

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

CASE NO: _____

In the matter between:

REFILOE MOTSWENYANE

Applicant

and

SIFISO LEARNING GROUP (PTY) LTD

Respondent

FUTURE NATION SCHOOLS (PTY) LTD

Second Respondent

SIZWE NXASANA N.O.

Third Respondent

MAMPHO LANGA N.O.

Fourth Respondent

NKANYEZI MAKHARI N.O.

Fifth Respondent

TSHEPO TSELENG N.O.

Sixth Respondent

THE INDEPENDENT EXAMINATIONS BOARD

Seventh Respondent

**MEMBER OF THE EXECUTIVE COUNCIL FOR
EDUCATION, GAUTENG**

Eighth Respondent

APPLICANT'S HEADS OF ARGUMENT: PART A

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INTRODUCTION AND PURPOSE OF THE APPLICATION

- 1 This case concerns three children.
- 2 Two are in Grade 12. They stand on the threshold of completing their school education. The third is a young child of compulsory school-going age. None bears responsibility for the debt that lies at the heart of this dispute. Yet each has become its principal victim.
- 3 The respondents do not contend that the children are academically unqualified, disruptive, or unsuitable to remain at school. Their exclusion rests on one ground alone: their mother has fallen into arrears with school fees.
- 4 The respondents are entitled to recover what is lawfully owed to them. They are not entitled to do so at the expense of the children's constitutional rights.
- 5 The Constitution does not prohibit private schools from enforcing contracts. Nor does it immunise parents from their financial obligations. What it does require is that when a decision directly affects a child's access to education, dignity and future prospects, that decision must be taken lawfully, fairly and with the best interests of the child treated as paramount.
- 6 The respondents did none of those things.

- 7 Without affording the applicant or the children a hearing, without any demonstrable consideration of the children's best interests, and despite the availability of ordinary debt-recovery mechanisms, the respondents excluded all three children from school and refused to register the Grade 12 learners for the examinations that will determine whether they obtain a National Senior Certificate this year.
- 8 The consequences are immediate and severe. Every day outside the classroom is a day of education lost. For the Grade 12 learners, the loss is potentially far greater. If relief is not granted now, they face the real prospect of losing an entire matric year.
- 9 The question before this Court is therefore not whether the respondents are entitled to recover outstanding fees. Indeed, they are. The question is whether they may use exclusion from education as the means by which to do so.
- 10 The applicant submits that they may not.

The material facts

- 11 The applicant's son was enrolled at the School in 2020 and her twin daughters in 2021, and they were taught there for years.¹ The daughters are now in Grade 12; the son is in Grade 4.
- 12 The applicant fell into arrears. Over several years the School's practice was to bar the children briefly during periods of arrears and then to re-admit them,

¹ Founding affidavit, CaseLines 001-8.

usually upon payment. In September 2024, for example, the children were excluded and re-admitted once payment was made.²

- 13 The respondents now contend that the contract was terminated on 28 October 2025 and that the children were never enrolled for 2026. The contemporaneous record is squarely to the contrary:

13.1 the notice of 28 October 2025 states that the contract “will now be terminated”, and demands a term’s fees for January to April 2026 “in lieu of notice”;³

13.2 the notice of 5 January 2026 invited the applicant to pay “to complete enrolment” or inform the School if the children will be removed;⁴

13.3 the notice of 13 April 2026 offered registration for the IEB examinations upon payment by 30 April 2026, and referred to the children’s “academic programme” and to “the Class of 2026”; and⁵

13.4 throughout, the School welcomed the children for 2026, convened progression meetings, engaged on their subject choices, and sent timetables, cycle-test schedules and mid-term review invitations, treating them as enrolled matriculants.⁶

² CaseLines 010-70 – 010-75 (annexure RA3, the applicant’s correspondence of September 2024).

³ CaseLines 009-54 – 009-56 (annexure FNS4).

⁴ CaseLines 009-57 – 009-59 (annexure FNS5); and CaseLines 001-49 – 001-52 (annexure RM5).

⁵ CaseLines 009-60 – 009-61 (annexure FNS6); and CaseLines 001-53 – 001-54 (annexure RM6).

⁶ CaseLines 010-21 (RA1a, progression-meeting invitation); 010-24 (RA1b, subject choices and Grade 12 progression); 010-27 (RA1c, 2026 welcome letter); 010-33 (RA1d, Grade 12 timetables); 010-36 (RA1e, Term 1 cycle-test timetable); 010-39 (RA1f, mid-term review meeting).

- 14 The single, final and unconditional decision — terminating enrolment, refusing registration, and barring the children from the premises — was taken and communicated only on 7 May 2026. That letter attributes the termination to the notice of 5 January 2026 and says nothing of any termination on 28 October 2025; the October date appears for the first time in the answering affidavit.⁷
- 15 The children have been excluded since. The Grade 12 learners face the imminent and permanent loss of their matriculation year; the youngest child loses foundation-phase schooling with each passing day. The applicant sought to resolve the matter without litigation, approaching SECTION27 and delivering a letter of demand on 20 May 2026, before launching this application.⁸

THIS MATTER IS URGENT

- 16 Rule 6(12) requires the applicant to set out the circumstances rendering the matter urgent and to explain why she cannot be afforded substantial redress in due course; the degree of departure from the ordinary rules must be commensurate with the urgency.⁹ Both requirements are amply met.
- 17 The harm lies in the immediate future. The Grade 12 revision classes are set for the week of 1 July 2026, and the mid-year examinations begin on 9 July 2026.¹⁰ Once those dates pass, the loss is irretrievable, and no hearing in the ordinary course could come in time.

⁷ Final notice of 7 May 2026, CaseLines 009-62 – 009-64 (annexure FNS7); and CaseLines 001-46 – 001-48 (annexure RM4). The 28 October 2025 termination is first raised in the answering affidavit, CaseLines 009-1.

⁸ Letter of demand, CaseLines 001-55 – 001-62 (annexure RM7).

⁹ *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another* 1977 (4) SA 135 (W) at 137E–138A.

¹⁰ IEB timetable, CaseLines 001-69 – 001-70 (annexure RM10).

- 18 The urgency is not self-created. The operative decision was taken on 7 May 2026; until then the School itself held enrolment and registration open upon payment. Time runs from 7 May 2026, not from January. Time reasonably spent on bona fide attempts to resolve the dispute before litigation does not render the resulting urgency self-created.
- 19 In justifying the urgency of the application before it, in a matter of similar facts, the Constitutional Court in *Moko*, per Khampepe J, held as follows:

“Mr Moko approached the High Court as a matter of urgency for the vindication of his constitutional right to education – a right which, due to its transformative nature both for individuals and society as a whole, is of fundamental importance in this country. ... And yet, for reasons beyond any feasible comprehension, the High Court struck this matter off the urgent roll. This placed the applicant in an invidious position...

On the face of it, this matter concerns a potentially serious violation of the applicant’s right to education. Over and above that, a lack of urgent relief could have a significant adverse effect on the applicant’s future endeavours and opportunities. His life could forever be out of step by a whole year. Also, delaying the pursuance of further education until 2022, to wait for the results of the supplementary examination, could easily result in the applicant abandoning that admirable goal entirely. Even if the applicant wished to pursue a different path, a five to six-month delay in obtaining his matric results could similarly frustrate any attempt to obtain employment that requires a matric certificate. In my view, the urgency of this matter is undeniable.”¹¹

- 20 The present matter raises precisely the concerns identified by the Constitutional Court in *Moko*. The Grade 12 learners stand on the threshold of completing their school education. The respondents' refusal to register them for the 2026 IEB examinations places them at risk of losing an entire academic year. If urgent relief is withheld and the relevant examination and registration deadlines pass, no subsequent order of this Court will be capable of restoring the lost opportunity.

¹¹ *Moko v Acting Principal of Malusi Secondary School and Others* 2021 (3) SA 323 (CC) at paras 21 to 22.

The prejudice is therefore not merely financial or administrative. It concerns the learners' educational progression, future tertiary studies, employment prospects and life opportunities.

- 21 The position of the younger child is equally compelling. He is a learner of compulsory school-going age who has already been excluded from school for a significant period. Every day spent outside the classroom constitutes a permanent loss of learning that cannot later be recreated. The continued exclusion of a child from basic education constitutes an ongoing infringement of constitutional rights and gives rise to a continuing form of prejudice that intensifies with the passage of time.
- 22 As in *Moko*, the applicant seeks urgent relief for the vindication of the children's constitutional right to basic education. The educational harm is immediate, ongoing and incapable of adequate redress in due course. By the time the matter could be heard in the ordinary course, the examination cycle may have passed and a substantial portion of the academic year may have been lost. The constitutional injury would already have occurred.

THE APPROPRIATE LEGAL PRINCIPLES

- 23 The starting point is the text of the Constitution. Section 29(1)(a) of the Constitution guarantees everyone the right to a basic education. Unlike the qualified socio-economic rights, it is immediately realisable and is not subject to progressive realisation or available resources.¹²

¹² *Governing Body of the Juma Masjid Primary School and Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) at para 37.

- 24 Section 28(2) makes a child's best interests of paramount importance in every matter concerning the child; the language is comprehensive and emphatic, and requires that the law be applied in a manner that protects and advances children's interests.¹³ Sections 10 and 9 protect dignity and equality.
- 25 By section 8(2) the Bill of Rights binds the School as a private party. A private party bears a negative obligation not to impair another's existing access to basic education.¹⁴
- 26 An independent school which has undertaken to educate a child bears a negative constitutional obligation not to bring that education to an end without a fair process and without regard to the best interests of the child. That is precisely this case.¹⁵
- 27 The right to a basic education includes the right of a final-year learner to be registered for, and to write, the examinations leading to the National Senior Certificate; and what is true of a public school is no less true of an independent one, by operation of section 8(2). For the Grade 12 learners, registration and the writing of the examinations are not a contractual indulgence but the culmination of their basic education.¹⁶
- 28 In other words, the import of *Moko* is this: for learners in the final year of schooling, the examination pathway culminating in the National Senior Certificate is part of basic education itself, not some detachable administrative extra.

¹³ *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) at paras 14–26.

¹⁴ *Juma Musjid* (above) at paras 57–58.

¹⁵ *AB and Another v Pridwin Preparatory School and Others* 2020 (5) SA 327 (CC) at paras 167–180.

¹⁶ *Moko v Acting Principal of Malusi Secondary School and Others* 2021 (3) SA 323 (CC) at paras 41–49.

- 29 Furthermore, where a school wishes to make a decision that affects a child, that child has a self-standing right to have their views heard on the matter, either in person or through a representative.¹⁷ In *C, Skweyiya J* reasoned that section 28(2) requires “as a minimum that the family, and *particularly the child concerned*, must be given an opportunity to make representations.”¹⁸
- 30 Khampepe J asseverated that 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. This, she rightly held, is based on our constitutional order, legislation and international law instruments to which South Africa is a party.¹⁹

- 31 Instructively, Khampepe J further held that:

“... section 28(2) requires that, before an independent school may enforce a termination provision in a Parent Contract in a particular case, it must have due consideration of the best interests of the individual child who will be removed from the School. ... section 28(2) forms a standard that is expected of conduct which affects children in general. In this case, it prescribes that the conduct of independent schools, generally, in terminating Parent Contracts (and thereby interfering with the basic education of children) must be done in accordance with the ‘best interests of the child’ standard required by section 28(2).”²⁰

- 32 The South African Schools Act²¹ is also useful. The Act defines, under section 1 of the Act, a “school” to include an independent school that enrolls learners between grade zero and grade twelve; it makes school attendance compulsory

¹⁷ *Pridwin* (above) at para 148.

¹⁸ *C v Department of Health and Social Development, Gauteng* 2012 (2) SA 208 (CC) at para 27

¹⁹ *Pridwin* (above) at para 232.

²⁰ *Pridwin* (above) at para 228.

²¹ South African Schools Act 84 of 1996 (“**South African Schools Act**”).

until age fifteen or Grade 9; and it expressly provides, in relation to public schools, that no learner may be refused admission because a parent has not paid school fees. The Act therefore reflects a legislative policy architecture in which children's access to schooling is separated from parental indebtedness. That policy backdrop supports the applicant's basic submission that fee enforcement should be directed at the parent, not operationalised through the child's educational exclusion.

WHY THE RESPONDENTS ACTED UNLAWFULLY

- 33 The applicant was repeatedly invited to pay. She was never invited to make representations on whether exclusion, de-registration, or non-registration was lawful, fair, necessary, or consistent with the children's best interests. A demand to pay is not a hearing.
- 34 In other words, the applicant was informed about her breach of contract, but she was not invited to make representations about the decision that would have an adverse impact on her and her children.
- 35 Our courts have recognised that the law is that you must be afforded *audi* in terms of the decision that would have an adverse impact on you. For example, in *President of the Republic of South Africa v Public Protector*, the Full Bench held that the Public Protector ought to have given the President notice of the drastic remedial action she was contemplating and an opportunity to make representations on this issue.²² Her failure to do so led to the setting aside of the

²² *President of the Republic of South Africa v Public Protector* [2020] 2 All 865 (GP) at paras 154–162.

remedial action included in her report. This reasoning *Gordhan v Public Protector*.²³

- 36 The respondents' best-interests case is also deficient. Nothing in the operative notices demonstrates a genuine balancing exercise between debt recovery and the catastrophic educational consequences for two Grade 12 learners and one younger child of compulsory school-going age.
- 37 The respondents remained free to sue for the debt, insist on security, or negotiate a payment structure. What they could not constitutionally do was to convert access to education into leverage for debt collection.

THE REQUIREMENTS FOR INTERIM RELIEF

- 38 The requirements are settled: a prima facie right, though open to some doubt; a reasonable apprehension of irreparable and imminent harm; a balance of convenience favouring interim relief; and the absence of a satisfactory alternative remedy.²⁴
- 39 Insofar as the relief directing registration and the writing of the examinations is final in effect, the applicant accepts that she must show a right that is clear, or very nearly so, that the threatened harm is serious and irreparable, and that there is no satisfactory alternative.²⁵ Each requirement is satisfied.

²³ *Gordhan v Public Protector* [2021] 1 All SA 428 (GP).

²⁴ *Setlogelo v Setlogelo* 1914 AD 221 at 227.

²⁵ *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) at paras 41 and 45–47.

A clear right: the “never enrolled” defence is untenable

40 The respondents’ only answer to the right is that the children were never enrolled for 2026. That defence cannot survive the respondents’ own documents.

41 Final relief on motion is granted on the respondents’ version together with the admitted facts, save where the respondents’ allegations are “so far-fetched or clearly untenable” that they may be rejected on the papers.²⁶ The “never enrolled” allegation is of exactly that character. It is contradicted by the 7 May letter (which traces termination to 5 January 2026, not October 2025); by the 28 October notice (prospective, and claiming a term’s fees for January to April 2026 in lieu of notice); by the 5 January notice (inviting payment “to complete enrolment” or for the applicant to indicate if she will be withdrawing her children from the School); by the 13 April notice (offering examination registration on payment by 30 April and referring to “the Class of 2026” to ensure that the Grade 12 learners’ progress); and by the School’s own welcome letter, timetables, progression meetings and assessments for 2026.²⁷ A school does not welcome, timetable and assess children whom it has not enrolled. The allegation falls to be rejected on the papers.

42 Nor may the respondents rely on their own act of exclusion to contend that there was no access to impair. That would be to permit a party to profit from its own wrong.

²⁶ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E–635C.

²⁷ CaseLines 009-62 (FNS7, 7 May 2026); 009-54 (FNS4, 28 October 2025); 009-57 (FNS5, 5 January 2026); 009-60 (FNS6, 13 April 2026); 010-27 (welcome letter); 010-33 (timetables); 010-21 and 010-24 (progression and subject choices).

- 43 The right is clear for the further reason that the decision was procedurally unfair. The respondents say the applicant was afforded repeated opportunities to make representations. She was afforded opportunities to pay. She was never invited to be heard on the decision to cancel the contract and to exclude the children, or on its consequences for them; and when she did make representations, in early May 2026, the School did not engage but proceeded to its decision.²⁸ A demand for payment under threat of exclusion is not a hearing. The Constitution required a fair process and an opportunity to make representations on the effect of the termination upon the children; there was none.²⁹
- 44 The best interests of the children, which section 28(2) makes paramount, were not considered at all. That paramountcy cannot be reconciled with the exclusion of three children, two in their matriculation year, deployed as an instrument of debt collection.³⁰
- 45 Finally, the School broke its own contract. Under clause 11.3 it could cancel “for any reason” only on a full term’s written notice, the learner remaining until the end of the term; under clause 11.4 it could cancel for non-payment, a breach curable by payment, only after a notice to remedy and the lapse of twenty business days, its remedy being limited to a term’s fees. The decision of 7 May 2026 gave neither notice nor any opportunity to remedy, and excluded the children at a stroke. A school that invokes clause 12.1.2 is bound to obey clauses 11.3 and 11.4.³¹

²⁸ The applicant’s appeal of May 2026, CaseLines 010-63 – 010-69 (annexure RA2).

²⁹ *Pridwin* (above) paras 167–180 (Theron J).

³⁰ *S v M* 2008 (3) SA 232 (CC) paras 14–26.

³¹ Parent Contract, clause 11, CaseLines 009-33 – 009-34 (and, for the youngest learner’s contract, 009-47 – 009-48); annexure FNS2. Clause 12.1.2 is invoked in the notices at, e.g., CaseLines 009-55 and 009-63.

- 46 The applicant has therefore established, at the least, a prima facie right, and in truth a clear right.

Irreparable harm

- 47 For the Grade 12 learners the harm is grave and irreversible. Unless they are registered and re-admitted now, they cannot write the June, Preliminary and Final examinations; no National Senior Certificate can be awarded to them in 2026; they cannot apply to a university for 2027; and the matriculation year is lost.³² An examination once missed cannot be written in retrospect, and no award of damages can restore a year that cannot be lived again. The Constitutional Court in *Moko* recognised exactly this.³³
- 48 For the youngest child, who is of compulsory school-going age, every day out of class causes harm that cannot afterwards be made good. He has already been made to repeat a grade as a result of the respondents' earlier exclusions.³⁴

Balance of convenience and the absence of an alternative remedy

- 49 The balance of convenience is not close. The respondents' only prejudice is the timing of a debt that is admitted, secured, and (on their own version) already in the hands of attorneys; they retain every remedy to recover it.³⁵ The children's prejudice is the loss of their education. The interim relief takes nothing from the respondents that they cannot recover in the ordinary course. A decision affecting

³² Final notice, CaseLines 009-62 – 009-64 (FNS7); IEB timetable, CaseLines 001-69 – 001-70 (RM10).

³³ *Moko* (above).

³⁴ Founding affidavit, CaseLines 001-8; and CaseLines 010-70 – 010-75 (RA3).

³⁵ Final notice, CaseLines 009-62 (FNS7); statement of account, CaseLines 009-75 – 009-79 (FNS11).

a child's basic education cannot, in any event, be treated as a purely commercial matter.

50 There is no satisfactory alternative remedy. The seventh respondent deals only with the school and not with a parent, which is why relief is sought against it. The alternatives the respondents propose (registration as a private candidate, or a distance-learning provider) are neither available nor adequate on the evidence: the Grade 12 learners' school-based assessment was completed at the School, the alternative identified by the seventh respondent did not offer the same subjects, and the youngest child cannot be placed elsewhere mid-year, the more so while his records were withheld and produced only under cover of the answering affidavit.³⁶

THE ANSWERING AFFIDAVIT IS NOT PROPERLY BEFORE THE COURT

51 In terms of Regulations 3(1) and 4(1) of the Regulations Governing the Administering of an Oath of Affirmation, Government Notice R1258, Government Gazette 3619 of 21 July 1972 (as amended):

51.1 The deponent shall sign the declaration in the presence of the commissioner of oaths. (Regulation 3(1))

51.2 Below the deponent's signature or mark, the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration, and he shall state the manner, place and date of taking the declaration. (Regulation 4(1))

³⁶ The 2025 report cards were produced only with the answering affidavit, at CaseLines 009-65, 009-68 and 009-71 (annexures FNS8 to FNS10).

- 52 Thus, an affidavit is a written statement sworn before someone authorised to administer an oath, such as a commissioner of oaths. Rule 6(5)(d)(ii) contemplates that a person opposing relief sought shall file an answering affidavit.
- 53 The answering affidavit has not been duly commissioned. The applicant has not been served with a signed and commissioned answering affidavit, notwithstanding the respondents' undertaking to furnish one, and the document does not comply with the regulations governing the administering of an oath. An answering affidavit that has not been duly deposed to and commissioned is not an affidavit, and is not properly before the Court.³⁷
- 54 Accordingly, the applicants have not filed an answering affidavit as required by Rule 6(5)(d)(iii).

COSTS

- 55 The applicant seeks costs against the first and second respondents, jointly and severally, including the costs occasioned by any opposition.
- 56 This litigation became necessary solely because of the respondents' conduct.
- 57 The applicant did not rush to court. Following the respondents' decision of 7 May 2026, she attempted repeatedly to resolve the dispute without litigation. Through SECTION27, a formal demand was addressed to the respondents. Further

³⁷ Regulations Governing the Administering of an Oath or Affirmation, GN R1258 of 21 July 1972 (as amended), made under the Justices of the Peace and Commissioners of Oaths Act 16 of 1963, in particular reg 4. The reply records that no duly signed and commissioned answering affidavit was delivered: CaseLines 010-7.

attempts were made to secure engagement and a practical resolution. Those efforts were met with silence or refusal.

58 Therefore, the respondents left the applicant with no alternative but to approach this Court urgently in order to protect the constitutional rights of her children.

59 More importantly, this case concerns the vindication of fundamental constitutional rights, including the rights to basic education, dignity and the paramountcy of the best interests of the child.

60 The respondents were entitled to pursue outstanding fees through ordinary legal processes. They were not entitled to do so by excluding children from school and by refusing access to the examination process that culminates in the National Senior Certificate.

61 The respondents' conduct has necessitated urgent proceedings, extensive legal intervention and the involvement of this Court in circumstances that ought never to have arisen.

62 In those circumstances, considerations of fairness strongly favour a costs order against the first and second respondents.

63 Should the Court grant the relief sought, the applicant submits that the costs should follow the result.

CONCLUSION

64 The respondents may sue for fees. They may not use fee arrears to extinguish existing access to basic education. Section 29(1)(a) protects the right

immediately; section 28(2) requires that the children's interests be treated as paramount; and section 8(2) brings those obligations to bear on a private school where the right and the duty so require.

- 65 For an independent school, contractual autonomy is not a constitutional exemption. At the least, fair process, public policy, and genuine regard to the child's best interests are required before educational exclusion is effected. On these papers, the respondents themselves accept that much.
- 66 For Grade 12 learners, the refusal to register the matric examinations is not administratively incidental. It strikes at the core of basic education. In this matter, the exam calendar renders the prejudice immediate, escalating, and irreparable.
- 67 The respondents' proposed alternatives do not answer the constitutional wrong. A theoretical later route is not a substitute for continuity of schooling, continuity of assessment, and preservation of a live matric cycle.
- 68 The balance of convenience favours the children. The school's financial prejudice is recoverable. The learners' educational loss is plainly not recoverable.

SFISO BENARD NXUMALO
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8 June 2026