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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 16939/2024

In the matter between:

D[...] W[...] D[...]

Applicant

And

I[...] L[...] L[...]

First Respondent

HERSCHEL GIRLS SCHOOL

Second Respondent

Matter heard on – Tuesday 13 August 2024

Judgment delivered on – Tuesday 20 August 2024

JUDGMENT

PARKER, AJ

Prof Maureen A Weston, writes that mediation is:

“premised upon the intention that by providing disputing parties with a process that is confidential, voluntary, adaptable to the needs and interests of the parties, and within party control, a more satisfying, durable, and efficient resolution of disputes may be achieved”¹

Introduction

[1] This is an application brought on an urgent basis in which the applicant seeks an Order for the following:

- “1.1 Directing that compliance with the forms and service provided for in the Uniform Rules of Court be dispensed with and that the matter be heard on an urgent basis in terms rule 6(12)(a).*
- 1.2 That the Respondent be and are hereby directed and ordered to within 24 hours of this order sign and otherwise execute all documents required for the admission of N[...] J[...] L[...] (minor child) born on 1[...] S[...] 2021, for the year 2024 at Herschel Girls School, situated at Claremont, Cape Town.*
- 1.3 That in the event that the Respondent fails and or refuses to comply with Order 1 above, then in that case, her consent and signature for the admission of the minor child at Herschel Girls School be and is hereby dispensed with and the Second Respondent in such case be granted leave to admit the minor child without the consent or signature of the First Respondent.*

¹ Prof Maureen A. Weston in her article “Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality”, 76 Indiana Law Journal 591 – 592 (2001).

1.4 *Directing the respondent to pay the applicant's costs in the event of opposition; and*

1.5 *Further and/or alternative relief."*

Background

[2] The parties are the biological parents of the minor child. It is common cause that the communication between the parties are acrimonious. The parties are entangled in bitter disputes over a relatively short period of time in the life of a minor child who is barely 3 years of age. The litigation history shows several applications being launched in various fora including an earlier application which was also sought by Applicant on an urgent basis to this Honorable Court on 21 November 2023 ("*contact and care application*"), for the determination of a Family Advocate's report to enable Applicant to be granted more rights for contact and care. This case is still pending.

The current application

[3] The parties are at loggerheads as to which is the preferred school for the minor child, the intention being that she would start crèche in 2025. Applicant contends that he has had to drag First Respondent to Court regarding her unreasonable, unconscionable refusal to co-operate with the co-parenting of the minor child.

[4] After attempts were made to come to a compromise as to which school is suitable and despite attempts to hold roundtable meetings, Applicant had no alternative but to bring this issue to Court on an urgent basis.

[5] The timeline leading to the urgent application:

- 5.1 **21 November 2023.** The contact and care application was sought by Applicant, on an urgent basis. An Order was granted by this Honorable Court which were replaced by the recommendations of the Family Counsellors' recommendations dated 26 September 2023 pursuant to the order granted in the High Court of South Africa, Johannesburg dated 6 December 2022. The Court referred the matter to the Offices of The Family Advocate to deliver their report on or before 12 April 2024. Such report is still pending. The earlier Family Counsellors' recommendations dated 26 September 2023 suggested both parents hold joint decision making powers including inter alia "*education and schooling*", and importantly, it was also recommended "*that the parents attend mandatory co parenting classes with the Parent Centre (021 752 0116) or through any other suitable organisation or professional, aimed at improving their communication and co-parenting relationship*"
- 5.2 **14 February 2024.** The First Respondent attended one session at the Parent Centre and the individual who did assist resigned. First Respondent contends that Applicant failed to take steps to locate another individual to assist.
- 5.3 **12 April 2024.** The Applicant learns that First Respondent had applied to Curro Academy School for the admission of the minor child.
- 5.4 **3 June 2024.** The Applicant receives confirmation of acceptance from Herschel Girls School, subject to the conditions contained therein.
- 5.5 **2 July 2024.** The Applicant's advises of the Herschel Girl School acceptance and invited the First Respondent to engage in the co-parenting of the minor child failing which he will approach the High Court for intervention.

- 5.6 **8 July 2024.** The First Respondent agrees to engage and directs the attention to the Applicant of the reference to a dispute resolution process which states that the parents shall appoint a qualified Social Worker if the issues remain unresolved, suggesting that a Social Worker to appoint a Parenting Coordinator, to assist them on an ongoing basis for issues which may arise from time to time and suggested the names of two experts. In addition, First Respondent warned the Applicant that it is premature to seek an urgent application and if persisted with, it will be opposed with a costs order.
- 5.7 **10 July 2024.** The First Respondent requested information regarding Herschel Girls School and invited Applicant to agree to a Parenting Coordinator.
- 5.8 **11 July -15 July 2024.** The Applicant's attorney requested a round table conference to discuss the minor child's future and attendance at Herschel Girls School, however First Respondent had requested certain information, so that a meaningful discussion could take place and an alternative date was suggested by First Respondent.
- 5.9 **16 July 2024.** Since Applicant failed to provide the information as requested, the meeting was called off. First Respondent requested the next meeting to be on 22 July 2024.
- 5.10 **17 July 2024 – 22 July 2024.** There was an exchange of information pertaining to both schools however First Respondent felt that additional information was needed from the Applicant since he failed to address the referral of a Social Worker or Parent Coordinator, resulting in the meeting not taking place.

Urgency

[6] The submissions made by the Applicant is that applications for decent and reputable schools for the 2025 academic have already closed and the Applicant has been afforded a limited amount of time to either convince the First Respondent or lose the placement, since the Second Respondent has been accommodating the applicant by continuously extending the registration date. Furthermore it is invariably too late to apply to another school of the same status as the Second Respondent. The result will prejudice the minor child in that she will be deprived of an opportunity to attend one of the best institutions in the country.

[7] Resulting from the numerous attempts to engage the First Respondent and reach a reasonable decision regarding the education and best interest of the minor child, and because the First Respondent refuses to cooperate, his proverbial hand is forced at launching this application on an urgent basis.

[8] On urgency, Applicant sought reliance that it is appropriate to bring the proceedings without delay² where the Court rendering it inherently urgent for the Court to hear the application.

[9] This was countered by the First Respondent on the basis that the urgency is self-created when the Applicant chose so late to enrol the minor child by waiting until the eleventh hour. Secondly, the Applicant should have heeded the message for referral to an external third party made as early as 8 July 2024. As such, the argument advanced by the First Respondent on urgency, cannot be sustained as the application was wholly unnecessary. It was premature on the basis that the issue ought to be determined with the assistance of a Social Worker or, failing that, an independent expert (or better still a

² *MM v AV* (2901/2010) [2011] ZAWCHC 425 (16 November 2011) para [42].

Parenting Co-Ordinator) to determine which school would be best suited to the needs of the minor child.

[10] The First Respondent was of the view that the minor is not yet three years old and, as such, her entrance into a school is not an urgent matter and there are no indications that she will suffer any emotional or developmental damage or that she is currently suffering emotional or developmental damage as alleged by the Applicant. Pertinently, she is still on nappies. First Respondent stands by its warning given to the Applicant that an urgent application is premature and would be opposed.

Evaluation

[11] On the morning of the hearing I stood the matter down to afford the parties to reach a possible settlement which was fruitless. At the commencement of the hearing Applicant provided the Court with a memorandum issued by the Family Advocate dated 13 August 2024 (*“the memorandum”*) indicating that the issue at hand is not within its mandate, however, submitted that an educational psychologist will be best placed to make a recommendation in the respect of whether it will be in the child’s best interest for the relief to be granted.

[12] Of concern, the Applicant only, and after First Respondent sought clarity on what precise relief is being sought, is, when the Applicant from the bar and for the very first time abandoned prayers 2 and 3 of the Notice of Motion. This was novel to the Court to hear that Applicant was no longer persisting with same and rather proceeding in its prayer for alternate and or further relief in line with the latent memorandum dated 13 August 2024. First Respondent took issue with the abandonment of prayers 2 and 3 contending that Applicant morphed his case by virtue of the memorandum.

[13] This reliance on alternate and or further relief came as a surprise because the Founding affidavit contained no averments directing the Court to consider alternative

relief on the basis suggested. What was further confusing, was that Applicant had until 12 noon, sufficient time to have considered his position, to have used the opportunity to discuss the alternative relief with the First Respondent, given that the First Respondent suggested a Parenting coordinator or social worker repeatedly.

[14] Before I turn to the issue of the urgency and the merits, it is important that I discuss Alternate Dispute Resolution mechanisms. The First Respondent in her opposing affidavit raised the issue of Non compliance with Rule 41A.

[15] The relevant concepts on mediation were dealt with comprehensively in *Kaladagi Manganese (Pty) Ltd and Others v Industrial Development Corporation Of South Africa and Others*³ and discussed the provisions of Rule 41A. Mediation is a tool, and if used effectively yields potential results. The notion of Facilitative mediation, where the mediator endeavors to facilitate communication between the parties and to help each side to understand the other's perspective, position and interests through a process where parties may find each other “a way out of the deadlock”⁴.

[16] Mediation provides for disputes to be resolved in a reconciliatory manner and therefore, promotes restorative justice. I remain of the view that Court annexed mediation should be utilised more effectively. The practice of it becoming a tick box exercise or to bypass it on urgency needs to be addressed more vigorously.

[17] The role of mediation is more suitable to build a relationship in matters such as this, which involves a very young child and where the parties will have to consult and communicate with each other for quite a long time on joint decision making until the minor child reaches the age of majority. However, I am mindful that not all disputes are suitable for mediation. I am mindful that I cannot force parties to mediate. However, the parties are obligated to consider mediation.

³ *Kalagadi Manganese (Pty) Ltd and Others v Industrial Development Corporation of South Africa Ltd and Others* (2020/12468) [2021] ZAGPJHC 127 (22 July 2021) at paras [28], [29] and [30].

⁴ *Kalagadi Manganese (Pty) Ltd, supra* at para [21].

[18] In my view, this is a classic case for mediation. It is evident that there was no meaningful mediation prior to the application. Not only will both parties own the process and if correctly managed by a mediator with experience, decisions could be made quicker. It will cost far less than a High Court urgent application and appropriate experts could be engaged as and when needed. Where issues arise requiring joint decision making, a mediator is better suited in instances where there is high volatility between parties and where communication is fractious.

Urgency

[19] Courts and its fast lane Courts should be a last resort, in circumstances such as this. It is regrettable that it was only after bringing Urgent proceedings and at the hearing when Applicant acquiesced in favour of the Memorandum to refer the parties to an educational psychologist premised as its alternative relief. The earlier invitation by the First Respondent to consider a social worker or Parenting Co-Ordinator was simply not considered and Applicant persisted with the urgent application despite warnings of First Respondent that an urgent application was premature. Instead, Applicant rushes to Court and wants to be heard in the fast lane.

[20] In any event I had nothing before me as to which educational psychologist should be considered. Applicant has at no stage put forward any names as the preferred educational psychologist. Even if I was inclined to the appointment of an unidentified educational psychologist, I foresee it would be complicated if I grant such an Order. Supposing I do, the parties will need to reach consensus as to whom to appoint. They will likely continue with their factious conduct and in the absence of the communication being managed properly, I foresee a replay.

[21] Applicant persisted that the pleadings dealt with the further or alternative relief which covered the memorandum, albeit in its Replying affidavit. However, on being

questioned to direct where the averments were made in favour of substantiating such relief in the Founding affidavit, none could be pointed out. Erasmus deals with ‘*further and or alternative relief*’ concisely. “*The facts set out must constitute the premises for the relief sought*” and the practice of adding an additional claim for ‘*further or alternative relief*’ will not assist a plaintiff who seeks relief of quite a different nature from that asked for in the summons⁵. Unless the order is “*clearly indicated in the pleadings and is established by satisfactory evidence*”⁶ which is not of application in these circumstances as the relief is not foreshadowed in the notice of motion.

[22] On the contrary the Replying affidavit was contradictory, on the one hand at paragraph 21.4 thereof the Applicant agrees to a referral states that “*it is not in the best interest of justice for all important decision in relation to the minor child be to be referred to Court or a third party*” and at paragraph 21.5 states that there is “*no obligation to utilise a Social worker or an expert to resolve the matter*”.

[23] The timeline referred to earlier shows that this Application was not ripe for hearing, the discussions around the referral to a third party was not as yet exhausted. Whilst the right of a minor child is paramount and often regarded as inherently urgent, steps ought to be in place before bringing a matter on urgency, only then, once those steps are exhausted can urgency be considered.

[24] Instead State resources were used to deal with a possible referral which should have been considered at the outset and not whilst the hearing was in motion.

[25] Urgency is not automatic in cases involving minors. It can never be so. The converse would be chaotic for our Courts especially for the urgent Court, seized with its caseloads⁷.

⁵ Superior Court Practice 2nd Edition Erasmus at D1 – 232B. *Port Nolloth Municipality v Xhalisa and Others; Luwalala and Others v Port Nolloth Municipality* 1991 (3) SA 98 (C).

⁶ *supra* at [112] D – G; *Somali Association of South Africa v Refugee Appeal Board* 2022 (3) SA 166 (SCA) at para [97].

⁷ *MM v NM and Others* (15133/23P) [2023] ZAKZPHC 117 (18 October 2023).

[26] I am not convinced that there are compelling reasons to have brought this matter on urgency. The urgency was self-created and does not meet the requirements set out in rule 6(12) of the Uniform Rules of Court, where a litigant is required to set forth its reasons why they cannot be afforded substantial redress at a hearing in due course. A few more months would not prejudice the minor who is barely 3 years of age and still on nappies. An additional few months or two, to allow for the processes to follow to enable both parties to consider what will be in the best interests of the child, should follow. I do appreciate that schools have deadlines but I do not agree that it is appropriate to rush into Court and bypass other pressing matters which are placed on the semi-urgent or urgent roll.

[27] After a careful consideration of the submissions made by both parties, the relevant case law relied upon, I conclude that this matter is not urgent. It is an abuse of the Court processes to skip the queue to get this Court to grant an Order in circumstances where only genuinely urgent matters ought to be heard.

[28] Self-created urgency is not a basis for circumventing the normal rules of Court and procedures of the Court⁸. I do not accept the relief occasioned by Applicant for further and alternative relief in the manner done, in order to maintain the integrity of the urgent Court processes.

[29] In striking this application, the hope is that the parties will make a concerted effort to work on their communication skills, take ownership and control over the decision making in the best interests of the child rather than to come to Court each time. The hope remains that the parties heed the message running through this judgment.

Costs

⁸ *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* (11/33767) [2011] ZAGPJHC 196 (23 September 2011) at para [6] (*East Rock Trading*); *MM v NM*, *supra*.

[30] Although the Applicant abandoned costs I see no reason why costs should not follow the result. First Respondent had issued a warning to Applicant if he persisted with the urgent Application, it would be opposed with an appropriate costs order. First Respondent argued for costs on Scale C. In my view, This was not a complex matter justifying costs higher than Scale B.

[31] In the circumstances the following order is made

- a) The application is struck from the roll.
- b) Applicant is liable to First Respondent for the attorney and client Costs including costs of counsel on scale B.

R K PARKER
ACTING JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for delivery is deemed to be 20 August 2024 at 15h30.

For the Plaintiff: Counsel: Ms. C. Van Douw
Email: chey@cvandouwlaw.co.za

Instructed Attorney: Mncube Attorneys Inc.
Email: gift@mncubelaw.co.za
c/o – PVW Attorneys Inc – Ms. N. Ndlovu
Email: noni.ndlovu@pvwinc.co.za

For the Plaintiff: Counsel: Adv. C. Reilly

Email: clairereilly@capebar.co.za

Instructed Attorney: Fairbridges Wertheim Becker – Ms. S. Breslaw
Email: sheri.b@fwblaw.co.za;