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Must fees fall? The impact of the lockdown on school fees

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It has now been more than a month that all schools have been closed in an effort to prevent the spread of COVID-19 among school children, educators and staff employed in schools. While several independent schools have taken the initiative to continue their schooling programs via online learning platforms, many institutions lack the resources to provide their students with similar access to education.

On 30 April 2020, the Minister of Basic Education urged parents to nevertheless continue paying school fees as normal in order to ensure that teachers receive their salaries. The question which arises is whether or not parents must be expected to pay the full school fees even though their children are not physically attending school, benefitting from the wholesome schooling experience which includes social interaction, free play and sports and recreation. In the same vein, what are the rights of schools to enforce the payment of fees in the circumstances?

The governing legislation for schools is the South African Schools Act No. 84 of 1996 ("Schools Act"), which distinguishes between public and independent schools. Public schools perform the constitutional function of providing basic education in terms of section 29(1) of the Constitution. As such, the Schools Act prohibits the refusal of admission, suspension or expulsion of a learner due to the non-payment of school fees in order not to deprive learners of their right to basic education. In terms of Section 40 of the Act, parents of learners in public schools are liable for school fees, but can be exempted from the payment of school fees to the extent that they are unable to pay. Depending on whether a parent has suffered a reduction in salary or has become unemployed, the exemption may be partial or full. According to a statement made by the Western Cape Education Department, where parents have been rendered unemployed due to the national lockdown, they should apply to the head of the School Governing Body ("SGB") for exemption from fees in terms of section 40. Nevertheless, parents have been urged by various stakeholders to continue paying school fees to cover the salaries of teachers appointed by SGBs.

Independent or private schools do not provide the same constitutional function as public schools, and instead have contractual relationships with the parents of learners. As such, independent schools have more extensive remedies at their disposal to enforce the payment of school fees. In *St Charles College v Du Hecquet De Rauville*, the KwaZulu-Natal Division of the High Court confirmed the principle of informed choice, which dictates that parents exercise a discretion to send their children to independent schools because they enjoy a higher economic status than the majority of parents who choose to send their children to public schools.[1] The case confirmed that the immovable property of parents is executable for payment of arrear school fees. Further, in *AB and Another v Pridwin***[2]** the Supreme Court of Appeal held that private schools have the right to terminate their contractual relationships in the event of a material breach. Depending on the terms of each contract, failure to pay school fees may constitute such a breach. Schools would then be entitled to prevent students from returning to school.

In the case of *NM v John Wesley School***[3]** the KwaZulu-Natal Division of the High Court emphasised that when independent schools enforce their contractual rights in recovering arrear payments or want to exclude learners, they must always be cognisant of the best interests of the child standard. Schools must enquire into the reason for the default on fees and make a reasonable decision which will minimise any adverse effect on a learner's education. Considering the ongoing situation regarding COVID-19 and its effect on the economy and the livelihoods of many South Africans, schools should be careful not to appear draconian in the enforcement of their contractual rights in the

face of the possible economic hardship of parents. Schools should consult with parents and attempt to settle the outstanding fees or make provision for alternative repayment terms before considering the exclusion of a learner.

Where parents become unemployed or it becomes unreasonably difficult for them to pay their school fees, they may rely on the contractual principle of supervening impossibility of performance. If a school contract contains a material adverse change ("MAC") clause, parents may rely on that clause to justify non-performance of their contractual obligations to pay school fees. However, such a clause may only be invoked in specific circumstances. Even if there is no MAC clause, the common-law principle of *vis maior* may apply where performance has become objectively impossible or so onerous that it would be unreasonable to expect a party to perform. However, such disputes will always need to be decided by a court, taking into account all the relevant and surrounding circumstances.

In conclusion – parents have been encouraged to continue paying their school fees wherever possible. In a situation where it becomes impossible for parents to pay, the first step should always be mutual engagement between parents and schools. Parents in public schools may be granted exemptions in terms of the Schools Act. It is advisable that parents obtain legal advice before attempting to rely on *vis maior* or MAC clauses. In enforcing their contractual rights, independent schools must be careful to minimise any adverse impact on learner's rights and seek settlement routes before considering more litigious options. COVID-19 has not only brought to the fore various "new normals" in virtually all areas of life, but it has also accentuated the glaring stubborn inequality in South African society and in particular the interconnectedness between the right to education and access to data.

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[1] *St Charles College v Du Hecquet De Rauville* [2017] 3 All SA 358 (KZP)

[2] *AB and Another v Pridwin Preparatory School and Others (Equal Education as amicus curiae)* [2019] 1 All SA 1 (SCA)

[3] *NM v John Wesley School and Another* 2019 (2) SA 557 (KZD)



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