

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE – PORT ELIZABETH)

CASE NO.: 3331/12

In the matter between:

ROBYNNE BOSCH

Applicant

And

M E C, DEPARTMENT OF EDUCATION, E C

First Respondent

HEAD OF DEPARTMENT OF EDUCATION

Second Respondent

GOVERNING BODY, HERBERT HURD PRIMARY
SCHOOL

Third Respondent

G J HARRIS

Fourth Respondent

MINISTER OF BASIC EDUCATION

Fifth Respondent

JUDGMENT

BESHE, J:

[1] The applicant in this matter is the mother of the two boys that are the subject of this application, Callym and Keane 12 and 10 years old respectively. She approached this court on an urgent basis for an order in the following terms:

- “1. That the non-compliance with the Rules of this Honourable Court in respect of this application be hereby condoned as a matter of urgency.
2. That a *Rule Nisi* do calling upon the Respondents to show cause to this Honourable Court on **Tuesday** the **30th** of **OCTOBER 2012**, at **09h30** or so soon thereafter as the matter may be heard, why an Order in the following terms should not be granted:

2.1. Declaring that the administrative action of the First and Second Respondents, in failing to consider and decide upon the Applicant's matter in terms of the South African Schools Act 84 of 1996 as amended (the "Act"), is reviewed and hereby declared unlawful;

2.2. Declaring that the First and Second Respondents failure to place Callym and Keane McClean in school is reviewed and hereby declared unlawful.

2.3. Declaring that the Third and Fourth Respondents refusal to admit Callym and Keane to Herbert Hurd Primary School is reviewed and hereby declared unlawful.

2.4. That the Third and Fourth respondent be and are hereby ordered to accept and enrol Callym and Keane McClean at Herbert Hurd Primary School for the final term of 2012 with immediate effect upon receipt of this order.

2.5. Alternatively, that the First and/or Second Respondents, or the duly authorised official in the First and/or Second Respondents' department, be and is hereby ordered to place Callym and Keane McClean in a school, within reasonable travelling distance of the children's home, by no later than **13 November 2012**.

2.6. That the First, Third and Fourth Respondents be and are hereby ordered to pay the costs of this application, the one paying the others to be absolved.

3. That paragraph 2.4 above operates as an interim order pending the finalisation of this matter.

[2] On the date appointed for the hearing of the application which was opposed by the firsts to fourth respondents, the fifth respondent was joined and the matter was postponed to the 23 October 2012 at the instance of the applicant.

[3] It appears to be common cause that Callym and Keane, were withdrawn from Lorraine Primary School (LPS) at the end of second term (June 2012) by

the applicant. This, as a result of being unhappy at the treatment Callym received at the said school.

[4] According to the applicant, Callym was a victim of sexual and physical abuse from 2000 to 2003, which resulted in him having feelings of rejection and suffering from other related illnesses. He received counselling as well as psychological and psychiatric treatment. This required that he be taught and dealt with in a caring and understanding manner. At first he did well at school but towards the end of the second school term this year (2012) he started having a number of difficulties with his class teacher. Things came to a head when he was required to take classes in isolation. This had an adverse effect on him requiring his admission in Greenacres hospital for three days. It was after this incident that applicant took a decision to withdraw him (Callym) from Lorraine Primary School.

[5] On the 20 June 2012, the applicant approached the fourth respondent, who is the principal of Herbert High Primary School "HHPs" for assistance in the placement of Callym at Herbert Hurd Primary School. The fourth respondent suggested that Callym should attend Herbert Hurd Primary School for the last two days of the third term in order that it may be determined whether he would acclimatize or fit into the environment at Herbert Hurd Primary School. Applicant and fourth respondent also discussed the position of Callym's younger brother Keane who was also a pupil at Lorraine Primary School. There was apparently a suggestion that it would be in Callym's interest if both brothers moved to the same school. As a result of which Callym spent the last two days of the second term at Herbert Hurd Primary School.

[6] It is common cause that during discussions with the applicant in June, the fourth respondent uttered words to the effect that paper work regarding the admission to school can be sorted out later. According to the fourth respondent he made it clear to the applicant that the admission of Callym to Herbert Hurd Primary School would depend on what emerged during the two

days that he would attend Herbert Hurd Primary School in June, as well as compliance with the prerequisites for admission to the school.

[7] It appears to be common cause that no communication took place between the applicant and fourth respondent in the period after the end of second term and the start of the third school term. On the first day of the third school term, Callym and Keane attended Herbert Hurd Primary School in casual clothes. They were turned away. According to the applicant the reason for her children to be turned away from school was that they were not wearing school uniform.

[8] Applicant acknowledges that she was also at that stage told to collect registration forms. Having bought school uniform for the children applicant presented with the two children as well as registration forms which according to her, she had completed to the best of her ability. She was also informed that a R1000.00 deposit was required and that certain documents that were supposed to be attached to the application forms had not been attached by her.

[9] On the 26 July 2012 applicant emailed the documentation required for application purposes and requested the school's banking details in order for her to pay the R1000.00 deposit. On the 29 July 2012 fourth respondent emailed to inform her that because the school did not hear from her after the two days that her sons spent at the school (HHPs) there were no longer any positions available and therefore the school cannot accommodate her children.

[10] As it would appear from the Notice of Motion applicant seeks the reviewal of actions and decisions by the respective respondents. And that pending the finalisation of this matter third and fourth respondent which are the Governing Body and principal of Herbert Hurd Primary School respectively, to accept and enrol Callym and Keane at Herbert Hurd Primary School for the final school term of 2012.

[11] *Mr Pienaar* who appeared with *Mr Dyer* on behalf of the applicant, submitted that all that the applicant sought effectively at this stage, was that pending the finalisation of this review application, the third and fourth respondent be ordered to accept and enrol Callym and Keane at Herbert Hurd Primary School for the remainder of the 2012 school term.

[12] The adoption of the approach proposed by *Mr Pienaar* was opposed by *Mr Scott* who appears for the third and fourth respondent on the following grounds. There was no need for the matter to be heard piecemeal because applicant set a return date that would have been two weeks after the issue of the *rule nisi* for orders sought in the Notice of Motion. In the course of opposing the application third and fourth respondent complied with the time frames set by the applicant and ventilated all the issues raised by the applicant.

[13] *Mr Pienaar* submitted that they came to court to argue in respect of interim interlocutory order sought and not the review of the respective respondents' actions. He argued respondents cannot amend applicant's cause of action. Under the heading "Introduction", applicants heads of argument dated 22 October 2012 read thus:

"1. The relief that the applicant effectively seeks on the 22 October 2012 is that pending the return day of the third and fourth respondent be ordered to accept and enrol the minor children, Callym and Keane McClean, at Herbert Hurd Primary School for the final term of 2012 with immediate effect upon receipt of the order."

[14] Beside a detailed exposition of the background to the matter, the bulk of third and fourth respondents heads of argument are devoted to dealing with the two points raised *in limine* by them. The same points are also raised by the first and second respondent although Cedric Pillay who deposed to an affidavit filed on behalf of the first and second respondent stated that first and second respondent do not oppose the application.

[15] Besides the two points raised *in limine*, being:

1. Lack of urgency.
2. Failure to exhaust internal remedies; submissions on the merits are addressed in paragraph 27 of the third and fourth's heads of argument which reads:

“Having regard to the abovementioned facts, it is submitted that it is clear that the reason why the applicant's children were not admitted to the school was due to the fact that despite the fact that the applicant was afforded the opportunity of bringing the older child Callym to the school for a period of two days, she failed to thereafter meet with the fourth respondent, and furthermore failed to enrol her children at the school timeously. By the time that the applicant complied with the enrolment requirements, namely on 26 July 2012, the positions which the school would have allocated to the applicant's children had been filled.”

[16] From the foregoing, it is clear that the matter is before court at this stage for consideration of the application for an interlocutory order sought by the applicant pending the finalisation of the review application. Whilst I agree with *Mr Scott* that it is undesirable for matters to be dealt with in a piecemeal fashion, I do not think that aspects pertinent to the review application have been sufficiently ventilated to enable this court to decide whether the actions of the respondents stand to be reviewed and set aside.

[17] First, second, third and fourth respondents, as already indicated earlier, have raised two points *in limine*. One of those is lack of urgency. This application concerns two children. Section 28(2) of the Constitution stipulates that a child's best interest is of paramount importance in every matter concerning the child. Section 4 of the Children's Act number 38 of 2005 provides that:

“In any matter concerning a child –

- (a) an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; and
- (b) a delay in any action or decision to be taken must be avoided as far as possible.

Lastly, in ***B v B 2008 (4) SA 535 WLD at 542 marginal letter a-h*** it was stated that:

“In a matter such as the current matter, where there is a need to remove uncertainty about the future, safety and well being of minor children, will always be urgent.”

In casu, the right to schooling is in issue. Just like the safety and well being of the children, the issue relating to the right of the two children to basic education is and will always be urgent in my view.

[18] As would appear from the authorities referred to in the preceding paragraph decisions to be taken in matters concerning children should be taken without delay. The need to remove uncertainty in matters pertaining to children will always be urgent. I am therefore not persuaded that this application should be dismissed on the basis of lack of urgency although considerable time has elapsed since the beginning of the second 2012 school term.

[19] The second point raised *in limine* by the respondents is failure by applicant to exhaust internal remedies, as provided for in section 7(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). It was submitted in this regard that the first respondent has not determined the applicant's appeal.

“7 (1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date-

(a) subject to subsection (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or

(b)

(2) (a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust

such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.”

[20] Section 5(9) of the South African Schools Act 84 of 1996 (SASA) provides that “Any learner or parent of a learner who has been refused admission to a public school may appeal against a decision to the Member of the Executive Council”. On the 27 September 2012 a letter was addressed to the Department of Education on behalf of the applicant. In that letter applicant requested urgent assistance with the placement of the minor children who are the subject of this application. This is not an appeal as envisaged in section 5(9) of the South African Schools Act. Be that as it may, I am of the view that because this application concerns young children in respect of whom any uncertainty should be removed, and is therefore urgent. That this is an appropriate case where the applicant can be exempted from exhausting the external remedy prescribed in terms of section 7(2) (c) of PAJA. This section provides that “A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice”.

[21] This being an application for an interim interlocutory relief, the following must be established by the applicant:

- (a) A *prima facie* right
- (b) A reasonable apprehension of harm should the interim relief not be granted, but final relief be granted.
- (c) Balance of convenience and
- (d) Absence of satisfactory or alternative relief.

[22] In order to determine whether the applicant has satisfied the requirements for the granting of an interlocutory interim interdict, and whether it will be in the best interest of the two boys to grant the order sought by the applicant, it is necessary to trace the timeline of the events that took place after the last day of the second term.

[23] The two children were in grade four and one respectively. The older child had been attending school at Lorraine Primary School since 2011 and the younger one since 2012. Implicit in this is that the applicant is aware that certain procedures must be followed before a child can be enrolled at a school. In her founding papers she states that the fourth respondent said she should bring the children in and paper work will be sorted out later. However the applicant did not take the trouble to enquire after Callym had attended Herbert Hurd Primary School on the last two days of the second term what the way forward was. How he fared at the school on those two days. What she was required to do next when they can attend to the paperwork.

[24] On the first day of the term, Monday the 16 July 2012 she merely sent the children to school. It was only after the children had been turned back – according to her because they were not in uniform that she was told to collect registration forms and have them completed. The secretary of the school dealt with the matter at that stage and she had not been given any instructions regarding the two boys because according to the fourth respondent, due to the fact that he had not heard from the applicant he assumed that she had decided against enrolling her children at Herbert Hurd Primary School. She had not taken any steps even then to enquire about the school requirements or what the “two day trial run” yielded or whether the children had been accepted. On Wednesday when she took the children to school with the registration forms with documents that were supposed to be attached to the registration forms still outstanding.

[25] It was only on the 26 July that she e-mailed the fully completed forms to the school – and requested the school’s banking details in order for her to pay the R1000.00 deposit required by the school. On the 29 July 2012 she received communication from the fourth respondent that since the school had not heard from her all the positions at the school had been filled and the school could no longer accommodate her children.

[26] Thereafter several schools were contacted by her in a bid to get her two boys enrolled. Those being Charlo Primary School, Walmer West Primary

School, Victoria Park Grey School, Sunridge Primary School, Newton Park Primary School, Clarendon Park Primary School. None of the school accepted her children.

[27] Based on what transpired during discussions between applicant and the fourth respondent, which was encapsulated in a letter written by the fourth respondent to the applicant *inter alia* that “You approached me with a very unique problem towards the end of last term and I allowed you to send your child to school for two days, after consultation with the necessary health practitioners, if it would be his best interest. Yes, I did say that it would be in your best interest to move both boys across and yes; I did say that the paper work would be sorted out later. Sorting the paper work out later implied that if your son enjoyed the school set-up, formal application for official enrolment and transfer from one school to the next would then take place.” It would seem that applicant has succeeded in establishing a *prima facie* right.

[28] I am however not persuaded that there is no other satisfactory remedy available to the applicant. She was informed in no uncertain terms on 8 August 2012 that on 26 July 2012 when she forwarded the completed application forms by e-mail to the Herbert Hurd Primary School, the places that the school had had available for her sons had been filled and that it was impossible for the school to accommodate the boys. After she had addressed a letter to the Department of Education only in September 27, attempts were made to assist her by an official of the department Mr Cedric Pillay. Mr Pillay contacted principals of a number of schools in the Port Elizabeth area, including that of Herbert Hurd Primary School. Schools in the Walmer vicinity where applicant resides could not accommodate applicant’s children. In August applicant also contacted the following schools:

Charlo Primary School

Walmer West Primary School

Victoria Park Grey School

Sunridge Primary School

Newton Park Primary School

Clarendon Park Primary School

She could not get her children accommodation at any of these schools as indicated.

[29] Mr Pillay received confirmation from the following schools that they can accommodate applicant's children:

Gelvandale Park Primary School

Missionvale Primary School

Kleinskool Primary School

Daniels Primary School

Applicant was not amenable to sending her children to any of these schools, stating that she had a number of concerns about the schools. She however only mentioned one such concern, as being the distance between her residence and the school. Instead she insisted that a school in respect of which it was made clear that there was no longer any accommodation available, should admit her children.

[30] Besides I do not think it will serve the two children who have been out of school for the whole of the third term and part of the fourth term, any good to attend a few days of school in the fourth term.

[31] I am not satisfied that the applicant has made out a case for the relief sought.

[32] Accordingly the application is dismissed with costs.

N G BESHE

JUDGE OF THE HIGH COURT

APPEARANCES

For Applicant	ADV: B J Pienaar SC and ADV: E Dyer
Instructed by	ANTHONY INC. 9 Bird Street Central Port Elizabeth Ref.: J Anthony Tel.: 041 – 582 5150

For Respondent(s)	ADV: P W A Scott SC and ADV: I Dala
Instructed by	OFFICE OF THE STATE ATTORNEY 29 Western Road Central Port Elizabeth Ref.: Nr. 2073/2012/K Tel.: 041 – 585 7921

BOQWANA LOON & CONNELLAN
4 Cape Road
Port Elizabeth
Ref.: Mr LT Schoeman/mc)
Tel.: 041 – 506 3700

Date Heard	23 October 2012
Date Reserved	23 October 2012
Date Delivered	29 November 2012