

SOUTH AFRICA / JUDGMENT

CMK v BJK (18521/2024) [2024] ZAWCHC 334 (28 October 2024) [2024] ZAWCHC 334

COURT

Western Cape High Court, Cape Town

BEFORE

Lekhuleni

CASE / FILE NUMBER

18521/2024

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

CASE

NO: 18521/2024

In

the matter between:

CMK

Applicant

And

BJK

Respondent

Heard:

16 October 2024

Delivered:

Electronically on 28 October 2024

JUDGMENT

LEKHULENI J

INTRODUCTION

- [1] This is an application in which the applicant seeks an order, on an urgent basis, dispensing with the consent of the respondent, to appoint an educational psychologist to conduct an assessment and make recommendations as to the optimal schools to be attended by the parties' minor children: TJK, born on 15 June 2009, and TWK, born on 25 February 2011, from the commencement of the academic year in January 2025, or as soon thereafter as reasonably possible.

FACTUAL**BACKGROUND**

- [2] The applicant and the respondent were married to each other on 19 December 2007 and their marriage was dissolved by a decree of divorce granted in this court on 11 April 2018 under case number 4917/2018 incorporating a settlement agreement and a parenting plan. The applicant and the respondent have two minor children (sons) who are currently 13 and 15 years old respectively. The eldest son is set to start Grade 10 next year, while the younger son will begin his high school education. This application was lodged because the parties could not agree on which schools the two children should attend

starting in January 2025.

- [3] The respondent initially agreed to appoint an educational psychologist, Ms Leigh Pettigrew, to conduct an assessment and make recommendations. However, Ms Pettigrew declined the appointment. Following this, the applicant proposed Ms Gerda Grobler to carry out the assessment. The respondent then retracted his consent for the appointment of an educational psychologist. The respondent contended that it is not in the best interest of the minor children to be constantly exposed to the possibility that they may be changing schools and homes again. According to the respondent, the children need stability and security and should not be pulled from one school to the next at the whim of the applicant. In the respondent's view, the applicant is using the children's scholastic requirements as a stratagem, hoping that it will enable her to relocate to Cape Town again.
- [4] During the marriage, the applicant and the respondent initially lived in Noordhoek in Cape Town. In 2015, the parties relocated to Plettenberg Bay, where the respondent wished to live. However, the applicant returned to Noordhoek with the children in 2016. When the parties divorced in 2018, they included a provision in their consent paper that the applicant and the children would return to live in Plettenberg Bay, and the children would attend G[...] B[...] College, where the respondent had enrolled them previously.

- [5] At the end of 2019, the applicant realised that G[...] B[...] College in Plettenberg Bay was not meeting the needs of their children, either scholastically or concerning their extracurricular and extramural activities. The applicant then approached the respondent to request his permission to move the children to a more suitable school, but the respondent was adamant that the children should remain at G[...] B[...] College. The applicant accordingly appointed an educational psychologist, Dr Hetta van Niekerk, to conduct an assessment and make recommendations for the schools that best serve the children's best interests.
- [6] Dr van Niekerk confirmed in her report that both children should move from G[...] B[...] College, and she recommended R[...] H[...] in Constantia, a school the minor children had previously attended. Alternatively, Dr van Niekerk recommended O[...] H[...] School in Knysna or G[...] House in George. The applicant's preference was R[...] H[...] in Constantia. The respondent was unwilling to agree to any of the schools recommended by Dr van Niekerk.
- [7] Pursuant to the assessment of the children by Dr van Niekerk in 2019, the applicant launched an application on 03 July 2020, under case number 8425/2020, for an order authorising her to relocate from Plettenberg Bay to Cape Town with their children and to enrol them at R[...] H[...] School in Cape Town. The respondent opposed the relocation application. The respondent also appointed his expert, a clinical psychologist, Martin Yodaiken, who commenced his interviews with the children in September 2020, fourteen months after Dr van Niekerk saw them.
- [8] Mr Yodaiken considered the advantages of the proposed relocation to Cape Town and opined that the children would have the advantage of being close to the family who lives in Cape Town and more especially to their half-brother, who they are fond of. Mr Yodaiken further opined that these reasons are significant and lend credence to the applicant's bona fides for wishing to relocate to Cape Town. The relocation application was ultimately scheduled for a hearing on 24 March 2021 before Ndita J, who heard arguments and delivered a well-reasoned judgment in favour of the applicant on 23 April 2021.
- [9] The respondent expressed dissatisfaction with the order and subsequently applied for leave to appeal, which was granted. The appeal was argued before a full court of this division on 22 October
2021. On 01 December 2021, the full court unanimously dismissed the appeal with costs and upheld Ndita J's judgment. Following the full court's judgment, the applicant and the children returned to Cape Town, and the children commenced the 2022 academic year at R[...] College in Constantia.
- [10] Despite the full court's judgment, the applicant, for her reasons, returned to Plettenberg Bay with the children in July 2022. She enrolled the children at G[...] B[...] College. According to her, she returned the children to Plettenberg Bay as the respondent persuaded her. Additionally, the applicant stated that one of the reasons she agreed to another trial period in Plettenberg Bay was that their youngest son was not entirely happy at R[...] College, as he

had been both physically and verbally bullied there. However, the respondent disputed that he persuaded the applicant to return to Plettenberg Bay with the children in July 2022.

- [11] The applicant asserted that Dr van Niekerk described the eldest boy's (TJK) intellectual functioning as falling within the high average range, and she considered him to be a gifted underachiever. In her Psychometric Report concerning TJK, doctor van Niekerk recorded that the gap between his cognitive ability and actual performance seems to widen, while his frustration that school does not pose an adequate challenge to his mental capacity is growing. The applicant further stated that TJK is underachieving; he does the bare minimum and makes no effort. His marks are deteriorating, and it has become apparent that he may not be able to take the subjects he prefers as matric subjects for next year.
- [12] While the youngest boy (TWK) has excelled academically at G[...] B[...] College and has done well on the sports field. However, he has exhibited oppositional, insolent and aggressive behaviour towards teachers. He is also frequently given detention, and in August 2023, the applicant found pornographic material on his phone, including a WhatsApp conversation between TWK and an adult woman.
- [13] The respondent, on the other hand, averred that the report relied upon by the applicant in support of her application is outdated. However, the respondent conceded that their eldest son, (TJK) has been accused by his teachers of doing very little work and not putting in any effort, that he needs to develop study habits and participate more in class, and that it takes some prodding for him to do any work, and that his results indicate a lack of preparation and undertaking. The respondent added that TJK was ill for 15 days in Cycle 1 of 2024, which may account for the drop in his marks.
- [14] The respondent added that TJK has been sick and missed out on much work. Even though the applicant and the respondent appealed to the school to exempt him from writing tests, the school was adamant that he must write the tests. The respondent asserts that the applicant posits R[...] College as the preferable institution for TJK, citing its capacity to fulfil his intellectual requirements and challenge him. The respondent contends that the applicant enrolled TJK at R[...] College for the year 2025 without securing the respondent's consent. Nevertheless, a review of TJK's first-term report from R[...] in 2022 reveals that TJK displayed the same tendencies observed by his educators at G[...] B[...] College.
- [15] The respondent contended that he has not applied to other schools for his children as he considers G[...] B[...] College appropriate. The respondent does not believe that, yet another move will serve their interests. The respondent feels that the children are happy and settled, and in his opinion, this is an important consideration. According to the respondent, he is astounded that the applicant has applied for and secured places for the children at W[...] and at R[...] College without his consent.

PRINCIPAL SUBMISSIONS BY THE PARTIES

- [16] At the hearing of this matter, Ms Riley, the applicant's Counsel, argued that there is distress for the children at the current school where they are enrolled. Ms Riley referred the court to the respondent's answering affidavit, in particular, paragraph 13 thereof, where the respondent stated that if, in fact, the children were unhappy and their attendance at G[...] B[...] College was not promoting their emotional and physical well-being, he would accept that the court would find that an assessment is necessary to get to the root of their distress. According to Ms Riley, the children's enrolment at G[...] B[...] College does not promote their emotional and physical wellbeing as the children are disturbed and unsettled.
- [17] Ms Riley further referred the court to a correspondence of the principal from G[...] B[...] College, Mr Falconer, dated 03 March 2024, where the principal noted that it is evident from the teachers of both boys that, at the moment, they are both unsettled, distressed and disturbed. Counsel also referred the court to another correspondence from the youngest child's (TWK) teacher dated 24 July 2024, addressed to the applicant and respondent, where it was stated that their youngest son seems to be having ongoing behavioural issues as he tends to disrupt classes and at times can be downright difficult. In that correspondence, it was also stated that this appears to be happening in several of his classes and that it is not an isolated incident.
- [18] Ms Riley also referred the court to a correspondence of the Deputy School Principal dated 06 September 2024 addressed to the applicant and the respondent stating that TWK has repeatedly been extremely disruptive at school and is now required to attend an afternoon detention on Friday 06 September 2024. According to Ms Riley, the school itself has indicated that TWK's emotional wellbeing is a concern, and he is distressed and underperforming academically.
- [19] Regarding the eldest child (TJK), Counsel submitted that his position is even more concerning. Ms Riley submitted that TJK has difficulty falling asleep and, for weeks this term, could not sleep more than two or three hours per night due to stress and anxiety. Apparently, the doctor whom the respondent took TJK to see prescribed the child anti-anxiety medication, Alzam, which is a benzodiazepine (for adults), despite the medicine being habit-forming. Counsel implored the court to grant the relief sought so that an educational psychologist could conduct an assessment to determine the children's best interest regarding their schooling for the 2025 academic year.
- [20] On the other hand, Ms Bartman, the respondent's Counsel, challenged the urgency of this matter. Counsel submitted that the applicant failed to make out a case for urgency as envisaged in Rule 6(12) of the Uniform Rules. To this end, Ms Bartman argued that on 08 April 2024, the applicant requested the respondent to consent to the children being assessed by an educational psychologist. On 10 April 2024, albeit with reluctance, the respondent consented to the appointment of Leigh Pettigrew to conduct the assessment. Counsel submitted that even though the applicant considered the assessment urgent, she did not ascertain whether Ms Pettigrew was available to conduct the assessment.

- [21] Ms Bartman dealt with the chronology of the matter and submitted that it illustrates that urgency, if any, was self-created. Among others, Ms Bartman submitted that Ms Pettigrew advised the applicant's legal representative on 25 April 2024 that she could not take on the matter. On 18 June 2024, the applicant's legal representative proposed that Michelle Berger assesses the children and threatened the respondent that unless he cooperated and signed the consent intake forms of each child, the applicant would approach the High Court for an order compelling him to do so. In the meantime, the respondent learnt that the applicant had been applying to schools without the respondent's consent.
- [22] Despite several correspondence exchanges between the applicants and the respondents' legal representatives, the applicant only brought her application and had it served upon the respondent on 23 June
2024. Ms Bartman submitted that whilst matters involving children are ordinarily urgent, the applicant still must make a case and, in this case, the applicant failed to make out a case for urgency.
- [23] As far as the merits of the application are concerned, Counsel disputed the averments that the minor children are distressed or not stimulated because of the environment in the school in which they are currently enrolled. Ms Bartman referred the court to the same letter of Mr Falconer, the Principal of G[...] B[...] College, where the latter stated that 'while it is not in the province of the school to be making any legal recommendations to divorced parents, it is worthwhile to make note that unless there are overwhelming clear reasons, children do better in the care of both father and mother.' The Principal also noted that it is apparent that both boys are profoundly unsettled at the moment without what seems to be enough opportunities for a stable and predictable relationship with their father.
- [24] According to Ms Bartman, the Principal does not say the children are distressed because they are under-stimulated by their school. In the Principal's view, argued Counsel, their distress is directly attributed to the animosity between the applicant and the respondent and the fact that the respondent is not playing a more central role concerning the children. Counsel further submitted that the respondent does not agree to a further assessment of the children. Ms Bartman argued that the respondent is keen to assist his children, but he is precluded from doing so by the applicant. His contact with the minor children is minimal, and he wants a 50:50 arrangement. He wants to have a constructive involvement in the children's lives.
- [25] Ms Bartman further submitted that the children have been assessed before, and once it comes to their attention that there is another assessment, the message to them will be that there is a move imminent, as in the last assessment, there was a move. Counsel reminded the court that the children were moved in 2022, enrolled in R[...] College, and subsequently removed and returned to Plettenberg Bay. According to Ms Bartman, the respondent believed that what is more important for the children is having more stability. The children have been moved five times in nine years of their educational program, and this impacts on

the relationship that the children have with friends.

- [26] Significantly, Ms Bartman submitted that if the children were to move, they would be exposed to a new curriculum. To her knowledge, R[...] College does not follow the Cambridge curriculum but rather the IEB education system, while W[...] follows the CAPS system or the Government's education system. If the children are relocated in 2025, Ms Bartman argued that they would need to make new friends and join different sports teams. This would change the contact they have with their father and friends. Ms Bartman implored the court to dismiss the applicant's application with costs.

ISSUES

TO BE DECIDED

- [27] There are two critical issues in dispute in this matter. The first is whether the applicant has established a case for urgency, as envisaged in Rule 6(12) of the Uniform Rules. The second issue is whether an educational psychologist should be appointed to assess and recommend the most suitable school for the minor children, starting at the beginning of the academic year in January 2025.

APPLICABLE LEGAL PRINCIPLES AND DISCUSSION

- [28] For the sake of brevity, I will address the issues in dispute sequentially.

Urgency

- [29] This case involves the interests of two minor children who are unfortunately caught in an unhealthy emotional conflict between their parents. It is essential that the children's best interests take precedence over the animosity and difficult relationship between their parents. The respondent impugns the applicant's application by arguing that the applicant has not demonstrated a case for urgency in this matter. I do not agree with this proposition. I must stress that cases involving minor children require a thoughtful and sensitive approach. Unlike other conventional urgent matters, cases involving children necessitate careful consideration due to the inherent vulnerability of children.
- [30] In my opinion, a child-centred approach should be the primary focus in any situation involving a child. Formalities and strict procedures should be secondary to their wellbeing, as the centrality of the child's best interests must take precedence.[1] More so, section 6(1) of the Children Act 38 of 2005 emphasises a transformative shift in child law, marking a departure from traditional approaches and underscoring a commitment to prioritising the rights and wellbeing of children. It sets out principles that must guide the court in implementing all legislation applicable to children, including the Children's Act. To this end, section 6(1)(b) buttresses the fact that all proceedings, actions or decisions concerning a child must respect, protect, promote and fulfil the child's rights set out in the Bill of Rights.

[31] In the present matter, the applicant engaged the respondent and his legal representative before launching this application in a quest to resolve the matter amicably, as contemplated in section 4 of the Children's Act. Section 4 establishes that in any matter concerning a child, an approach which is conducive to conciliation and problem-solving should be followed, and a confrontational approach should be avoided.[2] From the totality of the evidence placed before this Court, particularly considering the vulnerability of the children involved, this matter is urgent and deserves this court's speedy attention and intervention. I will now turn my attention to the second issue under discussion.

Should an educational Psychologist be appointed to assess the children?

[32] At the outset, this court is not tasked with determining whether the children are required to relocate to Cape Town. This court's responsibility is solely to determine whether the children should be evaluated or not. It is common cause that the relationship between the applicant and the respondent has been very much conflictual, acrimonious and affecting the emotional wellbeing of the minor children. The teachers of the minor children have expressed concern about their emotional and physical wellbeing.

[33] The correspondence addressed by the principal to the applicant and respondent is highly concerning. In it, the principal records that it is clear to the teachers of both children that, at the moment, they are both unsettled, distressed and disturbed. The principal also notes this is evidenced particularly by the young boy's erratic and undisciplined acting out of his depressed and tearful demeanour. Evidently, it is particularly distressing to the principal to witness the emotional turmoil these boys experience, as they seem to be caught in an unhealthy tug of war.

[34] From reading the papers filed, I believe that the observation of the principal is spot on and to the point. The two children are depressed and unsettled. They are not performing well at school. The animosity between the applicant and the respondent has affected their performance in class. In this situation, I firmly believe that it is essential for the children to receive professional help. Appointing an educational psychologist will be invaluable in identifying their shortcomings and determining the appropriate remedial actions needed for both children to perform optimally and regain their self-confidence.

[35] Notably, the respondent initially consented to the applicant's request to participate in the proposed assessment by Ms Leigh Pettigrew, whom the applicant wished to appoint to conduct an educational assessment of the children. The respondent noted that his consent was not an indication that an assessment was necessary or desirable. Only when Ms Leigh Pettigrew declined the appointment did the respondent suddenly change his mind. It seems to me that the respondent only had an objection to the person who had to conduct the assessment as opposed to the assessment per se.

[36] The respondent acknowledged that if the children were unhappy and their attendance at G[...] B[...] College was not promoting their emotional and physical wellbeing, he would accept that the court would find that an assessment is necessary to get to the root of their

distress. I must emphasise that the teachers and the principal have categorically stated that the children are unsettled, distressed and disturbed. Considering the current situation, particularly their emotional and educational performance, I am of the view that it is inherently compelling that an educational psychologist be appointed to assess the two minor children and unearth the root cause or the real issues that affect them.

- [37] It would be irresponsible of this court to ignore the letters and communication of the principal, and the schoolteachers addressed to the applicant and the respondent on the physical and emotional wellbeing of the children. The issues raised by these educators must be investigated by the educational psychologist so that the best interests of the two minor children can be better served. In my view, the problems of these children go beyond the question of which school they should attend next year. Their distress and anguish cry loudly for a professional intervention.
- [38] After carefully examining the affidavits of the parties, it has become increasingly evident that the issue of care and contact arrangements between the applicant and the respondent serves as a significant contributor to the emotional distress that the children are experiencing. The applicant states that the respondent had expressed concern about both children's emotional wellbeing, their anxiety, their maturity and masculine development. The applicant further asserts that the respondent appears to attribute the misbehaviour of the children to the fact that the applicant has not acceded to the respondent's repeated request over the past three years to increase his contact with their children so that they can spend 50 per cent of the time in their respective homes.
- [39] On the other hand, the respondent stated that since the applicant returned from Cape Town in 2022, he had consistently attempted to negotiate more contact with the minor children. According to the respondent, the existing parenting plan they concluded when the children were 7 and 9 years old is outdated and does not serve their current interests. Additionally, both boys have expressed a desire to spend more time with him. Notwithstanding, the applicant has rigidly adhered to the provisions of the parenting plan and refuses to change this.
- [40] The respondent further asserted that he repeatedly expressed his wish to have equal residence and has made repeated proposals about increased contact in numerous letters. The respondent believes that the applicant and the respondent are best deposed to making those decisions relating to care and contact as they know their children and their routines and what they want; however, the applicant has consistently refused to engage with him in this regard.
- [41] From the above, it is apparent that the issue of care and contact is in dispute. Importantly, the Office of the Family Advocate, in their memorandum addressed to the court dated 10 October 2024, notes that they are not opposed to the applicant's application; however, they requested that a simultaneous referral be made to the Office of the Family Advocate to conduct its own independent care and contact assessment given the underlying care and

contact dispute evident from the papers. The Office of the Family Advocate has underscored the importance of establishing appropriate care and contact arrangements, as these are vital for serving the best interests of minor children.

[42] I am of the view that the Office of the Family Advocate must investigate the question of care and contact to determine what is in the best interest of the minor children. The two minor children should also have their voices heard. It is essential for them to participate and express their views openly, as this situation directly impacts them. Importantly, it is now firmly established in our family law that children have the right to express their opinions and participate in matters that affect them. Section 10 of the Children's Act provides that:

“Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.”

[43] In the present matter, the children are 13 and 15 years old. The two boys are of such an age, maturity, and stage of development that they can participate in these proceedings and give informed views on whether they would like to stay in Plettenberg Bay or relocate to Cape Town. The Family Advocate is ideally suited to gather and represent the children's expressed views on this matter. The expertise of the Family Advocate would ensure that the voices of the children are heard and valued appropriately.

COSTS

[44] The general rule in matters of costs in civil suits is that costs follow the event; that is, the costs of the successful party are to be paid by the party who is unsuccessful. Ordinarily, this rule should not be departed from except where there be good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. However, the court has a discretion in awarding costs.[3] Such discretion must be exercised judicially upon a consideration of the facts in each case.[4]

[45] In this case, Ms Riley conceded that the costs of the remand of this matter on 16 September 2024 when the court file was not brought to court timeously must be borne by the applicant as the duty to prepare and deliver the court file lies with applicant. I agree with that argument. However, I am of the view that the respondent should be ordered to pay the costs of the application save for the costs occasioned by the postponement on 16 September 2024.

ORDER

[46] Consequently, having read the documents filed and having heard from both Counsels, the following order is granted:

46.1 It is ordered that the respondent's consent to an assessment by an educational psychologist Michele Bergere or educational psychologist Gerda Grobler be dispensed with and that the applicant is authorised to appoint either Ms Grobler or Ms Berger to conduct such an assessment and to make recommendations as to the optimal schools to be attended by the parties' minor children TKJ and TWK from the commencement of the academic year in January 2025.

46.2 The Office of the Family Advocate is directed to conduct a care and contact investigation to determine what is in the best interest of the minor children.

46.3 The Office of the Family Advocate is also directed to gather the views of the two minor children concerning care and contact and the schools they wish to attend from the commencement of the academic year in January 2025.

46.4 The applicant and the respondent are directed to cooperate in such investigation and assessment.

46.5 The applicant is ordered to pay the wasted costs occasioned by the postponement of the matter on 16 September 2024.

46.6 The respondent is ordered to pay the costs of this application, including the costs of Counsel on the scale A, save for the costs stated in para 46.5 above.

LEKHULENI JD

JUDGE OF THE HIGH COURT

APPEARANCES

For the applicant: Adv Rilley

Instructed by: Fairbridges Wertheim Becker

For the Respondent: Adv Bartman

Instructed by: JO MacRoberts Attorneys and Associates

[1] Section 28(2) of the Constitution provides that: 'A child's best interests are of paramount importance in every matter

concerning the child'.

[2] See Transnet Ltd vs Rubenstein 2006

(1) SA 591 SCA where it was held that where a litigant had endeavoured to settle the matter and had brought an urgent Application after the attempts to settle the matter because of the delay occasioned by the attempt to settle had failed, the Applicant should not be deprived of his costs and that it could not be argued that a litigant had been the author of his own urgency.

[3] Ferreira v Levin NO and Others; Vreyenhoek and Others v Powell NO and Others 1996

(2) SA 621 (CC).

[4] Motaung v Makubela and Another, NNO; Motaung v Mothiba, NO 1975

(1) SA 618 (O) at 631A.

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