



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 15133/23P

In the matter between:

MM

FIRST APPLICANT

and

NM

FIRST RESPONDENT

THE OFFICE OF THE FAMILY ADVOCATE

SECOND RESPONDENT

ST. CHARLES COLLEGE

THIRD RESPONDENT

ALSTON PRIMARY SCHOOL

FOURTH RESPONDENT

Coram: Davis AJ
Heard: 13 October 2023
Order: 13 October 2023
Reasons: 18 October 2023

REASONS FOR JUDGMENT

Davis AJ

Introduction

[1] These are the reasons for the granting the order on 13 October 2023, which are set out at the end of this judgment. Noting the need to protect the identity of the minor child in this matter and will simply be referred to as the child. The applicant will

be referred to as the applicant and the first respondent as the respondent. The second to fourth respondents play no role in the application and will be referred to as, the Office of the Family Advocate, St. Charles College and Alston Primary School.

[2] This is an opposed urgent application in terms of which the applicant seeks interim relief in the following terms:

- (a) The first respondent is hereby directed to continue facilitating the attendance of the child, a boy born on 18 January 2015, to St. Charles College where he is enrolled.¹
- (b) The first respondent is ordered to pay the costs of the application on the scale as between attorney and client.
- (c) That the relief operate as interim relief pending the finalisation of this application.

[3] The applicant is represented by Mr. Miya who also signed the certificate of urgency. The respondent appeared without legal representation and there is no appearance by the second to fourth respondents, and neither is there any relief sought from them.

Urgency

[4] A litigant that approaches the court for relief on an urgent basis must comply with Uniform rule 6(12)(b).² The rule reads;

‘In every affidavit filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course.’

[5] The rule requires two legs to be present before urgency can properly be founded, namely; first, the urgency should not be self-created³ and secondly, it must provide reasons why substantial relief cannot be achieved in due course. The

¹ As per the numbering in the notice of motion at 2.

² Uniform rules of the High Court.

³ *Nelson Mandela Metropolitan Municipality v Greyvenouw CC* [2003] ZAECHC 5; 2004 (2) SA 81 (SE) paras 23, 33-34, and *Rokwil Civils (Pty) Ltd and others v Le Sueur N.O and others* [2020] ZAKZDHC 61 paras 16-19.

importance of these provisions is that the procedure set out in rule 6(12) is not there for the mere taking.

[6] Notshe AJ in *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd*⁴ stated:

‘The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.’

[7] The import of this is that the test for urgency begins and ends with whether the applicant can obtain substantial redress in due course. It means that a matter will be urgent if the applicant can demonstrate, with facts, that the applicant requires immediate assistance from the court, and that if his application is not heard on an urgent basis that any order that he might later be granted will by then no longer be capable of providing him with the legal protection he requires.

[8] First, De Wit,⁵ in his article discussing *East Rock Trading*, with regards to the harm the applicant may suffer where the matter is not dealt with on an urgent basis, wrote as follows:

‘harm does not found urgency. Rather, harm is a mere precondition to urgency. Where no harm has, is, or will be suffered, no application may be brought, since there would be no reason for a court to hear the matter. However, where harm is present, an application to address the harm will not necessarily be urgent. It will only be urgent if the applicant cannot obtain redress for that harm in due course. Thus: harm is an antecedent for urgency, but urgency is not a consequence of harm.’

⁴ *East Rock Trading 7 (Pty) Ltd and another v Eagle Valley Granite (Pty) Ltd and others* [2011] ZAGPJHC 196 para 6.

⁵ V de Wit ‘The correct approach to determining urgency’ (2021) 21(2) *Without Prejudice* 12 at 13.

[9] Secondly, Strydom J in *Roets N.O. v SB Guarantee Company (RF) (Pty) Ltd*⁶ regarding the explanation that the application must furnish as to why the matter is not urgent and cannot be brought be in the ordinary course, held:

‘urgency which is self-created in a sense that an applicant sits on its laurels or take its time to bring an urgent application can on its own lead to a decision that a matter is struck off the roll. It would of course depend on the explanation provided but if the explanation is lacking and does not cover the full period from when it was realised, or should have been realised, that urgent relief should be obtained. If this criteria to strike a matter from the roll is not available to a court, a court would be compelled to deal with an urgent application where for instance nothing was forthcoming for weeks or months and a day or two before an event was going to take place a party who wants to stay that event can approach a court and argue that if an order is not immediately granted such party would not obtain substantial redress in due course. If this is the approach to be adopted by a court there exist no reason why any explanation for the delay should be provided at all. An applicant only have to show that should interim relief not be granted it will suffer irreparable harm.’

[10] If this was not a criterion by which one could strike a matter from the roll a court would be compelled to deal with an urgent application where for instance nothing was forthcoming for weeks or months and a day or two before an event was going to take place a party who wants to stay that event can approach a court and argue that if an order is not immediately granted such party would not obtain substantial redress in due course. If this approach was adopted in matters of urgency there exists no reason why any explanation for the delay should be provided at all. An applicant would only have to show that should interim relief not be granted it will suffer irreparable harm. This would be an untenable situation.⁷

[11] The applicant relies on the following factual matrix contained in his founding affidavit to support his application for urgent relief:⁸

(a) He was involved in an intimate relationship with the respondent. The parties were never married.

⁶ *Roets N.O. and another v SB Guarantee Company (RF) (Pty) Ltd and others* [2022] ZAGPJHC 754 para 26.

⁷ See *Schweizer Reneke Vleis Maatskappy (Edms) Bpk v Die Minister van Landbou en andere* 1971 (1) PH F11 (T).

⁸ The application papers at 6-23.

- (b) Out of this union their only child, a son, was born on 18 January 2015, and he is currently eight years of age.
- (c) Throughout the duration of their relationship they lived in Scottsville, Pietermaritzburg.
- (d) Paradoxically the applicant avers that the home was a warm and happy home until May 2023, but later in his founding affidavit avers that the respondent had left the family home in January 2023, in order to live with her new boyfriend.
- (e) In May 2023 the applicant sought a protection order against the respondent's adult daughter alleging drunken and inappropriate sexual behaviour that was disrupting his home.
- (f) In May the applicant requested the respondent and her family to leave the premises.
- (g) At the time their child was enrolled at St. Charles College along with one of the respondent's minor children.
- (h) Before the commencement of the third term the respondent unilaterally removed their son from the school in defiance of the applicant's parental rights or knowledge, however he acknowledges being aware of the intended removal as the school had told him.
- (i) Fees were owing at the time but have apparently been paid as at September 2023.
- (j) The applicant avers that the removal from St. Charles College was not in the best interests of their child.
- (k) Their son is now enrolled at Alston Primary School in Pietermaritzburg with no input in this decision from him.
- (l) This was in breach of his parental rights as protected by section 31 of the Children's Act 38 of 2005.
- (m) The child attended at Alston Primary School for the entire third term, the fourth and final term of the year commenced this week, on 10 October 2023.
- (n) A children's court enquiry aimed at settling the issue of care and contact and other matters pertaining to their minor child has been enrolled at the local Magistrates' Court and was supposed to be heard on 26 September 2023.
- (o) The enquiry was postponed till 5 December 2023, due to the illness of the applicant.

(p) The applicant's concern about the education of his child including the sporting programme, in particular cricket makes this matter urgent.

[12] I applied the paramountcy principle as enshrined in section 28(2) of the Constitution⁹ in respect of the minor child at all times during these proceedings and am further acutely aware of the need to endeavour to protect the child from the negative consequences that might befall the child in this hearing.

Submissions on behalf of the applicant

[13] Mr. Miya submitted that as the best interests of the child was paramount in this matter, the constitutional imperative demanded that the child be returned to St. Charles College from where the applicant's child had been unlawfully removed. This, in his view made this matter urgent. The submission being that as a holder of parental rights, the removal without informing or engaging with the applicant breaches those parental rights. Mr. Miya was constrained to concede that the respondent had left the family home at the demand of the applicant and that this had changed the circumstances of the child. Mr. Miya submitted that the urgency was not self-created, but he could not convincingly assert that substantial redress was not shortly attainable in the Children's Court.

Submissions of the respondent

[14] The respondent was at court sans legal representation due to the truncated notice given to her. She was in Johannesburg at the time service was attempted but was told of this date by the applicant's attorneys. When she addressed the application she advised that she was the primary care giver, she had paid a substantial portion of the school fees for St. Charles College. When the applicant evicted her from the family home, she acted in the best interest of all of her children, including the applicant's child

⁹ Section 28(2) of the Constitution provides that 'A child's best interests are of paramount importance in every matter concerning the child.' In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. The best interests of the child is expanded on in section 7, and set out in section 9 of the Children's Act 38 of 2005. Section 9 simply states: '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.'

and enrolled him in a state school nearby. According to the respondent the child has excelled at his new school and is happy.

Analysis

[15] The children's court enquiry initiated by the respondent is designed, as its primary purpose, to protect the child and settle how both parents' parental rights and responsibilities towards the child will be regulated. The decision of that court is based on the proper ventilation of all the facts, in conjunction with a report from the Office of the Family Advocate, in which they set out their recommendations based on the facts and issues, following upon an investigation into the affairs of the litigants before that court. The presiding officer in the children's court will then be in the best possible position to make findings on what course of action is in the best interests of the child.

[16] This report and the subsequent children's court decision on the matter will substantially address all the concerns raised by the applicant in these proceedings. The children's court is the proper forum whereby the applicant can ventilate and vindicate his parental rights. This is, with respect, self-evidently obvious even from a mere reading of the papers of the applicant.

[17] The reality is that the child is enrolled in a school, has completed an entire term at that school and the fourth and final term of the school year has already commenced. In July before the commencement of the third term the applicant was aware that the respondent wished to remove their child from St. Charles College, fees were in arrears and on 28 June 2023 the school bursar had written to them about the outstanding fees. By this time the respondent had at the instance of the applicant left the family home and was residing elsewhere. The applicant was well aware that the respondent had made a decision to remove the child from St. Charles College from the beginning of the third term and that the outstanding fees was not the only consideration.

[18] Notwithstanding the applicant waits from mid-July 2023, the independent schools went back to school for the third term on 18 July 2023, until October to approach this court on an extremely urgent basis, filling the application on 11 October 2023, after some 12 weeks had lapsed. In the interim his son has been enrolled in a

school, is receiving tuition at an accredited learning institution appropriate for his age. There is actually no explanation for the long delay, good or otherwise.

[19] The urgency requirement contained in Uniform rule 6 is two-fold, the urgency must not be self-created and that the applicant is unable to obtain substantial redress at a hearing in due course. On both these scores the applicant's contention that the matter is urgent fails to pass judicial muster by a considerable margin. He had ample opportunity if he perceived the matter to be urgent to approach this court for relief in July, yet he waits till a children's court enquiry is convened in September 2023 before, he approaches this court for relief. The urgency is self-evidently self-created.

[20] The children's court is currently seized with this exact issue pertaining to the parties' child's schooling. They will deal with the issues of access, custody and maintenance in a holistic manner. These are the identical issues that the applicant raises in this supposedly urgent application before this court. The children's court is the appropriate court to resolve exactly the issues raised in this application.

[21] I consider the all-pervasive standard of the best interests of the child as stated in section 28(2) of the Constitution insofar as it pertains to litigation involving children. On the papers presented in this application there is not a single piece of evidence before this court to suggest that the current status quo is not in the best interests of the child. For completeness, the child is at a recognised accredited school, attending with a sibling and living with his mother as his primary-care giver, he is in the last term of the year and his mother, the respondent, has approached the proper court to ensure that his future needs are taken care of. The children's court, and the investigation of the Office of the Family Advocate, will allow for a proper ventilation of the issues of access, custody and visitation, and the decision reached will always bear in mind what is in the best interests of the child.

[22] The premise of the application, seems to be that as the applicant was at an elite independent or private school, and that his subsequent enrolment at an ordinary state school is automatically not in the best interests of the child. This premise is flawed. It might be that it could be in the best interests of the child for this to occur, but that finding could only be arrived at after a full ventilation of the current circumstances

surrounding the child. That enquiry would not only be limited to what the respective schools offer, but a complete assessment and consideration of what is in the best interests of the child.

[23] It seems to be premised on the supposed 'fact' that an independent school is automatically providing a superior quality education and access to sporting facilities than a state school. No evidence is placed before this court that this is so. It might well be in the best interests of the child not to disrupt his schooling after the fourth term has commenced. The proper place for that determination to occur is the children's court.

[24] The application is manifestly not urgent, it falls to be struck from the roll.

Costs

[25] Costs, in the usual manner, normally follows the result. The applicant had sought costs on the attorney and client scale in a matter manifestly not urgent. The respondent due to constraints of time has fortunately for the applicant not instructed legal representation. With the respondent undefended I make no order as to costs.

Order

[26] In light of the above, the following order was granted on 13 October 2023:

1. The applicant's application is struck off the roll for lack of urgency.
2. There is no order as to costs

DAVIS AJ

Date of Hearing: 13 October 2023

Date of Order: 13 October 2023

Date of Reasons 18 October 2023

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