

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

Case Number: 2025/006632

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
DATE	SIGNATURE

In the matter between:

AJE

Applicant

(ID NO: 9[...])

and

WRE

First Respondent

(ID Nol 8[...])

E K P S

Second Respondent

E K P

Third Respondent

This judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date for the hand down is deemed to be 29 January 2025.

JUDGMENT

ABRO AJ:

Introduction

[1] This judgment deals with the reasons for the order granted by me in an urgent application wherein *inter alia* I granted an order that the children concerned be forthwith enrolled in their respective schools in order for them to commence the 2025 academic year.

[2] The application came before me in open court on Tuesday 29 January 2025. I informed the parties at the outset that because the application concerned the children's schooling and more particularly the fact that the minor children had not attended school at all during 2025 when the school term had begun on 15 January (almost two weeks prior) the matter required urgent intervention and determination.

[3] The first respondent, who appeared in person, did not pursue the issue of urgency and agreed that the issue as to the children's reenrolment in a school was indeed urgent.

Background

[4] The applicant and the first respondent are parents to two young boys, A and R, aged 9 and 6 respectively. The parties were divorced from one another on 7 September 2023. An agreement of settlement entered into between the parties was made an order of court on said date.

[5] In accordance with the agreement the parties' exercise a shared residency arrangement with specifically defined contact on special days and holidays. The

agreement further contains provisions relating to the parties' respective maintenance obligations. The issue before this court pertains to the provisions contained in the agreement in respect of joint decision making around the children's education.

[6] In this regard the agreement makes provision for joint decision making in clauses 3.11 and 3.13 thereof. Clause 3.16 contains a mediation clause. These clauses find relevance in this application. They respectively provide as follows:

"3.11 It is also agreed that all matters relating to schooling, sport, holidays, travel, policies, place of residence (suitability of home) is to be agreed upon by the Plaintiff and the Defendant jointly.

3.12 ...

3.13 The parties undertake to co-operate with each other in all matters relating to the general well-being, health, education and religious instruction of the minor children. The Plaintiff shall inform the Defendant of any significant problem or issue relating to the children's well-being, health and education and vice versa.

3.14 ...

3.15 ...

3.16 If the parties are unable to resolve any disputes between them relating to the welfare, health and education of or access to the minor children, such disputes shall be referred to an independent mediator. The mediator shall determine the procedure to be followed which shall be informal and speedy, having regard at all times to the best interests of the minor children. The costs of the mediator shall be borne equally between the parties unless otherwise determined by the mediator and the decision of the mediator shall be final."

[7] The agreement makes provision for the parents to be equally liable for the payment of A and R's school fees.

[8] The second and third respondents are the children's respective schools. The second respondent is the primary school which A attends whilst the third respondent is a preschool which R attends. Neither entered an appearance to oppose and as is to be expected they refrained from entering the fray.

[9] A was enrolled in the primary school at the beginning of the 2023 school year when he commenced his Grade 2 academic year. He completed Grade 3 at the school at the end of 2024 and was set to begin his Grade 4 year on 15 January.

[10] R, who is 6 years old, was enrolled in the preschool at the beginning of the 2024 school year. R is a special needs child who has been diagnosed with Attention Deficit Hyperactivity Disorder ('ADHD') for which he is medicated. He thus took some time to settle down initially and whilst there were some issues during the 2024 school year, R's year end assessment from the school at the end of 2024 concludes as follows:

"General Comment from Teacher C:

You have come such a long way this year, big boy. I'm so proud of all the progress you have made and are still going to make. Our biggest accomplishment is that you enjoy your days at school and are happy to come into your class each morning. I love to see your little face light up in ring time each morning when you put up your hand to answer every question that I ask. Your love for learning shines through my boy. I know that you are ready to take on a more formal approach to your learning and are ready for Grade R. Congratulations on being promoted! You are ready to soar and take on new challenges. Well done on all of your hard work this year R!"

[11] R was set to begin Grade R on 15 January 2025.

[12] R was previously assessed by an educational psychologist during 2023 and will be re-assessed by the same educational psychologist as per the relief sought by the applicant incorporated in the order below. This was agreed to by the first respondent during the hearing.

[13] The dispute between the parties which resulted in the applicant approaching the urgent court came about as a consequence of the first respondent's unilateral removal of the children from their respective schools on or about 9 January being 3 workdays before the first term and the new school year was to begin. It is worth mentioning that the schools were still closed at this time.

Sequence of events

[14] Whilst there was email correspondence between the parties during December 2024 around various issues, more particularly the identification of a play therapist to be appointed for R, no mention was made therein about the children's schools. This issue as to R's attendance in play therapy, as well as the identity of the therapist was settled by the parties during the hearing.¹

[15] In email correspondence dated Saturday 4 January 2025 the first respondent made various suggestions around contact and schooling for the children. He specifically recorded therein that whilst he valued the education provided by A's school, he was unable to afford the rising fees thereof due to his current financial situation.² He advised that he had done research and had discussions with A, who is 9, around various schools and provided his preferred choice. Notably, he acknowledged that all decisions regarding schooling need to be made jointly as per the agreement. He insisted that the matter be resolved before Term 1 was to begin and proposed mediation should the parties be incapable of reaching agreement.

[16] In respect of R, the first respondent recorded that it was vital to have him assessed in order to establish whether he would be able to attend Grade R at his current school or if he required a school that could better accommodate his special needs. He also suggested hiring an au pair who would assist with homeschooling pending a decision on schooling.

[17] Term 1 of the 2025 school year was set to begin 8 days later.

¹ The first respondent conceded the issue surrounding an assessment to be conducted by an educational psychologist. The first respondent also acknowledged the importance of identifying a play therapist for R. The matter stood down in order to afford the parties an opportunity to agree on the identity of the experts to be appointed. Agreement was reached and recorded in a draft order provided by the applicant's counsel. The order, as amended by the court, includes the parties' agreement on these issues.

² It is important to note that whilst the first respondent made reference to his 'financial situation' throughout his lengthy answering affidavit and in open court, no concrete evidence was provided as to what in fact his financial situation is. I informed the parties that any issues around their respective maintenance obligations would need to be referred to a maintenance court.

[18] The applicant's attorney, to whom the aforesaid email correspondence was addressed (with the applicant copied in) was only set to return to her office on Monday 6 January.

[19] Then, and on Thursday 9 January, the first respondent addressed correspondence to the children's respective schools informing them in no uncertain terms that he would not be enrolling A and R in the schools for the upcoming year. The applicant and her attorney were copied in.

[20] The applicant in response thereto on said date informed the schools *inter alia* that 'no final decision has been made or any discussions taken place to reach a consensus on this matter'. She advised the schools that the children would, in the circumstances, continue their schooling at their respective schools.

[21] Later that same afternoon, the first respondent again addressed email correspondence to the schools, the applicant and her attorney, wherein he stated that '*he was formally withdrawing A and R from the schools due to financial constraints*' and that he was '*cancelling his contractual agreement with the schools effective immediately*'. He advised further that should the applicant wish to keep the boys enrolled at their respective schools; she would need to assume full responsibility for any fees beyond a previous tender made by him in his email of earlier that day of R1 400.00 per child per month.

[22] On Monday 13 January and in response to the above correspondence, the first, second and third respondents were informed by the applicant that both parents need to consent to R's removal from his schools and that the applicant did not give permission or consent to his removal from his pre-primary school. The applicant went on to advise that she would engage directly with the school in respect of the payment of fees in order to ensure that R remained a student there. She emphasised that it was not in R's best interests to be removed from the school for numerous reasons not the least of which being that he had expressed a love for the school and staff and his friends, the smaller classes, his stability and the consistency that he required.

[23] In response thereto and later in the day the first respondent again advised *inter alia* that he was willing to contribute R1400.00 per child per month should the children remain at their schools. Further, the applicant would be required to assume responsibility for the balance of the fees and a new contract would need to be drawn up to which only the applicant would be a party.

[24] Then at 8:15 on 14 January, the day before the first day of school, the first respondent in a further email recorded that –

“This matter is dragging out longer than necessary. Please note that no agreement between myself and AJE will be reached regarding this matter because there is nothing to agree on. I have made my position clear. I cannot afford the school fees, and no court in this country will force me to remain in a contract I have canceled (sic) or pay for something I cannot afford. I have formally canceled (sic) my contract with the schools, and I do not require AJE’s permission to do so. AJE may choose to draft a new contract with the school if she wishes for R and A to remain enrolled but I will not be held liable for fees I can no longer afford or have explicitly stated I will not pay.”

[25] Further correspondence was exchanged between the parties later that day being 14 January. Interestingly, the first respondent advised that he had met with a lawyer and had been to maintenance court where he alleged he was informed that he had every right to cancel his contract with the school and further that he could not be held liable for payments beyond the amount he had already stipulated (presumably the R1400.00 tendered per child per month). He further advised that his decision is final and that neither A nor R would be returning to school at either the second or third respondents’ premises. He further claimed in email correspondence and during submissions made in open court that he had sought advice directly from the court and that he would not entertain the notion of the children attending their respective schools. He then requested urgent mediation.

[26] The first term was set to begin the next day.

[27] Notably, the schools had advised that whilst they were prepared to waive the term's notice in respect of R, they would not do so in respect of A. In the circumstances whether A attended his school at the second respondent or not, the parties were liable for a full term's fees as a consequence of the first respondent's late notice and breach of his contractual obligations.

[28] The children were in the first respondent's care on Wednesday 15 January being the first day of school. The children were not taken to their respective schools. The schools had indicated that the children were welcome to return, and the applicant had purchased the required stationary and ordered and paid for the required textbooks. The applicant had also undertaken to be responsible for the school fees. As such and on 16 January, the second day of school, the first respondent was requested to provide his consent for the children's enrolment in their schools as a matter of extreme urgency.

[29] In response thereto, the first respondent simply reiterated his stance and refused to provide his consent for the children to return to their schools. His stance, which is obstructive and not in the children's best interests, flies in the face of his tender to make a lesser contribution to the fees on condition that the applicant entered into a new contract with the schools and remained solely liable for the balance of the children's school fees. He raised other new excuses and reasons for his refusal to consent to the children's enrolment in their schools and advised that he had approached the Children's Court and filed an application to address this matter.³

[30] In that the schools required the first respondent's consent, which he refused to provide, the children have not gone back to school this year.

³ Notably, no such application has been served on the applicant, and it would appear from the first respondent's answering affidavit that he approached the Children's Court for the District of Benoni on 16 January seeking *inter alia* the court's permission for him to enrol his children in alternative, more affordable schools. In the alternative, he requested court ordered mediation. There is no return date on the application and no order was granted. The document attached to the answering affidavit is a 'Form 2 – Bringing A Matter to Court in Terms of Section 53 of the Children's Act, 2005. Section 53 of the Act simply sets out who may approach a children's court by bringing a matter which falls within the jurisdiction of a children's court to a clerk of the children's court for referral to a children's court. I am satisfied there are no proceedings pending.

[31] It hardly needs to be said that the current situation is not in the children's best interest and as such I indicated to the applicant's counsel, Ms Saldulker, and the first respondent, who appeared in person, that I intended to make an order whereby the children were to be immediately returned to their respective schools in order to begin their 2025 academic years.

[32] The first respondent who submitted repeatedly that he was in fact acting in his children's best interests failed to appreciate the concept of 'joint decision' making as contained in the agreement made an order of court. He did not appreciate that unilaterally removing the children from their school constituted a breach of the agreement which is in fact a court order. His submissions and allegations made in his answering affidavit that he had not breached the agreement or acted in any way contrary to his children's best interests were flawed. His complaints as to the applicant's conduct and refusal to mediate on the issue of new schools for the children after the fact were without merit. His allegations that he had adhered to the steps and processes outlined in the agreement were clearly baseless.

[33] The agreement made an order of court is clear and unambiguous. Consultation and joint decision making in respect of the children's education is required. This, and any mediation, had to be done and undertaken prior to the first respondent causing the children's removal from their respective schools and not thereafter. There is to be consultation and agreement prior to enrolling the children in a school and prior to removing them from a school and refusing for them to return.

[34] What the first respondent has done is to unilaterally remove his children from their school which school they are happy at and to which school they expected to return at the beginning of the 2025 school year. Notably, A has already attended the primary school for 2 years, whilst R would be going into his second year at the pre-primary school. The first respondent further seemed to imply that his rights and responsibilities as provided for in the Children's Act somehow trump the paramountcy of his children's best interests.

[35] Notably, the applicant contacted the schools suggested by first respondent in the above referred email correspondence and all indicated that they were full and

had no place for either child in either grade. The respondent's allegations (which were hearsay) that the principal of one of the schools he had approached had assured him that when a place became available the children would get preference as their cousins attend the school provides little comfort whilst the children remain out of school and at home whilst both parents work.

[36] I was informed by Ms Saldulker for the applicant that the first respondent had sought to file a further affidavit in response to the applicant's replying affidavit on Monday 27 January, the day before the hearing, which affidavit he provided to the applicant's attorney. I did not accept the further affidavit which had not been uploaded to CaseLines. I explained the procedure to the first respondent and rejected his attempts to make submissions about additional schools that he had now found and approached and which he contended had space for the children.

Consideration of the facts, application of the law to the facts

[37] Ms Saldulker made reference to the Basic Education Laws Amendment Act which came into operation on 24 December 2014 ("Bela Act") and more specifically the provisions therein which mandate 'that every parent must cause every learner for whom he or she is responsible to attend school, starting from Grade R on the first day of the year in which the learner reached the age of six years until the learner reached the age of 15 or completes Grade 9, whichever occurs first.'⁴ The first respondent, by unilaterally removing his children from their schools and allowing them as a consequence thereof to languish at home, is clearly in contravention of the law.

[38] The Western Cape High Court in *Nel v Nel*⁵ found the respondent (the mother) to have acted unlawfully by unilaterally moving her children back to their previous schools under the guise that it is in the best interests of the children. The respondent disturbed the *status quo* by doing so. The court found further '*that there was no objective evidence to suggest that the removal of the children from the one schooling environment to the one the Respondent chose was in their best interests*

⁴ Section 3(1) of the Schools Act 84 of 1996 as amended by the Bela Act

⁵ *Nel v Nel* (1986/2011) [2011] ZAWCHC 113 (1 January 2011) at [13] – [19]

so as to disregard the rights of the Applicant to have been properly informed or consulted about the fact that the Respondent had removed the children from one schooling environment to another.' The first respondent before me similarly provided no objective evidence that either child's best interests would be served by removing them from their familiar school environments to a new, and as yet to be determined, school. The converse appeared to be the case and being kept out of school altogether is simply untenable and unlawful.

[39] In *CB v KEB*⁶ the court was similarly confronted with an urgent application in respect of *inter alia* the identity of the school in which to enrol a minor child for the 2024 school year. She was to begin Grade R. The respondent (mother) unilaterally enrolled the child in a school. The applicant refused to consent thereto. He had proposed two other schools. The child was provisionally enrolled in two schools. One of the applicant's choice and one of the respondent's choice. Neither parent was prepared to co-sign for the final admission of the child. The court dealt with urgency and whilst finding that the urgency may have been created by the parties through their seemingly endless clashes, the court found that the matter needed to be dealt on the urgent roll as the child would be highly prejudiced if left without a school to attend in the new year.

[40] At paragraph [43] of her judgment Malatsi-Teffo AJ said the following which finds application in this matter –

“The decision as to which school a child should attend, in situations where parents disagree, is ultimately a matter of judicial discretion exercising its inherent jurisdiction as the upper guardian of a minor child.⁷ Its finding shall be based on the facts presented...”

⁶ *CB v KEB* (4625/2021) [2023] ZAGPPHC 1416 (29 December 2023)

⁷ The Constitutional Court in *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) expressed a view in para [64] that – “*The High Court sits as upper guardian in matters involving the best interests of the child (be it custody matters or otherwise), and it has extremely wide powers in establishing what such best interests are. It is not bound by procedural strictures or by the limitation of evidence presented, or contentions advanced or not advanced, by respective parties*”.

[41] The court further held that the choice of a school for a child should be in the best interests of the child not of the parties.⁸

[42] The first respondent's allegations made in his answering affidavit as to his financial circumstances which were in any event vague and unsubstantiated appeared to focus more on his interests and his rights to make decisions in order to further or protect his rights. He appeared unable to comprehend the damage that his actions over the past two to three weeks may have caused to his children.

[43] In *UR v SB*⁹ the issue before the court in an urgent application was whether, subsequent to the withdrawal of the applicant's consent and the payment of the deposit for the 2024 year, it was in the interests of the child to remain at school A or whether he ought to be moved back to his previous school where he had spent the previous school year. The child had just started Grade 1 at school A. Senyatsi J found the applicant's sudden unreasonable withdrawal of his consent regarding his child's attendance at school A was not in the child's best interest and accordingly his removal from the school would similarly not be in his best interests. The applicant's attempt to interdict his child from attending school at school A (the main application) was dismissed with costs.

[44] Whilst the merits of the above referred matter are distinguishable from the merits *in casu*, the first respondent's sudden and unreasonable withdrawal of his consent and refusal to allow the children to continue with their schooling is not in the children's best interests and is in fact detrimental to their psychological well-being and continued education.

[45] I have already dealt above with the provisions contained in the agreement requiring agreement and joint decision making in respect of the children's schooling and education, which decisions will obviously have a direct impact on their well-being and development and the first respondent's total disregard therefore. These provisions remain extant until varied or set aside by a competent court.

⁸ *Supra* para [46]

⁹ *UR v SB and Others* (2024-001357) [2024] ZAGPJHC 55 (25 January 2024)

Costs

[46] The applicant sought punitive costs as against the first respondent and argued that the first respondent had been obstructive and punitive in his refusal to permit the children to return to school and further that no reasonable explanation had been provided therefore. She submitted further in her heads of argument that *'but for this conduct, the application would not have been necessary and as a result, there is no reason why a cost order should not be granted against him.'*

[47] The first respondent submitted that I should not make a costs order against him as he would not be able to afford to satisfy such order. He submitted further that if he had funds he would have appointed an attorney as he felt the process was skewed against him as he was unrepresented. He stated that his actions were undertaken because he could not afford the children's private schooling, and he was trying to prioritise his expenses and act in the children's best interests. 'A costs order would financially ruin him.'

[48] Notably, and after certain issues were conceded by him and others, like the appointment of the experts referred to in the order and their identity agreed to, the first respondent asked me if the order was appealable. He also informed that 'the court' or 'someone at the court' (this court) had told him that because he was unrepresented and a lay person any order that I made was automatically reviewable.

[49] These queries raised a concern as to the first respondent's *bona fides* in relation to his submissions that he was only acting in the children's best interests and point to his failure to appreciate the effect of his actions on the children.

[50] In exercising my discretion, I am of the view that costs should follow the result. I am in agreement with Ms Saldulker's submission that but for the first respondent's conduct, which conduct was unilateral and contrary to the provisions of the agreement which he had violated, and most importantly contrary and harmful to the children's best interests, the applicant would not have found herself in a position where she had no choice but to approach an urgent court to ensure the children's enrolment and attendance at school.

[51] I however informed Ms Saldulker that I would not order punitive costs. In the circumstances I will order the first respondent to pay party and party costs on scale B.

Order

[52] The order, as partly agreed to by the parties, is attached hereto marked “X”.

**M ABRO
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG**

For the Applicant: A Saldulker instructed by Chadinha Attorneys

For the Respondent: Mr W R Eksteen