



Reportable:	YES/ NO
Circulate to Judges:	YES NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO

IN THE HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE HIGH COURT, DIVISION, KIMBERLEY]

Case No: 2039/13

In the matter between:

HJC

FIRST APPLICANT

AC

SECOND APPLICANT

AND

OV

FIRST RESPONDENT

LS

SECOND RESPONDENT

CORAM: LEVER AJ

JUDGMENT

Lever AJ

1. The applicants seek relief, both in their personal and in their representative capacities on behalf of their two minor children "F", a boy who was 7 years old at the material time and "A", a girl who was 6 years old at the material time ("the children").

2. Applicants seek an order against the first respondent, a registered public school and the second respondent, its former principal. The second respondent was the principal of the first respondent at the material time.

3. The Order sought against the said respondents is as follows:
 - “1. Dat die Respondente gelas word om die identiteit van die klaer/klaers en wie beweer het dat die Applikante se kinders moontlik seksueel misbruik word (soos verwys in aanhangsel “F” hiertoe) aan die Applikante te openbaar en te verskaf, alternatiewelik sodanige besonderhede by die Griffier van hierdie Hof in te dien binne 7 (sewe) dae na datum van hierdie bevel, waarna die besonderhede aan die applikante beskikbaar gestel moet word deur die Griffier.
 2. Dat die Tweede Respondent die koste van hierdie aansoek betaal, alternatiewelik indien Eerste Respondent die aansoek opponeer, beide Respondente gelas word om die koste te betaal.”

4. The applicants seek final relief by way of a mandamus to order the respondents to reveal the identity or identities of the informant or informants who reported to the second respondent the possible sexual abuse of the applicants’ two children referred to above.

5. The first respondent filed a notice to abide the decision of the court. In earlier correspondence the first respondent’s attorney indicated that the first respondent did not know the identity of the informant/s and that the school held no record of the informant/s identity.

6. The second respondent filed a notice of opposition. In the first answering affidavit which she filed she requested that the matter should be heard *in camera*, because there were minor children involved. Furthermore, that from the allegations made by the applicants, that the matter should be

referred to oral evidence and that the second applicant should be subject to cross-examination.

From the sensitive nature of the application second respondent requested that she not be compelled to deal with the substantive contentions of the applicants and that the matter be referred to a judge in chambers for directions on whether the matter should proceed *in camera* and be referred to oral evidence.

7. The matter then came before my sister Williams J (in chambers), the parties and their legal representatives were instructed to have a round table conference and to file a report on the results of such conference. No formal report had been filed, but the parties representatives informed me that the only thing that the parties could agree on was that the matter be heard *in camera*. Subsequent to this agreement the second respondent filed a substantive answering affidavit to the applicants' founding papers on the basis that she had been informed by her legal representatives that on the strength of the said agreement there was no longer a substantial reason for her not to do so.
8. The applicants did not file a reply to either of the second respondent's answering affidavits.
9. In summary, the applicants' version in their founding affidavits, is that during October 2012 the second respondent visited the second applicant at the applicants' home. During that visit second respondent informed second applicant that two persons had reported to her that the applicants' son "F" raped his younger sister "A" every night. Furthermore, that the second applicant was present when this occurred and did not intervene. Second applicant requested that the identity of the persons who made the reports be disclosed to her. Second respondent refused to disclose the identities of the persons who made the said report. Second respondent informed second applicant

that she and the children must see a social worker in Kimberley on the 6th December 2012. The second applicant accepted the second respondent's instructions and second applicant and the children saw a social worker and a counselling psychologist for assessment. Various reports are annexed to the founding papers.

10. Applicants contend that the allegations were not only baseless, but were extremely upsetting to both of them. By virtue thereof the children were exposed to sensitive examinations, enquiries and conversations; that there is no question of the children being sexually abused; that the allegations made against second applicant and the children are defamatory and that they were made with the intention to defame them; and that it is in the interests of the second applicant and the children that such allegations be stopped.

11. In her personal capacity the second applicant finds the allegation that she was present during the alleged incidents and does nothing to stop them disturbing. Applicants' maintain that they do not know the source of these allegations, but contend that they have become generally known in their hometown. They allege that the effect on the children is that they have become isolated and that they cannot go and play with any other children. Applicants' also state that they have their suspicions that the second respondent may simply have sucked these false stories out of her thumb and spread them around. Although it is not set out explicitly in the applicants' founding affidavits, it is contended on applicants' behalf that it is only the person who made the report to second respondent that could have spread these stories about. Obviously, this contention is at odds with the applicants' fears that second respondent fabricated the story.

12. In summary the second respondent's version is that she did indeed visit the second applicant at her home during October 2012. She places it on record that the person who made the report to her never alleged that applicants' children were possibly being sexually abused. The complaint was that there was possibly inappropriate sexual conduct between the children, a brother and a sister.
13. Second respondent denies ever telling second applicant that two persons had made the relevant report to her. She states that she told second applicant that she was informed by the informant that at some point the second applicant made the following comment: "***Julle verstaan nie, F... 'rape' sy sussie elke aand.***" Second respondent also denies ever saying to second applicant that she (second applicant) is alleged to be present during these incidents and does nothing to stop them. Second respondent states that she visited second applicant twice at the applicants' home. That it was during the second visit that she arranged the appointments with second applicant to see a social worker in Kimberley and a consulting psychologist. Second applicant kept the appointment with the consulting psychologist, but did not keep the appointment with the social worker in Kimberley. Instead second applicant went to see a social worker in Bloemfontein, who provided a report which will be referred to later.
14. Second respondent also states that the informant made the report in question in confidence and by virtue of second respondent's position as the school principal at the relevant time. Second respondent also submits that she acted upon that report in a reasonable manner as would be required of any responsible school principal.
15. Second respondent submits that she had a duty to follow up on the report and she did not believe that she could simply ignore the report that had been made to her. She submits she acted correctly

and in a *bona fide* manner when she consulted social workers from another town to guide her through this process. Second respondent states that she was advised to report the matter to the police, but because she was unsure of whether the information she received disclosed sexual abuse of the children she decided to have professional persons assess the situation. That is why she approached the second applicant with a request to consult the relevant professionals as set out above. Her motive in choosing this course of action was to protect the children and the family.

16. Second respondent denies the contention that in providing the report the informant defamed the applicants or the children. Second respondent submits that the informant acted professionally. That she was not simply accosted in the street with a rumour but that the informant made an appointment to see her in her office. That the report was made by the informant in the second respondent's office behind a closed door. In second respondent's opinion the informant acted in the best interests of the children and that the informant had expressed a deep concern for the welfare of the children.

17. Second respondent states that she never defamed anybody in this process and that save for discussing the matter with two social workers who guided her through this process she never discussed the matter with anybody else outside those involved. Second respondent states that while she was in the applicants' house to discuss the matter with her, second applicant phoned the first applicant (her husband) and informed him of the matter. While second respondent was still present, second applicant received a text message from her Minister of religion and further second applicant called an employee who was in the house and told such employee the whole story.

18. At the commencement of argument in this matter Counsel for the second respondent moved an application that the matter proceed *in camera*. Having regard to the fact that the children involved are very young, as well as the nature of the allegations involving such children, the agreement of the parties that the matter should proceed *in camera* and also the circumstances in which the second respondent filed her substantive answering affidavit to the founding affidavit filed by the applicants, I ordered that the matter should proceed *in camera*.

19. In the matter of **A v R KINDER - EN KINDERSORGVERENIGING**¹ Southwood J dealt with an application for similar relief to that which present applicants seek. After considering the relevant authorities Southwood J concluded that the court will only order the disclosure of the identity of the person who made the report, in circumstances where the applicant has established that the person who made the report acted as a principal and the person to whom such report was made acted as the agent of such principal and that the applicant intended to sue such principal.² In other words there are two requirements to be established by the applicants, firstly that the person receiving the report received it as the agent of the person who made such report (the principal) and secondly, that the applicants intended to sue the principal.

20. It is clear from the judgment of Southwood J that that there are equally compelling arguments based on public policy grounds why such relief would not be lightly granted.³ In short these are, children need to be protected from abuse, molestation and neglect. Whilst an undertaking not to disclose the identity of an informant is not a binding agreement, however on public policy grounds,

¹ 1996 (1) SA 649 (T)

² A v R Kinder – En Kindersorgvereniging case., supra at 655 – 656.

³ A v R Kinder – En Kindersorgvereniging case., supra at 657.

it ought to be enforced.⁴ Southwood J concludes that even if all of the requirements for the relief sought are established, the court would still have a discretion as to whether it orders disclosure or not.⁵ Southwood J accepts that where the person who made the report acts maliciously, such person will not enjoy the protection of the agreement not to disclose or the discretion of the court not to order such disclosure.⁶

21. It is one of the core values of our society that children must be protected. In this context children are protected by the provisions of section 28(1)(d) of the Constitution⁷. Similarly, section 110 of the Children's Act⁸ also evidences the value placed on the protection of children by our society. In this context where a report is made *bona fide* and not frivolously or maliciously a court will generally not order the disclosure of the identity of the person who made the report. To do otherwise would make it almost impossible to implement the protections set out in section 110 of the Children's Act or to give effect to the value of protecting children enshrined in the Constitution, because people will simply look the other way if they fear being put to the time, trouble and expense of defending themselves in court.

22. On the facts of the present matter I think there is little value to be gained from trying to analyse the available evidence to determine if second respondent acted as the informant's agent or not when the report was made to her. In my view this matter falls to be decided on whether or not this court exercises the discretion it undoubtedly has in favour of the applicants to order disclosure or in favour of second respondent to dismiss the present application.

⁴ A v R Kinder – En Kindersorgvereniging case., supra at 657 F-G.

⁵ A v R Kinder – En Kindersorgvereniging case., supra at 657 B-C.

⁶ A v R Kinder – En Kindersorgvereniging case., supra at 657 H.

⁷ The Constitution of the Republic of South Africa, 1996.

⁸ Act 38 of 2005.

23. It must be remembered that the applicant seeks final relief in the present application. In the circumstances, the general rule as it has been re-stated in the Plascon-Evans case is applicable:

“...It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant’s affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.”⁹

24. As can be seen from the summaries of the respective versions put by the applicants and the second respondent, there are important disputes of fact. From the papers filed in this matter, it cannot be said that the version put up by the second respondent is inherently improbable. Applicants’ have chosen not to file a reply to second respondent’s substantive affidavit. In these circumstances I have to accept that applicants cannot dispute the second respondent’s version.

25. On second respondent’s version, it was reported to the second respondent by the informant, that at some point second applicant stated: “Julle verstaan nie, F... ‘rape’ sy sussie elke aand.” Applicants’ have not disputed this version. It is implicit in this version that the person who made the report to second respondent was present and heard the second applicant make this statement. It is also implicit in this version by virtue of the fact that the plural is used, that there was more than one person present when the second applicant made this statement. The fact that the second applicant made this statement publicly weighs heavily with me in considering this court’s discretion not to order the disclosure of the identity of the person who made the report. Furthermore, when second respondent discussed the matter with the second applicant, second applicant called an employee in

⁹ Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634 H-I.

and related the whole story to the employee. Applicants' have also not disputed this contention.

Second applicant had no reason to disclose the report to her employee. The said employee or any of the other persons present when second applicant made the statement set out above, aside from the person who made the report to second respondent could be responsible for the stories circulating in the community.

26. In exercising this court's discretion, I must also place in the scales, the conduct of the person who made the report as well as the conduct of the second respondent. It cannot be disputed that the person who made the report did so in circumstances where he/she made an appointment to see the second respondent. At the material time the second respondent was the principal of the school the children attended. In the circumstances of the case it was reasonable for the report to be made to the second respondent. The report was made behind closed doors and the second respondent avers that in her opinion the report was made *bona fide*. The report was also made to the second respondent in confidence. The second respondent sought the help of two social workers in taking the matter forward. In the circumstances I consider this to be both reasonable and responsible. Second respondent sought to speak to the second applicant alone. It was the second applicant who involved other people. It is understandable that the second applicant would contact her husband (first applicant), but it is neither understandable nor reasonable for the second applicant to relay the report to her employee. The social worker found that there were incidents of sexual experimentation between the brother and sister and this appears in the relevant report. This report was not disputed by any party and it appears to be common cause. This finding by the social worker supports the original report as disclosed by the second respondent.

27. In the circumstances I conclude that the report was made *bona fide*. Furthermore, for the reasons set out above I believe that I should exercise this court's discretion and not order the disclosure of the identity of the person who made the report in the present case.
28. Originally the applicants sought an order of costs against the second respondent. Applicants' maintained this attitude until they filed their heads of argument in this matter on the 20th October 2014. Subsequent to filing the said Heads of Argument, they took the position that if second respondent withdraws her opposition to the application and abides the decision of the court then they would not seek a costs order against second respondent.
29. Second respondent's position on costs was that an organisation was assisting her with the professional fees of the advocate representing her, but that she was responsible for the disbursements of her Counsel as well as the professional fees and disbursements of the attorneys representing her. The organisation that assisted her with the professional fees of the advocate who represented her was not seeking to recover costs. In the circumstances the second respondent is awarded her costs. Such costs to include the disbursements of the advocate representing her together with the professional fees and disbursements of the attorneys who represented her.
30. During the hearing of this matter I enquired whether the second applicant and the children had received the guidance and assistance in establishing boundaries for sexual conduct as well as the therapy recommended by the social worker. Counsel who appeared for the applicants made the necessary enquiries and informed me that second applicant and the children had not had the benefit of such guidance and therapy.

31. I enquired whether applicants were willing to have second applicant and the children undergo the necessary sessions with the social worker to establish the boundaries for sexual conduct between the children. Applicants agreed and I requested applicants' Counsel to draw up an appropriate Order that would cater for this. In broad outline I required the Order to make provision for consultation with a social worker or a social welfare organisation to cater for the establishment of sexual boundaries and therapy for the children and to report to the Registrar within four months of the date of such Order that the situation had been appropriately dealt with, failing which the Registrar was to report the matter to the Department Of Social Welfare for further investigation. In taking such approach I do not make any judgment on the applicants as parents. The fact that they readily agreed to such an Order shows that they are willing to act in the best interests of their children.

32. An Order was subsequently made in accordance with the broad outline set out above. In taking such approach, it is also important that one does not take a knee jerk reaction to any allegation of sexual conduct between the children and think the worst, but against this must be weighed the fact that timely and appropriate intervention may prevent one or both of the children suffering emotional or physical damage later in their lives. In these circumstances, it is always better to take responsible and appropriate action rather than to ignore warning signs of a potential problem.

33. In the circumstances, the following order is made:

33.1. The application is dismissed;

33.2. The second respondent is awarded costs on a party and party scale.

33.2.1. Insofar as such costs relate to the advocate who represented her, such costs are to be confined to the disbursements relating to the engagement of the said advocate;

33.2.2. Insofar as such costs relate to the attorneys who represented her, such costs order includes the professional fees and disbursements of such attorneys.

LEVER AJ

APPEARANCES:

For Applicants: The Heads of Argument were drafted by Adv SJ Reinders , but the matter was argued by Adv Sieberhagen for the applicants.

For Second Respondent: Adv JH Mollentze

Date of Hearing: 3 December 2014

Date of Judgment: 27 February 2015