REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 31480/2019

DELETE WHICHEVER IS NOT APPLICABLE	
1.REPORTABLE:	YES/NO
2.OF INTEREST TO OTHER JUDGES:	YES/NO
3.REVISED	
.....	.....
DATE	**SIGNATURE**

In the matter between:

M S	Applicant
and	
L S (BORN L)	First Respondent
MANFRED JACOBS	Second Respondent

JUDGMENT

DIPPENAAR J

[1] The applicant launched an urgent application on Friday 24 January 2020, enrolled for hearing on 28 January 2020 against his wife and her attorney of record, seeking an order in the following terms:

a. *"That the first respondent's required consent pertaining to the admission of the minor children (of the applicant and first respondent) S and C S to the […] Primary School in Northmead Benoni, be relinquished and the school be allowed to enroll both children with the applicant's consent only;*

b. *That the applicant be allowed to take S for counselling with a registered psychologist and C to play therapy with a registered psychologist and consent from the first respondent be disposed of.*

c. *That there is a conflict of interest in the second respondent representing the first respondent;*

d. *That the second respondent is no longer allowed to act for the first respondent;*

e. *Costs of the application on the attorney and client scale against the first respondent and that this cost be shared between the first and second respondent. …except in the event that the second respondent immediately withdraws as attorney of record for the first respondent, in which case no costs order is sought against the second respondent.*

[2] The application did not comply with the practice directives in relation to urgency, nor did the papers make out any case for the urgency with which the application was brought. I agree with the respondents' contention that the relief sought against the first respondent should have been launched prior to the commencement of the academic year on 15 January 2020 and that the relief sought against the second respondent lacks urgency. These factors have a bearing on the costs order I intend to grant.

[3] I would have been justified in striking the application from the roll for lack of urgency as the applicant failed to comply with the prescripts of the practice manual and failed to factually support the urgency he contended for. I was however persuaded not to do so and to deal with the application on its merits, as the application pertains to the best interests of the two minor children of the applicant and first respondent in relation to their care, more specifically their schooling

[4] It would in my view not be in the interests of justice to adjudicate on the application piecemeal and necessitate further legal costs being incurred, hence I also allowed argument on the relief sought against the second respondent.

[5] The children in issue are S, who is presently 12 years of age and in grade 7 and C, who is presently six years of age and due to commence grade 1. Up to 2019, both children were enrolled in B, a private school, which S attended since inception of her schooling and C for the past three years. The applicant seeks to enroll the children in a government school, A Primary School in Benoni ("A"). The first respondent objects to such course of action on the basis that it is not in the children's best interests. Neither of the parties resides in Benoni.

[6] The applicant and first respondent are currently involved in acrimonious divorce proceedings. It is undisputed that the parties have been contemplating divorce proceedings for the past twelve years and that they reconciled on various occasions. It is further common cause that the second respondent was involved in mediation proceedings aimed at settling the divorce proceedings prior to the commencement of the divorce proceedings. On the respondents' version the second respondent at all material times represented the first respondent in the divorce proceedings.

[7] It is undisputed that on 4 October 2019, the applicant collected the minor children from school and that C, but for a few days, has not been returned to school. It is further not disputed that the applicant kept S out of school for a week at a time. This triggered the first respondent to launch a rule 43 application.

[8] Pursuant to the rule 43 application, an interim order was granted by agreement on 12 December 2019. In terms of this order, inter alia, the primary residence of S would be with the first respondent, whereas C's primary residence would be with the applicant, pending investigation and written recommendations by a psychologist appointed in terms of the order, Dr Lynette Roux. Dr Roux was directed to conduct a full and comprehensive assessment of, and investigation into the best interests of the minor children, more particularly regarding residence and contact. Dr Roux has not yet commenced her investigations.

[9] The applicant's case against the fist respondent is predicated on the contention that the first respondent has failed to enroll S in school, despite the academic school year commencing on 15 January 2020. This notion was dispelled in the answering papers wherein it became clear that the first respondent has borrowed the funds necessary to pay S's arrear school fees and that she was enrolled and commenced the academic year at B on 15 January 2020. The first respondent objected to the relief sought by the applicant on the basis that it was in the best interests of S to finish her primary schooling in a familiar environment and not to be removed to a new school.

[10] It was however only during the course of argument, that the applicant relented and abandoned the relief sought in relation to S. He conceded to allow S to remain in B to finish her final year of primary school. This concession was belatedly made and despite receiving the answering papers, the applicant persisted in the application to seek consent to remove her to A. The applicant has persisted in the relief sought in relation to C.

[11] It is undisputed that the genesis of the schooling issue lies in the applicant's failure to pay the school fees of the minor children since July 2019, resulting in the school's refusal to accept the enrolment of the children for the 2020 academic school year, absent payment of the outstanding school fees of some R65 000. Despite the applicant's undertaking to resolve the payment issue with B, he failed to do so. It is not the applicant's case that he lacks the financial means to do so.

[12] This position is exacerbated by the acrimonious attitude adopted by the applicant in relation to B, resulting in correspondence from the school's legal representatives and a decision from the school to refuse the applicant access to the school's premises. During argument Mr Vermaak the applicant's attorney of record, advised that the applicant was contemplating instituting legal proceedings against the school. The applicant's stance is that he blatantly refuses to allow C to attend B as a result of his disputes with the school.

[13] This stance has the effect that the minor children are separated even further as their primary residence is in different homes, pending the determination of the r43 application.

[14] The first respondent objects to the relief sought on the basis that it would not be in C's best interests to be further separated from his sister. Her counsel pointed out that as B is a private school and A a public school, the school holiday periods may well be different, resulting in the siblings spending even less time with each other. It is undeniable that a lack of stability may well have a detrimental effect on C, more so in the face of the divorce proceedings and what is clearly a traumatic experience for both.

[15] Both parties allude to the fact that the divorce proceedings are taking a toll on C. The first respondent complains that the applicant is breaching the interim order relating to her access to C and that she has very little contact with him. On the applicant's version, C refuses to see his mother and is in need of play therapy to resolve his issues. It is also not disputed that S has been traumatised.

[16] S23 of the Children's Act[1] ("the Act") regulates the care of minor children. In terms of s29(5) of the Act, a court is afforded certain powers, including the investigation of certain issues, as regulated by s29(5)(a) and (b). These provisions are underpinned by the best interests of the children.

[11] 32 of 2005

[17] I am of the view that it would be in the best interests of the children to expressly widen the scope of the investigation which Dr Roux has been directed to undertake, (insofar as it is not already included) and to also include an investigation into whether it is in the children's best interests to have their primary residence separated and whether they should attend different schools. Ancillary thereto would be the identification of suitable schools absent agreement by their parents.

[18] These issues cannot be finally determined in the present proceedings and I intend granting an appropriate interim order pending the finalisation of the investigation and the r43 application in the best interests of the minor children.

[19] In considering the best interests of the minor children, I have considered the principles enunciated in s6 of the Act. I have carefully considered these principles and the relevant facts.

[20] It is significant that the source of the dispute is the applicant's failure to recognise the impact of his conduct has on the minor children. The initial dispute with B arose as a result of the applicant's failure to pay arrear school fees, despite it being undisputed that he is well able to afford it. This situation must have resulted in grave embarrassment, especially for S. The subsequent dispute with the school did little to improve the situation. The applicant has not presented any other evidence why it would not be in the children's best interest to attend B.

[21] The stance adopted by the applicant is in my view unreasonable and fails to consider the best interests of the minor children, who are already separated pending the determination of the r43 proceedings. The parties should be mindful of allowing the minor children as much contact as possible, rather than to diminish such contact even further.

[22] It is undisputed that C has effectively not been in school since October 2019. The applicant did not illustrate that he took all reasonable steps to ensure his attendance in school during the remainder of 2019 or have him enrolled in a school in 2020. This position is clearly untenable and breaches C's constitutionally entrenched rights.

[23] The present application was belatedly brought some two weeks after the commencement of the school year. If granted, its effect may well endure beyond the determination of the r43 application and may well have an impact on its result. The first respondent's refusal to pay the outstanding school fees despite his undisputed financial ability to do so, evidences a pandering to his own interests rather than the best interests of his son.

[24] Although the applicant recognises that S and C may require therapy, he has not sought to discuss these issues meaningfully with the first respondent and come to a mutually suitable arrangement on the issue. I am not persuaded that the order sought by the applicant should be granted at this stage, as it may well lead to additional conflict if the applicant pursues a unilateral course of action. In my view, Dr Roux is best suited to investigate this issue and to make recommendations in her report, to be considered in the pending r43 proceedings.

[25] S29(3) of the Act empowers a court to grant an order unconditionally or on such conditions as it may determine, or to refuse the application, subject to the important rider that a court may grant an application only if it is in the best interests of the child.

[26] In my view, it would not be in the best interests of either of the minor children to grant the applicant the relief sought. It follows that the application must fail.

[27] In the interim and pending the finalisation of the r43 application, it is not in C's best interests not to be enrolled in school. No evidence was presented that it would be detrimental to his interests to attend B, where he has already spent three pre-school

years. It would in my view be in his best interests that he forthwith be enrolled in that school so that he does not fall behind his peers in his development, at least until the finalisation of Dr Roux's investigations and report and the determination of the r43 application.

[28] The applicant, if a reasonable attitude is adopted, is well able to resolve his differences with the school and to effect a reconciliation if he acts in C's best interests rather than his own. He is further well able to afford payment of whatever fees remain outstanding and to comply with his earlier undertaking to do so. The applicant will not be unduly prejudiced by doing so, whereas the prejudice to C if payment and reconciliation is not effected is manifest. In these circumstances, the best interests of C must trump those of the applicant.

[29] I turn to the relief sought against the second respondent. There are disputes on the papers regarding the representation by the second respondent of the respective spouses, the first respondent and the applicant.

[30] The first respondent contends that the second respondent was at all times her attorney of record prior to the institution of the divorce proceedings. This is confirmed by the second respondent, who contends that he never represented the applicant in relation to the divorce and at all times, to the knowledge of the applicant, represented the first respondent.

[31] The applicant contends that by virtue of the involvement of the second respondent, and as he acted for him and certain other family members over the years in other matters, the second respondent is conflicted as he was privy to confidential information during the course of the mediation proceedings wherein he consulted with both parties. No particularity is provided of exactly what information this entailed and the applicant describes it in broad terms as "financial and confidential".

[32] The second respondent contends that at all times he obtained information and instructions from the first respondent, the wife of the applicant, and that to the knowledge of the applicant, he represented his wife. This is confirmed by the first respondent. He further avers that he took legal advice from counsel regarding the alleged conflict of interest and received advice that no conflict existed.

[33] The application against the second respondent must fail for various reasons. First, the applicant has on the papers failed to establish a proper case for the relief sought. The relief sought by the applicant is final in nature and the application must thus be adjudicated on the principles enunciated in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [2]. Applying these principles and considering the application on the basis of the respondents' version together with the admitted facts alleged by the applicant, the applicant has failed to establish his case.

[34] Secondly, the relief presently sought by the applicant is flawed and has no solid foundation in law. During argument, the applicant could not refer me to any authority supporting his entitlement to the declaratory relief sought or the removal of the second respondent as legal representative of the applicant. He invited me to develop the common law on the issue, despite no proper case for such relief having been made out on the papers. I decline to do so.

[35] The day after the hearing and after judgment had been reserved, an email was received from the applicant, placing reliance on a judgment of the Supreme Court of Appeal in *Wishart and others v Justice Blieden NO and Others*[i] in support of his contentions[3].

[2] 1984 (3) SA 623 (A) 634-635 and National Director of Public Prosecutions v Zuma, Mbeki and Another Intervening 2009 (2) SA 277 (SCA) para [26]
[3] My attention was drawn to the contents of paras32, 34 and 37 of the judgment by Mr Vermaak

[36] In *Wishart*, reliance was placed on the principle enunciated in *Robinson v van Hulstenyn Feltham and Ford*[4], being that our law affords protection to the former client of a legal practitioner such that he or she will be precluded from acting against a former client where the practitioner has confidential information about the former client that may be misused[5]. In Robinson, "confidential information" is defined as: *"the most intimate circumstances of his client's case"*.

[37] In the present context, a fundamental enquiry is thus whether the second respondent had confidential information regarding the applicant (which emanated from the applicant himself and not from his wife, the first respondent). There is a dispute on this issue which is not resoluble on the papers. The applicant's case is framed in broad terms and it cannot intelligibly be discerned from the papers what information he is referring to or assessed whether such information is indeed confidential.

[38] Moreover, various important factors which require consideration were not addressed in the application papers , such as "*the countervailing considerations relating to a client's right to choose his or her legal practitioner and the latter's right to choose a client, are important factors to be taken into account"*[6]

[39] I am not satisfied that a proper case has been made out on the papers, either factually or legally, for the declaratory and other relief sought. No case is made out on the papers for any interdictory relief, insofar as same may be competent. I agree with the submission of respondents' counsel that the applicant's remedies lie elsewhere and that there are alternative and adequate remedies at his disposal to pursue.

[40] It follows that the relief sought against the second respondent must fail.

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[4] 1925 AD 12 at 21, referred to in paragraph 32 of Wishart supra
[5] Para 48
[6] Para 38

[41] It is regrettable that the second respondent has resorted to sarcasm in his correspondence and that the attorneys appear to have adopted the acrimony shared by their clients. It is not in the best interests of the parties nor importantly their minor children that this acrimony be perpetuated.

[42] The normal principle is that the costs follow the result. There is no basis to deviate from this principle. The respondents seek a punitive costs order against the applicant. Considering the conduct of the applicant and the approach adopted by him in relation to these proceedings, a punitive costs order costs order is warranted.

[43] I grant the following order

[1] The application is dismissed.

[2] Dr Lynette Roux is directed to conduct the following investigations pertaining to the best interests of the minor children and report on such issues in addition to the investigations as directed in the order dated 12 December 2019 in the proceedings under case no 31480/2019:

[2.1] the nature and extent of the separation of the minor children and the effect of the enrolment of the minor children in different schools on them;

[2.2] whether either of the minor children require therapy and, if so, to make recommendations regarding the nature of the therapy required for such child;

[2.3] whether it is in the best interests of the minor children to have their primary residence with different parents;

[2.4] whether it is in the best interests of C that he continue with his schooling at (1) B or (2) A Primary School or (3) another school identified by Dr Roux;

[3] Pending the finalisation of the investigation and report by Dr Lynette Roux and the rule 43 proceedings under case number 31480/2019, C is to remain at B and the applicant is directed to take all steps necessary to ensure his enrolment in the said school forthwith;

[4] The applicant is directed to pay the costs of the first and second respondents, on the scale as between attorney and client.

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EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	:	29 January 2020
DATE OF JUDGMENT	:	05 February 2020
APPLICANT'S COUNSEL	:	Mr M Vermaak
APPLICANT'S ATTORNEYS	:	Martin Vermaak Attorneys Mr Jacobs
RESPONDENTS' COUNSEL	:	Adv N Nortje
RESPONDENTS' ATTORNEYS **ATTORNEYS**	**:** :	Manfred Jacobs Attorneys Mr M Jacobs

[i] [2014] ZASCA 120 (19 September 2014) paras 32, 34 and 37