

**REPUBLIC OF SOUTH AFRICA**

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

**CASE NO: 13323/2021**

REPORTABLE: YES

OF INTEREST TO OTHER JUDGES: YES

REVISED.

21/1/2021

In the matter between:

**M[....] P[....] (Born K[....])  
(ID NO.[....])**

**APPLICANT**

And

**V[....] P[....]  
(ID NO.[....])**

**RESPONDENT**

**JUDGMENT**

**MAKUME J:**

[1] The parties in this matter are in the process of a divorce. They are the biological parents of M[....]1 (the minor child) a male who is 13 years old and lives with the Applicant.

[2] M[....]1 started school during January 2020 at D[....] College one of the top private colleges situated in the North of Johannesburg.

[3] The parties parted ways in August 2020 and have since then been living apart. The minor child continued schooling at D[....] College with the consent and agreement of his parents. He is described as an “A” student and has won many awards for educational excellence. This resulted in the College awarding him a scholarship which translates to 25% reduction in school fees.

[4] It is common cause that for the period January 2020 until September 2020 the Applicant made payments of the minor child’s school fees amounting to the sum of R127 006.00 without the assistance of the Respondent.

[5] From September 2020 and as a result of the parties’ separation the Respondent agreed to pay 50% of M[....]1’s school fees.

[6] On the 15<sup>th</sup> September 2020 the College issued a statement of account addressed to the Respondent which statement recorded transactions from the 15<sup>th</sup> January 2020 to September 2020. In that statement it is indicated that monthly debit order in the sum of R11 334.00 was being deducted from the bank account of the Applicant.

[7] The College followed that statement of account with an email addressed to the parties which reads as follows:

“Dear parents, welcome back to the third and final term of this unusual year. Term 3 2020 fees have been billed to your school fees account. Kindly note payment of these fees together with sundries that have been billed to your account to date were due and payable to D[....] College by 11 September 2020.”

[8] During September 2021 the College addressed a letter to the parties informing them that they were in arrears in the amount of R54 776.00 and that if the arrears are not paid by the end of the 2021 academic year then the minor child will not be allowed to register from the 2022 academic year at the College.

[9] On or about the 11<sup>th</sup> November 2021 the Applicant and the Respondent met and had a lengthy discussion in an attempt to work out a reconciliation. It was during those discussions that the Respondent verbally undertook to the Applicant that he will pay the arrears to the College. Applicant accepted the offer.

[10] Reconciliation was not successful as a result the Respondent reneged on his undertaking to pay the arrears but did not inform the Applicant about his change of mind.

[11] On the 20<sup>th</sup> December 2021 the Applicant issued a Rule 43 Application in which she seeks relief amongst others that the Respondent be ordered to pay the arrear amount of R54 776.00 which is owed to the College.

[12] On the 7<sup>th</sup> January 2022 the parties received a welcome email from the College. Pursuant to that the Respondent proceeded to purchase school uniform and stationery for the minor child who had been promoted to grade 8.

[13] On the 11<sup>th</sup> January 2022 the College informed the parties that the minor child will not be allowed to register for the 2022 Academic year because of the arrear school fees still owing.

[14] As soon as the Applicant became aware that the minor child had been excluded she informed her attorneys who in turn made contact with the Respondent's attorneys requesting the Respondent to make payment of the arrears so as to ensure the minor child's enrolment at the College. That request was ignored.

[15] On the 13<sup>th</sup> January 2022 the Applicant launched this urgent application which became opposed. I ruled on the 18<sup>th</sup> January 2022 that the application in as far as it seeks to ensure the enrolment of the minor child at the College was urgent. I accordingly requested the parties to prepare heads of argument and deal only with the issue of the arrear amount of R54 776.00. I directed that the balance of the prayers would be dealt with on the date set aside to deal with the December 2021 Rule 43 application.

[16] The issue before me in this urgent court was strictly speaking not a Rule 43 application it is an application to determine who between the Applicant and the Respondent is liable to pay to the College the amount of R54776.00.

[17] The provisions of Rule 43 are as follows:

43(i) This rule shall apply whenever a spouse seeks relief from the court in respect of one or more of the following matters:

- a) Maintenance *pendente lite*;
- b) A contribution towards the costs of a pending matrimonial action;
- c) Interim custody of any child;
- d) Interim access to any child.

[18] This application whilst forming part of the December 2021 Rule 43 application does not make it a Rule 43 application. It is clearly not covered by the provisions of Rule. It is a separate application aimed at recovering money due to a third party arising out of a contract.

[19] This matter is not about the two parties it is actually about protecting the constitutional rights of a child to receive education (See: Section 28 read with Section 29 of the Constitution of the Republic of South Africa 1996).

[20] In this matter it is evident that if M[....]1 is not allowed to continue his education at a school that he has become used to it may affect him in many ways more-so that the school itself has expressed a wish that he should return to the

school he is a bright young man who has made a significant impression on the school management and the educators.

[21] I do not think that it is necessary for this court to interrogate the financial aspects of each of the parties. This will be done when the parties deal with the rest of the prayers in the Rule 43 application.

[22] During November 2021 the Respondent agreed that he will pay the arrears he is bound by that undertaking and cannot renege simply because he did not succeed to reconcile with the Applicant. That condition was never discussed with the minor child he was not part of that agreement and should therefore not be prejudiced by a failure of his parents to reach an agreement on reconciliation.

[23] Even prior to that the Respondent had during September 2020 told the College to remove the debit order instruction against the Applicant bank account and informed the College that he will pay. The Respondent wants to keep the minor child at D[....] and to this extent he has already purchased school uniform and books and stationery for the child. It is his duty to see to it that the minor child attend school after all the Schools Act demands that of him.

[24] The undertaking to pay the arrears by the Respondent and its acceptance by the Applicant can be described to be similar to an agreement for the benefit of a third party in this instance the third party not being the College but being the minor child.

[25] The law in this regard was dealt with by our Court in the matter of **Buttar vs Ault NO 1950 (4) SA 229 T. Murray J said the following at page 229A:**

“The law as laid down by De Villiers, CJ in *Slabber's Trustee v Neezer's Executor* (12, SC 163 at pp 168-9) is to the effect that acceptance by the child alone suffices if he has reached the age of puberty (it may be open to question whether a child through impubers cannot validly accept for himself if of sufficient age and intelligence to understand that he is being offered and is accepting a donation. If, however, the child is incapable of a valid act of acceptance the gift must be accepted on his behalf by the court or the

Master or by the father himself or by some other person not necessarily a public person.”

[26] In this matter there is evidence that the minor child was involved and took part in the discussion with the mediator. He is 13 years old and is mature enough to have done so. His mother the Applicant accepted the undertaking by the Respondent on his behalf and in his interest. I see no reason why the Respondent should not be held liable.

[27] When he made the undertaking to pay he knew that payment must be made by end of 2021. He made the undertaking because he had the financial means to do so. It is therefore unacceptable that within two months he now cries foul that his financial position is such that he cannot pay. He can make arrangements with the College how to defray the arrears whilst the minor child attends school.

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

#### ORDER

1. The Respondent is hereby ordered to make payment of the sum of R54 776.00 to D[...] College to enable the College to register the minor child M[...]1 P[...] as a scholar for the 2022 Academic year.
2. The balance of the prayers in the December 2021 Rule 43 application are postponed to a date to be allocated by the Registrar.
3. The Respondent is ordered to pay the taxed party and party costs of this application.

DATED at JOHANNESBURG this the 21 day of JANUARY 2022.

**M A MAKUME**  
**JUDGE OF THE HIGH COURT**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

APPEARANCES

DATE OF HEARING	:	18-19 JANUARY 2022
DATE OF JUDGMENT	:	21 JANUARY 2022
FOR APPLICANT	:	Adv Pillay
INSTRUCTED BY	:	Elogran Naicker Attorneys
FOR RESPONDENTS	:	Adv Ramsey
INSTRUCTED BY	:	Barry Hurter Inc.