REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2015/28396

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

....
DATE SIGNATURE

In the matter between:

HEIDI ANSPACH Applicant

And

RUSSELL MARTIN OPLAND Respondent

J U D G M E N T

MAKUME, J:

[1] In this application the applicant seeks an order against the respondent in the following terms:

1.1 That the rules relating to forms and service as required and provided in the Uniform Rules of Court be dispensed with in terms of Rule 6(12)(a) and that this matter be heard as one of urgency.

1.2 That the respondent be ordered henceforth:

1.2.1 To ensure that the minor child [J…..] [B….] [O……] (J……) attends the [S……] [G….] [P…..], [5…… B…….], [B…….] on every weekday on which Josh is in respondent's care between now and the end of the year (unless Josh is certified by a medical doctor to be ill) and to this end that respondent timeously transports J…. to the aforesaid playschool when J…… is in his care;

1.2.2 As from January 2016 and provided J….. is offered a place there, to ensure that J….. attends M….. M…. W……, 2…. B…… Drive, B……. on every weekday on which Josh is in respondent's care (unless J…… is certified by a medical doctor to be ill) and to this end that respondent timeously transports J…….. to the aforesaid playschool when J…… is in his care;

1.2.3 Not to jeopardise J……'s chances of being offered a place at M…… M…… W……. School by way of written or oral communication to the school which directly or indirectly negatively affects J…….'s chances of being offered a place at that school;

1.2.4 To contribute 50% of all costs associated with J……..'s education, including but not limited to deposits, levies, tuition fees, books, stationery, uniforms, extramural activities, tours and outings.

1.3 Costs on the scale as between attorney and attorney.

[2] This case involves a 5 year old child J….. B…. O…… (J……..) a male born on the 20th January 2010. Josh was born out of a short lived intimate relationship between the applicant and the respondent.

[3] When the relationship between the applicant and the respondent ended they became and have since that time being involved in legal wrangles and dispute centred mainly around the care and custody of Josh. This eventually resulted in a court order on the 13th March 2013 being granted under Case Number 2012/5126. The court order declared both parents as co-holders of full parental rights and responsibilities in terms of section 18 of the Children's Act No 38 of 2005.

[4] The terms of that court order which was drafted by respondent's counsel are wide however the relevant portion for purposes of this judgment relates to the powers granted to a psychologist Dr Lynette Roux as Case Manager with the following powers:

4.1 In the event of written request (email acceptable) by either the Applicant or the Respondent for a recommendation on what is in the best interests of J…….h, Dr Roux shall, insofar as she is able, within 5 calendar days of such request, or sooner if circumstances warrant, make a written recommendation in the best interests of Josh.

4.2 Any written recommendation by Dr Roux shall be considered binding upon the applicant and the respondent who shall be obliged to implement such recommendation immediately until subsequently revised or modified in writing by Dr Roux or as per 4.3 below.

4.3 The written recommendation of Dr Roux shall not be final, pending a decision by a court of law having jurisdiction in the circumstances.

4.4 In the event that either party objects to Dr Roux's written recommendations, they are entitled to either request her

reconsideration thereof or to approach a court of law having jurisdiction in the circumstances.

4.5 Dr Roux is specifically empowered to make any and all written recommendations that she deems to be in the best interests of Josh, except those matters specifically reserved for the jurisdiction of the High Court in the Children's Act 38 of 2005, section 45(3).

[5] The order of the South Gauteng High Court went on to provide as follows:

> "*In the event that either the Applicant or the Respondent does not specifically comply with this Order or with the most recent written recommendations of Dr Roux, then the sheriff of the Court and/or members of the South African Police Services are hereby requested to render any and all assistance to the Applicant or the Respondent, as appropriate, in ensuring compliance with this order or with the most recent written recommendations of Dr Roux.*"

[6] In pursuant to her duties and powers as described above on the 8th June 2015 Dr Roux delivered her Case Manager's Report No 26 which report amongst others made the following recommendation which was binding on both parties. The recommendation was that an application be made for Josh to be enrolled at Michael Mount Waldorf School in January 2016 and at Secret Garden Playschool from mid 2015.

[7] On the 29th June 2015 the respondent addressed a letter to the applicant's attorneys in the form of an email which read as follows:

> "*My assumption (as a layperson) is that, if I launch civil litigation in terms of the Court Order to have the former Case Manager's written recommendations reviewed, then the matter is considered sub judice, and I am not obliged to comply pending the outcome of that litigation. If my assumption is incorrect, I still intend not to comply, as I verily believe the recommendations are irrational, and not in Josh's best interests.*"

[8] On receipt of this letter the applicant's attorneys replied to the respondent directly and said the following:

> "*The Court Order dated 13th March 2013 sets out the procedure to be followed if either party objects to a ruling by the Case Manager Dr Lynette Roux. Until such time as that procedure has been followed and the court of competent jurisdiction has overruled Dr Roux's recommendation such recommendations are binding on both parties. As such you will be required to comply with the recommendations irrespective of the fact that Dr Roux has now resigned. Kindly confirm that you will do so pending the outcome of the pending litigation foreshadowed in your letter.*"

[9] On Tuesday the 14th July the respondent brought an urgent application in this Court for an order *inter alia* suspending the Case Manager's rulings in her reports and ordering that Josh remain at his former school namely Cottage Montessori in Roodepoort. In that application he told the honourable court in his founding affidavit that one of the reasons he had to bring the application as a matter of urgency was that he was bound to comply with the Case Manager's rulings. He said the following in paragraph 21 of his affidavit:

> "*Only this court can overrule the written recommendations of the Case Manager and I am obliged to implement the written recommendations of the Case Manager until and unless the court rules otherwise.*"

[10] That application which was brought on urgency served before Acting Judge Collis and on the 23rd of July the application was struck off the roll due to lack of urgency.

[11] In terms of the recommendation by Dr Roux Josh has now been enrolled at Secret Garden Playschool with effect June 2015 and on those occasions when the minor child J….. is in the care and custody of the respondent he has consistently shown reluctance to take the child to school. For instance it is said that on the morning of Friday the 24th July he arrived at S….. G……. School with J……. at about 08h00 in the morning and complained to the applicant's attorney that the trip had taken 1 hour 20 minutes from his house to take J….. to school. The respondent further informed the applicant's attorneys that it was his intention to approach the Constitutional Court on an urgent basis as he believed that the judgment by Acting Judge Collis did not take J…….'s best interest into account as she was required to do.

[12] The arrangement in terms of the court order of the 13th March 2013 is that Josh shares residence between applicant and the respondent and on Mondays and Tuesdays J…… is with the applicant until after school on Wednesday and then with the respondent on Thursdays and Fridays and he alternates weekends with each of the parents.

[13] On Wednesday the 29th July the respondent fetched J…… from S……. G……. School and spent the Thursday and the Friday with J……. until after school on Monday the 3rd August. At 15h36 on the afternoon of Sunday the 2nd August 2015 the respondent sent an email to applicant's attorneys in which email he stated the following *inter alia*:

> "*I decline to bring J…… to S….. G……. whilst he is in my care, and I decline all financial responsibility for such day care, which arises from your client's unilateral unlawful action, without prior consultation with me. Your client may collect Josh from my home at 1 pm on Fridays when it is 'her' weekend, and at 1 pm on Mondays following 'my' weekends.*"

In the same email he also informed the applicant's attorneys that he was opposed to J…… going to M……. M……. W……. School in 2016 as recommended and ordered by the Case Manager.

[14] On Monday morning the 3rd August 2015 the respondent did not take the minor child J…… to S……. G…… School and instead addressed a letter to the teacher a Mrs Kidson wherein he told her that:

> "*I have determined that (a) it is not necessary for me to bring J……. to S……. G……., and (b) that I have no financial responsibility for his attendance there. I have communicated as such to Heidi's attorneys.*"

[15] As a result of this the applicant's attorneys addressed a letter to the respondent on the 4th August 2015 and said the following:

"*Dear Mr Opland*

HEIDI ANSPACH // YOURSELF

1. *We refer to your email sent to us at 15h36 on the afternoon of Sunday 2nd August 2015.*

2. *We note from this email that you 'decline' to take J… to the S……. G…… P…… when he is in your care, and that you 'decline' to pay any of the costs associated with S….. G…….*

3. *Notwithstanding that you email was sent on 2 August 2015, our client has now found out that in fact you did not take J…… to school on Thursday 30 or Friday 31 July 2014.*

4. *We do not understand on what basis in law you believe you are entitled to act in this manner.*

5. *In your affidavit dated 14 July 2015 in support of your abortive urgent application, you stated that the recommendations of the former Case Manager, Dr Lynette Roux, were binding on you. On 22 July 2015, you repeated this several times in court before the Honourable Acting Judge Collis.*

6. *Your actions in failing to take J…… to S…… G……. every day while he is in your care are in direct and flagrant contravention of the binding ruling of the former Case Manager. They are also indicative of the contempt in which you hold the High Court , in that you gave the Court – a mere two weeks ago – every indication that you would be abiding by the rulings of the Case Manager, when in fact it would now appear you had no intention of so doing.*

7. *Furthermore, you are well aware of the ruling of the former Case Manager to the effect that you and our client are liable in equal shares for the costs of J…..'s education. You have on several occasions written to me reminding me that school fees are jointly and equally payable 'as per the Children's Act, the case manager's reports, the High Court Order, the Fish Hoek Primary cases, the Constitution, and basic parental responsibility, inter alia', (per your email to me and others dated 4 March 2015).*

8. *Your conduct is grossly unreasonable, completely unacceptable, and patently not in J……'s best interests.*

9. *You now force our client to bring an application on an urgent basis to the High Court for such relief as our client may be advised is appropriate, but which will include:*

9.1 an order compelling you to abide by the rulings of the former Case Manger, and in particular to take J….. to the S……. G…… on every single week day between now and the end of the year when he is in your care, and to M…… M…… W…… School next year in the event he is offered a place there;

9.2 an order for payment of half of all costs associated with Jo…..'s education;

9.3 a punitive costs order against you (ie an order on a higher scale than the one already awarded against you).

10. You are sternly and specifically cautioned not to communicate with M…….. M….. W….. School in such a way that you effective sabotage J….'s chance of being offered a place at that school, thereby indirectly flouting the ruling of the Case Manager in the misguided belief that you will get your own way 'through the back door' if you are unable to be successful by following due process. We notice that you have already begun to do this, and if you do not cease immediately, we will also seek an interdict against you.

11. To the extent that you may seek to rely on the specious semantic argument set out in paragraph (e) of your aforesaid email, we again caution you. This argument has no basis in either fact or in law, and you are well aware of this, having repeatedly told the Court that you were bound to take J….. to his new school.

12. Should you be of a mind to avoid a punitive costs order and contempt finding, we urge you to confirm by noon tomorrow, 5 August 105, that – pending the outcome of our client's aforesaid application – you will henceforth abide by the Case Manager's rulings by taking J….. to the S……. G…… on every single week day between now and the end of the year when he is in your care, and to M…. M….. W…… School next year in the event he is offered a place there, and that you will forthwith pay half the fees and deposit for S….. G……., and will pay half the deposit and fees for M……. M…….. when called upon to do so."

[16] On receipt of this letter the respondent replied on the 5th August as follows to the applicant's attorneys:

"*Dear Mrs. Clark,*

I acknowledge receipt of your below email, and attached letter, which refer, as does my email to you of Sunday, 2 August, and my SMS to you today at 10h49 (unanswered as at this sending).

I decline to litigate by correspondence, and I reserve my rights to respond at the appropriate time and in the appropriate forum.

I note that your letter did not address my urgent requests (oft-repeated) for discussions with your client regarding J…..'s schooling which requests are now all-the-more important as I have recently attended an 'Introductory Talk' at M….. M….. W……. School, and have thereby acquired new information about the school and its approach, etc. Your client is not privy to these views, and is legally obliged to consider them, as you know. I still await to hear from you in this regard.

I further note that my urgent application about J……'s schooling was struck from the roll at your client's insistence. Should she now seek to re-enroll the same matter, I will request a contempt of court finding against her, a punitive damages order, and that the costs order against me be set aside.

However, if your client still insists on litigating the matter in urgent court, and if the court so indulges her, I would be delighted to argue the merits, which is what I sought in the first place.

At this stage, given your client's persistent intransigence regarding discussions, mediation, etc. I foresee that we will simply move forward with my Part B, which I am busy with. All issues will be dealt with therein.

Lastly, I find your letter to be aggressive, threatening, and intimidating, and request, again, that you cease such tactics, which are contrary to the Children's Act, Brownlee, and the Constitution, inter alia, I further note various specific threats to violate or infringe my basic human rights, as per the Bill of Rights in our Constitution, and my parental rights in respect of J…..., and I request that you cease and desist in so doing as well. Thank you.

I remain open to proposals to resolve these disputes without litigation, and encourage such from you and your client.

All my rights remain strict reserved at all times."

[17] After having received this letter the applicant's attorneys followed up with another letter to the respondent Mr Opland and posed certain questions:

> "*Dear Mr Opland*
>
> *1 Will you take J…… to S….. G…… every weekday while he is in your care?*
>
> *2 Will you pay for half of J……'s education costs?*"

In response to the above questions the respondent emailed the following response to the applicant's attorneys and said the following:

> "*I do not believe I am obliged to answer your questions, and I decline to litigate by correspondence.*
>
> *I reserve my right to change my mind, along with all my other rights.*"

[18] These e-mails prompted the applicant to launch this application on the 7th August 2015 and set it down for the 18th August 2015.

[19] On the 18th August 2015 the respondent appeared in court unrepresented and asked that an attempt be made at mediation. As a result the application was removed from the roll by agreement and the parties attended mediation at the offices of Attorneys Bowman Gilfillan on the same day the 18th August from 09h00 in the morning until 13h00.

[20] I am informed in the supplementary affidavit deposed to by the applicant that the mediation was unsuccessful and that Messrs Bowman

Gilfillan declined to be involved any further in the matter. The applicant further informed this Court that the respondent still continues and refuses to comply with the Case Manager's rulings with regard to J…….'s school. As a result a letter was addressed to the respondent on the 19th August 2015 which reads as follows:

"*Dear Mr Opland*

1 *Our client's Notice of Motion and founding affidavit were served only on 6 August 2015.*

2 *The Notice of Motion required that you serve your answering affidavit, if any, by 16h00 on Tuesday 11 August 2015.*

3 *The matter was placed on the roll for hearing on Tuesday 18 August 2015.*

4 *You served your Notice of Intention to Oppose on 11 August 2015.*

5 *On 12 August 2015, you said per e-mail that you were waiting for contributions from a third party, essential to your representations, that would only be delivered to you by 17h00 that day, and that you would therefore endeavour to deliver your affidavit that evening.*

6 *Later that day, we once again placed on record our client's strenuous objection to your refusal to adhere to the binding rulings of the case manager, when the very purpose of case management is to ensure that parties have a 'holding position' pending the outcome of court proceedings to overturn the rulings.*

7 *You asked again that the parties attend mediation with Natasha Rech at Bowman Gilfillan, which had been offered on a pro bono basis.*

8 *Our client agreed to attend mediation, and we arranged for it to take place urgently on Tuesday 18 August 2015.*

9 *We accordingly removed the matter from the roll of 18 August 2015, by agreement with you.*

10 On Thursday 13 August 2015, you said that you had been advised that your third party's contributions would be ready by 15h00 that day.

11 On Sunday 16 August 2015, we wrote to you to say we had noticed that your answering affidavit had still not been served, and said:

> *'Please remember that, if mediation is not successful, the matter WILL be heard on Tuesday 25 August 2015. As you have had more than enough time within which to prepare your answering affidavit, I would ask that you kindly ensure that it is served on us by no later than NOON tomorrow, 17 August 2015. I am unable to grant you any further indulgence, I'm afraid."*

[21] Despite the correspondence exchanged the respondent still maintained his stance and did not take the child to school. Instead he started to threaten S…… G……. Playschool suggesting that the school is operating illegally.

[22] The respondent who appeared in person in court filed a voluminous answering affidavit which spans some 40 pages which affidavit he settled himself. Both in his address to court as well as in his affidavit he states that he is a layperson and appears in person as he cannot afford legal counsel like the applicant.

[23] It is interesting to note that despite the respondent's assertion of being a layperson he has sufficiently set out his replies in the answering affidavit and even quoted case law dealing with the best interest of children. He freely refers to the Constitution like a seasoned trial lawyer. It is evident that the respondent has a fair knowledge of legal issues or is being assisted by

someone with such knowledge. He should therefore know that once a court order has been granted it remains valid until set aside.

[24] In his affidavit the respondent does not spell out in clear terms why J….. should not attend S….. G……. School except what he says at paragraph 30 of his affidavit where he alleges that S…. G…… is in fact not a school it is a crèche and yet at paragraph 32 he contradicts this assertion by saying that J….. will only be turning 7 in January 2017 and does not need to attend school.

[25] In my view the respondent is being disingenuous. He would rather keep Josh at home than take him to the playschool. I do not think that he is acting in the best interest of the minor child a policy which he so boldly espouses but seems to be only paying lip service to. He even went ahead to investigate if S……. G…….. is registered when he telephoned the Gauteng Department of Education. He says that he was told by one Malebo that S…. G…… is not registered. It is interesting that this information is not confirmed in any affidavit and why raise it only now some two years after Dr Roux had made the recommendation.

[26] In conclusion the respondent argues that the application is not urgent and falls to be struck off the roll and refers the court to the decision of *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another* 1977 (4) SA 135 (W). I remain unpersuaded by this argument and find that the applicant has satisfied the requirements for urgency in that the continued keeping away of

the child J….. from attending playschool as recommended by Dr Roux is continuous and is a violation of the minor child's constitutional right to education I accordingly rule that the matter is urgent. In his counterclaim the respondent seeks to resuscitate his application which was struck off the roll by Collis AJ on the 23rd July 2007. His argument is that that application is still alive. In the counter-application which has got no notice of motion he says that when his application was struck off the roll the honourable court overlooked his extensive good faith efforts to resolve the dispute without litigation. In this regard it must be remembered that when this matter was set down for hearing on the 18th August he requested a postponement to enable him to undergo mediation together with the applicant. Those mediation efforts were unsuccessful. It is not clear who caused the breakdown of negotiations or deadlock in that matter. However, it can safely be accepted that no headway could be made out of the discussions that ensued. Neither did the respondent indicate that he was willing to take the minor child to the school as recommended by Dr Roux. This is evidenced by the fact that he still insists that the minor child should not attend those schools. In paragraph 47.1 of what he calls his counter-application the respondent has now decided to come up with some startling information which was never disclosed before. He now says that J…… has subsequently developed significant psychological distress as evidenced by the fact that he has begun soiling himself when he is with the applicant and which thing he has recently started doing. He further says that J…… has also exhibited other signs of psychological distress which started in late July. The respondent has not furnished any medical or reliable evidence to back this version. It is clear that the respondent has set himself

on a path of disregarding recommendations of the Case Manager which recommendations were made an order of court and in my view this is a flagrant disregard and contemptuous behaviour on the part of the respondent and this should not be allowed.

[27] The reality of the issue is that Dr Roux had informed both the applicant and the respondent that it was her intention as the Case Manager that J…… should change schools and this would happen at the beginning of 2015 academic year and because of this the respondent notified the Cottage M……. School that J…….. would be leaving at the end of the first term in 2015. It is now surprising that he now seems to be changing his mind without any reasonable cause.

[28] In my view it is clear that the report of Dr Roux which was made an order of court should be complied with until such time that it shall be set aside by the High Court. This has not happened the respondent is engaged in an effort to defy this court order.

[29] The fact that the respondent has said that Dr Roux has not given any reason to justify a change of school for J…….. in mid 2015 is without any substance in the light of his own actions. His description of Dr Roux's reasons as being irrational is equally without any substance.

[30] In my view the application by the applicant Anspach Heidi should succeed and the counter-application by the respondent is hereby dismissed with costs.

[31] I accordingly make the following order:

(i) The respondent is ordered to henceforth ensure that the minor child J……. B…… O…… attends the S….. G……. Playschool situate at 54 on every week day on which J…… is in Respondents care between now and the end of the school year (unless J…… is certified by a medical doctor to be ill) and to this end that the respondent timeously transports Josh to the aforesaid playground school when J……. is in his care.

(ii) As from January 2016 and provided Josh is offered a place at M….. M…… W…… School situate at 2……. B…… D…… the respondent shall ensure that J……. attends that school on every weekday on which J…… is in his care (unless J…… is certified by a medical doctor to be ill). He shall further ensure that J……. is timeously transported to the said school when in his care.

(iii) The respondent shall further not in any manner jeopardise J……'s chance of being offered a place at M……. M….. W….. School by way of written or oral communication to the school which directly or

indirectly negatively affects J…..'s chances of being offered a place at that school.

(iv) The respondent shall contribute 50% of all costs associated with J……..'s education including but not limited to deposits, levies, tuition fees, books, stationary, uniforms, extra mural activities tours and outings.

(v) The respondent is ordered to pay the applicant's cost of this application on an attorney and client scale

DATED at JOHANNESBURG this 8th day of SEPTEMBER 2015.

_____

M A MAKUME
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING	25 AUGUST 2015
DATE OF JUDGMENT	8 SEPTEMBER 2015
APPLICANT'S COUNSEL	ADV ANTHONY BISHOP

INSTRUCTED BY	CLARKS ATTORNEYS Block A2 Impala Road Chislehurston Johannesburg Tel: 011 783 1066 Ref: Mrs B Clark
RESPONDENT'S COUNSEL	IN PERSON