

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No. 1592/2010

In the matter between:

MR. B First Applicant

B Second Applicant

and

Mrs. B Respondent

MEYER, J

[1] This application and counter-application came before me in the Motion Court yesterday by way of urgency.

[2] The first applicant and the respondent were formerly married. There were two minor children born of their marriage, a daughter who is presently seventeen years old and a son who is the second applicant in these proceedings and presently sixteen years old.

[3] On 2 September 2009, the first applicant and the respondent were divorced from each other by an order of this Court, which order incorporated

their settlement agreement. In terms thereof the first applicant and the respondent have joint parental rights and responsibilities in respect of the minor children, their primary residence vests with the respondent, and the first applicant has reasonable contact to them subject to his contact to the second applicant being specified.

[4] In terms of Part B of the Notice of Motion, the first and second applicants intend to approach this Court by way of urgency next week on Tuesday, 26 January 2010, for an order that primary residence of the second applicant be awarded to the first applicant, and for permitting the first applicant to remove the second applicant from the Republic of South Africa and to take him to reside and study in Portugal. The applicants and the respondent are Portuguese nationals. It is stated in the founding affidavit that was deposed to by the first applicant and confirmed by the second applicant that the second applicant 'wishes at this stage to finish his schooling in Lisbon Portugal, to do his tertiary education there and to advance his passion for soccer which he feels he can do more readily if he were allowed to relocate to Portugal.'

[5] The urgent relief that is presently sought in terms of Part A of the Notice of Motion is for an advocate to be appointed to represent the second applicant in the application for the relief set out in Part B of the Notice of Motion and for a referral of the matter to the Family Advocate to prepare a report as a matter of urgency.

[6] The reasons for the second applicant's wish to be legally independently represented are stated to be that he was advised by counsel that he should be so represented and because he wants to ensure that there could be no suggestion that he is being influenced. It is to be noted that the respondent avers that he has been influenced by the first applicant and the first applicant's family.

[7] The respondent resists the relief claimed in terms of both parts of the Notice of Motion. The relief claimed in Part A is essentially resisted on the basis that no case for urgency has been made out; that the second applicant is a minor and has no *locus standi*; and that the second applicant does not require his own legal representative since his views, submissions and facts he wishes to advance can be done through the first applicant's attorney and counsel.

[8] The respondent, by way of counter-application, seeks that the second applicant be ordered to forthwith return to Redhill School pending the final determination of this matter and for the first applicant to be ordered to ensure that he does so.

[9] I consider the circumstance that this Court will be approached next week to determine whether or not it is in the best interests of the second respondent if his primary residence is awarded to the first applicant and if permission should be given for the second applicant to reside in Portugal as rendering the relief sought in Part A of the Notice of Motion sufficiently urgent.

Whether or not urgency exists in respect of the relief claimed in Part B of the Notice of Motion is for the Court hearing that part of the application to decide. The fact is that the second applicant wishes that an independent counsel represent him before the Court next week.

[10] S 28(1)(h) of the Constitution of the Republic of South Africa provides that '[e]very 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.' It has not been established that 'substantial injustice' would result if the second applicant is not represented by his own legal practitioner and the appointment of a legal practitioner by the State and at State expense is not sought. The second applicant seeks the appointment of a legal practitioner of his choice and his father, the first applicant, undertakes to pay for such independent representation for him - 'win, lose or draw', as it was put by Adv. Folkes-Jones SC who appeared for the first applicant.

[11] S 8(1) of the Children's Act 38 of 2005 ('the Act') provides that '[t]he rights which a child has in terms of this Act supplement the rights which a child has in terms of the Bill of Rights.' S. 14 of the Act provides that '[e]very 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.'

[12] S. 14 of the Act supplements and is broader in scope than s 28(1)(h) of the Constitution. S. 14 does not limit a child's right to legal representation to

cases in which 'substantial injustice' would otherwise occur. S. 14 also does not limit the assistance to which a child is entitled to that of a legal practitioner assigned by the State.

[13] S 14 of the Act does not prescribe the manner in which a child is entitled to bring a matter to a Court nor the way in which he or she is entitled to be assisted. Nothing stated in this section, in my view, places any constraint upon this Court to determine the manner in which a child is to bring a matter before it or the way in which the child should be assisted. The paramount consideration in determining such issues remains the best interests of the child concerned. A request by a child to be assisted in legal proceedings by his or her own legal representative will, however, in my view, only be refused in exceptional circumstances since the child concerned, particularly where he or she is a party to the proceedings, will otherwise be placed in a worse position than all other natural or legal *personae* that enjoy such right.

[14] I consider it appropriate in all the circumstances for the second applicant to remain a party to the proceedings. He is sixteen years old. He has been cited as the second applicant in the notice of motion and all the affidavits filed so far. Also bearing in mind the issues raised on the papers, I do not consider it appropriate to disturb the manner in which he, as second applicant, elected to bring the matter to Court. His best interests will also, in my view, not be served by refusing him assistance by a legal representative in the conduct of Part B of the Notice of Motion. He is not financially at risk and

his wishes and desires will be better presented and argued by a representative who will 'apply legal knowledge and expertise to the child's perspective.' See: *Soller v G* 2003 (5) SA 430 (W), para 27.

[15] The second applicant wishes to be represented by Adv. Renay Kathawaroo, who is an Advocate of this Court and who is often appointed as an *ad hoc* Family Advocate with extensive experience in matters involving children. The second applicant states that he finds that he communicates easily with him.

[16] The respondent objects to the appointment of Adv. Kathawaroo on the grounds that he has already formed a view in regard to certain matters, which allegation is presumably based on a statement in the founding affidavit that Adv. Kathawaroo confirmed that the second applicant 'had told him that he wished to study in Portugal and that he could not find any evidence that he had been influenced.'; that Adv. Kathawaroo has close ties with the office of the Family Advocate; and that payment of his fees by the first applicant is improper and that it is the obligation of the State to pay for a legal representative if this Court should direct that one should be appointed.

[17] The grounds of objection raised do not, in my view, disqualify Adv. Kathawaroo from representing the second applicant. His view on whether or not evidence exists that the second applicant has been influenced is inconsequential. A Court will determine the issues on the evidence presented and the application of the relevant legal principles, having due regard to the

submissions, and not views, of counsel representing the parties. The fact that Adv. Kathwaroo acts as *ad hoc* Family Advocate from time to time and the fact that he will receive his fees from the first applicant do not justify any inference that he will not act with competence and integrity and comply with his duty towards his client, the second applicant, and with his duty towards the Court. The Family Advocate assigned to this matter is obliged to render a professional and neutral function. The State is not obliged to pay Adv. Kathwaroo since he is not assigned to the second applicant by the State and a case that substantial injustice would result if a legal practitioner is not assigned to the second applicant has not been made out.

[18] The second applicant attended Redhill School, Sandton all his life. The respondent's undisputed affidavit evidence is that Redhill School is 'one of the top independent South African schools, where he has been happy, well settled and has received an excellent education.' Prior to January 2010 the second applicant did not give the respondent any reason to believe that he did not wish to continue his education at Redhill School. He now refuses to go back to Redhill School. I have no hesitation in finding, as was in my view correctly submitted by Adv. Woodward SC on behalf of the respondent, that it is in the best interests of the second applicant that he should immediately go back to school pending the final determination of this matter.

[19] In the result the following order is made:

1. The applicants' and the respondent's non-compliance with the Rules of this Court are condoned and Part A of the application and the counter-application are determined as matters of urgency.
2. The second applicant is entitled to legal representation in this application for the relief set out in Part B of the Notice of Motion and to have Adv. Kathawaroo appointed to so assist him.
3. The matter is referred to the Family Advocate to prepare a report as a matter of urgency in regard to Part B of the Notice of Motion herein.
4. The second applicant is ordered to forthwith return to Redhill School pending the final determination of this matter.
5. The first applicant is ordered to ensure that the second applicant return to Redhill School forthwith.
6. The applicants are given leave to amplify their founding affidavits pertaining to the relief set out in Part B of the Notice of Motion.
7. The respondent is given leave to amplify her answering affidavit pertaining to the relief set out in Part B of the Notice of Motion.
8. Part B of the Notice of Motion is postponed to Tuesday, 26 January 2010 at 10h00 or as soon thereafter as the matter may be heard.
9. The costs of Part A of the Notice of Motion and of the counter-application are reserved for determination by the Court hearing Part B of the Notice of Motion.

P.A. MEYER
JUDGE OF THE HIGH COURT
20 January 2010