 2013, ordered the CCL to:

(a) comply with the school's rule 35(12) notice by delivering up for inspection and copying the original questionnaires; and

(b) pay the costs of the proceedings including those of two counsel.

On 24 July 2014, Sutherland J granted leave to the CCL to appeal to this court against his judgment. By then, however, a settlement agreement had been concluded between the parties to the litigation in the main application. In terms of the settlement agreement dated 23 July 2014 and to which the CCL was a party, the relevant authorities had undertaken by the beginning of the 2015 academic year to construct a new English medium secondary school in Fochville. It was also agreed that, save for one learner, all of the additional learners will be allowed to complete their education at the School.

[9] In granting leave to the CCL to appeal to this court the learned judge recognised that in the light of the settlement agreement, 'the rule 35(12) application by the School against CLL . . . has become moot as it cannot be enforced and is now utterly irrelevant'. Accordingly, so stated the learned judge, 'the provisions of section 16(2)*(a)* of the Superior Courts Act 10 of 2013 (the successor provisions to section 21A of the Supreme Court Act 59 of 1959) applies'. Sutherland J was nonetheless persuaded that there was a 'live issue' that went beyond the strictures of this case that justified the grant of leave to appeal.

[10] In the light of the competing contentions of the parties we were required to consider at the hearing of the matter whether the appeal should be entertained at all. To that end counsel were requested to present argument as to whether it was not appropriate to deal with the matter in terms of s 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013 (the Act), according to which this court may dismiss an appeal where 'the issues are of such a nature that the decision sought will have no practical effect or result'. It is trite that courts should and ought not to decide issues purely for academic interest (*Radio Pretoria v Chairman, Independent Communications Authority of South Africa & another* 2005 (1) SA 47 (SCA)). Of its predecessor, s 21A of the Supreme Court Act 59 of 1959,[3] this court stated in *Coin Security Group (Pty) Ltd v SA National Union for Security Officers & others* 2001 (2) SA 872 (SCA) para 7:

'The purpose and effect of s 21A has been explained in the judgment of Olivier JA in the case of *Premier, Provinsie Mpumalanga, en 'n Ander v Groblersdalse Stadsraad* 1998 (2) SA 1136 (SCA). As is there stated the section is a reformulation of principles previously adopted in our Courts in relation to appeals involving what were called abstract, academic or hypothetical questions. The principle is one of long standing.'

[11] This court has a discretion in that regard and there are a number of cases where, notwithstanding the mootness of the issue as between the parties to the litigation, it has dealt with the merits of an appeal (see, inter alia, *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA) ([1998] 4 All SA 258); *The Merak S: Sea Melody Enterprises SA v Bulktrans (Europe) Corporation* 2002 (4) SA 273 (SCA); *Land en Landbouontwikkelingsbank van Suid-Afrika v Conradie* 2005 (4) SA 506 (SCA) ([2005] 4 All SA 509); and *Executive Officer*, *Financial Services Board v Dynamic Wealth Ltd* 2012 (1) SA 453 (SCA)). With those cases must be contrasted a number where the court has refused to enter into the merits of the appeal.[4] The broad distinction between

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[3] Section 21A(1) of the Supreme Court Act 59 of 1959 provided:
'When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'

[4] See *Radio Pretoria v Chairman, Independent Communications Authority of South Africa above*; *Rand Water Board v Rotek Industries (Pty) Ltd* 2003 (4) SA 58 (SCA); *Minister of Trade and Industry v Klein NO* [2009] 4 All SA 328 (SCA); *Clear Enterprises (Pty) Ltd v CSARS* [2011] ZASCA 164 (SCA); *The Kenmont School & another v DM & others* [2013] ZASCA 79 (SCA); and *Ethekwini Municipality v South African Municipal Workers Union & others* [2013] ZASCA 135 (SCA); *Legal Aid South Africa v Magidwana*

the two classes is that in the former a discrete legal issue of public importance arose that would affect matters in the future and on which the adjudication of this court was required, whilst in the latter no such issue arose (see *Qoboshiyane NO & others v Avusa Publishing Eastern Cape (Pty) Ltd & others* 2013 (3) SA 315 (SCA) para 5).

[12] The facts in *Gould* were: An election for the office of president of the appellant rugby union was held at its annual general meeting. A review application to the High Court alleging that the election was invalidated by procedural irregularities succeeded. But before the appeal to this court against that decision was heard the rugby union convened a special general meeting to hold fresh presidential elections at which a president was duly elected. In explaining why it was nonetheless appropriate for the appeal to be entertained by this court, Howie JA stated (at 444I–445B):

'Had there been no appeal the judgment of the court below would in all probability have continued to influence the procedure adopted in respect of office bearer elections at future union meetings. There was, of course, nothing irregular or unfair in the procedures adopted at the re-election meeting, viewed purely in isolation, without regard to the constitution. But the union does have this constitution. It is the chosen instrument by which the union's affairs are to be regulated and the union, its office bearers and council members are entitled to have it interpreted in order to guide them for the future. In the circumstances I consider that determination of the appeal will, quite apart from the issue of costs in the court below, have a "practical effect or result" within the meaning of s 21A of the Supreme Court Act.'

[13] Both *The Merak S: Sea Melody Enterprises SA v Bulktrans (Europe) Corporation* and *Land en Landbouontwikkelingsbank van Suid-Afrika v Conradie* were concerned with questions of law. In the former, Farlam JA took the view that in the light of the importance of the questions of law which arise in the matter and the frequency with which they arise, it was an appropriate matter for the exercise of this court's discretion to allow the appeal to proceed. In the latter, Mpati DP observed '[w]here, for example, questions of law, which are likely to arise frequently, are at issue a court of appeal may hear the merits of the appeal and pronounce upon it'. *Executive Officer*, *Financial*

& others [2014] 4 All SA 570 (SCA); and *Deutsches Altersheim Zu Pretoria v Dohmen & others* [2015] ZASCA 3 (SCA).

Services Board v Dynamic Wealth concerned 'the proper construction of an important provision in the regulatory armoury of the registrar, the test to be applied in considering an application for curatorship under s 5(1) of the [Financial Institutions (Protection of Funds) Act 28 of 2001] and a consideration of the evidential status of an inspection report'. Wallis JA stated that these 'are all important issues that will impact upon the future conduct of the registrar' and thus could not agree that the appeal did not have any practical effect or result.

[14] The High Court considered that it was engaged in the proper interpretation of rule 35(12). On that score, it has spoken and absent an appeal its judgment will in all probability continue to influence how litigants approach such an enquiry. If the High Court erred in its approach, as it appears that it indeed has, then future litigants are entitled to the benefit of this court's view on the issue. I thus consider that the determination of the appeal will have a 'practical effect or result' within the meaning of that expression, inasmuch as a discrete legal issue of public importance arises that would affect matters in the future and on which the adjudication of this court is required.

[15] Uniform rule 35(12) states:

'Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording.'

As Botha J pointed out in *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis* 1979 (2) SA 457 (W) at 459G, the self-contained sanction in rule 35(12) is of a 'negative nature, being to the effect that a party failing to comply with the notice shall not, save with the leave of the court, use the document in question, provided that any other party may use such document'. That sanction is one that comes into effect automatically upon non-compliance with the provisions of the rule. But, a

party who gives notice under rule 35(12) may not be content with just the negative sanction provided by the rule. In that event it is to rule 30A that such party must turn.

[16] Uniform rule 30A reads:

'(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out.

(2) Failing compliance within 10 days, application may on notice be made to the court and the court may make such order thereon as to it seems meet.'

Under rule 30A a party making a request, or giving a notice, to which there is no response by the other party, may through a further notice to the other party warn that after the lapse of ten days application will be made for an order that the notice or request be complied with, or that the claim or defence be struck out, as the case may be. Failing compliance within the ten days mentioned, application may then be made to court and the court may make an appropriate order. That, as Botha J described it in *Coucourakis* (at 459H), is a 'positive form of relief'.

[17] In general terms, the rules exist to regulate the practice and procedure of the courts. Their object is to secure the 'inexpensive and expeditious completion of litigation before the courts and they are not an end in and of themselves.[5] Ordinarily, strong grounds would have to be advanced to persuade a court to act outside the powers provided for specifically in the rules. Here, having given notice in terms of rule 35(12) that has not been complied with, it was for the School to give notice in terms of rule 30A that it intended, after the lapse of ten days, applying for an order that its rule 35(12) notice be complied with. That, the School did not do. Nor did it apply to court in terms of rule 30A to compel production of the documents sought. That, in and of itself, may have been fatal to the application (see *Universal City Studios v Movie Time* 1983 (4) SA 736

[5] See *Hudson v Hudson* 1927 AD 259 at 267; *Federated Trust Ltd v Botha* 1978 (3) SA 645 (A) at 654C-D. See also D E van Loggerenberg & P B J Farlam *Erasmus: Superior Court Practice* (2014) (Revision Service 45) at B1-4 – B1-6.

(D)).[6] In *Universal City Studios*, Booysen J was urged, despite the fact that the procedure laid down in rule 30(5) (the predecessor to rule 30A) had not been followed, to nevertheless order compliance with the rule 35(12) notice. He declined, stating that 'a party who deliberately chooses not to claim relief of a particular nature, should in general, even if it were competent, not be granted such relief under the general prayer of alternative relief'. Whether Booysen J was correct in his approach to the matter hardly need detain us. For, the real complaint in this case is that however the application was presented, the learned judge in the court a quo failed to appreciate that he was, in truth, considering an application in terms of rule 30A. In compelling production of the questionnaires, Sutherland J 'sum[med] up the law' thus:

'25.1. There is clear authority that confidentiality does not trump the rule.

25.2. There is some authority for the proposition that rule 35(12) must be literally interpreted, and irrelevant and privileged documents must be disclosed. I am in firm disagreement with such a view.

25.3. There is some authority, which is nevertheless obiter, to support the idea that an irrelevant or privileged document, if referred to in a pleading or affidavit, cannot be subjected to compulsory disclosure in terms of rule 35(12). I am in firm agreement with this view.

25.4. Therefore, I hold that, upon a proper interpretation of rule 35(12), a party called upon to comply with rule 35(12) is excused from so doing, if that party shows that the document sought is irrelevant to the issues in the matter, or is privileged, but cannot refuse on the grounds of confidentiality.'

[18] *Universal City Studios* held (at 748A) that:

'[this] being an application, I would say that the *onus* is to be discharged on the usual basis, ie that the applicant bears the overall *onus* of satisfying the Court that the respondent is obliged to produce the document . . . . Where the respondent files an opposing affidavit . . . and either denies relevance or avers that he is on ground of privilege not obliged to produce a document . . . the applicant would, in order to succeed, have to satisfy the Court on a balance of probabilities that the document is indeed relevant or not privileged.'

[6] In *Universal City Studios v Movie Time* 1983 (4) SA 736 (D), Booysen J dismissed an application to compel compliance with a notice in terms of rule 35(12) on basis that the procedure laid down in rule 35(5) (the predecessor to the current rule 30A) had not been followed.

In *Gorfinkel v Gross, Hendler & Frank* 1987 (3) SA 766 (C), Friedman J disagreed with this dictum. He took the view that the rule should be interpreted as follows:

'*[P]rima facie* there is an obligation on a party who refers to a document . . . to produce it. That obligation is, however, subject to certain limitations, for example, if the document is not in his possession and he cannot produce it, the Court will not compel him to do so. . . . Similarly, a privileged document will not be subject to production. A document which is irrelevant will also not be subject to production. As it would not necessarily be within the knowledge of the person serving the notice whether the document falls within the limitations I have mentioned, the *onus* would be on the recipient of the notice to set up facts relieving him of the obligation to produce the document'.

Friedman J's approach found favour with Thring J in *Unilever plc v Polagric (Pty) Ltd* 2001 (2) SA 329 (C). For my part, I entertain serious reservations as to whether an application such as this should be approached on the basis of an *onus*. Approaching the matter on the basis of an *onus* may well be to misconceive the nature of the enquiry. I thus deem it unnecessary to attempt to resolve the disharmony on the point. That notwithstanding, it is important to point out that the term *onus* is not to be confused with the burden to adduce evidence (for example that a document is privileged or irrelevant or does not exist).[7] In my view, the court has a general discretion in terms of which it is required to try to strike a balance between the conflicting interests of the parties to the case. Implicit in that is that it should not fetter its own discretion in any manner and particularly not by adopting a predisposition either in favour of or against granting production. And, in the exercise of that discretion, it is obvious, I think, that a court will not make an order against a party to produce a document that cannot be produced or is privileged or irrelevant.

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[7] In *Coch v Lichtenstein* 1910 AD 178, Innes JA stated that 'the mere production of evidence which makes the existence of . . . facts probable does not in itself shift the *onus* though it may go a long way towards satisfying it'; and in *Pillay v Krishna* 1946 AD 946 at 952 Davis AJA held:

'in my opinion, the only correct use of the word *onus* is that which I believe to be its true and original sense, namely the duty which is cast on a particular litigant, in order to be successful, of finally satisfying the court, that he is entitled to succeed on his claim, or defence, as the case may be, and not in the sense merely of his duty to adduce evidence to combat a *prima facie* case made by his opponent.' See also *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548.

[19] In striking the appropriate balance in a case of this nature adequate weight must be accorded to the interests of the children. In that regard, a useful starting point is an appreciation that the right of children to representation separate from their parents, flows from their right to participate in all matters that affect them. That is a right which is widely recognised in international law and forms part of South African law. Article 12 of the United Nations Convention on the Rights of the Child, 1989 (UNCRC)[8] entrenches the child's right to participate. It provides:

'1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.'

Closer to home, in terms of the African Charter on the Rights and Welfare of the Child, 1990 (ACRWC)[9] the following obligation is placed on the States in Article 4(2):

'In all judicial or administrative proceedings affecting a child who is capable of communicating his [or] her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.'

[20] The child's right to have separate legal representation during legal proceedings in a matter such as this is thus clearly contemplated by those provisions. Both specifically envisage that the child may participate 'through a representative'. The ACRWC goes further than the UNCRC in stating that the child may participate through an 'impartial representative as a party to the proceedings'. The child's right to be heard and to have his or her views taken into account, in terms of the UNCRC and ACRWC,

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[8] Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entered into force 2 September 1990, in accordance with article 49. Signed by the Republic of South Africa in 1993 and ratified on 16 June 1995.

[9] Adopted by the Organisation of African Unity in 1990 and entered into force on 29 November 1999. OAU Doc. CAB/LEG/24.9/49 (1990). Signed by the Republic of South Africa on 10 October 1997, ratified on 7 January 2000 and deposited on 21 January 2000.

has been recognised as forming part of South African law.[10] The importance of the child's participation was emphasised in *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 53. The Constitutional Court there held:

'There is a further observation to be made. We have not had the assistance of a *curator ad litem* to represent the interests of the children. It was accepted in the High Court that it was not necessary to appoint such a curator because the State would represent the interests of the child. This was unfortunate. The children concerned were from a highly conscientised community and many would have been in their late teens and capable of articulate expression. Although both the State and the parents were in a position to speak on their behalf, neither was able to speak in their name. A curator could have made sensitive enquiries so as to enable their voice or voices to be heard. Their actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue, and the factual and experiential foundations for the balancing exercise in this difficult matter would have been more secure.'

[21] In *MEC for Education, KwaZulu-Natal & others v Pillay* 2008 (1) SA 474 (CC) para 56, Langa CJ pointed out:

'Legal matters involving children often exclude the children and the matter is left to adults to argue and decide on their behalf. In *Christian Education South Africa v Minister of Education* this court held in the context of a case concerning children that their "actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue, and the factual and experiential foundations for the balancing exercise in this difficult matter would have been more secure." That is true for this case as well. The need for the child's voice to be heard is perhaps even more acute when it concerns children of Sunali's age who should be increasingly taking responsibility for their own actions and beliefs.' (Footnotes omitted.)

Children have always received assistance through the common law. Herbstein and Van Winsen state that a child must be assisted by a guardian to institute legal proceedings.[11] Legal proceedings instituted by a child, without the assistance of a guardian, may be ratified by that child's guardian. Furthermore, if a child wants to litigate and does not

[10] *McCall v McCall* 1994 (3) SA 201 (C) at 204J-205G; *Lubbe v Du Plessis* 2001 (4) SA 57 (C) at 73F; *Soller NO v G & another* 2003 (5) SA 430 (W) para 8; *R v H & another* 2005 (6) SA 535 (C) 439 para 6.
[11] Andries C Cilliers, Cheryl Loots and Hendrik C Nel *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (2009) at 160-164.

have assistance from a guardian, a *curator ad litem* must be appointed for the child. A child may litigate without assistance if the High Court grants him or her *venia agenda*.[12]

[22] The drafters of our Constitution[13] appeared to recognise that there may well be circumstances where, notwithstanding the common law protection, additional assistance may be required by children in specific instances. Accordingly, the right of children to be legally represented in civil matters was included in the Constitution. Thus, s 28(1)*(h)* of the Constitution, guarantees State-funded legal representation, as one incident of the right of children to participate in matters affecting them. It provides:

'Every child has the right to have a legal practitioner assigned to the child by the State, and at State expense, in civil proceedings affecting the child, if substantial injustice would otherwise result'.

Section 28(1)*(h)* affords every child a right to legal representation at State expense in *civil proceedings* affecting a child if substantial injustice would otherwise result. The right is triggered, not only when the child is a party to the proceedings, but whenever he or she is affected by the litigation. The child is then entitled, not merely to be heard, but to be afforded the envisaged legal representation at State expense.

[23] The Children's Act 38 of 2005 was drafted pursuant to South Africa's obligations in terms of the UNCRC, the ACRWC and the Constitution. Sections 10, 14 and 15 of the Children's Act are a cluster of provisions designed to ensure that children's rights are protected and their dignity is upheld in any proceedings affecting them. Section 10 of the Children's Act entitles every child to participate 'in an appropriate way' in any matter 'concerning the child'. It adds that the 'views expressed by the child must be given due consideration'.[14] Section 14 recognises the right of every child to have access to court for the protection and enforcement of their rights. It further entitles every child 'to be assisted in bringing a matter to a court'.[15] Section 15 deals with the enforcement of

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[12] Herbstein & Van Winsen op cit note 11 at 160-164. See also *Ex Parte Goldman* 1960 (1) SA 89 (D).
[13] The Constitution of the Republic of South Africa, 1996.
[14] Section 10 provides:
'Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.'
[15] Section 14 provides:

fundamental rights and reinforces the broad standing provisions of s 38 of the Constitution specifically in relation to children.[16] It would thus seem that the legislature intended to create wide and generous mechanisms for the protection and enforcement of children's rights beyond that available to them at common law. The language of ss 14 and 15 is clear and unequivocal. Section 14 emphatically states that every child has the right to bring a matter to court. It states further that a child may be assisted in bringing the matter to court. It does not state who must assist and does not repeat the common law requirement of being assisted by a guardian.

[24] In terms of s 28(2) of the Constitution, in all matters concerning children – including any litigation concerning them[17] – their best interests are of paramount importance.[18] Section 28(2) must be interpreted so as to promote the foundational values of human dignity, equality and freedom.[19] The reach of s 28(2) extends beyond those rights enumerated in s 28(1): it creates a right that is independent of the other rights specified in s 28(1).[20] Section 28(2), read with s 28(1), establishes a set of rights

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'Every child has the right to bring, and to be assisted in bringing a matter to a court, provided that matter falls within the jurisdiction of that court.'

[16] Section 15 provides:
'(1) Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights or this Act has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.
(2) The persons who may approach a court, are:
(a) A child who is affected by or involved in the matter to be adjudicated;
(b) Anyone acting in the interest of the child or on behalf of another person who cannot act in their own name;
(c) Anyone acting as a member of, or in the interest of, a group or class of persons; and
(d) Anyone acting in the public interest.'

[17] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others* 2009 (2) SACR 130 (CC); *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC) para 14-26.

[18] International law also affirms the 'best interests' principle and many countries have subsequently incorporated it into their constitutions or child and family legislation. Article 3(1) of the UNCRC requires that: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' Similar pronouncements are found in art 4(1) of the ACRWC. See Neo Morei 'Where for maintenance law as child support grants and defaulters put it to the test' (2014) 5 *Mediterranean Journal of Social Sciences* 756 fn 6.

[19] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others* 2009 (4) SA 222 (CC) para 72.

[20] *DPP, Transvaal v Minister of Justice and Constitutional Development & others* (above) para 72.

that courts are obliged to enforce.[21] In *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC) para 15, the Constitutional Court observed that:

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

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

Thus in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others* 2009 (4) SA 222 (CC) para 115, the Constitutional Court pointed out:

'In *S v F*, for example, the court equated an enquiry into the desirability of appointing an intermediary with a trial in which the State bears the burden of proof to establish the need for the appointment of an intermediary on a balance of probabilities. I am unable to agree with this view. This approach to the enquiry overlooks the objectives of the enquiry. The overriding consideration at that enquiry is to prevent the child from exposure to undue stress that may arise from testifying in court. What is required of the judicial officer is to consider whether, on the evidence presented to him or her, viewed in the light of the objectives of the Constitution and the subsection, it is in the best interests of the child that an intermediary be appointed'.

[25] Professor Trynie Boezaart notes that:[22]

'There are two ways in which children can be allowed, in the words of the [UNCRC], to "express their views freely" in matters that affect them, namely by means of participation and representation. "Participation" would refer to all the rules that allow the child to be heard directly, without an intermediary. It includes rules that require children to be consulted about their opinion, or enable children to become parties to legal actions, so that they have the right to

[21] *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC) para 14.
[22] Trynie Boezaart 'General principles' in C J Davel & A M Skelton *Commentary on the Children's Act* (Revision Service 6, 2013) at 2-15.

participate in proceedings and/or demand a certain remedy. “Representation” is used to indicate the rules that allow children to instruct attorneys, to seek legal advice or to have other kinds of adult representation in legal proceedings.’ (Footnotes omitted.)

Here the CCL, in consultation with the children, elected to act in the interests of a group of children (including other similarly situated children) and in the public interest for inter alia the following reasons: The children expressed clear and strong views and opinions in respect of the case – independent of the views and opinions of their parents and communicated some information that they were reluctant to share with their parents. They requested that their experiences of being at Hoërskool Fochville be placed before the court. Those parents who met with the CCL supported the idea of the children being separately represented in the matter. At the time of the intervention application by the CCL, the parents were not yet separately represented – they later secured separate legal representation by SECTION27.[23] Allowing them to complete the questionnaires individually and consulting with them in small groups ensured that the children’s views and experiences were properly collated and articulated in one affidavit, thus allowing the court to get a full range of views without having to read some 37 affidavits. This approach appears to be more protective of the children. The children described victimisation within the school, especially by other children, and if cited individually and deposed to their own affidavits, they ran the potential risk of being vulnerable to reprisals or further victimisation. The 37 children directly affected expressed concern about siblings and neighbours who may need to attend the School in the future. The interests of children similarly placed as the children currently affected therefore may also require safeguarding. The CCL’s approach in this regard is consistent with that advocated by Professor Noel Zaal and Ann Skelton that

‘It is necessary to promote a children’s rights culture in . . . court proceedings, and therefore the representative would ideally wish to be supporting the wishes and instructions of the child. The child must, if possible, be convinced that the legal

[23] SECTION27 is a public interest law centre having as its main objective to influence, develop and use the law to protect, promote and advance human rights. Its name is drawn from s 27 of the Constitution which enshrines everyone’s right to health care, food, water and social security. See the organisation’s website at *http://section27.org.za/*, accessed on 7 October 2015.

representative is his or her very own who will see that his or her views and hopes gain priority at the hearing.'[24]

[26] Accordingly, as I have endeavoured to show, in every weighing of rights and interests and any value judgment relating to whether the questionnaires should be produced, the best interests of the children would have to be the paramount consideration. Thus even if the questionnaires were not protected by privilege or if the privilege had been waived, it may not have been appropriate for the court a quo to have ordered their disclosure on the basis that it would not have been in the children's best interests to do so. The CCL explained why the children specifically requested that their confidentiality be protected. The court a quo took the view that the CCL could not refuse to produce the questionnaires on the grounds of confidentiality. But as Moseneke DCJ pointed out in *Independent Newspapers v Minister for Intelligence Services: In re Masetlha v President of the Republic of South Africa & another* 2008 (5) SA 31 (CC) para 27:

'Even before the advent of the Constitution, courts often, and correctly in my view, recognised that when there is a claim of confidentiality over information that is sought to be discovered or disclosed other considerations of fairness arise. These are well recognised by Schutz AJ in *Crown Cork & Seal Co Inc & another v Rheem South Africa (Pty) Ltd & others (Crown Cork)*:[25]

[A conflict arises] between the need to protect a man's property from misuse by others, in this case the property being confidential information, and the need to ensure that a litigant is entitled to present his case without unfair halters. And, although the approach of a Court will ordinarily be that there is a full right of inspection and copying, I am of the view that our Courts have a discretion to impose appropriate limits when satisfied that there is a real danger that if this is not done an unlawful appropriation of property will be made possible merely because there is litigation in progress and because the litigants are entitled to see documents to which they would not otherwise have lawful access. But it is to be stressed that care must be taken not to place undue or unnecessary limits on a litigant's right to a fair trial, of which the discovery procedures often form an important part.'[26]

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[24] Noel Zaal & Ann Skelton 'Providing effective representation for children in a new constitutional era: Lawyers in the criminal and children's courts' (1998) 14 *SAJHR* 539 at 554.

[25] *Crown Cork & Seal Co Inc & another v Rheem South Africa (Pty) Ltd & others (Crown Cork)* 1980 (3) SA 1093 (W).

[26] Id at 1100A-C.

[27] The concern expressed in this case is that the children may suffer prejudice should they be identified as the makers of some of the statements in the questionnaires. At the very least, the children appear to believe that they will. There is nothing to suggest that their perception in that regard is not genuinely held. In those circumstances, there is much to be said for the argument that disclosure of the questionnaires would not be in their best interests. That is not to suggest, to employ the language of Sutherland J, that the best interest principle operates as a trump because as the Constitutional Court pointed out in *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC) 'the fact that the best interests of the child are paramount does not mean that they are absolute'. It is thus but a starting point for any balancing of rights. Of course in appropriate circumstances and as part of that balancing act a court could endeavour to impose suitable conditions relative to the production and inspection.

[28] Here the School has failed to show why their interests should outweigh those of the children. On that score, in his replying affidavit, Mr Erasmus stated:

'32.5 The intervening party's statement that the applicants will not be placed in a better position to answer the allegations should they be given access to the questionnaires, is denied. This is for the applicants to decide after disclosure of the documents, not for the intervening party to decide in order to evade disclosure.'

Tellingly, he does not inform the court why the School could not oppose the intervention application without the benefit of the questionnaires. Ms Du Toit's affidavit captures the lived experiences of the children. It bears noting that no relief was sought against the School in respect of the incidents complained of. The School thus did not require to know the precise details of each incident in order to respond to CCL's application to intervene. In the event, there was no justifiable basis for holding that the interests of the School in investigating the identities of the children in order to answer the allegations outweighed the interests of the children in not having their identities disclosed, especially in the light of the fact that the children had disclosed the information (which they otherwise may not have done) on condition of, and in the expectation of, their identities not being disclosed.

[29] It seems clear that the litigation concerns the children. It also seems clear that the children wish to participate in it at least to the extent that their views and perceptions of the school are considered. The question is whether the use of a summary of their sentiments in an overarching affidavit by Ms Du Toit, without supporting affidavits by them and disclosure of their individual questionnaires, is an appropriate way for them to do so. The school could point to no prejudice to it. It further cannot be said that, if the CCL is joined in the application, this is not an appropriate way for the children to participate in the litigation. The court below held that the hearsay nature of the evidence adduced by the CCL required the disclosure of the questionnaires. The CCL adduced the evidence in hearsay form so as to protect the identities of the children, conscious that the admissibility and weight of the evidence would be considered in due course on the basis that it is hearsay evidence. The questions of admissibility and weight of the evidence were thus not issues to be determined in this application. The School obviously retained the right to oppose the admission of the hearsay evidence and to argue that it should be accorded little weight, if admitted. But those are matters that would obviously have had to be canvassed and ultimately decided in either the intervention or main application in due course.

[30] It follows, for the reasons given, that the Uniform rule 30A application ought not to have succeeded before the court below. Accordingly, the appeal must succeed. As to costs: CCL, commendably, did not seek costs either in this court or the one below. In the result, the appeal succeeds and the order of the court below is set aside and replaced with:

‘The application is dismissed’.

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V M Ponnan

Judge of Appeal

APPEARANCES:

For Appellant:	W Trengove SC (with him J Brickhill) Instructed by: Legal Resources Centre, Grahamstown Honey Inc., Bloemfontein
For Respondents:	A Kemack SC (with him C Dreyer) Instructed by: Erasmus De Klerk Inc., Johannesburg Webbers, Bloemfontein