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

Case No: 32/2025

In the matter between:

C[...] A[...] H[...]

Applicant

And

L[...] D[...] H[...]

Respondent

Date of hearing and order granted: 10 January 2025

Written reasons delivered: 23 January 2025

REASONS FOR ORDER

PANGARKER J

Introduction

1. The parties are the divorced biological parents of a minor daughter aged 14 years at the time of the application. The mother approached this Court during the recess period on an urgent basis for the following relief against the father, the respondent, as follows:

1. *That the applicant's failure to comply with the Rules of Court with regard to time periods and serving of process be condoned and the application be heard as a matter of urgency in accordance with the provisions of Uniform Rule 6(12)(a);*

2. *Directing the respondent to pay the applicant monthly maintenance for the parties' minor daughter in the amount of R51 300 on or before the 1st of every month, with the first pro rata payment to commence on 15th January 2025 in the following bank account: C[...] H[...], FNB, Account number¹;*

3. *Directing the respondent to consent to the enrolment of the parties' minor daughter in R[...] House, Green Point;*

4. *Directing the applicant to institute an application in the Cape Town Maintenance Court for a variation of the parties' maintenance order on or before 15 February 2025;*

5. *That prayer 2 operates as an interim interdict pending the finalization of the maintenance proceedings mentioned in prayer 4;*

6. *Directing the respondent to pay the costs of this application, only in the event of opposition;*

¹ Details withheld

7. Granting such further and alternative relief as the above Honourable Court deems appropriate.

2. The application was dated 2 January 2025 and on truncated timelines, required of the respondent to deliver his notice of opposition by 3 January and his answering affidavit by 7 January. The application unsurprisingly became opposed and due to the respondent's legal representative being on leave, and then having to take instructions and consult with counsel, such affidavit was filed one day late, on 8 January. To the extent that condonation was requested for such lateness, it was granted to the respondent. The replying affidavit was filed electronically with the Registrar at 00h29 on 10 January.

3. Having heard the argument by the parties' respective counsel, the matter stood down for my consideration thereof. The legal representatives were informed that an order would be granted on the same day and reasons for such order would be delivered at a later stage. These are the written reasons for the following orders granted after the hearing on 10 January 2025:

1. That the application is struck from the urgent roll.

2. That it is ordered that the minor child's best interests, particularly in relation to an intended relocation from Hermanus to Cape Town and a potential change of schools, be assessed as soon as possible by an expert professional. In this regard, the parties are directed to adhere to their agreement contained in the Parenting Plan read with the attached Annexure "X", which were incorporated in their Final Decree of Divorce granted on 30 April 2021. In the event that the parties fail or refuse to agree on the costs of such expert professional to attend to the aforementioned assessment, such costs shall be shared between them equally.

3. *That the applicant is ordered to pay the costs of the application on an attorney and client scale to be taxed.*

Common cause facts

4. The common cause facts are summarised as follows:

4.1 The parties were divorced on 30 April 2021, and the Final Decree of Divorce incorporates a Consent Paper and Parenting Plan, attached to which is Annexure “X”, containing the procedure to resolve disputes related to parental rights, responsibilities, care and contact in respect of the minor child, and the powers of the elected parenting co-ordinator.

4.2 The applicant and the parties’ daughter reside in Hemel en Aarde, Hermanus. The child, whom I refer to as J, attends C[...] H[...] High School and is, by all accounts, an exceptionally talented dancer who has attained several dance achievements at her young age. One of her recent achievements is that she represented South Africa at the 2024 Dance Star Competition in Croatia. At the time the application was launched, J attended J[...] D[...] in Hermanus.

4.3 The father, a managing partner at T[...] Co. (Pty) Ltd, resides permanently in Val de Vie Estate, Paarl. In terms of the Divorce Order (incorporating the Consent Paper and Parenting Plan), he enjoys reasonable contact with his daughter. His maintenance obligations toward her include the payment of school fees, costs of extra murals, school books, cellphone and related expenses, additional educational costs, medical aid contributions and the payment of pocket money. At this juncture I point out that the Consent Paper includes a reference to the parties’ son who attained the age of majority and whose interests did not form the subject of this application.

4.4 Paragraph 3.5 of the Consent Paper makes provision for either party to approach the Maintenance Court for a review of the maintenance granted in the divorce order.

Furthermore, no cash amount is stipulated therein, however, it is common cause that on 6 November 2023, the Hermanus Maintenance Court granted an order by consent in terms of which the father was ordered to pay R6000 per month for J². All other clauses related to maintenance in the Consent Paper incorporated in the Final Decree of Divorce, remained extant. It is undisputed that the respondent pays R7000 as cash maintenance currently for J in terms of the Hermanus maintenance order (*Hermanus order*).

4.5 It is evident from the affidavits filed in the application that the Hermanus order was never varied and that the respondent continues to pay the cash maintenance as well as complying with the ancillary maintenance provisions as contained in the Final Decree of Divorce.

4.6 Pursuant to the events which transpired in this application related to the applicant's desire that J relocates to Cape Town, enrolls at R[...] House Green Point (*R[...] House*) and attends K[...] D[...] U[...] in Edgemoor (*K[...]*), the parties engaged in mediation with Michelle Joubert, Family Mediator³ but the applicant subsequently decided to withdraw from the mediation process.

The opposed application for urgent relief

5. In her founding affidavit, the applicant states that the minor child exhibits exceptional dancing talent and prowess and that J[...] D[...] in Hermanus no longer provides a suitable platform for her to showcase her dancing skills. These views are apparently shared by the child and the J[...] D[...] teacher. A Somerset West dance school offered her an invitation which led to J being able to compete in an international competition hosted in Croatia. According to the applicant, the only suitable dance school of equitable calibre which would provide her with international exposure in the dance

² LDH6

³ CAH7

field, is Prestige Dance in Somerset West but the distance from Hermanus makes this dance school unsuitable.

6. The applicant's timeline which, according to her, rendered the application urgent, was as follows: on 9 November 2024, J, of her own accord, auditioned at K[...] in Cape Town. On 16 November, the latter confirmed that J was accepted to the dance school and that dance classes would commence on 20 January 2025. From annexure CAH3, the acceptance letter, it is apparent that J was accepted immediately upon conclusion of the audition. A late enrolment is/was not an option in light of preparation for dance competitions.

7. On 28 November 2024, the applicant engaged the respondent to discuss J's enrolment at R[...] House and joining K[...]. She emailed the respondent a lengthy undated letter in which she informed him, *inter alia*, that J was accepted at K[...] and would compete in 2025, and that pursuant to her research regarding the best school options, accommodation, travel expenses and time, R[...] House was the best option. The applicant advised that she was in contact with the R[...] House school mistress and furthermore, that the school fees would be R15 000 per month. According to the applicant, she was informed that the child would be eligible for a bursary from 2026 onward.

8. On 6 December 2024 the respondent replied to the email, indicating that the applicant was welcome to have the matter referred to mediation with Ms Joubert. The timeline reflects that on 18 December the parties conducted an online mediation session with her⁴. According to the applicant, the mediation was postponed to 16 January 2025. Her version was that because the R[...] House school year commenced on 15 January 2025 and K[...] would commence classes on 20 January, the urgency of the matter and circumstances precluded the matter being mediated on the timeline as suggested by Ms. Joubert.

⁴ CAH7

9. On 23 December 2024, the applicant addressed correspondence to the respondent requesting interim maintenance pending the completion of the mediation process; failing that, an application for variation of the maintenance order would be launched. The interim maintenance was requested as from 1 January 2025. The applicant did not receive the respondent's consent to the enrolment of their daughter at R[...] House.

10. In respect of her financial circumstances, the applicant stated that she earned R6000 per month from a cleaning service, utilised approximately R30 000 per month from the capital she receives from the divorce settlement to supplement her income⁵, holds a pension interest only accessible once she reaches the age of 55 years and has an interest in the Hemel en Aarde house which forms the subject matter of pending litigation in this Court between the parties.

11. The minor child's monthly maintenance needs include the following⁶: R15 000 tuition fees, R15 000 R[...] House fees, R5 000 K[...] dance fees, R22 500 accommodation costs and R3 000 transport costs. The total monthly expenses, excluding the R[...] deposit, totals R51 300. The applicant confirmed that the respondent pays R7 000 plus J's remaining expenses and that she cannot afford to settle the difference of R44 300 per month as she was depleting the capital at her disposal. The applicant referred to annexure CAH10, a quote for two-bedroomed accommodation in Green Point for herself and J at a total cost of R45 000 per month in support of the claim for accommodation costs for J.

12. The applicant made the averment that the respondent earned more than R100 000 per month as a net salary at the time of the divorce and also has earnings in equity, received annual bonuses in respect of fees, employment and holds executive positions at A[...] F[...]. He also held crypto currency and has a property portfolio which included properties owned in Stellenbosch. She thus alleged that he has the necessary means to

⁵ The capital is invested with PSG Wealth, CAH9

⁶ I have not listed all the expenses, only those which are contentious

satisfy the increased maintenance claim and requirements of their daughter.

13. The applicant sought an interim maintenance order pending the finalization of a variation application in the Maintenance Court to be instituted before 15 February 2025. The applicant's view was that she could not approach the Maintenance Court on an urgent basis requesting an interim order and so, without the relief from this Court, she could not obtain additional funds which would allow J to achieve her full potential.

14. Furthermore, the applicant made the averment that the child was not guaranteed a place at K[...] in 2026, and should she forfeit the opportunity to join the dance team in 2025, it would have a lasting effect on her life and future. The applicant maintains that the respondent has a duty to maintain J and also has the means to pay the increased maintenance requirements and were the relief not to be granted, J would be robbed of a chance to realise her dreams and aspirations⁷ and her development would be hampered.

15. The applicant further stated that despite the urgent situation, the respondent failed to respond to her letter of 23 December 2024, and she was thus left with no alternative but to approach this Court on an urgent basis. In respect of service, the applicant alleged that the Sheriff of the High Court was not contactable and thus unable to serve the application, which was eventually served in a different manner in terms of the Rules. In respect of costs, the applicant sought costs in the event of an opposition of the application.

16. The respondent's answering affidavit is quite lengthy and only the pertinent aspects are referred to. According to the respondent, the application was not urgent and was nothing more than a calculated attempt to induce him to increase J's maintenance by more than R44 000 without first having to undergo a maintenance inquiry conducted by the Maintenance Court and also sought to compel him to consent to enrolment at R[...] House without his prior knowledge. His view was that the sudden change of

⁷ Par 49, p16

schools was not in the child's best interests and not a viable option.

17. The respondent furthermore criticised the applicant when alleging that she was unhappy with the terms of the Divorce Order incorporating the Consent Paper and wished to take a second bite at the cherry rather than approach the Maintenance Court. He furthermore argued that in view of the applicant's relationship with her partner who lived in Green Point, the application was premised on her desire to relocate to Green Point to be closer to him. The respondent was not opposed to his ex-wife's relocation but drew the line at what seemed to be an attempt to force him to foot the bill and expenses for such relocation.

18. As far as urgency was concerned, the respondent highlighted certain important information in respect of the timeline proffered by the applicant, which he submitted was either not disclosed and/or was not referred to in the founding affidavit. The respondent stated that on 11 September 2024, the applicant made payment to counsel and he attributed this payment to the applicant having obtained legal advice regarding an intended relocation in September 2024 already and without notice to him⁸. It was evident from an email between the headmistress of R[...] House and the applicant on 18 September 2024 already, that J had a trial day at R[...] House. He also referred to the applicant's further response to the headmistress on the same date wherein she informed the latter that she (the applicant) had to provide the respondent with enough reason for him to pay for the 2025 fees and so enquired about a 2026 scholarship for their daughter.

19. The respondent accused the applicant of not discussing the changes to the child's schooling with him nor that J was invited to R[...] House for a trial day. He emphasized that the parties were required to make joint decisions regarding schooling as provided for in the Parenting Plan and alleged that the trial day at R[...] House occurred approximately seven weeks *before* the dance audition at K[...], which took place on 9 November 2024. Furthermore, on 17 October 2024, the applicant paid R550

⁸ CAH11

to R[...] House as an application fee⁹. On 20 November 2024, the respondent met the owner of JD Dance Academy. Sometime thereafter his daughter contacted him and informed him of her intended change of schools and that she had auditioned at K[...] on 9 November and was accepted to the latter dance school as well as R[...] House in Cape Town. The respondent was also advised by J that she would be relocating to Cape Town and the gist of the rest of the conversation was that he was expected to pay the increased school and related fees and the K[...] dance school costs.

20. The respondent confirmed receiving the email of 28 November 2024 from the applicant wherein she requested a substantial increase in the maintenance and informed him of the intended relocation to Cape Town and J joining the new dance school. He responded on 29 November 2024, informing the applicant of the radical departure from the *status quo* and that he would reply by 6 December, which he then did, advising that she may go ahead with the mediation process. At this point, it is important to highlight that the applicant failed to indicate in her founding affidavit that the respondent indeed responded to her email. The relocation was only made known to him the day before, on 28 November 2024, during his conversation with J.

21. The respondent points out further that the applicant only contacted the mediator approximately a week after he confirmed his willingness to attend mediation¹⁰. The respondent's contention was that it was known at all material times that the mediator would be taking leave over the pre-Christmas period and that resulting from the mediation process, the parties would have needed to exchange financial information by 20 January 2025. The mediator would have conducted a voice of the child assessment and meet with J on 16 or 17 January 2025.

22. The respondent submitted that despite the mediation process and the mediator's proposal to reconvene on 20 January, the applicant withdrew from the mediation process. This is evident from annexure LDH4, an email from the applicant in which she

⁹ CAH11

¹⁰ The mediator contacted him on 13 December 2024

indicated that mediation had failed to resolve the matter and that she had no option but to withdraw from such process. The respondent was requested to respond on truncated timelines, which he did. In view of the orders granted herein, I do not address the issue of affordability of maintenance and the respondent's earnings in these Reasons.

23. The respondent's view was that there was no urgency or that the urgency was self-created seeing as the applicant acted in September 2024 already to secure the child's trial day at R[...] House, weeks before the dance audition at K[...] in Edgemoor. He submitted that the applicant abandoned the mediation process and brought apparent urgent proceedings two weeks before the planned relocation a few days prior to the commencement of the 2025 school year. His view was that the applicant did not explain why the child's best interests would be served by relocating in Grade 9, leaving C[...] Hermanus for which he had already paid partial fees for 2025, why J needed to move to Green Point as opposed to another area closer to K[...], and the contradiction in the dance fees or costs payable for J.

24. The respondent was of the view that the application was premature, not urgent, constituted an abuse of the Court time, and that the applicant sought to circumvent the Maintenance Court process. In this regard, the respondent's counsel motivated for a punitive costs order on an attorney and client scale. In respect of the child's maintenance needs as set out in the applicant's papers, the respondent denied that he had the necessary funds to satisfy those needs as he had a monthly shortfall. In respect of the order for an interdict, the respondent's averments and submissions correspond in that he argued that the applicant did not satisfy the requirements for such interim interdict and that what was actually sought was relief akin to a Rule 43 order, even though the latter Rule was not applicable as the parties were already divorced at the time the application was launched.

25. In reply, and insofar as the attack on urgency was concerned, the applicant accused the respondent of "*sluggishness*"¹¹ in respect of responding to emails and to

¹¹ Par 11, p168

the mediator's request for their financials. She elaborated that having concluded her investigations, she was of the view that R[...] House was a natural choice to enroll J in due to her exceptional achievements in academia and dance and that she (J) would be placed in a position to contribute positively to the standard of Grade 9 learners at R[...] House. According to the applicant, the mediator took leave suddenly, on 24-hours' notice. The applicant persisted with the view that the timeline provided by the mediator would not be conducive as the dance classes at K[...] were due to commence on 20 January and the R[...] House school year on 15 January, respectively. The applicant furthermore held the view that if the matter was not heard in the Urgent Court, J would then be *"robbed of an opportunity to progress and fulfil her potential"*.¹²

26. The applicant regarded increasing J's social network by offering her the opportunity to dance at a prestigious dance institute as an enhancement of the child's development which, at the time of the application, was at a crucial stage as she was 14 years old. Furthermore, relocating as requested by the applicant - that is, five days before the start of the new school year – would allow her daughter to form lifelong bonds. The applicant submitted that if the relocation and change in schools (academic and dance) only occurred in 2026, it would mean that J would have missed out on opportunities to realise her dance ambition and form new friendships. She furthermore argued that R[...] House offered dance as an academic subject, is/was one of the top schools in the Western Cape and would thus benefit J's future dance ambitions.

27. As for *"why relocate to Greenpoint?"*, the reply was that living close to R[...] House in Greenpoint would eliminate most travel expenses and time to school and would allow J to form a closer bond with the applicant's partner, his children and the extended family. The alternative suggestions presented by the respondent, that the applicant should have considered Platteklouf or Century City, were regarded as not being viable residential options due to the distance from R[...] House and distance from Greenpoint and support structures.

¹² Par 20, p170

Discussion and evaluation

28. In the order granted after the hearing, the application was struck from the urgent roll. Having regard to the averments in the affidavits placed before me at the time and the submissions by counsel, the main reason for striking the application was due to self-created urgency. My views and findings are based on the reasons which follow below.

29. Firstly, the applicant did not play open cards with the Court in respect of the timeline which she said rendered her application urgent. Apparent from her founding affidavit, wherein she was required to make out her case for urgency, her timeline commenced on 9 November 2024 when J, of her own accord, auditioned at K[...] D[...] U[...]. According to the applicant, it was only thereafter, on 16 November, that K[...] accepted the child for the current year, that is, approximately a week after her audition. Secondly, having read the founding affidavit, the impression gained from paragraph 19 thereof was that it was only after confirmation of the successful dance audition that the applicant commenced her investigation into suitable schools which offered dance as an academic subject.

30. However, the above timeline and the applicant's reasoning for enrolling J at R[...] House Greenpoint, were anything but transparent. I say this because in an annexure which the applicant attached to her affidavit, CAH4, it was apparent that around early or mid-September 2024 already, J spent a trial day at R[...] House, yet the applicant failed to mention this significant date in setting out the chronology supporting the urgency of the application. In fact, CAH4 was simply referred to in passing in that the applicant stated that J would qualify for a R[...] House bursary for 2026. The headmistress responded in the affirmative to the applicant's request in an email of 18 September 2024 which read as follows:

"I have to provide J..'s father enough reasons for him to pay for 2025 fees so if at all possible – can you secure a 2026 scholarship for J.?"¹³

¹³ CAH4

31. Having regard to what is stated above, the failure to inform the Court about the mid-September 2024 date was significant as it contributed to my determination whether the application for such drastic relief was urgent or not. In my view, and as correctly submitted by the respondent's counsel, the timeline commences at the earliest date on 18 September 2024 and not on 9 November 2024, the dance audition date, as the applicant suggested to the Court. It is also significant that the emails of 18 September 2024 also provide insight not only into the applicant's conduct but also her intention at the time leading up to the application on 10 January 2025. To clarify, it became clear to me that the applicant had formed the idea or intention in mid-September 2024 already, and not in November 2024, that J would enroll at R[...] House Greenpoint.

32. Furthermore, the applicant would have the Court believe that the reason for the change of school from C[...] Hermanus to R[...] House was because J would be attending the K[...] D[...] U[...] school in Edgemean and would thus have to relocate to Cape Town and attend a school here. However, her own annexures do not support this contrived view because as indicated above, the R[...] House trial date and the applicant's interaction with the school in order to secure a place and scholarship for her daughter, occurred on 18 September 2024 already, nearly two months prior to the dance audition and confirmation of acceptance to K[...] U[...]. In my view, there is simply no explanation for this glaring inconsistency and failure to set out the correct commencement date of the timelines related to urgency.

33. A further worrying aspect which even the replying affidavit did not allay, was that the applicant wished the Court to believe that one of the reasons why J should attend R[...] House, and the respondent be ordered to consent to such enrollment, was due to the fact that R[...] House was one of two schools to offer dance as an academic subject. Yet, there was no specific mention of the reason why J should attend R[...] House was because dance was offered; rather, the impression was certainly created that R[...] House was suitable because it was in Greenpoint, where the applicant's partner and his family reside. My understanding, and also that of the respondent's counsel, was that the

move to Cape Town was so that J could attend K[...] U[...] which would expose her talent to international dance opportunities.

34. In response to the queries and attack on the issue of urgency, the applicant's counsel argued that his client had not rested on her laurels as she had embarked on mediation to resolve the issues related to the school change and increase in maintenance but that the mediation had failed. The applicant seemed to hold a similar view regarding a failure of the mediation process, yet this was anything but correct. I say this because it was apparent from the affidavits that the applicant did not inform the respondent of her intentions to relocate the child to Cape Town, nor had she informed him of the proposed change of schools and dance school. The truth of it was that he got wind of the developments indirectly from his daughter in November 2024 after she telephonically informed him of the potential schooling and dance changes¹⁴, and it was only eight days later that the applicant informed him of the intention to relocate and change dance and academic schools.

35. The end November 2024 email from the applicant wherein she finally informed the respondent of the imminent changes in light of a relocation to Cape Town, was not met with a response only on 6 December 2024 as the applicant alleged. Rather, the true state of affairs as depicted by the respondent, and supported by the correspondence, was that he immediately replied to the email the next day (29 November 2024) and stated that the matter could be mediated¹⁵. Once again, the applicant selectively or deliberately - it is unclear which - failed to indicate that the respondent replied to her email on 29 November 2024.

36. The further questionable actions of the applicant relate to her failure, once again, to mention in the founding affidavit that on 17 October 2024, she paid R550 as an application fee to R[...] House. This transaction was clearly evident from her First

¹⁴ By all account, this occurred on 20 November 2024

¹⁵ LDH1

National Bank October 2024 statements attached to her founding affidavit¹⁶. She attached her bank statements for purposes of indicating her income and expenses in relation to her increased maintenance claim of more than R44 000 per month, yet on the issue of a timeline related to urgency, the applicant failed to mention that on 17 October 2024, she paid such fee to R[...] House for admission of J to that school. This failure to disclose another pertinent fact is problematic as it underscores the applicant's selective disclosure of chronological dates and times relevant to the issue of urgency. These non-disclosures, or selective disclosures, played a significant role in the assessment of the applicant's *bona fides* in approaching the Court on such short notice and during the High Court recess period.

37. In my view, the applicant should have disclosed the event of 17 October 2024 in her founding papers, but it was left to the respondent to alert the Court to the relevance of the date and the corresponding action taken on such date. This lead me to conclude that long before the dance audition on 9 November 2024, the applicant had already taken steps to apply for and enroll J at R[...] House for 2025 and did so without informing the respondent, who is the co-holder of parental rights and responsibilities in relation to their daughter. Clearly, he was sidestepped on the issue of his daughter's relocation and change of schools and only placed in the picture at a later stage, in November 2024.

38. Even if I were to ignore the 18 September 2024 date as the commencement of the timeline for purposes of urgency, there remained the 17 October 2024 event/date which was simply not mentioned. At the earliest, therefore, the "*urgency timeline*" should have been disclosed as having commenced in mid-September 2024 and at the latest, 17 October 2024, yet as seen above, the applicant failed to indicate these dates in her application.

39. On the issue of a failed mediation process as a further motivation for urgency, the applicant's insistence that mediation failed was incorrect. The facts indicate that the

¹⁶ CAH11

mediator saw the parties on 18 December 2024, a few days before Christmas, and consulted virtually with them, whereafter she compiled a comprehensive report. The suggestion that it was somehow the mediator's fault that the process failed, was not supported by the facts. The thrust of it seemed to be that the mediator had in any event intended to be on end-of-year leave and blaming Ms. Joubert for going on leave, simply does not assist the applicant at all.

40. It is apparent from the mediator's report that she dealt with, *inter alia*, the following: the parties' views and concerns, the unknown facts, the information required by the mediator in order to assist the parties to make an informed decision regarding relocation and schools, care and contact issues, proposals for the way forward and a recommendation that both parties were to provide their income and expenses by 20 January 2025 in order for an assessment to be made on affordability in respect of the proposed relocation of the mother and child.

41. From the facts and submissions, I conclude that the mediation had neither failed nor was it halted. At the risk of repetition, the mediator required certain pertinent information from the parties and gave them a deadline for submission. It was evident that there were concerns around the following: the timing and rush to make a decision about a change of schools; the drastic school fee increase from the current C[...] Hermanus fee to the R[...] House fee; the lack of any firm detail and arrangements regarding the child's accommodation; the indication that decisions regarding the child seemed to be based solely on the child's dancing abilities¹⁷; the impact of relocating J who was in Grade 9; the unknown costs and tuition fees; whether dance as an academic subject would benefit J in terms of international tertiary education; how the applicant's request for increased maintenance was calculated, and more.

42. Importantly, the mediator wished to review the parties' means, wished to assess the child's best interests in light of potential significant changes, emphasized that both parents were actively involved in making major decisions about the child's life and were

¹⁷ The correctness of this view, given the above discussion, is uncertain

cautioned about prematurely involving children in such decisions and creating expectations before concrete arrangements were finalised between the parents. There was no doubt that Ms. Joubert intended to reconvene the mediation process upon the parties' submissions of their financials and after having conducted a voice of the child assessment on 16 or 17 January 2025.

43. Having regard to the above and CAH7, I find that Ms. Joubert therefore had not concluded the mediation process nor had it failed, nor had she abandoned the process but rather that it seemed that when the applicant did not get her way or did not like the way the mediation was going, she then decided to withdraw from the process of her own volition on 27 December 2024¹⁸. It was apparent from CAH7 that the applicant was of the view that relocation was in the child's best interests, yet the mediator, correctly in my view, was of the view that the child's best interests would still have to be assessed.

44. The applicant made out in paragraph 52 of the founding affidavit that as there was no response to her correspondence of 23 December 2024¹⁹ seeking the increased maintenance, she was left with no option but to launch the urgent application on 3 January 2025. Yet, this was also not entirely correct when regard is had to the answering affidavit and annexure LDH3 thereto, because the respondent indeed addressed correspondence to Ms. Joubert, dated 27 December 2024, wherein he queried the applicant's withdrawal from the mediation process. He indicated that he had co-operated in respect of mediation and enquired about the way forward. The respondent's explanation that the applicant was included in the correspondence to the mediator was not denied, hence, I accepted that she knew that the respondent was querying her maintenance increase request pursuant to the mediation report of a few days earlier. Thus, the applicant's basis for approaching the Court urgently due to the respondent's alleged lack of response to the 23 December 2024 letter was not simply not correct

¹⁸ LDH4

¹⁹ CAH8

45. Having regard to the issues in the timeline and the failure to disclose pertinent dates and actions, I agree with the respondent's submission that the urgency was self-created. In my view, nothing barred the applicant from approaching the Court as far back as mid-September or for the latest, immediately after 17 October 2024 with an urgent application, yet she failed to do so. She effectively waited more than three and a half months before approaching this Court, not only during the January recess period but also on truncated timelines, forcing the respondent to appoint legal representatives to oppose the application on his behalf and she did so five days prior to the new school year commencing.

46. Given the failure to disclose the timelines as mentioned above and the applicant's failure to approach the Court at that stage, alternatively, delaying the matter for months and waiting to approach the Court until a few days before the commencement of the 2025 school year, I held the view that urgency was self-created. It bears repetition that a party who approaches the Court on an urgent basis in terms of Rule 6(12) should be mindful of the *dicta* in **Commissioner for the South African Revenue Service v Hawker Air Services (Pty) Ltd**²⁰ which highlights the possible consequences if such party fails to make out a case for urgency or if the urgency is self-created:

"Urgency

[9] One of the grounds on which Patel J dismissed the applications was that at their inception they had lacked urgency. This was erroneous. Urgency is a reason that may justify deviation from the times and forms the rules prescribe. It relates to form, not substance, and is not a prerequisite to a claim for substantive relief. Where an application is brought on the basis of urgency, the rules of court permit a court (or a judge in chambers) to dispense with the forms and service usually required, and to dispose of it 'as to it seems meet' (Rule 6(12)(a)). This in effect permits an urgent applicant, subject to the court's control, to forge its own rules (which must 'as far as practicable be in accordance with' the rules). Where

²⁰ [2006] SCA 55 par 9

the application lacks the requisite element or degree of urgency, the court can for that reason decline to exercise its powers under Rule 6(12)(a). The matter is then not properly on the court's roll, and it declines to hear it. The appropriate order is generally to strike the application from the roll. This enables the applicant to set the matter down again, on proper notice and compliance."

(my emphasis; footnotes omitted)

47. The further question was whether the applicant could be afforded substantial redress in due course, which is also a requirement in terms of rule 6(12)(b). In this regard, the applicant simply failed to overcome this hurdle too. Her case was that given the looming commencement of the new school year and that the K[...] dance classes would commence on 20 January 2025, she had no other option but to approach the Court urgently. However, on a consideration of her founding affidavit, it became apparent that she did not explicitly set out the reason why she could not be afforded a hearing in due course.

48. I emphasise that the urgency was of the applicant's own making, and in my view, there was simply no justifiable reason why she could not have approached the Maintenance Court months ago for a variation of the High Court maintenance order once she had intended or decided upon the relocation and the R[...] House enrolment; similarly, there was no reason offered why she had not approached this Court sooner than 3 January 2025. Put simply, there was no reason to approach the Court during recess on truncated timelines on the eve of the commencement of the 2025 school year when the issue of a new school, a change in the dance classes and relocation had first arisen in mid-September or October 2024 already. In view of the above reasons, the matter was struck from the roll.

49. I do not express a view as to whether a basis is made out for the granting of increased maintenance in the form of an interim interdict pending a variation application in the Maintenance Court because the application was struck from the roll for the reasons expressed above. However, the applicant was of the view that if an order was

not granted, the child's best interests would be prejudiced and in effect, her opportunities at K[...] would be infringed and her future prospects in the international dance community would be diminished. There was no real opposition to this view. Hence, being mindful that I was dealing with relief related to a minor child, that the best interests of the child were still to be assessed, and as the High Court is the upper guardian of minor children, after some consideration, I concluded that that the door should not be closed in respect of the future prospects, both academic and dance-related, in respect of the minor child, J.

50. Whether enrolling J at R[...] House, removing her in Grade 9, leaving C[...] Hermanus, leaving behind all the friends and familiar surroundings/community and current dance school, would be in J's best interests, must still be assessed by a professional expert. One would hope that the doors are still open for this teenager to exhibit her dance talent notwithstanding the application being struck from the roll. I hold the view that, urgency issues aside, to simply have relied on the mother's view and the child's desire to join K[...] and R[...] House, without first assessing the child's best interests, particularly having regard to section 10 read with section 31 of the Children's Act 38 of 2005 (the Act), would have been premature²¹.

51. In particular, section 31 of the Act states that:

31. Major decisions involving child

(1)

(a) Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b) involving the child, that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development.

²¹ Also read with section 6(2) and 7(1) of the Act

(b) *A decision referred to in paragraph (a) is any decision—*

(i) *in connection with a matter listed in section 18(3)(c).*

(ii) *affecting contact between the child and a co-holder of parental responsibilities and rights.*

(iii) *regarding the assignment of guardianship or care in respect of the child to another person in terms of section 27; or*

(iv) *which is likely to significantly change, or to have an adverse effect on, the child's living conditions, education, health, personal relations with a parent or family member or, generally, the child's wellbeing.*

(2)

(a) *Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b), that person must give due consideration to any views and wishes expressed by any co-holder of parental responsibilities and rights in respect of the child.*

(b) *A decision referred to in paragraph (a) is any decision which is likely to change significantly, or to have a significant adverse effect on, the co-holder's exercise of parental responsibilities and rights in respect of the child.*

[Commencement of s 31: 1 July 2007.]

(my emphasis)

52. The respondent's submission that the applicant acted contrary to section 31(2)(a) of the Act, was convincing. Given the chronology of events herein, it was

apparent that the mother made decisions about a change of school and relocation months prior to the respondent first being notified thereof at the end of November 2024. In view of the issues and concerns raised in the mediator's report, the agreements which the parties reached which are encapsulated in the Parenting Plan, and the paramountcy of the best interests of the minor child, I thus granted an order in the terms as set out at paragraph (2) of the 10 January 2025 order.

53. Insofar an appropriate costs award, the motivation for punitive costs in the circumstances of this matter was justified. I have set out in some detail the failure to disclose pertinent timelines, dates, and facts, as well as contradictions in the applicant's affidavit. Furthermore, she withheld information from the respondent in respect of the intention to relocate the child and failed to act in terms of section 31 (2)(a) of the Act in that she unilaterally decided in September/October 2024, and without notice to and engagement with the respondent that J would relocate to Cape Town, change schools, and in so doing, failed or had no regard to the father's views and wishes as a co-parent and co-guardian of J.

54. Lastly, the submission that I should not grant costs because the mother of a minor child had approached the Court in the child's best interests held no sway. The reasoning is based on the applicant's failure to disclose material facts and timelines which had a bearing on the finding related to urgency, her failure to act in terms of section 31(2)(a) of the Act and her delay in approaching the Court, all of which warranted a punitive costs order to signify the Court's displeasure at such conduct.

M PANGARKER
JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv B Nothling
Instructed by: Kassel Skaar Cohen Attorneys
Cape Town
Per: Mr. R Kassel

For Respondent: Adv M de Wet
Instructed by: C & A Friedlander
Cape Town
Per: Ms. B Biassoni