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

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

3/5/2019
DATE

SIGNATURE

CASE NUMBER: 12412/2019

In the matter of

RODEAN SCHOOL NPC (SOUTH AFRICA) **APPLICANT**

and

BS **FIRST RESPONDENT**

YS **SECOND RESPONDENT**

JUDGMENT

DOSIO AJ:

INTRODUCTION

[1] This is an urgent application in terms of Uniform Rule 6 (12) for final relief, interdicting and restraining the first and second respondent, from bringing their minor daughter, (hereinafter referred to as L), to the applicant's premises, for any purpose whatsoever,

from the 6th of May 2019. In addition directing that the first and second respondents remove L from the applicant's premises permanently.

[2] The respondents were unrepresented at the stage when the answering affidavit was filed. However, counsel did appear *pro bono* to assist them. Although counsel representing the respondents at the inception of the argument stated that the matter on the merits would not be opposed, and that only the question of urgency would be dealt with, the fact remains that a defence of inability to pay was alluded to by the respondent's counsel and due to the fact that the application was initially opposed by both the first and second respondent, I deem it necessary to deal with both the issue of urgency and the issues raised by the respondents in their answering affidavit. The respondent's answering affidavit states that the application is unfair based on the following three facts, namely, that;

1. There is a dispute of facts;
2. There is non-compliance with section 29(3) of the Constitution of the Republic of South Africa, and;
3. Expelling or excluding L for unpaid school fees for the year 2019 will be unfair.

[3] The applicants seek urgent relief with effect from the 6th of May 2019, which is the commencement of the applicant's second school term.

[4] After considering the argument on urgency I find that it is urgent and I accordingly proceed to deal with the merits.

BACKGROUND

[5] On the 3rd of March 2010, the respondents entered into a contract with the applicant, governing the terms on which the applicant would educate L in exchange for the payment of fees.

[6] In terms of paragraph 3 of the contract, the respondents undertook to pay fees within three weeks of receiving the termly account and in terms of paragraph 5, either party could terminate, without notice, where there had been a material breach by the other party, and such termination would be on one term's notice.

[7] In every year that the respondent's daughter was enrolled at the applicant's premises there were defaults in the amounts owed to the applicant by the respondents.

According to the applicant, these defaults occurred in 2011, 2012, 2013, 2014, 2015, 2016, 2017 and in 2018.

[8] E-mails were sent from the second respondent dated the 23rd of November 2018, the 14th of January 2019 and the 19th February 2019 stating that payments had been made to the applicant, however even though there were attachments to the e-mails showing the purported payments, according to the applicant no such payments were ever received.

[9] It is common cause that no payment has been made in respect to the fees owed for 2019.

[10] On the 15th of March 2018, due to the respondent's repeated late and non-payment of fees, the applicant terminated the contract with effect from the end of 2018.

[11] It was argued by the applicant's counsel that non-payment of fees is a material breach of the contract entered into between the applicant and the respondents, entitling the applicant to terminate summarily. Notwithstanding this breach, the applicant afforded the respondents an opportunity until the end of 2018 to find alternative schooling for L. The respondents were accordingly given two clear terms' notice.

[12] The respondents have not taken issue with the lawfulness of the termination of the contract. They have accepted that the contract was lawfully terminated but have however attempted to persuade the applicant to reverse its decision or to enter into a new agreement.

[18] In January and February 2019, attempts were made by the applicant to enter into a new contract with the respondents, but the parties failed to do so, as the respondents were unable to meet the conditions imposed by the applicant. The applicant's conditions were firstly, that the respondents had to pay the arrear school fees of R91790,26 relating to 2018, secondly, the respondents had to provide the applicant with an acceptable proposal as to how they would pay the future school fees and thirdly, that the respondents had to pay an amount of R220 967,00 in respect to the 2019 annual fees.

[19] The respondents in their answering affidavit state that they paid the outstanding amount of R91 790,26 relating to the arrears for 2018, however as to the further conditions imposed by the applicant, the respondents disagree that there were further conditions. The respondents contend that at the meeting held on the 11th of January 2019 they had not agreed to pay the annual fees for 2019 in full. The respondents aver in their answering affidavit that they usually pay for each term and the first term would only end on the 12th of April 2019. This is dispute of fact raised by the defendants.

[20] The respondents further contend in their answering affidavit that L's circumstances must be considered and that any decision to suspend or expel L during the school term must satisfy due process. This includes adequate warning prior to the suspension or exclusion and a provision to make arrangements to settle fees.

[21] The respondents contend the applicant did not give them adequate time to pay the fees as they paid outstanding fees for 2018 in January 2019 and the applicant issued a notice of motion before the end of the first term when the respondents were about to make payment to the applicant.

[22] It is common cause that even though since the 1st of March 2019 the applicant has requested the respondents to refrain from bringing L to the applicant's premises, this request remains unheeded.

[23] The applicant has not physically prevented L from entering its premises, nor has it prevented L from participating in school or co-curricular activities, for fear of stigmatising or humiliating her.

[24] It is because of these prevailing circumstances that the applicant has sought the intervention of this court.

EVALUATION

[25] It is trite that in order to claim relief by way of a final interdict it is incumbent upon the applicant to demonstrate that it has a clear right to the relief sought. In addition it must be shown that there is an injury which has been committed, or for which there is a reasonable apprehension that it will be committed. In addition that there is no other effective remedy available.

Clear right

[26] The relationship between the applicant and the respondents is contractual. Based on the events described *supra*, the applicant has exercised its right to terminate the contract on notice, which it did on the 15th of March 2018 with effect from the end of 2018. It is clear to this court that the applicant has a clear right to exclude any learner where there is no valid contractual relationship with the parents of a learner.

Reasonable apprehension of harm

[27] The applicant gave the respondents notice not to bring L to its premises from the start of 2019. Although the parties engaged in *bona fide* negotiations to enter a new contract, this failed and on the 26th of February 2019, the applicant informed the respondents that they should not bring L to its premises from the 1st of March 2019. On the 4th of March 2019, the applicant's attorneys sent a letter to the respondents demanding that they stop bringing L to its premises. Despite the absence of a contractual basis to do so, and in the face of repeated requests by the applicant the respondents refrain from doing so.

[28] From the past actions of the respondents there is a reasonable apprehension that the parents will resume bringing L to the applicant's premises at the start of the next school term which is to commence on the 6th of May 2019 unless this Court grants an order preventing them from doing so.

No other satisfactory remedy

[29] The applicant is an independent, fee-paying school which receives no subside from the State. It cannot be forced or be expected to provide free education to L, especially since the applicant has repeatedly requested the respondents to refrain from bringing L to the applicant's premises for schooling.

[30] Nor can it be expected of the applicant to continue educating L for a further four years and then sue the respondents for outstanding fees once this period has ended, specifically in light of the fact that there is currently no contract between the applicants and the respondents. The applicants accordingly have no relief in due course due to no contract being in place with the respondents and have no legal recourse going forward. The fees for 2019 have not yet been incurred as the academic year has not yet ended. Accordingly, the applicant can only bring an application at the end of 2019.

[31] The respondents have not proposed any solid proposal as to how they will be able to afford to pay the fees for the first term, which have now been incurred, or how they envisage to pay for the remaining two terms. At no stage in the answering affidavit is it suggested that the first and second respondent can come up with the outstanding amount of R R220 967,00.

[32] Although the applicants have let this matter hang in the air since January 2019, when it was already clear that the first and second respondent would not be able to pay the amount of R220 000, so too have the parents abused the courtesy offered by the applicant to accommodate L in its premises. The applicant's goodwill to accommodate L is to be lauded, and the Courts should not allow parents to take advantage of such similar situations.

The issue of fairness

[33] Dealing with the issues raised in the respondents answering affidavit I would like to deal firstly with the assertion that this application is unfair.

[34] Fairness in the absence of an existing contract between the applicant and the respondent is not a basis to be considered. This is not a situation where L is being expelled for non-payment of school fees due to a breach of an existing contract. In the absence of a contract, the respondents have no right to bring L to the applicant's premises.

Dispute of fact

[35] As regards the respondents allegation that there is a dispute of fact, the only alleged dispute of fact raised by the respondents, concerns two of the three conditions which the applicant proposed, before it would consider whether to enter into a new agreement with the respondents or not.

[36] An applicant who seeks final relief on notice of motion must in the event of conflict, accept the version set up by the opponent unless the latter's allegations are, in the opinion of the Court, not such to raise a real, genuine or *bona fide* dispute of fact, or are so far-fetched or clearly are so untenable that the court is justified in rejecting them merely on the papers. (see *Plascon-Evans paints Ltd v van Riebeeck Paints (Pty) Ltd* [1984 93) SA 623 (A) at 634E-635C].

[37] A real, genuine and *bona fide* dispute of fact can only exist where the court is satisfied that the respondents seriously and unambiguously addressed the fact disputed. A bare denial, such as in this application, that the respondents never agreed to the second or third condition imposed by the applicant is not sufficient. This statement by the respondents is contradicted by the correspondence between the applicant and the second respondent. It is clear from the correspondence that the respondents accepted that full payment of the fees for the 2019 school year had to be effected by the 15th of January 2019 before a new contract could be entered into between the parties for L's re-admission to the school.

[38] The alleged dispute of fact is neither material nor relevant to the relief sought in this application. The respondents answering affidavit does not raise anything of substance as it is merely a plea for more time to get their affairs in order. The material facts are not in dispute and accordingly I find that the alleged dispute of fact is so far-fetched and untenable that I am justified in rejecting it on the papers. The respondent's counsel in fact stated at the commencement of the proceedings that the merits were not opposed.

Non-compliance with section 29 (3) of the Constitution of the Republic of South Africa

[39] As regards the respondents' contention that there has been non-compliance with section 29(3) of the Constitution of the Republic of South Africa, and that expelling or excluding L for unpaid school fees for the year 2019 will be unfair, I would like to state as follows;

[40] Section 29 (1) (a) guarantees the right of everyone to a "basic education". As stated by the learned Cachalia JA in the matter of *AB and Another v Pridwin Preparatory School and Others* (1134/2017) [2018] ZASCA 150 (1 November 2018) at paragraph [38], "This is an obligation on the State not one imposed on private institutions". Further at paragraph [39], "Section 29 (3) expressly recognises the right to establish and maintain independent schools, which is what Pridwin is. And though it provides a standard of education not inferior to a public school it is not providing a basic education as envisaged in section 29 (1) (a). It would only be doing so if it was contracted by the State for this purpose, as explained in *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (4) SA 179 (CC) [51]-[53]. It would then be under a positive duty to do so because it was performing a constitutional function. Section 29 (1) (a) cannot therefore be used to impose a duty on a private school."

Further at paragraph [42] "...Pridwin had no constitutional obligation...to admit the appellant's children. The children also had no constitutional right to attend this school. They were admitted after their parents had signed contracts with the school, ...And their right to remain at the school flowed from these contracts."

[41] The applicant has no constitutional obligation to continue to accommodate L where the respondents are unable to afford the school fees.

[42] The applicant has gone to great lengths to accommodate the best interests of L. It has provided a lengthy notice of period within which the parents could have secured alternative schooling, in order to secure the best interests of L.

[43] As explained in the applicant's founding affidavit, the applicant approached the Principal of Parktown Girls High School in an attempt to find a place for L at that school. Although it was informed that the school is full it would try to accommodate L. The respondents would still however have to apply in the normal way. At a meeting held with the respondents on the 26th of February 2019 the second respondent stated that she was not prepared to contemplate taking L to Parktown Girls High School and insisted that she stay at the applicant's premises.

[44] It is clear to this Court that if the first and second respondent are not interdicted from bringing L to the premises of the applicant, the same scenario will continue to occur until the end of the year.

[45] From a pure legal perspective it does not help to continue bringing L back to the applicant if the first and second respondent do not have the means to continue keeping L in the applicant's premises.

[46] The relationship between the applicant and the respondents was governed by contract. Without a contract the respondents have no right to bring L to the applicant's premises.

[47] There is a possibility that Parktown Girls High School can accommodate L which may fall within the means of the first and second respondent. This will ensure that L will not be deprived of an education.

[48] I accordingly find in favour of the applicant.

COSTS

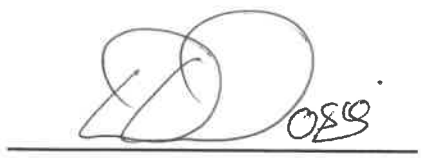
[49] Although the applicants have sought a punitive order against the first and second respondent, I do not believe that such an order is warranted in these circumstances. The advocate arguing the matter on behalf of the first and second respondent was doing this on a *pro bono* basis.

[50] I can see no reason to deviate from the general rule. Costs are to follow the result.

ORDER

[51] In the premises the following order is made;

1. Ordering that the forms and service provided for in the Rules of Court be dispensed with and that the matter be heard as an urgent application in terms of Rule (12) of the Rules of this Court.
2. Interdicting and restraining the first and second respondents from bringing their minor daughter, L, to the applicant's premises for any purpose whatsoever from the 6th of May 2019;
3. Directing the first and second respondent to remove their minor daughter L from the applicant permanently;
4. Directing the first and second respondent to pay the costs of this application, the one paying the other to be absolved.
5. Directing that, subject to authorization by a Court in exceptional circumstances, the publication of the identity of, and any information that may reveal the identity of, the first and second respondents, and their minor daughter, is prohibited.



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ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the Applicant	**Adv A.E. Franklin**
On behalf of the first and second respondent	**Adv G. Maphanga**

Heard on the 30th of April 2019
Judgment handed down on the 3rd of May 2019