Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 4625/2021

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

....

L M MALATSI-TEFFO **DATE: 29 December 2023**

In the matter between:

C[redacted] B[redacted] Applicant
([redacted])

K[redacted] E[redacted] B[redacted] Respondent
([redacted])

JUDGMENT

MALATSI-TEFFO AJ

A. INTRODUCTION

[1] When parents are in turmoil, children are the ones who feel the brant. Sadly divorce, separation or any kind of dispute between the mother and the father exposes children to a great deal of acrimony. Ordinarily, while the parents engage in a legal battle, the poor children become the arena of the struggle. This at times leads to a child losing a sense of stability and security, which may result, as most psychologists say, in problems such as perpetual emotional commotion, depression, substance abuse, and educational failures. It is for that reason that the law considers the interest of the children to be of paramount importance in cases of this nature.

[2] At the heart of this matter is a little girl L[redacted] ("the child") who is presently 5 years old. She was born of the marriage between the Applicant and the Respondent. In this matter I am confronted with an urgent application for an order as follows:

2.1 Expert to be appointed to investigate the matter and conduct a forensic investigation into the best interests of the child and provide the above Honourable Court with a report and recommendations about the allocation of parental responsibilities and rights as contemplated in section 18 of the Children's Act 38 of 2005.

2.2 The Respondent be ordered to cooperate with the expert and take all such steps as are reasonable and necessary to enable the expert to compile her report.

2.3 The Respondent be interdicted from unilaterally enrolling the minor child at any school and directing the Respondent to cooperate with the Applicant in the enrolment of the minor child at Laerskool Hennopspark, alternatively, such other school as is located equidistant from the Applicant and the Respondent's respective homes and agreed to by both the Applicant and the Respondent.

[3] The Respondent filed a counterclaim wherein she prays for the applicant to:

3.1 co-sign the enrolment form for Laerskool Constantiapark pending the court's finding.

3.2 That the child be allowed to resume her play therapy with Jana Van Jaarsveld and receive occupational Therapy by the consultant recommended by Jana.

3.3 The confirmation of the de facto contact regime

[4] The applicant asserts that the two pressing issues that cannot await determination in the ordinary course, are the choice of primary school for the minor child which she will commence in January 2024, and the appointment of an expert to assess the child's current concerning behaviors.

[5] The respondent, however, contends that the applicant's relief sought is not urgent and can be dealt with in the normal course, alternatively, any urgency that might exist was self-created. For two years he has chosen not to pursue the disputes that are now described as urgent. He knew that L[redacted] had to attend grade R next year and he did nothing to further his issue in this regard.

B. BACKGROUND

[6] The Applicant and the Respondent were married to each other on 17 February 2007 and the marriage still subsists. They then separated on 28 October 2020 and the divorce process is currently underway. Shortly after the separation, the Respondent moved from the former matrimonial home in Kyalami, Midrand (where the Applicant remains resident), to The Wilds Estate, in Pretoria.

[7] There is a Rule 43 application that was brought by the applicant which remains pending, on the issues of parental responsibilities and rights, contact, and residency.

[8] The parties consulted various experts on the best interest of the child.

[9] The office of the family advocate investigated L[redacted]s' best interest and compiled a report which is dated 14 September 2021

[10] There is a dispute about the identity of the school that L[redacted] should attend with effect from January 2024.

[11] There is an alarming behavior displayed by L[redacted], which the Applicant contends requires urgent investigation.

[12] I have noted part B of the applicant's prayer, but in this judgment, I will delve into part A only. Furthermore, while there is a counter application, to avoid confusion I shall throughout this judgment refer to the father of the minor child as the applicant and the mother as the respondent, irrespective of which application it is that I am referring to.

C.THE FACTS

[13] The Rule 43 application that the applicant instituted, was postponed for the parties to attend mediation with Dr De Jong from the end of 2021 to August 2022. The respondent terminated the mediation before all issues were resolved.

13.1 The Applicant alleged that since their separation, the Respondent has adopted a high-handed and dictatorial approach to all decisions about the minor child's care and has made unilateral decisions. Even though they jointly consulted with Dr Lynette Roux in December 2020 to obtain advice about their impending divorce and its impact on the child. The respondent contends that the applicant has ever-increasing demands that are not in the interest of their minor child.

13.2 Dr Roux and Jana van Jaarsveld advised the parties that it was important for the child to attend a school midway between the parties' respective homes for ease of contact between both parents. The respondent stated that the report of the family advocate holds a contrary view and indicated that the doctor merely referred to the ideal world which in their circumstances is not possible13.3 The respondent moved from Johannesburg to Pretoria with L[redacted] and set herself up as primary residence without considering L[redacted]s'needs. The respondent confirmed that she moved to Pretoria because of her work and both their parents are living in Pretoria.

13.4 There is a contact regime in place, which the parties refer to as the *'de facto'* arrangement*.* The parties reached an agreement in respect of residency and contact with the assistance of Professor De Jong and the applicants' attorneys suggested a closure of the family advocate's file.

13.5 The applicant alleged that L[redacted]s' concerning behavior that displays emotional distress, which is becoming increasingly severe is not normal and indicates that there is a serious unidentified problem that needs professional attention urgently. Respondent contends that there is nothing abnormal, however, if there are signs of anxiety it could have been impacted by the applicants' withdrawal from the occupational therapy session.

[14] The respondent had unilaterally enrolled L[redacted] at Bambolini Playschool after their separation when L[redacted] was 3 years old. The applicant was opposed to this school because it's 5 minutes away from the respondent's house and it's leaving 100% of transportation for him between Kyalami and Pretoria. This resulted in him spending hours in traffic to exercise contact with L[redacted]. The respondent acted in line with the recommendation of the family advocate, and in consideration of the input from her and his parents. The applicant did not visit the school as requested, and the respondent was working against time because of her work hence she proceeded with the enrolment.

14.1 in January 2021 applicant requested the respondent to enrol L[redacted] in a play school that is halfway through their respective houses to facilitate his contact with her. The respondent ignored him. The family advocate advised that the Applicants' preference of school would mean that L[redacted] and the Respondent would travel on traffic daily where they should rather consider the school that is close to the area within which L[redacted], and the Respondent reside.

[15] In March 2023 the parties began discussing the choice of school for L[redacted] for 2024. The Respondent has since March 2023 misled the Applicant into believing that she would take his views into account about the choice of school for L[redacted].

15.1 The Applicant was under the impression that he and the Respondent were considering schools for L[redacted] and that they would make a joint decision in this regard. Between May and July 2023, there was an exchange of letters through the parties' respective lawyers in respect of the choice of school for L[redacted]. The applicant's stance was that the school should be situated halfway through their respective homes. around Centurion and the respondent's view is the school with proximity, to the Pretoria east area.

[16] The applicant established on 11 September 2023 that the respondent had already enrolled L[redacted] in Constantiapark Laerskool on 27 May 2023. The applicant was displeased with the respondent choosing a school without his consent and sent a letter to the school informing them that he does not consent to L[redacted]'s enrolment for grade R next year. The respondent states that the applicant said that he would consider the school in Pretoria East if she considered a school in Centurion.

[17] The applicant confirmed that he has viewed the two schools proposed by the respondent namely Laerskool Constantiapark and Laerskool Garsfontein, however, the respondent has failed to comment on the two schools recommended by himself being; Laerskool Wierdepark and Hennopspark.The respondent confirmed that she had viewed the schools and her concern is that the schools are 29 kilometres away from their house and that would not serve the interest of L[redacted] instead it is about the convenience of the applicant.

[18] The respondent stated that the applicant is unreasonably refusing to consent to L[redacted] attending Laerskool Constantiapark, save for his convenience has failed to provide the reason why.

Common Cause

18.1 The divorce action and Rule 43 application are in the process and the report of the family advocate of the recommendation on the best interest of the child has been obtained.

18.2 The parties are currently operating on the de facto regime whereof the primary residence is with the Respondent.

18.3 The respondent has relocated to Pretoria with L[redacted]

18.4 L[redacted] must go to a formal school next year.

18.5 Both parents must sign the enrolment form for the prospective school for L[redacted].

18.6 Both parents have provisionally enrolled L[redacted] at the schools of their choice, and they are both refusing to co-sign.

D. THE ISSUE

[19] This case in my view raises three critical questions, namely.

19.1 Whether this application is urgent as envisaged in rule 6 (12) of the Uniform Rules and if so,

19.2 Whether a forensic investigator should be appointed, and if so which one?

19.3 Which school should L[redacted] be enrolled in 2024?

F. LEGAL PRINCIPLES AND REASONS

E. URGENCY

[20] This court was asked to dispense with all forms of service provided for in the rules of court and to deal with this application in terms of rule 6 (12) of the Uniform Rules of this court.

[21] I have scrutinized the urgency of the application in terms of Uniform Rule 6(12) (b) which requires that the urgency should not be self-created, and that the applicant cannot obtain substantial redress in due course. In addition, I have considered the best interest of the child.

[22] From the nature of the relief claimed it is obvious that this is a dispute involving a minor child. Notwithstanding what I was told about the urgency of the matter, including the bulky papers that I am expected to read within a short space of time, this is not a naturally urgent matter. The urgency is evident in the fact that L[redacted] is required to start school next year and it is undecided now which school she should attend as the parties are unable to agree on this issue.

[23] The parties have known of the commencement of the school term for a long time. Through their seemingly endless clashes, they have created an urgency that may exist and in so doing have jumped the queue of cases awaiting adjudication and pressurized the court to deal with the matter in a manner that suits them.

[24] I would have struck the matter off the roll had it not involved the minor child and allowed it to take its normal course through the rolls. Nonetheless, it is now before me, and I will deal with it because it is in the best interest of the minor child that a decision regarding her future be taken, given the failure of her parents to agree with each other.

[25] Having said that; before I can consider the matter on its merits, I must determine whether the requirements of urgency have been satisfied. Rule 6 (12) provides *inter alia* that a court may dispose of urgent applications at such time and place and in such a manner and by such procedure it deems fit. The circumstances that an applicant avers render a matter urgent and the reasons why he claims that he would not be afforded substantial redress at a hearing in due course must in terms of rule 6(12)(b) be set forth explicitly in the founding affidavit.

[26] The approach to adopt in determining urgency was set out in *in re: Several Matters on the Urgent Court Roll*[1], where the court referred with approval to the views of Notshe AJ[2] the court stated:

[1] 2013 (1) SA 549

[2] in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2012] JOL 28244 (GSJ) at paras 6-7

"[6] The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances under which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course……...

[7] It is important to note that the rules require the absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course, but it may not be substantial. Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard[3]."

[27] The applicant's counsel argued that this is a semi-urgent matter.

[28] Contrarily the respondents' counsels' argument is based on the applicants' non-compliance with rule 6(12)(b) of the uniform rules of the court submitting that he has failed to provide the court with the circumstances that render a matter urgent; and reasons why substantial relief cannot be achieved in due course.

[29] She referred to the principle laid down by Notshe AJ in East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others. The counsel argued that the fact that the Applicant wants to have the matter resolved urgently does not render the matter urgent.

[30] She further submitted that the applicant's application does not comply with rules considering what has been set out in the applicant's founding affidavit. For example, in paragraph 81 of the founding affidavit, it is alleged that L[redacted] has been distressed on an almost ongoing basis since their separation. On his version, this has been an issue since at least October 2020.

[3] Eniram (Pty)Ltd v New Woodholme Hotel (Pty)Ltd 1967 2 SA 491

The appointment of an Expert

[31] The urgent need for the appointment of an expert as indicated by the applicant is induced by the three incidents which displayed a significant deterioration in the child's behaviour. He alleged further that the respondent completely discounts and disregards this very concerning behaviour and has resisted the appointment of an expert since March 2021 to conduct a forensic investigation into the child's best interests.

31.1 The first incident is one where the child displayed severe emotional distress when being returned to the Respondent's care by him. She screams and cries hysterically to the point that she becomes ill and exhausted. The Applicant feels that this behaviour is not normal and indicates that there is a serious unidentified problem with the child.

31.2 The second one is when the child became physically ill with a tummy problem and vomited on the side of the highway whilst on the way home with the Respondent after spending time in the Applicant's care in September 2023.

31.3 He alleges that this happened when he and the respondent exchanged the child at a service station on the 10th of September 2023.

31.4 The third incident was when she was returned by her paternal grandmother to the Respondent's care, she also demonstrated emotionally distressed behaviour.

[32] The respondent argued that some of the behaviours are normal and age-appropriate and it's confirmed by the teachers at her current school, and the other behaviour could have been the change of their picking up routine and also the applicants' abrupt stop on the occupational therapy sessions could have impacted negatively on her behaviour.

[33] a). Self-created urgency: the urgency was self-created by the applicant. He had been aware of the level of distress of the child since their separation in 2020. As a matter of course he requested the Respondent to consent to the appointment of an expert on

many occasions in 2021. The respondent, thus agreed to the appointment of Dr Duchen but in March 2021 she withdrew.

33.1 It is so disturbing that the parents for almost three years notice that the child is not well, however, they do nothing for the child to get medical attention, instead, the focus is on the legal battle. Even with the current triggers, the practical thing would have been for the applicant as he is so concerned, to take the child for medical attention rather than diagnose her without the relevant expertise and be so preoccupied with the forensic investigation.

33.2 Regrettably, the courts of law desist from making findings on assumptions[4], hence the report from the doctor could have been of assistance. There has been a delay from 2020 to the date of this application in bringing this application and there is no adequate explanation in that regard before this court. Therefore, this delay undermines the applicant's claim of urgency.

b). Availability of alternative redress; I have noted that the Rule 43 application is already in progress and issues of access, custody, the appointment of a forensic expert, and the choice of school are dealt with therein. This suggests that the applicant could obtain substantial redress in due course through Rule 43[5] application wherein the full examination of what is in the child's best interest would be better served. Thus, negating the need for urgency.

c). Lack of immediate harm; The applicant's submission that the child's emotional being is deteriorating without the medical report, is not evidence that can warrant the appointment of a forensic expert on an urgent basis. The applicant failed to take this court into confidence on the prejudice that the child will suffer should the court refuse to grant this order. Furthermore, the issues raised by the applicant in the papers are not new. From the correspondences filed in the Rule 43 application, it is evident that the parties engaged several times regarding the

[4]The South African Law of Evidence

[5] H v H (44450/22) [2022] ZAGPJHC 904; [2023] 1 All SA 413 (GJ); 2023 (6) SA 279 (GJ) (30 September 2022)

appointment of an appropriate expert for the of L[redacted]s' behaviour as well as parental rights and obligations and in the best interests of the child.

[34] Having said that, the prayer for the urgent appointment of an expert failed to meet the criteria for urgency. It is therefore dismissed.

School

[35] The child is currently enrolled provisionally at two schools of both the applicant's and respondent's choices. Both parents are not willing to co-sign for the final admission of the child. This denotes that the parents' persistence with this mindset will leave L[redacted] without a school to go to next year, she will thus be highly prejudiced.

[36] Considering the criteria for urgency; there will not be substantial relief through the regular judicial channel as the child has to be in class in January 2024. The prejudice is that he will lose the space for next year if the court does not intervene now. Considering the above, the applicant has met the criteria for Urgency on this issue.

F. MERITS

<u>Which School</u>

[37] The issue that require resolving is:

(a) Which school should L[redacted] be enrolled in?

[38] Section 28(2) of the Constitution[6] states that a child's best interest[7] is of paramount importance in every matter concerning the child. Similarly, sections 7 and 9 of the Children's Act (*the Act*)[8] promote the best interests of the child standard in all matters concerning children.

[6] The Constitution of the republic of South Africa 1996
[7] A.C v S.A.M (22507/2021) [2023] ZAGPJHC 756 para 14

[8] 38 of 2005

[39] L[redacted] has been provisionally accepted into both Laerskool Hennopspark, the Applicant's choice of school, and Laerskool Constantia Park, the Respondent's choice of school. Both schools require the countersignature of each parent. It is common cause that neither school will accept L[redacted] for final enrolment without the other parent's countersignature. Both parents refuse to cosign the respective enrolment forms.

The Parties' Positions in This Case

[40] Both the applicant and respondent spent a fair amount of time explaining to the court the reasons why they believed their school of choice was the best option for L[redacted].

Hennops school

[41] The applicant insisted that there were several reasons for sending the child to Hennops, including:

41.1 The school is situated mid-way between their respective homes, for the parties' ease of contact with L[redacted].

41.2 He decided to enrol L[redacted] at Hennops school after realizing that the respondent had unilaterally enrolled her at Constantia school.

41.3 That he will be spending hours in traffic as the case before for contact with L[redacted] at the play school which is closer to the respondent's home in Pretoria east

41.4 That the respondent failed to take his views into account and misled him by making him believe that she was considering his proposal of halfway school between their respective homes.

41.5 That the respondent's insistence on the school of her own choice is nothing more than a transparent effort to steal a march and force L[redacted] to attend the school of her choice again dictating this major decision and knowing full well that she seeks to create a status quo, only to later argue that L[redacted] is settled in her school and should not be moved.

Constantiapark Laer skool

[42] The respondent likewise laid out several reasons for enrolling L[redacted] at Constantiapark Laerskool, including that:

42.1 It will be easy for her to commute with L[redacted] between home, school, and any other activities as it is close to her home and on her way to her workplace which is 2.7 kilometers from the school and takes about 15 minutes to travel from or to, which is important in times of emergency.

42.2 the school is in their feeder zone accordingly she will be easily accepted for grade1.

42.3 it is approximately 6.3 kilometres from their home and it's on her way to work.

42.4 She will leave at 7h10am which will be in time for school which will be starting at 7h30am.

42.5 Some of her friends from Bambolani will attend Constantia Laerskool next year and seeing familiar faces will also help her to adapt easily to the transition.

42.6 If she is enrolled at Hennopspark Laerskool it will mean that they will be on the road for hours everyday

42.7 She further asserts that the minor child does need to attend Grade R from January 2024 and the applicant is unreasonably withholding his consent for a school near where the minor child resides with the respondent.

Factors to Consider

[43] The decision as to which school a child should attend, in situations where parents disagree, is ultimately a matter of judicial discretion exercising its inherent jurisdiction[9] as the upper guardian of a minor child[10]. Its finding shall be based on the facts

[9] S173 of the Constitution of The Republic South Africa 1996

[10] The Constitutional Court, in the decision H v Fetal Assessment Centre 2015 (2) SA 193 (CC) expressed a view in para [64] as follows: "The High Court sits as upper guardian in matters involving the best interests of the

presented. The various factors that the court can apply in exercising this discretion[11], include the following:

- in developing a child's educational plan, the unique needs, circumstances, and attributes of that child must be taken into account, and a parent's capacity and commitment to carry out this plan are a further important element affecting a child's best interests;
- the ability of the parent to assist the child with homework, and the degree to which the parent can participate in the child's educational program;
- the emphasis should be on the best interest of the child, not on the best interests of the parents;
- importance should be placed on the promotion and maintenance of a child's cultural and linguistic heritage;
- decisions about schooling that were made by parents before separation, or at the time of separation will be considered, taking the best interest of a child into account.
- The pros and cons of the proposed schools will have to be weighed.
- the decision on the choice of school should be made on its own merits and should be based, in part, on the resources that each school offers about the child's needs,
- custodial parents should be entrusted with deciding as to which school their child will attend. Where a sole custodial parent has always acted in the best interest of a child, there should be no reason to doubt that the parent will do so when it comes to deciding on a school;

child (be it in custody matters or otherwise), and it has extremely wide powers in establishing what such best interest are. It is not bound by procedural strictures or by the limitation of evidence presented, or contentions advanced or not advanced, by respective parties". "

[11] *Charron v. Hollahan*, 2020 ONSC 4423; and *Sussman v. Febrega*, 2020 ONSC 5162)

- each case is fact-specific and will depend on the best interests of the specific child in question, not the best interests of the children's general

[44] Given the fact that the parties live far apart, it is not feasible that the minor child should live with one parent but go to school in an area where the non-custodial parent resides.

[45] I respectfully disagree with the idea of the school halfway between the parties' respective homes. For L[redacted] to make it in time every day to school, it means she will have to leave the respective house, considering the distance and considering the pattern of traffic in the respective areas, load-shedding, and other delaying factors at approximately 05h45. Surely that will be torture for the child and it will be serving the interest of the parents and disregarding the best interest of the child.

[46] The applicant's insistence on Hennops Laer School is in my view based solely on his convenience. It should be in the best interest of the child not of the parties, but for the applicant it's transparent in his assertions …" I had spent time in traffic previously", It will be easy for me to contact the child", ".

[47] It is evident that the respondent in an effort to consider the views and wishes of the applicant[12] she tried to communicate with the applicant about L[redacted]s's school for 2024, however the applicant was adamant that the halfway through their respective home school is the one they should go for. Another approach by the applicant which I find to be unreasonable, was that he will sign the papers for Constantiapark school provided the respondent signed the ones for the school of his choice".

[48] It appears to me that the Respondent as the current custodial parent of the minor child has always acted in the best interest of the child, therefore there should be no reason to doubt that she will do so when she decides for school. It is on that note and in my view that the respondents' stance to go ahead and register the child at Constantiapark Laerskool without the consent [13]of the applicant was not to overlook the applicant

[12] S31 of the Childrens' Act 38 of 2005
[13] S30(2) Of the Childrens' Act 38 of 2005

rather it was a proactive and a responsible step to ensure that the child's space was secured, while the parties are in a tug of war.

The respondent's insistence on Constantia Laerskool is clearly on the convenience of the child and this is evident from her assertions as she constantly refers to "us, we, she" for example, "we will spend more than an hour on the road"," we will commute easy between home, school and other activities" and so on. These assertions and the arrangements by the respondent are without any doubt projecting what is in the interest of the child.

[49] The school is close to the proximity of the custodian parent, and it will be easy for the child to access the school rather than having to travel for such a long distance for the sake of the parents.

CONCLUSION

[50] The parties are clearly in an acrimonious relationship to the point where they act to the prejudice of the child; for that reason, I shall draw my inherent powers to make a ruling on the interim primary residence, care, and contact as contained in the applicants founding affidavit, pending rule 43 application and /or divorce action.

[51] The remaining prayers as contained in the notice of motion and counterclaim should be channelled accordingly by the parties to the proper forum.

[52] Regarding the costs, there are no victorious parties in family law litigation, particularly where the best interest of the child is involved[14].

[53] In conclusion, I am of the view that it would be in the child's best interest, that she must be enrolled at the school proposed by the respondent, namely Constantiapark Laerskool and the *de facto regime shall be confirmed by this court.*

[14] K [....] v M [....] (47512/18) [2021] ZAGPPHC 269 para 40

I THEREFORE GRANT AN **ORDER AS FOLLOWS:**

1. Noncompliance with the rules relating to the forms, service, and periods as provided for in rule 6 of the uniform rule of court is hereby condoned and application is heard as one of urgency in terms of rule 6(12)
2. The Applicant must sign the necessary documentation for final enrolment in Laerskool Constantia Park for L[redacted]s' Grade R year.
3. The *de facto* regime is hereby confirmed.
4. Each party is to pay his/her own cost.

MALATSI-TEFFO AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

COUNSEL FOR THE APPLICANT:

Adv L Segal SC

Instructed by: Lowndes Dlamini Attorneys

Gillian@lowdes.co,za

COUNSEL FOR THE RESPONDENT:

Adv I Vermaak- Hay

Instructed by: Arthur Channon Attorneys

Arthur@channonattorneys.co.za