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

Case No: 2024-085826

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED.

.....	17 DECEMBER 2024
SIGNATURE	DATE

T[...] **J[...]** **M[...]**

Applicant

And

C[...] **H[...]** **M[...]**

Respondent

JUDGMENT- LEAVE TO APPEAL

WINDELL, J

[1] This is an application for leave to appeal an order that was given in the family court. In terms of the order the court granted permission for the three minor children of the parties, aged 10, 8 and 6, to be removed from their current private schools and to be enrolled at another private school, P[...] C[...] F[...] H[...]I (P[...] C[...]).

[2] The circumstances under which the order was granted are largely common cause. The parties are currently involved in an acrimonious divorce that has been ongoing since 2019, and the end of the litigation is not in sight. At least eight orders have been granted by various Judges.

[3] On 7 November 2023, Van Wijnbeek AJ (the court a quo) granted a Rule 43 order in which the applicant was ordered to pay maintenance to the respondent in the amount of R15 000 per month to enable her to maintain herself and to meet the needs of the parties' children while they are in her care. At the time of the order the children were with the respondent eight days during the month. The applicant did not comply with the order. He instead approached the Germiston Maintenance Court for an amendment of the maintenance order two months later, on 2 February 2024.

[4] In the maintenance court, the applicant is tendering to pay R1500 per month per child. That is a total of R4500. He also seeks an order that the respondent pays 50% of the children's current school fees (her share being R15 541.50 per month), as well as 50% of the children's extra murals and 50% of the children's excess medical expenses. During the hearing of the application the applicant also indicated that he will seek an order that no cash payment be made to the respondent. The maintenance application is still pending eleven months later.

[5] The applicant's reasons for not complying with the maintenance order are twofold. First, he is unable to afford the maintenance order. Second, the respondent has either substantially increased her income since the order was granted or has misrepresented her income before the court. This means that she is able to support herself and the children while they are with her.

[6] On average, the applicant has only paid an amount of R4100 per month to the respondent. He has short paid maintenance at the time of the hearing in the sum of approximately R112 000.

[7] The respondent approached this court with a solution to the applicant's inability to comply with the Rule 43 order. The solution she presented was a simple

one. At present, the applicant is solely responsible for the payment of the three children's school fees. The school fees amount to approximately R31 000 per month. The respondent is a teacher at P[...] C[...]. She qualifies for a discount on school fees. If the children are removed from their current schools and enrolled at P[...] C[...], the applicant will save an amount of R25 869. Which in turn would enable him to pay the maintenance to the respondent.

[8] Regarding the applicant's complaint about the respondent's income and ability to maintain herself and the children, it is important to be reminded that the court a quo determined that she has demonstrated a need for receiving maintenance from the applicant. The findings of the court a quo and the order is not appealable and there is no application before this court for a redetermination of the Rule 43 order. Thus, the findings of the court a quo stands and must be complied with until set aside or amended.

[9] The only issue that the court had to consider was whether it was in the best interest of the children to be removed from their current schools to enable the applicant to pay maintenance in respect of the respondent and the three minor children. The applicant opposed the removal of the children from their current schools on the basis that P[...] C[...], albeit a private school, is substantially inferior to the schools the children are currently attending. He has no personal knowledge of P[...] C[...]'s standards but made these averments by looking at reviews of P[...] C[...] on Google and Hello Peter. In return, the respondent disputed that P[...] C[...] was not a good school.

[10] The respondent's allegations in relation to Google reviews of P[...] C[...] are of no evidentiary value, whilst the respondent has personal knowledge of the conditions at the school and has responded to the allegations in her replying affidavit.

[11] In any event, the question is not one of an assessment of the comparative merits and demerits of the respective schools but rather one of affordability and the children's best interests. At every school there are parents who are happy and parents who are unhappy with the school. The fact of the matter is simply that in

circumstances where food and groceries, shelter in the form of payment of rental and the like are not affordable, then it becomes necessary to reconsider all of one's spending as a family to determine what is truly in the children's best interests.

[12] The undisputed facts show that it is not affordable for the children to attend H[...] R[...] and S[...]. B[...]s when the applicant cannot afford to make payment of the maintenance order. The order was therefore granted in the best interest of the children.

[13] In addition, the applicant raised two other issues. The court's disallowance of a further affidavit and the fact that the respondent did not refer the dispute to the Parent Coordinator (the PC) before she approached the court.

[14] Firstly, the applicant filed his answering affidavit on the day the unopposed motion was to be determined. No satisfactory reasons were provided for the late filing thereof, but the court nevertheless allowed the answering affidavit as it was in the best interest of the children for the matter to be fully ventilated. The matter then stood down to the following day for argument. The respondent was given approximately 6 hours to file her replying affidavit. On the morning of the hearing the applicant filed a supplementary affidavit. No reasons were provided why the facts averred in the supplementary affidavit were not disclosed earlier and it was clear that the allowance of a further affidavit would only have delayed the application even further. I was fully addressed on this aspect during the hearing and found that this was just another indication of the applicant's dilatory conduct. In my discretion I disallowed a further affidavit.

[15] Secondly, when the court a quo handed down his judgment in November 2023, he appointed a PC. The PC's terms of appointment and his powers were contained in the order. The PC is empowered, inter alia, to resolve by way of mediation as speedily as possible without recourse to litigation any dispute between the parties relating to the exercise by them of their parental rights and responsibilities.

[16] The history between the parties and the extensive litigation between them clearly show that they disagree on the most basic principles and ideals. The mediation process would clearly have been a costly and time consuming process and had no prospects of success. Under these circumstances, the court as the upper guardian of children was entitled to hear the matter without first referring it to the PC.

[17] In conclusion, I am thus not convinced that there are reasonable prospects that another court will find in the applicant's favour. In the result the following order is made:

- 1 Leave to appeal is refused.
2. Applicant to pay the costs on a party and party scale, Scale A.

L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 17 December 2024.

APPEARANCES

Counsel for the applicant:	Advocate L. Metzger
Attorney for the applicant:	Strydom M and Associates
Counsel for the respondent:	Advocate L. Segal SC
Attorney for the respondent:	Clarks Attorneys
Date of hearing:	12 December 2024
Date of judgment:	17 December 2024