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REPUBLIC OF SOUTH AFRICA



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

CASE NO: 0000664/2018

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

.....
DATE

.....
SIGNATURE

In the matter between:

NTHABISENG QUTSWA (NEE SELLO)

Applicant

and

JANE MNGOMEZULU N.O.

First Respondent

MICHAEL J. SCHNEIER ATTORNEYS

Second Respondent

DIXON ACADEMY OF EDUCATION

Third Respondent

MASTER OF THE HIGH COURT

Fourth Respondent

J U D G M E N T

MABESELE, J:

[1] This is an urgent application for an order as follows:

- (i) Directing the First Respondent to fully cooperate with the Second Respondent to open the trust account on behalf of the deceased's minor children to enable the Second Respondent to release funds from the deceased's estate account for payment of the outstanding school fees of the minor children and the registration fees for the academic year 2018 as well as money for maintenance;
- (ii) Directing the Third Respondent to release the minor children's examination results to the Applicant, for the academic year 2017;
- (iii) The First and Third Respondents to pay costs of this application on the scale as between attorney and client.

[2] The Applicant is Nthabiseng Qutswa. She is the mother of the two minor children, namely: I., age 15 years, and T., age 13 years, respectively. She and the deceased were married to each other in 2002. Their marriage was dissolved by divorce on 4 February 2010. In terms of the Settlement Agreement, the deceased was liable for payment of the school fees of the minor children, amongst others. The deceased died in May 2016.

[3] The First Respondent is Jane Nomthandazo Mngomezulu, cited herein in her capacity as the Executrix in the estate of the late Themba Theodore Mngomezulu (Estate Number: 024098/2016).

[4] The Second Respondent is Michael J Schneier, an attorney practising under the name and style of Michael J Schneier Attorneys, cited herein as the attorney appointed by the Master of the High Court to wind-up the estate of Themba Mngomezulu.

[5] The Third Respondent is Dixon Academy of Education, a private school situated at corner Houtkop and Steel Road, Vereeniging.

[6] The Fourth Respondent is the Master of the High Court, Johannesburg, cited herein as a party responsible for the administration of the deceased estate.

[7] The deceased was the father of Itumeleng and Thando. He was responsible for the education and maintenance of these two children, as stated earlier. He paid their school fees direct to the school and bought stationery, uniform and other school needs. He paid maintenance in an amount of R1 500,00 per child, per month.

[8] Since the death of the deceased in 2016 the school fees of these children remain unpaid. According to a copy of the school account marked "NQ4" the outstanding amount is R69 291,20 (sixty nine thousand, two hundred and ninety one rand and twenty cents).

[9] The Third Respondent, according to the Applicant, refused to release I.'s Grade 9 results and T.'s Grade 7 results of the academic year 2017 as a result of the non-payment of the outstanding amount aforementioned. This is despite an undertaking by the Second Respondent, per the letter addressed to the Third Respondent, dated 20 July 2017, that the outstanding fees will be paid.

The letter reads:

"Messrs Dixon Academy

Carmy@dixonacademy.co.za

Dear Sirs

***RE: ESTATE LATE: T.T. MNGOMEZULU
FEES – I. AND T. MNGOMEZULU***

We report:

- 1. The Master of the High Court has to appoint Mrs Mngomezulu Senior as the executrix.*
- 2. We can then apply for funds from the Investment Institution to pay into the estate banking account.*
- 3. There is enough money to pay the funds but the correct steps have to be followed.*
- 4. Our firm will be assisting the executrix to wind-up the estate.*
- 5. As long as I am involved, the undertaking is given that the funds will be paid from the estate banking account.*

Yours faithfully

MICHAEL J. SCHNEIER"

[10] The Applicant is unemployed and thus not in a position to pay the outstanding school fees and to maintain the minor children.

[11] The Applicant's argument is that the First Respondent is being unreasonably and unfairly refusing to cooperate with the Second Respondent to open a trust account on behalf of the minor children in order for the Second Respondent to release funds to the Applicant and the Third Respondent. She argued further that the Second Respondent's conduct contravenes Section 1 of the Children's Act¹ and that the First Respondent is not acting in the best interests of the minor children because she deprives them of their constitutional right to education.

[12] She substantiated her argument by referring to a report prepared by a social worker in the employ of the Department of Social Development after she had interviewed the minor children with regard to their well-being and education. This report is dated 5 January 2018 and marked "NQ6". It reads:

"Psychosocial report of I. Mngomezulu and T. Mngomezulu aged 15 years and 13 years respectively. Children of the late Mr Themba Theodore Mngomezulu."

BACKGROUND

The children are the children of the late Mr Themba Mngomezulu who passed on the 10th of May 2016. The children are under the guardianship of Mrs Nthabiseng Qutsa who is their biological mother.

The two children were interviewed by me on the 3rd of January 2018. The two children explained to me that they are owing school fees and did not receive their reports since the second term until year end.

¹ Act 38 of 2005 which defines "care" *inter alia* as follows: "guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development".

They explained that their father was the one who was paying for their school fees and uniform but since he has passed on they have been struggling.

They also mentioned that they are not sure if they will attend school this year. (This is very disturbing thought for children of such age to have.)

MAJOR PROBLEM

The mother was also interviewed and she explained that she was not responsible for the payment of the school fees as the late father of the children was responsible and doing a good job there. She mentioned that the fees were paid straight to the school account and she never handles such fees.

The only money that she was receiving from the late husband is that of Maintenance of both children. She mentioned that she was getting R3 000-00 (Three Thousand). She was getting R1 500-00 per child hence she was getting R3 000-00. The money was electronically deposited to her account.

The children are learners at Dixon Academy, a private school in Three River's Sedibeng District. The children are owing this school an amount of R69 291-20. The school is not ready to hand out the end of the year report unless if the owed amount is paid in full. That is very frustrating for the children. They are unable to know how they performed for the year 2017 since they do not have reports. Their confidence as children has been minimised. The elder one has started behaving strangely. The children and their mother are in a process of looking for another place to stay since they are moving to another area due to job prospects of the mother.

The mother has performed her duties and responsibility by looking for another private school for the children in question. She is unable to find the school as the school she communicated with, needs a deposit for the children and currently she does not have.

IMPLICATIONS OF THE SITUATION

The two minor children are worried about the possibility of them not going to school in 2018 as they know and understand that their mom is unemployed and is unable to take care of her children financially.

The children's academic performance has been compromised for the year 2017. Chances of children not realising their right to education are very high for the academic year 2018 unless if the Court considers and have the health and welfare of the children at heart.

SOCIAL WORKER'S EVALUATION

The children are very hurt by the whole non-payment of their fees. They feel that somebody is failing them as children. The mother is willing to assist the children but is unable due to unemployment currently.

The following rights were violated by people who were supposed to take care of the two minor children:-

- 1. The right to education since their school fees were not paid;*
- 2. The right to quality healthcare – the children were taken care of by their late father who had them in his medical aid but currently they have to settle for the available medical care;*
- 3. The right to be taken seriously – if the two children were taken seriously, their education was not going to be stalled at all. Their livelihoods were going to be on top of the agenda every day.*

RECOMMENDATION

It is therefore recommended that the children's life especially education should be considered as priority like their father was doing.

The children costs of living has since changed and it is also recommended that the Court should also consider that.

The social worker also recommends that the children future maintenance be planned accordingly that will be beneficial to the children and all the people who are involved in this matter should consider having the interests of the children at heart.

WAY FORWARD

The children will be seen by the social worker to offer counselling on the strange behaviour that the children are now displaying.

Counselling will also be offered to their mom to assist her to continue to give utmost support to the minor children.

SCRIBE

*Phuti Sarah Mabuza
Social Worker
Sebokeng/Kopanong Hospital
Reg No. 10-16718
Signature:
Date: 05/01/18"*

[13] The main issue in this application, to my mind, is the right to education. I say so on the basis of the Applicant's contention that the funds be made available from her late former husband's estate for payment of the outstanding school fees of her minor children and that the Third Respondent should release the results of the minor children for the academic year 2017 despite the amount still owed.

[14] Education is not a privilege but right. This is evident in Section 29(1)(a) and (b) of the Constitution². The Section makes provision for a right to basic education and to further education which the State, through reasonable measures, must make progressively available and accessible.

[15] To my understanding, education is intended to improve one's knowledge and not for commercialisation. Its significance on the youths has been stated in numerous authorities³ and literature⁴

[16] On 1 September 2017 the First Respondent was duly appointed by the Fourth Respondent as the executrix and authorised as such to liquidate and distribute the estate of Themba Mngomezulu, father of the minor children, who died on 10 May 2016.

² Act 108 of 1996.

³ *Section 27 and others v Minister of Education and another* (2012) 3 All SA 579 4, 2013 (2) SA 40 (GNP); *Head of Mpumalanga Department of Education and another v Hoërskool Ermelo and others* 2010 (3) BCLR 177, 2010 (2) SA 415 (CC).

⁴ Bush T. *et al. Managing Teaching and Learning in South African Schools* Int. J. Educ. DEV (2009); Mathebula T. *People's Education (For People's Power) – a promise unfulfilled*. S. Afric. Educ. Vol. 33 no: 1 2013.

[17] It is beyond dispute that the First Respondent should have borne in mind that the process of liquidation and distribution of the deceased's estate is to be completed without delay for the sake of education of the deceased's minor children. Since her appointment, however, the First Respondent seems not to have shown eagerness to let the process finalised expeditiously, thus hampering education progress of the minor children.

[18] The Third Respondent has released the examination results of the minor children on the day of the hearing of this application despite non-payment of outstanding fees. Since the Third Respondent did not oppose the application it cannot be established whether its conduct to withhold the results is governed by its policy or emanates from established practice. Nevertheless, I am unable to condone the conduct of the Third Respondent. My view is that depriving the learners of their end of the year examination results due to non-payment of fees is to deprive them of their constitutional right to basic education as enshrined in section 29(1)(a) of the Constitution which includes right of a learner to know his or her academic performance. Therefore any public or private school that withholds the results of a learner due to non-payment of fees violate this right.

[19] The other issue worth noting is the adverse impact of the conduct of the Third Respondent on the emotions of the minor children and their mother as highlighted by the social worker in her report marked "NQ6". It is regrettable that children should lose confidence in them and be tortured

psychologically before they receive what they rightly deserve. That torture violates a right to freedom and security of the person⁵.

[20] The Third Respondent refused to release the examination results of the children in December 2017. It decided to release them on the day of the hearing of this application, on 15 January 2018. This is despite the fact that the Third Respondent was served with the papers on 12 January 2018. One would have expected the Third Respondent to release the results on the same day in order to save the Applicant legal costs, particularly that the Applicant is unemployed and the Third Respondent was assured that the outstanding school fees will be paid. For these reasons, I see no reason not to award punitive costs against the Third Respondent.

[21] In the result, the following order is made:

21.1 The First Respondent is directed to cooperate fully with the Second Respondent to open the trust account on behalf of the deceased's minor children.

21.2 The First Respondent should pay the costs of this application.

⁵ Section 12(1)(d) provides: *"Everyone has the right to freedom and security of the person which includes the right not to be tortured in any way."*

- 21.3 The Third Respondent should pay the costs of this application on the scale as between attorney and client.

**M M MABESELE
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

For the Applicant	Adv Mavodzi
Instructed by	Fouche Attorneys c/o Jay Mothobi Inc Rosebank, Johannesburg
For the Respondent	No appearance