

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



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

REPUBLIC OF SOUTH AFRICA

CASE NO: 2024-001357

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
.....
SIGNATURE	DATE
	DATE

In the matter between:

U[...] R[...]

Applicant

And

SARIKA BESESAR

First Respondent

REDHILL SCHOOL

Second Respondent

ST STITHIANS SCHOOL

JUDGMENT

SENYATSI, J

Introduction

- [1] This is an application brought on an urgent basis on 11 January 2024 and which was enrolled on the same day on 4 hours' notice. The time periods were found to be unreasonably truncated and the Court stated that because the schooling of the minor child was an issue, the matter needed urgent determination. The parties agreed to draft an order setting out more reasonable time periods for filing and re-enrolment of the matter. The applicant seeks *inter alia* an order that the minor child returns to St Stithians College. In her counter application the first respondent seeks *inter alia* an order that the minor child remains at Redhill School. The main application and the counter application are opposed.
- [2] The parties agree that the schooling issue requires urgent resolution and have consequently exchanged papers which the court has had regard to. I agree that the matter is indeed urgent. I am grateful for the efforts put forward by both counsels to assist me in the speedy determination of this matter.

Background

- [3] The applicant and the first respondent are parents to S[...] ("the child"), a boy child aged 7 (seven) years and are currently involved in an acrimonious divorce. The dispute between the parents is which school their minor child should attend between Redhill School and St Stithians College. The child commenced school at Redhill from 10 January 2024. In the 2023 school year the child was attending St. Stithians College.
- [4] The applicant states that he had given his consent for the minor child to attend Redhill School and had in fact already paid half of the deposit required. He contends that he subsequently withdrew his consent as he was of the view that it was not in the interest of the child to continue attending Redhill School following the experts reports which, according to the applicant, state that S[...] has anxiety as a result of any change. He understands the change referred to also relate to change in schools. He furthermore contends that because S[...] had spent a year at St Stithians which is less than 2 kilometres from the former matrimonial home, that S[...] had bonded with other children at St Stithians, and it was not in his interest to be moved to Redhill which is a further 7 kilometres away. Furthermore, the applicant contends that the minor child reported to him

an incident where he had been pushed on his stomach by one of the children at Redhill and this caused him anxiety .

[5] The applicant further contends that the first respondents' unilateral decision to remove S[...] from St Stithians College to Redhill School was unlawful, as it blatantly undermined his rights in terms of section 31 of the Children's Act 38 of 2005.

[6] The applicant furthermore contends that since attending Redhill School, S[...] has experienced following:-

6.1. On 10 January 2024, being his first day attending at Redhill, the child was pushed in the stomach by another pupil;

6.2. Redhill has failed to communicate what action would be taken to resolve the issue of the child being punched in the stomach in what procedures will be followed to resolve the bullying against the child by another at their school;

6.3. The child has maintained a reserved and anxious demeanour towards the applicant and fails to disclose to the applicant his views and wishes surrounding his attendance at Redhill;

6.4. He contends that, as a result, he has no knowledge on whether S[...] has made any friends in Redhill and the extent of S[...]’s unsettledness.

6.5. The child walks with the comfort toy- presumably to soothe his anxiety of being abruptly placed into a new environment; and

6.7. S[...] has displayed physical signs of anxiety, resulting in the applicant contacting S[...]’s therapist to see S[...].

[7] Consequently, so argues the applicant, it is not in the interest of the child to remain at Redhill and that the relief sought should be favourably considered by this Court.

[8] The first respondent contends that when S[...] was born, the applicant and the first respondent agreed that Redhill was the preferred school, and that St Stithians would serve as a stepping stone until the space became available at Redhill. She contends that she acted in accordance with their agreement and enrolled S[...] as soon as the space became available for 2024 school year.

[9] The first respondent contends that her and the applicant jointly signed the contract of enrolment and paid the non-refundable deposit to secure S[...]’s position at Redhill. She contends that it came as a surprise that the

applicant withdrew his consent for enrolment at Redhill and that it was not in the interest of the child that the withdrawn consent be reconsidered for future enrolment at Redhill.

[10] On 19 May 2022, the Urgent Court in this division granted an order for, *inter alia*, the appointment of Dr Robyn Fasser (“Fasser”), a clinical Psychologist, to investigate and furnish a report as to the manner in which the parties are to exercise their parental responsibilities and rights in respect of the minor child. Fasser published her report and made recommendations in October 2022. In her report she recommended that both parties have full parental rights and responsibilities with regard to guardianship of, contact with, care of and maintenance of S[...]. Furthermore, that decision making should be shared by the parents with regards to education, extra-mural activities, major medical issues, religious issues, and any deviation into contact arrangements.

[11] Further, that in the event the parties cannot negotiate these issues on their own, they should employ a parenting co-ordinator to assist with facilitating the decision-making process. She recommended furthermore, that, the day-to-day decisions be made by the parent with whom S[...] is with at the time. She recommended that S[...] be primarily resident with his mother and that he has regular and predictable contact with his father. She further made recommendations on how the contact with the applicant

should be exercised and provided a schedule of contact. Fasser also recommended that the applicant attend therapy as she was concerned about his parenting style.

[12] The recommendation was ignored and the applicant declined to subject himself to therapy to deal with the issues that concerned Fasser regarding his parenting style. The parties have implemented the other recommendations and the contact arrangements with the minor child is not at issue.

[13] Another expert who compiled a report was the educational psychologist, Ms. Gillian Berkowitz (“Berkowitz”). Her report states that S[...] is a child of above average cognitive functioning and enjoys reading and has a particular fascination with mathematics. She states that she is satisfied that the child can attend and adjust to either St Stithian College or Redhill School.

Issues for determination

[14] The issue for determination is whether it is in interests of the minor child to remain at Redhill or whether he must be moved back to St Stithians considering the withdrawal of the applicant’s consent and the deposit payment already made at Redhill for the 2024 school year.

Legal principles

[15] The Court, as the upper guardian of all minor children, must ensure that every decision taken about the child is in the child's best interests.¹ The constitutional protection of the interests of the minor child finds application in The Children's Act No: 38 of 2005.²

[16] Chapter 2 of the Act (sections 6 - 17)

contains several directive principles guiding the interpretation and implementation of all legislation applicable to children, as well as to all proceedings, actions and decisions by any organ of state in any matter concerning a child. The principles give concrete expression to the fundamental constitutional rights of children in section 28 of the Constitution and in particular the value in section 28(2) that "a child's best interests are of paramount importance in every matter concerning the child". Thus, for instance, section 6(2)(a) of the Act provides that all proceedings, actions or decisions concerning a child must respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard, which as already stated, set out in section 7 of the Act and the rights and principles set out in the Act. The best interests standard is a detailed provision to which I will

¹ Section 28(2) of the Constitution Act No: 108 of 1996

² Section 7 of the Act provides for the best interests of child standard and sets out 23 factors.

refer more fully in due course. Section 9 reiterates the constitutional injunction and provides that in all matters concerning the care, protection, and well-being of a child the standard that the child's best interest is of paramount importance, must be applied. Section 6(4) is also relevant to litigation for substituted consent to relocate. It provides that in any matter concerning a child an approach which is conducive to conciliation and problem-solving should be followed, and a confrontational approach and delays in any action or decision to be taken must be avoided as far as possible.³

[17] The approach that the Court should adopt in resolving facts in motion proceedings has been laid down by Corbett JA in *Plascon Evans Paints Ltd v Van Riebeeck (Pty) Ltd*⁴. The overriding principle, by necessity, must always be (and nothing has changed in this respect) whether the relief to be granted will be justified with reference to the common cause facts, the facts put up by the respondent, and those facts put up by the applicant, the denials of which by the respondent are untenable or uncreditworthy to the extent that they can be rejected and the contrary allegations of the applicant safely accepted. Moreover, bearing in mind that at least 23 factors are mandated by section 7 of the Act for consideration in relocation cases, none of which alone ordinarily

³ See *Cunningham v Pretorius* (31187/08) [2008] ZAGPHC 258 (21 August 2008) para 6.

⁴ [1984] ZASCA 51; 1984 (3) SA 623 (A).

will be decisive of what is in the best interests of the child, a court should hesitate to order recourse to oral evidence to resolve a dispute of fact about any one such factor when findings in relation to the others have been satisfactorily resolved and point inexorably to a particular resolution. Then, to state the obvious, the respondent's version of the disputed fact should rather be accepted, unless of course it is uncreditworthy. Where, however, on the rare occasion, that fact alone might prove decisive or critical in one way or another then a reference to oral evidence may still be justified.⁵

[18] When dealing with the best interests of child principle, the Court is required to assess an overall impression and bring a fair mind to the facts set out by the parties. The relevant facts, opinions and circumstances must be assessed in a balanced fashion and the court must render a finding of mixed facts and opinion, in the final analysis, structured value judgment about what it considers will be in the best interest of the minor child.⁶

Consideration of the facts, application of the law to the facts and reasons

⁵ See *Cunningham v Pretorius*, above foot note 3 para 5.

⁶ *Moko v Acting Principal, Malusi Secondary School and Others* 2021(3) SA 323 (CC) para 1 on the right to education.

[18] It is common cause that when the minor child was born, the parties had agreed that they would enrol the child at Redhill. The undisputed evidence is that they both started engaging Redhill to secure a space for when the child is ready to start school. S[...] was placed on the waiting list well in advance. The first respondent took the lead in checking with the school as to how far down the list S[...] was and kept the applicant apprised of the developments. This culminated in Redhill informing both parents that the child was still far on the list of waiting children. S[...] was taken to Crawford School for his pre-schooling. He was later moved to St Stithians to do Grade 0 during 2023 which both parties preferred as an alternative to Redhill whilst still waiting for S[...]’s turn at Redhill.

[19] During March 2023, the parents were asked by Redhill to bring him for the entrance test which they jointly did. Unfortunately, by that time, the parties were involved in an acrimonious divorce, but they still agreed to have S[...] tested and he passed his tests. The parents were jointly liable for the deposit and in fact the applicant was the first to pay for the fees at Redhill. At the time this was taking place, S[...] was already at St. Stithians which both parents had agreed would be used as a stop gap whilst their son was waiting for space at Redhill. It is evident from the conduct of the parties at that stage that they were in agreement about their

child's attendance at Redhill. It is also common cause that both parents kept the option at St Stithians open for S[...] for the 2024 school year.

[20] The applicant claims that he had a change of heart about Redhill when the experts expressed a view that a change in S[...] circumstances would cause him anxiety . The change of heart as contended by the applicant was premised on the experts reports. I have fully considered the reports and the applicants claim that they were the basis for his change of heart and cause for him withdrawing consent regarding attendance at Redhill. I have not found any reference in any of the report that the change from St Stithian to Redhill would adversely affect S[...]. On the contrary, Berkowitz states that any of the schools would be suitable for S[...]. Accordingly, the contention by the applicant that the change of heart was caused by the expert's reports is misplaced and unreasonably made.

[21] I have been referred by Ms Salduker on behalf of the applicant to the principles set out in *McCall v McCall*⁷. The dispute in the case was about the custody of a minor child aged 14 years which had still not yet been resolved post the divorce between the parties. In my view, the facts in that case are distinguishable from those of the matter before me. The issue in that matter was about who between the two parents was suitable enough to ensure that the interests of the minor were protected. In the instant matter, the custody is not the issue as both parents enjoy the co-

⁷ 1994(3) SA 201 (CPD).

parenting rights. Consequently, the facts in *McCall v McCall* find no application in the present litigation.

[22] It was also submitted on behalf of the applicant that I must have regard to *Nel v Nel*⁸. In that matter, the dispute involved the change of school of the eldest child from Kenridge Primary School which he had attended since grade R up to grade 2. It was common cause between the parties that the mother, who was the respondent in the matter, had removed the child from that school without informing the applicant and obtaining his consent. The court correctly held that the conduct of the mother was in violation of section 31(b)(iv) of the Children's Act. The facts in the instant case are different.

[23] The parties in the present matter had all along agreed and identified Redhill as the school of choice for S[...]. The parties are educated and relatively young. I have no issues that the current co-parenting arrangement which is honoured by both parties must remain in place as S[...] needs both his parents for his stability and growth. This is why they signed the necessary paperwork and paid the deposit, so S[...] could attend at Redhill from 2024. In fact, the first respondent has taken it upon herself that she would pay any penalty that may be imposed by St Stithian as the space for S[...] had remained available for 2024. The first respondent did not, in my view, conduct herself in a manner that was

⁸ [2011]ZAWGHC 113.

contrary to the interests of S[...] or for that matter in violation of section 31(b)(iv) of the Children's Act.

[24] In my considered view, the applicant's sudden unreasonable withdrawal of consent regarding S[...]’s attendance at Redhill, was not in the child's interest. On the contrary, S[...] is attending with some children that he was with at St, Stithians and the fear expressed by the applicant that Redhill is not suitable because it failed to report that S[...] was punched on the stomach by one of the children, is without basis and an insufficient reason why the school is not good enough or will cause anxiety to S[...]. Accordingly, the facts in *Nel v Nel* find no application in the present case.

[25] There was no unilateral decision to simply take S[...] to Redhill. For fear of repetition, the parties knew all along that Redhill was their school of choice and the child was comfortable there. I find no basis to reject the first respondent's contention that S[...] is excited about his new school and has expressed that excitement to family and friends. Accordingly, it will not be in S[...]’s interest to remove him from Redhill to St. Stithians.

[26] It follows therefore that the applicant has failed to show that he is entitled to the relief sought in so far as interdicting the child's school attendance at Redhill and all other related relief. The main application must therefore fail.

Counter-application

[27] In her counter-application, the first respondent seeks certain relief, *inter alia*, the minor child shall remain enrolled at and continue to attend Redhill School in Morningside, Sandton; that the first respondent and the applicant shall remain equally liable for the child's school fees and school related expenses at Redhill, pending the delivery of an order in the Rule 43 proceedings argued on 30 November 2023; that the parents shall be equally liable for any and all amounts due to St. Stithians as a result of the termination of S[...]’s attendance; in the alternative to paragraph 6.1 and in the event the Court is unable to determine which school S[...] should attend on the papers as they stand, a *curatrix ad litem* be appointed for S[...] , to do all things necessary to investigate what school would be in S[...]’s best interests and to provide a report and recommendation to the Court within 15 days from the date of the Court’s order.

[28] The counter application, as stated before, is opposed. However, upon consideration of the conspectus of facts on the papers, it is clear to me that the applicant does agree that Redhill is a good school. The applicant says so in his papers but states that because he has withdrawn his consent, the fact about Redhill being a good school should not be considered. He states that he may in future consent to S[...] attending Redhill.

[29] I find no basis why the child should be uprooted from Redhill contrary to his best interest. Consequently, upon consideration of the counter application before me, I hold the view that the first respondent has made out a case in the counter application.

Costs

[30] Both counsels argued that the costs should follow the outcome. When it comes to costs, the Court always has a discretion to exercise. When the application was brought before court on 11 January 2024, the truncated time periods set out in the main application were unreasonably short. The first respondent was expected to have filed the opposing papers in 4 hours and the costs for that day were reserved. In exercise of the Court's discretion, I am of the view that the costs should follow the outcome. I say so because the present litigation is unrelated to the Rule 43 application.

Order

[31] As a result, it is ordered that:-

- (a) the application and counter application are heard as applications of urgency in accordance with the provisions of Rule 6(12)(a) and the usual forms, time limits and procedures as

envisaged in terms of Rule 6(5), including the requirement of service via the sheriff of this court, are dispensed with.

- (b) The main application is dismissed and the applicant is ordered to pay the costs of the application, including the costs incurred on the 11th of January 2024 .
- (c) The minor child, S[...] R[...], be enrolled at and continue to attend Redhill School situated at 20 Summit Road, Morningside, Sandton.
- (d) The applicant and respondent shall be equally liable for S[...]’s school fees and school related expenses at Redhill, pending the delivery of an order in the Rule 43 proceedings argued on 30 November 2023.
- (e) The applicant and respondent shall be equally liable for any and all amounts due to St Stithians College as a result of determination of the minor child’s attendance.
- (f) The applicant is ordered to pay the costs of the counter- application.

SENYATSI M L
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

Delivered: This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 25 January 2024.

Appearances:

For the Excipient/Defendant: Adv A Salduker

Instructed by: Paizes Attorneys

For the Respondent/Plaintiff: Adv F Bezuidenhout

Instructed by: Clarks Attorneys

Date of Hearing: 23 January 2024

Date of Judgment: 25 January 2024