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REPUBLIC OF SOUTH AFRICA



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

Case Number: 2025-126867

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

SIGNATURE

DATE 16 January 2026

In the matter between:

V[...] F[...]

Applicant

and

S[...] C[...] M[...] - C[...]

Respondent

JUDGMENT

Mfenyana J:

Introduction

[1] The applicant instituted motion proceedings against the respondent for an order in the following terms:

- 1.1. Declaring that in accordance with the provisions of sections 30 and 31 of the Children's Act 38 of 2025, the applicant does not require the respondent's consent to enrol M J (the minor child) in a school.
- 1.2. That the applicant may enrol M J at St Benedict's College for the academic year.
- 1.3. That in the event of St. Benedict's College being unable to accommodate M J for the 2026 academic year, the applicant may enrol M J at Crawford, Bedfordview or Reddam House, Bedfordview.
- 1.4. That the respondent's consent, in so far as it is necessary and required by the school/s for M J to leave his current school and be enrolled at St Benedict's College, Crawford, Bedfordview or Reddam House, Bedfordview, is hereby dispensed with.
- 1.5. That the respondent shall continue to be liable for the minor child's educational expenses as provided for in the Consent and Maintenance Order issued out of the maintenance court for the district of Benoni on 23 July 2019 under reference number 14/3/2-299/18.

1.6. Costs of the application on the attorney and client scale in the event of opposition.

[2] The respondent has opposed the application and filed a counter-application for (1) an order declaring that he has full parental rights and responsibilities in respect of M J (the minor child), including the right to care for him, to maintain contact and act as a co-guardian together with the applicant and to contribute towards M J's maintenance; and (2) the dispute between the parties to be referred to the Office of the Family Advocate who should assist the parties to agree to parental plan.

Background

[3] Between 2011 and 2016, the applicant and the respondent were in a romantic relationship and living together in Benoni. The parties were never married to one another. M J was born from their relationship on 22 November 2013. At the end of the parties' relationship in 2016, the applicant vacated their shared home, taking M J with her. She secured accommodation in Benoni and has been M J's primary caregiver since.

[4] M J started his schooling at the Montessori school and subsequently moved to St Dunstan's in Benoni in 2018. Subsequently, the parties entered into an arrangement in terms of which the applicant would drop off M J at school in the mornings and pick him up from the respondent's house in the afternoons. M J would spend Wednesday night and the weekend from Friday afternoon to Sunday with the respondent. There was, however, no formal parental plan agreed to between the parties.

[5] In addition, the parties concluded an agreement in respect of the maintenance amount payable for M J, which agreement was made an order of the maintenance court on 23 July 2019.

[6] In June 2022, the applicant, together with M J, relocated to Edenvale, where the applicant resided with her partner. She continued travelling to Benoni in the mornings to drop M J off at school and to fetch him from the respondent's house in the afternoons. She was employed as manager at SPCA, Benoni and was later transferred to the Boksburg office.

[7] During July 2024, the applicant's partner sent correspondence to the respondent raising concerns about the minor child's declining school performance and his low energy levels, which he attributed to the travelling time M J spends on the road daily to and from Benoni. He suggested that M J should be registered at a school in Edenvale and further proposed that a discussion and mediation should take place. In response, the respondent stated that he was not agreeable to M J changing schools.

[8] The parties ultimately agreed to refer the issue for mediation. Ms Gillian Lowndes ("*Ms Lowndes*") was agreed upon by the parties to conduct the mediation. During their first session on 29 September 2024, Ms Lowndes referred the parties to Ms Danielle Harris ("*Ms Harris*") of the Voice of the Child for an interview and assessment of M J . This referral was in response to the applicant's desire to enrol him in a school closer to Edenvale. Ms Harris conducted the interview and issued a report on 4 December 2024. I deal with the report later in this judgment.

[9] As part of the mediation process, arrangements were made for the parties to visit schools and make comparisons. The parties visited Crawford, Curro and St. Benedict's College. Ms Lowndes drafted a parenting plan, which she shared with the parties for their consideration.

[10] The mediation process ended as the respondent sought to introduce the maintenance issue, which the applicant was not agreeable to. The applicant caused the mediator to issue a certificate of non-resolution.

[11] The parties, however, appear to have agreed that St Benedict's was the preferred option even to M J. The respondent also agreed that M J could write the admission examination for St Benedict's but may not be enrolled until the maintenance issue has been resolved and should only be considered for admission for grade 8. The parties give disparate accounts on this issue. The applicant was informed by St Benedict's that the consent of both parties is required for M J to be admitted and enrolled at the school.

[12] The report from Ms Harris of the Voice of the Child dated 4 December 2024 records that M J is on the fence about changing schools, that he was bullied at St Dunstan's and lastly that he struggles with early mornings. The report recommends that M J should remain at St Dunstan's until he is ready for grade 8.

[13] Aggrieved by the posture adopted by the respondent, the applicant instituted these proceedings. The applicant contends that the Children's Act does not require the consent of the respondent as co-holder of parental rights and responsibilities regarding the enrolment of the minor child to school. The respondent, on the other hand, asserts that both parties must make a collective decision regarding the school where M J will be enrolled.

[14] The applicant states that the daily commute to and from school, including picking M J up from the respondent, takes almost two hours. By the end of the day, he is often cranky and hungry, leaving him with little time to prepare for his schoolwork.

Applicant's submissions and contentions

[15] The applicant argues that enrolling M J in a school closer to his home would be in the child's best interests. She premises this suggestion on M J's daily routine, which she outlines as follows: (1) that the distance between Edenvale and Benoni is not conducive to learning for M J. She spends approximately two

hours daily commuting to and from Benoni. She leaves her house in the morning at 6h30 and travels between 30 and 45 minutes on the freeway if there is no traffic. M J would then be fetched from school at 14:00 by the respondent's driver and taken to the respondent's house. The applicant would thereafter, at approximately 16h45, fetch M J from the respondent's house and travel home for 1 hour and 15 minutes. In principle, M J spends two hours on the road daily. (2) At the respondent's house, M J would not be assisted with his homework. (3) He sleeps in the car on their way home and reaches the destination at around 17h45, cranky and hungry. (4) The applicant would then have to prepare supper, help M J with his homework and at the same time help him with revision.

[16] At the end of the day, M J is exhausted and not able to properly attend to his schoolwork. This can also be noted from his poor performance at school, as can be gleaned from his grades, the applicant further avers.

[17] She further contends that because of the long hours on the road, she is always late for work, and this reflects poorly on her as a manager at the SPCA, Boksburg. Further, she is also always exhausted from the travelling and spends an extra R2000.00 on fuel. She acknowledges that relocating M J to a school in Edenvale would take away at least a day of visitation, as M J would no longer sleep over at the respondent's house every Wednesday, as was agreed with the respondent. The applicant proposed that M J could spend Sunday night at the respondent's and be fetched on Monday.

[18] The applicant avers that M J is also interested in attending school at St Benedict's and has relayed his wishes to the respondent. She has made comparisons on the tuition fees and established that they are in the same region, with St Benedict's being R1,600.00 more than St Dunstan's.

[19] She further states that attempts to mediate the impasse between herself and the respondent took over three years without yielding any positive results. During those three years, mediation lasted for a period of nine months, and the

respondent failed to cooperate primarily because he argued that he could not afford the expenses associated with the new school.

[20] According to the applicant, the Children's Act provides that the co-holder of parental rights and responsibilities may exercise such rights without the concurrence of the other co-holder of rights and responsibilities, except where the Act or any other law requires. In addition, where major decisions are taken, the co-holder of rights and responsibilities is required to have regard to the wishes and views of the other co-holder to the extent that the rights and responsibilities of such co-holder's right would significantly be affected or be adversely affected. As such, the applicant contends that neither section 30 nor 31 of the Act provides for joint decision-making.

[21] The applicant, thus, avers that the respondent has failed to demonstrate in what respect his responsibilities and rights would be adversely affected, except that his finances are declining. This is unsustainable as the respondent is, in any event, already paying private school fees at St Dunstan's, she argues.

Respondent's submissions and contentions

[22] The respondent contends that M J has categorically informed him that he does not want to be enrolled at Crawford. He argues that if M J changes schools, he will find it difficult to adapt, as he is an introvert and would take time to make friends. He would no longer be able to spend time with M J, as he would no longer come to his house after school daily. He believes that it would be better if he M J enrolls at St Benedict's when he is done with his primary schooling.

[23] The respondent denies responsibility for the failure to mediate the dispute, claiming it resulted from the applicant's refusal to include the maintenance issue in the mediation process. He continued to insist that maintenance should be included since he had taken a salary cut due to the decline in the gas industry in recent years. Additionally, mediation was unsuccessful because the applicant

was firm in stating that M J should not be part of the mediation process, citing his youth as the reason.

[24] He further attributes the lack of cooperation in agreeing to a parental plan to the applicant, which could have circumvented the impasse regarding the choice of school for M J. Her refusal to allow M J to go on vacation with him reflects her non-cooperative stance, he avers. He further states that it is inappropriate for the applicant to initiate proceedings when section 33 of the Children's Act requires a party to first attempt mediation before approaching the court. In response, the applicant argued that some parental plans were exchanged between the parties without any progress, as the respondent was uncooperative.

[25] The respondent argues that, in his understanding of the Children's Act, he has the right to give consent regarding the choice of school. He believes that the applicant should not merely pay lip service to his request but must genuinely consider his views and wishes. Furthermore, the Act states that major decisions, as outlined in section 31(2), include decisions about M J's education.

[26] In reply, the applicant argues that the respondent does not address the challenges faced by the minor child due to the travelling involved, specifically that he spends two hours on the road daily between Edenvale and Benoni. Moreover, the respondent has not provided any alternative suggestions to mitigate the negative consequences of travelling for him. All he is concerned with, the applicant argues, is his personal interests and not M J's interests. The applicant further denies the respondent's averment that M J is an introvert, stating that even his geography teacher stated that M J is a 'big talker'. The applicant further disputed that she refused for M J to participate in the mediation process, adding that this can be inferred from the report submitted by Ms Harris, based on the interview with M J. The said report, she argued, demonstrated the negative effect of the daily commuting on M J.

[27] Concerning the respondent's counter application, the applicant avers that the parental rights and responsibilities of the respondent were never placed in dispute. To this end, the applicant acknowledges in the founding affidavit that both parties are vested with full parental responsibilities and rights as provided in sections 18(2)(a)-(d) of the Children's Act as amended ("the Children's Act"), read with section 21. There was therefore no basis for the respondent to file a counter-application for the declarator that he has full parental rights and responsibilities in respect of M J, including the right to care for him, the applicant further avers.

[28] Equally unsustainable, the applicant continues, is the other relief sought by the respondent relating to referral of the dispute to the Office of Family Advocate. Further, she contends, the respondent has failed to demonstrate the basis for contending that the said relief should receive urgent attention by the Family Advocate. In addition, she states that the necessity for a parenting plan has been discussed over time. The respondent's assertion that the applicant must seek assistance from the Family Advocate is unfounded. Ms Lowndes provided a draft for both parties to consider, yet the respondent chose to refuse cooperation. Nonetheless, the respondent has now taken the step to request assistance from the Family Advocate to draft and facilitate the parenting plan.

Discussion

[29] Both parties in their respective applications specifically refer to the provisions of sections 30, 31, 32, 33 and 34 of the Children's Act. Section 30 provides that each co-holder of parental responsibilities and rights may exercise such rights without the consent of the other co-holder, except where this Act or any law or order of court provides otherwise.

[30] Section 31 provides that where major decisions involving the child are to be made, a person holding the rights and responsibilities must give due consideration to the views and wishes expressed by the child with due regard to

his age, maturity and stage of development. Section 31(b)(iv) provides that the decisions referred to in Section 31(a) are those which may significantly change or have an adverse effect on, *inter alia*, the education of the child. Where such decisions are to be taken, due regard is to be paid to the wishes and views of the co-holder of the parental responsibilities and rights in respect of the child.

[31] The applicant relied on a judgment of this Division in *PB VZ v L VZ; L DK v J P DK; WJ S v R S*,¹ which held that the provisions of sections 30 and 31 do not prescribe that co-holders of rights are required to exercise joint decision-making. A co-holder is simply required to have regard to the wishes and views of the other co-holder of rights where such a major decision would affect the child or have an adverse effect on the exercise of parental rights and responsibilities of the other co-holder. The applicant further referred to *TLK v EEEB*², where the court held that a co-holder of rights is required to be informed when regard is had to the provisions of section 6(5) of the Children's Act and should be construed to mean that his consent is required before a parent relocates to another province. The applicant acknowledged that this matter pertains to relocation to another province and is referenced based on the parity of reason. It is noteworthy that Dippenaar J in *TLK v EEEB* noted that section 31 does not expressly require the consent of the other party.

[32] Regarding the issue of the choice of school to be attended by the minor child, the applicant relied on another judgment of this Division³ where the court held that where parents disagree, it is ultimately the court's discretion that will prevail as the upper guardian of the minor child, having regard to, *inter alia*, the capacity of a parent to assist the child with homework and the degree to which such a parent can participate in the child's educational program and resources which the school offers. Importantly, the court will have regard to what is in the best interests of the child.

¹ (047502/2024; 064524/2023;36830/2022)[2024] ZAGPPHC 1032 (10 October 2024).

² (2024-149673)[2025] ZAGPJHC 261; 2025 JDR 0575 (GJ).

³ *CB v KEB* (4625/2021)[2023] ZAGPPHC 1416 (29 December 2023) para 43.

[33] Although the recommendation by Ms Harris recognises that M J struggles with early mornings, being bullied at St Dunstan's and being unsure about whether or not he will change schools, Ms Harris, nonetheless recommends that M J should be retained at the same school and an *au pair* be appointed to assist him with homework and his child's travelling to the respondent's house after school. Ms Harris further states in her report that M J struggles with homework and often receives reprimands for incomplete work. Furthermore, he gets exhausted due to the long daily commuting and has also requested an earlier bedtime. M J reportedly informed Ms Harris that he is at times compelled to study in the car and manages to do revisions while lying in bed. He is unable to state whether he wants to be moved to a new school or not, as "... he may feel that expressing his preferences could result in disappointing" one of his parents.

[34] The recommendations by Ms Harris, in my view, would not address the difficulties faced by the minor child, as he would still be required to spend significant time on the road. He would still need to wake up at 5h30 to leave home at 6h30 and make it to school on time. He would still be on the road for a further hour, travelling from his father's house in Benoni to Edenvale daily.

[35] In light of the considerations outlined above, Ms Harris's recommendation presents significant challenges, as it appears impractical for M J to continue experiencing prolonged time on the road coupled with inadequate rest. There can be no doubt that the minor child finds himself in the middle of a storm and is reluctant to make his wishes clear, as, according to him, that would mean choosing one parent over the other.

[36] There are several problems with the respondent's interpretation. First, 31(2) does not require consent from a co-holder of parental responsibilities and rights to enrol a child at a school. Secondly, sections 31(1)(a) and 31(2)(a) stipulate that a holder of parental responsibilities and rights must give due regard to any views and wishes expressed by the co-holder of responsibilities and rights.

It does require consent. Thirdly, there is no suggestion that the decision is likely to significantly change or have an adverse effect on the respondent's exercise of parental responsibilities and rights in respect of M J. There can also be no argument that the decision would adversely affect the rights of the minor child and his well-being in any way, including his right to education.

[37] The interpretation attributed by the respondent to section 31 effectively expands the scope of the provision, incorporating elements that are not explicitly stated within the text. The decisions in *PB VZ v L VZ*; *L DK v J P DK*; *WJ S v R S* and *TLK v EEEB* and other decisions which share the same sentiments are instructive in this regard. That should be the end of the matter.

[38] The respondent, however, had another string to his bow. He relied on the decisions of the Western Cape and the KwaZulu-Natal Divisions in *MM v AV* and *WW v EW*, respectively. Both judgments are not authority on the issue. Not only do they relate to the declaration of parenting rights and the rights of the custodial and non-custodial parent, but they also do not oust the provisions of the Act in relation to the decision to enrol a child at a school. Their relevance, within the scope of the present application, is limited to the respondent's counter-application. They, thus, have no bearing on the issue to be determined by this court.

[39] Further, in *J v J*⁴, also relied on by the respondent, the court noted that a custodian parent is not bound to give effect to the views and wishes of the non-custodian parent. The judgment goes further to state that the right to decide all questions of education, including the right to decide which school the child shall attend, resides with the custodian parent. This judgment does not assist the respondent.

⁴ 2008(6)SA 30 (C).

[40] Notwithstanding the foregoing, it is apparent that the respondent's concerns pertain predominantly to his personal interests rather than the interests of the minor child. This is also evident from his averments in the answering affidavit that, *"I will not provide my final consent to (M J)'s enrolment at St Benedict until the maintenance issue has been resolved."* Elsewhere in the answering affidavit, the respondent states: *"I told the Applicant that (M...) could write the entrance exam of St Benedict College, subject to my finances being available to pay half of the school fees"; "They totally disregard what I have to say insofar it concerns (sic) my finances and affordability to pay tuition and school fees at these private schools."*

[41] This posture by the respondent has nothing to do with whether it is in the best interest of M J to enrol at St Benedict's. His key complaint appears to be that the issue of maintenance must be dealt with. Failing that, he would not grant his consent, which is, in any event, not a requirement. Moreover, it is tantamount to using the minor child as a pawn in a disagreement between the parties. This is unfortunate.

Conclusion

[42] It is trite that the high court is the upper guardian of all minor children, and where there is an impasse between co-holders of rights and responsibilities, the court is enjoined to make a decision, guided by what is in the best interests of the child. It is not uncommon that parents would advance arguments favourable to their wishes. In such an instance, the court should consider the views of the expert. In this case, Ms Harris presented a report incorporating the interview with M J, which reflects an environment and factors not conducive to good performance at school. I also fail to fathom the recommendation that it is acceptable for M J to study in transit on his way to school, as well as the notion that his exhaustion was adequately addressed by his request for an earlier bedtime, all while remaining at St Dunstan's.

[43] I conclude that it would be in the best interests of the minor child to be enrolled at a school closer to home. There is, further, no sound basis, legal or otherwise, for the respondent to use his consent as bait to achieve his wishes in respect of the maintenance issue. In the interim, the rights of the minor child remain in limbo. This is unacceptable. His consent, which, I have already found, is not required, is unreasonably withheld until the respondent 'gets what he wants'. None of this is about the minor child. Section 18 of the Children's Act makes specific provision of instances where consent of the other co-holder of rights is *sine qua non* for the decision to be taken. The choice of school is not one of those instances. The respondent's contention that it is, is incorrect.

[44] That is not to say that the respondent's plight concerning his inability to afford maintenance is taken lightly. As I have already stated, this has already been referred to the maintenance court. It is unreasonable to expect that the minor child should continue to endure the strife while the application is being processed by the maintenance court.

[45] The relief sought by the applicant for payment of maintenance by the respondent as per the court order is incompetent. The existing maintenance order has not been challenged before this court.

Costs

[46] The applicant seeks costs on a punitive scale between attorney and client. The general rule in respect of costs is that costs should follow the result. I cannot find any reason in the circumstances of this case which justifies a deviation from this established principle. I am, however, not persuaded that attorney and client costs are warranted. It cannot be said that the respondent was vexatious in his opposition to the application, regardless of the outcome.

Order

[47] In the result, I make the following order:

- a. It is declared that in terms of the provisions of sections 30 and 31 of the Children's Act 38 of 2025, the applicant does not require the respondent's consent to enrol M J (the minor child) in a school.
- b. The applicant may enrol M J at St Benedict's College for the 2026 academic year.
- c. In the event of St Benedict's College being unable to accommodate M J for the 2026 academic year, the applicant may enrol M J at Crawford, Bedfordview or Reddam House, Bedfordview.
- d. The respondent's consent, in so far as it is necessary and required by the school/s for M J to leave his current school and be enrolled at St Benedict's College, Crawford, Bedfordview or Reddam House, Bedfordview, is hereby dispensed with.
- e. The counter application is dismissed with costs, including costs attendant upon the engagement of counsel on scale B.
- f. The respondent is ordered to pay the costs of this application on a party and party scale, including costs of counsel taxed on scale B.

S MFENYANA
Judge of the High Court
Johannesburg

Date of hearing: 11 November 2025

Date of judgment: 16 January 2025

This judgment was handed down electronically by circulation to the parties' representatives by email and by uploading the judgment onto Caselines. The date of delivery of the judgment is deemed to be 16 January 2026.

Appearances:

For the applicant:

Counsel: M Abro

Instructed by Clarks Attorneys

For the respondent:

Counsel: WF Wannenburg

Instructed by L Cirone Attorney at Law