IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

CASE NO: 2456/2012
Date Heard: 8 January 2013
Date Delivered: 10 January 2013

In the matter between:

BANTU RAYMOND NOQEKWA Applicant

and

NOTUKELA ETHEL NOQEKWA Respondent

J U D G M E N T

GOOSEN, J:

[1] This is an application brought on an urgent basis in which the applicant seeks an order directing a clinical psychologist to conduct an assessment as to whether or not it is in the best interests of three minor children to commence schooling at Merrifield Preparatory School in East London on 16 January 2013. The application was brought on a semi-urgent basis in December 2012, the urgency arising from facts which came to the attention of the applicant in November 2012 and by virtue of the fact that the new academic year commences on 16 January 2013. When the matter was argued before me counsel for the respondent indicated that the respondent does not take issue with the urgency with which the matter was brought, given that the application concerns the interests of minor children.

[2] The applicant and respondent were divorced from one another on 9 October 2012. The decree of divorce issued by this court incorporates a deed of settlement

entered into between the parties on 8 October 2012 which regulates, *inter alia*, the primary care and maintenance of three minor children born of the marriage between the parties. The three minor children are sons currently aged 11, 8 and 4 years of age. In terms of the deed of settlement it was agreed that the respondent would be the primary carer of the children and that the children would primarily reside with the respondent. At the time of the conclusion of the deed of settlement, the respondent was in the process of relocating to East London. Accordingly, the deed of settlement makes provision for the children to remain in Port Elizabeth with the applicant until the end of the school year in 2012 at which stage they would relocate to East London.

[3] The circumstances giving rise to the application are briefly the following. According to the applicant he was informed on 21 November 2012 that the respondent intended enrolling the children at Merrifield Preparatory School in East London. In order to do so it was necessary for the children to attend an assessment and interview at the school to secure their enrolment for the new academic year. The respondent made arrangements for the children to be assessed and interviewed on the 23rd of November 2012, to which end they travelled with her to East London. At that stage the eldest son had still to write one examination to complete his academic year at St. Dominic's Priory in Port Elizabeth. The respondent returned with the eldest son who wrote that examination on the 26th of November and thereafter left for East London. She did not return the younger children to Port Elizabeth. When the applicant contacted Merrifield Preparatory School to enquire as to the outcome of the assessment conducted by that school he received an email communication from the head of the school which indicated that Merrifield Preparatory School would be prepared to admit the elder two children on condition

that the two children repeat the grades they had just completed at St. Dominic's Priory. It was indicated that the school would only consider enrolling the youngest child if he spent another year in a playgroup prior to commencing his formal schooling. The email communication from the head of Merrifield Preparatory indicates that in the assessment of the children they, and in particular the youngest child, presented as emotionally traumatised. It was this that prompted the applicant to raise his concern about the welfare of the children with the respondent's legal representatives. He proposed that the children be assessed by a psychologist to determine whether it was in their best interests to be enrolled at Merrifield and that pending such assessment they remain in his care in Port Elizabeth. When this proposal did not meet with any satisfactory response and this application was launched in December 2012.

[4] The respondent states in her answering affidavit that immediately after relocating to East London in October last year she commenced the process of finding a school for the children. She applied at Selborne College, Cambridge and Stirling. No places were available at these schools. She was, however, informed by the headmaster of Stirling that the children would be placed on a waiting list for admission in 2013 and that he was confident that they would be admitted.

[5] The respondent further states that by way of precaution she also applied at Merrifield Preparatory School. Since this school has high academic standards and strict selection criteria the children were required to write entrance examinations. She further states that the outcome of the examinations, as reflected in the email from Merrifield upon which the applicant relies, should be viewed in the context of the children having struggled academically for a number of years. She ascribed this

to their adverse home circumstances and allegedly violent and abusive conduct of the applicant towards her whilst they were married.

[6] The relief sought in the notice of motion is divided in two parts, the second part being in respect of permanent relief which arises only in the event of certain findings being made pursuant to the relief sought in part A. It is accordingly only necessary to consider the relief sought in part A of the notice of motion. In that part the applicant seeks an order formulated in the following terms:

> "2. Directing Dr. Gillian Smale, a clinical psychologist, to forthwith conduct an assessment of the minor children and their parents and to report to this Honourable Court as to whether or not it will serve the childrens' best interests to be enrolled at Merrifield Preparatory School in East London on 16 January 2013;
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> 2.2.1 That in the event of Dr. Smale recommending that the childrens' best interests will be served by enrolling in Merrifield Preparatory School on 16 January 2013, to in that event make recommendations as to the mechanisms to be put in place in making the transitions of schools as least traumatising to the children as possible;
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> 2.2.2 That in the event of Dr. Smale recommending that the childrens' best interests will not be served by enrolling in Merrifield Preparatory School the matter be referred to the offices of the Family Advocate to forthwith schedule an enquiry and investigate the bests interests of the minor children with the input and assistance of Dr. Smale and to report to this Honourable Court with its recommendations in respect of:
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> 2.2.2.1 the primary care and residence of the minor children and in particular whether it would serve the childrens' best interests to permanently relocate and reside with the respondent in East London and remain in her primary care; and
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> 2.2.2.2 the scope of the parties' future contact with the minor children.
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> 2.2.3 That in the event of paragraph 2.2.2.1 above becoming applicable, then pending the outcome of the Family Advocate's investigation, referred to in paragraph 2.2.2.2 above, that the minor children shall continue to primarily reside with the applicant and commence their school year at St. Dominic's Priory School in January 2013, subject to reasonable contact between respondent and the minor children by the respondent visiting the children in Port Elizabeth every weekend."

[7] During the course of argument the applicant's counsel sought an amendment to the notice of motion to which I will revert hereunder. At the commencement of

argument a letter addressed to the applicant's attorneys by Dr. Gillian Smale was handed up by agreement. That letter records the following:

> "This document confirms that my investigation of the Noqekwa parents and their three minor children commenced yesterday. Such investigations are typically long and involved, and the final report will therefore only be available within a period of 4 – 6 weeks. I stipulated this time frame when I undertook to do the assessment, also indicating that because of the Christmas holiday period, it would only commence on January, 7.
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> In the brief time I have spent interviewing both parents and perusing the relevant school documents, it is apparent that the matter is far more complicated than simply choosing the appropriate school for these children. Other important factors which need to be investigated are that the childrens' emotional and physical needs, as well as the background conflict between the parents leading to the current schooling deadlock.
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> The background information I have received so far shows serious discrepancies between the two parents' understanding of the situation. This also indicates a need for a slow, systematic and cautious investigation which will require much more time. For this reason I am also not able to predict at this time what my final recommendations will be in terms of primary care or school placement."

[8] It is of course immediately apparent that the proposed exercise to be undertaken by Dr. Gillian Smale will bear no fruit prior to the 16th of January 2013 when the new school year commences. It also bears noting that according to Dr. Smale's letter, she informed the applicant of the projected time frame when she agreed to undertake the assessment and that it could only commence on 7 January 2013. This being so it appears that the applicant and his representatives were aware, at the stage that the application was launched, that the enquiry by Dr. Smale could not be completed prior to the commencement of the academic year on 16 January 2013. The relevance of this will become apparent hereunder.

[9] In order to overcome the difficulty posed by the manner in which the relief is formulated, applicant's counsel sought an amendment to the relief sought which deleted the reference to the 16th of January 2013 and provided that, pending the investigation, the minor children be enrolled at St. Dominic's Priory in Port Elizabeth

or at Brylin Primary School[1] and accordingly remain in the care of the applicant for this purpose. During argument I raised my concern that the relief sought, if granted, would in any event render the exercise academic since there is nothing on the papers to suggest that it would be possible after the 16th of January for the children to be enrolled at Merrifield Preparatory School in the event that it was found that it was in fact in their best interests to do so. It was suggested that the amended relief would address this concern.

[10] The application is founded upon a concern about what is presented as a discrepancy between the school assessment reports obtained from St. Dominic's Priory and that reflected in the assessment obtained from Merrifield Preparatory School as well as the fact that Merrifield Preparatory School reported that the children presented as emotionally traumatised. It is this concern which caused the applicant to raise the question as to whether it is in the best interests of the children that they attend Merrifield Preparatory School. Significantly the applicant does not suggest that it is not in the children's best interests that they relocate to East London or that they should be in the primary care of the respondent. Nor is it suggested that there is any difficulty associated with the children attending Merrifield Preparatory School. The primary issue upon which the applicant bases the application is the fact that according to the academic assessment conducted by Merrifield Preparatory School the three children are not educationally ready to advance to the next grade level in their education. Applicant also relies on the report regarding the emotional instability and trauma experienced by the children. The fact that the children would be required to repeat a grade, it was suggested, would result in their educational

[1] It is common cause that the two older children attended St. Dominic's Priory during 2012 and that the youngest child attended the Montessori Pre-Primary at Brylin Primary School.

"retardation" and that this should be investigated before they are allowed to relocate. In developing this submission it was pointed out that the academic assessment undertaken by Merrifield Preparatory School is in stark contrast to that reflected in the reports presented by St. Dominic's Priory and Brylin, in that these schools had certified that the children could advance to the next level of education. In support of this, the applicant relied on a report by the principal of St. Dominic's Priory Junior School, Mr Beadon, regarding the eldest child, K, and that of the class teacher of the younger child, A. Based on these reports and the fact that it is recorded that the children made significant progress during the year, it was suggested that the improved circumstances of the children occurred at a time when the children were in the care of the applicant and at a stage when the divorce had been finalised. This, so the argument went, indicated that it was not in their best interest to relocate until the question had been properly and fully investigated.

[11] Whilst it is indeed so that the reports of St. Dominic's indicate that the older children's education performance showed improvement, the reports do not point to stark differences between their academic results at St. Dominic's and the assessment undertaken by Merrifield.

[12] The report in respect of the eldest child K, who was in grade 5, records the following:

> "In term 4 [K] showed glimpses of his true potential. Despite the fact that he no longer received extra lessons, he often delivered work that was of exceptional quality. <u>During the final exams, many of his marks were well above expectation, often exceeding the class average</u>. His final report reflected his remarkable improvement, and if he can continue the trend he showed in Grade 5, [K] will soon fulfil his true potential."
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> (Emphasis added).

[13] The underlined portion is not, however, borne out by the term 4 results annexed to the applicant's papers. These results reflect some improvement over the year but they also indicate clearly that K did not achieve any results which matched or exceeded the grade average, contrary to the school principal's assertion.

[14] In the case of the younger child, A, the teacher's report reflects a child who has struggled significantly and whose home circumstances have adversely impacted upon his performance. The report notes that:

> "He is clearly a sensitive little boy and any upsets at home have a direct impact on his standard of work."

[15] It is common cause between the parties that the divorce proceedings were extremely acrimonious and that the home circumstances prior to the divorce have taken a toll on the minor children. The reports from St. Dominic's Priory and Brylin Primary School confirm this. It is therefore not surprising that with the finalisation of the divorce proceedings in October 2012 that a greater degree of stability and certainty in the home circumstances may have contributed to an improvement in the children's wellbeing and therefore their academic and schooling achievements. It is of course also not surprising that the prospect of relocation and indeed the fact of relocation itself would have a negative effect on the children and may result in them suffering emotional turmoil. It was never an issue between the parties in the divorce proceedings that the respondent should be given primary care of the minor children and that they should live with her. At the stage that the divorce settlement was reached the parties knew and accepted that that would involve the children relocating to East London where the children would be enrolled in new schools for 2013. It must be accepted therefore, that the parties knew and understood that this

would result in some measure of instability and even emotional stress and turmoil for the children when that event occurred. To find otherwise would suggest that the parents entered into the agreement without giving any consideration whatsoever to the interests of the minor children. There is no reason to suppose that the parents would have been so irresponsible.

[16] It was argued that circumstances have now changed and that the applicant now has information which suggests that the children are emotionally traumatised and that their school circumstances would be in contrast to that which would occur in Port Elizabeth. These, it was submitted, constitute changed circumstances sufficient to warrant the investigation which this application seeks to initiate.

[17] I disagree. I accept that at the time that the children were interviewed by Merrifield Preparatory School that they presented as children in emotional turmoil. No doubt the circumstances in which the respondent conducted the assessments at Merrifield and the circumstances in which the children were removed to East London must have contributed to their emotional turmoil. It is apparent from a reading of the papers as a whole that although the immediate acrimony of the divorce proceedings is now over, the relationship between the parents remains a fraught one which undoubtedly must still be a source of anguish and turmoil for the children. On the applicant's own version he and the respondent do not communicate with one another other than by text messages.

[18] The fact that the children are experiencing emotional turmoil in circumstances where such turmoil is reasonably to be expected, cannot of itself necessitate a psychological assessment for the purposes envisaged in the relief sought in this

application. Something more is required. In this instance the applicant has not laid any basis upon which it may be said that the relocation to East London and the children's enrolment in another school is not in their best interests. It was suggested in argument that the status *quo* should be retained and that that would be in the best interests of the children in the light of the information now at hand. By this it was meant that the children should remain in Port Elizabeth and that they should commence the academic year by continuing their schooling at St. Dominic's Priory. Two difficulties arise in respect of this contention. The first is that there is no indication on the papers before me that the minor children can, as a matter of fact, continue their schooling at St. Dominic's and Brylin in Port Elizabeth. No indication is given on the papers that they have been enrolled at those schools for this coming academic year or that any enquiries have been made in this regard. The second, and more significant difficulty, is that the children have as a matter of fact already relocated to East London and are residing with the respondent. The fulltime carer previously employed by the parties has also relocated to East London where she will continue to assist the respondent in the day to day care of the minor children and there is no indication on the applicant's papers as to what arrangements have been made, even in the interim, for the care and wellbeing of the minor children should they remain in Port Elizabeth pending the investigation by Dr Smale. Although there is reference in the applicant's papers to an intention to employ the carer to assist with the care of the children, I was informed that no such arrangement has in fact been made in the light of the fact that the carer has already relocated to East London. There is accordingly nothing of substance in the papers upon which I am able to find that the interests of the children, in remaining in Port Elizabeth, can be protected or will be adequately catered for.

[19] The application too is not based on any specific allegation that it is not in the best interests of the minor children to relocate to East London or for that matter to take up positions at Merrifield Preparatory School. In respect of the two elder children it is apparent that they have had significant difficulties in their academic work even whilst at St. Dominic's Priory and although their circumstances have improved the trauma and turmoil experienced by them during the course of 2012 has had its toll. The email communication from Merrifield Preparatory School indicates that in their assessment of the minor children their academic performance is not of a standard which would permit them to cope with advancing to their next grade and that they would benefit from repeating the grades that they have just completed at St. Dominic's and Brylin. Significantly, the terms of the investigation to be carried out by Dr Smale does not address the circumstances of the youngest child whom it was reported is traumatised. Merrifield does not intend to enrol the youngest child. He will instead attend a playgroup before being considered for enrolment next year. The applicant nowhere suggests that because the youngest child, who is four years old, is traumatised he should be placed in the care of the applicant pending an enquiry as to whether he should be permitted to relocate to East London and be placed in the care of the respondent. That is not the basis upon which the application is made.

[20] This court is concerned only with what is in the best interests of the minor children. It must however be accepted that the break-up of a family home or changes to schools and relocation to another city are all factors which undoubtedly can, and more often than not will, induce anxiety and emotional turmoil in young children. In circumstances such as these where the parties have become divorced and their life circumstances are such that they will pursue careers in different cities some impact on the children cannot be avoided. It can only be hoped that the

parties themselves will approach those circumstances with a measure of maturity and sensitivity and that they will make every effort to minimise the most traumatic aspects of such circumstances for the children. Where they haven't done so, and do not appear resolute to do so, this court will be astute to avoid compounding the anxiety and insecurity that the children may experience by intervening in circumstances where such intervention is not warranted or where the form of such intervention will itself give rise to further emotional turmoil. In my view to grant the relief sought by the applicant, even in its amended form, would do nothing other than to compound an already difficult situation for the minor children and will exacerbate the insecurity that they currently face. In the circumstances to grant such relief would not be in the best interests of the minor children.

[21] In the result the applicant's application cannot succeed. In respect of costs it was argued by the respondent that the costs should follow the result. The applicant in contrast submitted that in the light of the respondent's high-handed handling of the relocation, the fact that she acted in breach of the terms of the agreement concluded at the stage of the divorce and in the light of the respondent's rebuffing of attempts to mediate the dispute in December that even if the applicant is unsuccessful the respondent should be ordered to pay the costs of the application. Whilst it does appear that the respondent may have acted in a somewhat high-handed manner in the relocation of the children to East London, I cannot lose sight of the fact that the relief sought was doomed from the outset. Dr Smale had indicated the time frames which would apply to the investigation and those time frames rendered it impossible to come to a resolution before the commencement of the school academic year, a factor which brought into play a range of considerations not adequately or properly addressed in the applicant's papers.

[22] An award of costs is always in the discretion of the court, and such discretion is to be exercised having regard to circumstances in which the application is brought as well as the subject matter of the dispute. Although I am mindful of the fact that the interests of minor children animated the decision to bring the application I am nevertheless of the view that the ordinary rule in respect of costs, namely that they follow the result, should apply.

[23] In the result I make the following order:

The application is dismissed with costs.

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G GOOSEN
JUDGE OF THE HIGH COURT

APPEARANCES:

FOR APPLICANT:	Mr B Dyke, instructed by Kaplan Blumberg Attorneys
FOR RESPONDENT:	Mr N Mullins, instructed by Cecil Kerbel Attorneys