

REPUBLIC OF SOUTH AFRICA

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

CASE NUMBER: 43856/2021

REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED. NO
DATE: 13 January 2022

In the matter between:

M[....] M[....]

First Applicant

R[....] M[....]

Second Applicant

and

**THE COLLEGE OF MODERN MONTESSORI,
LINBRO PARK**

First Respondent

ADAM DARBY

Second Respondent

ALISON DARBY (previously GREENWOOD)

Third Respondent

**THE DIRECTORS OF THE COLLEGE OF
MODERN MONTESSORRI, LINBRO PARK**

Fourth Respondent

**THE MEMBER OF THE EXECUTIVE COUNCIL
FOR EDUCATION, GAUTENG**

Fifth Respondent

**THE MEMBER OF THE EXECUTIVE COUNCIL
FOR SOCIAL DEVELOPMENT, GAUTENG**

Sixth Respondent

JUDGMENT ON COSTS

[1] On 14 September this court granted an order, made by consent, that:

...

2. The first, second, third and fourth respondents ("the Montessori respondents") are ordered to allow the applicants' minor child, who is currently in Grade 2, to return to the College of Modern Montessori (the school) with immediate effect from 14 September 2021, to complete Grade 2 for the remainder of the 2021 academic year;

3. The Montessori respondents are interdicted and restrained from making any attempts at removing, suspending or expelling the applicants' minor child (who is currently in Grade 2) from the school for the remainder of the 2021 academic year without good and lawful cause to do so, and without following a proper process; and

4. Costs to be determined by the Court on 15 September 2021 at 14h00.

[2] I had agreed to enroll the matter solely because it concerned a minor child's education.

[3] The issue of costs was reserved and the parties were requested to file heads of argument, which they did.

[4] The applicants contended that the granting of the order means that the applicants achieved substantial relief as a result of their application and costs should thus follow the result. They also sought costs on an attorney and client scale because they submitted that the conduct of Mr Darby, who was acting on

behalf of the Montessori respondents, prior to the launch of this application, was unlawful, and because of the alleged ‘falsehoods’ that he advanced before this Court.

[5] On the other hand, the Montessori respondents contended at the hearing that the matter had become settled and as such the matter was no longer urgent. They submitted that the applicants should be pay punitive costs.

[6] Although Mr Darby stated in the answering affidavit that no final decision had been taking on the expulsion of the children,¹ this appears not to be correct. Following an email received from the first applicant on 7 September 2021 complaining about the school, on Wednesday 8 September 2021, Mr Darby expelled the applicants’ children from the school. The applicants contended that Mr Darby informed them that the decision was final and the school would no longer be able to accommodate the children. Mr Darby offered to provide the applicants with a report card and transfer card for their daughter.

[7] The applicants submitted that this was prejudicial to their daughter. The applicants requested that their daughter remain at the school until the end of the 2021 academic year. On Thursday, 9 September 2021, the applicants’ attorney of record (MBA) addressed a letter demanding that Mr Darby withdraw his decision and allow the children to return school on Friday 10 September 2021. MBA drew Mr Darby’s attention to the fact that his decision was in breach of section 28(2)² and section 29(1)³ of the Constitution. MBA requested Mr Darby to furnish them with a response by 17h00 that day. He did not do so. He however sent a meeting request to the applicants to meet on Monday 13 September 2021.

[8] Also on 9 September 2021, at 17h29, MBA sent a follow up email to Mr

¹ The applicants had two children at the school, both of whom were expelled. They had however agreed that the younger child would be removed from the school

² A child's best interests are of paramount importance in every matter concerning the child.

³ (1) Everyone has the right— (a) to a basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

Darby emphasising the urgency of the matter. He stated that the applicants' daughter needed to return to school on 10 September 2021 and not only on Monday, 13 September.

[9] Mr Darby responded to MBA informing them that he needed time to seek legal advice and he also had to attend a school function. He would provide a substantive response by close of business on 14 September 2021. In the interim, his decision and the subsequent reconsideration of the Directors of the school to expel the children would stand.

[10] Later that afternoon, MBA sent a further letter to Mr Darby rejecting his response. They informed him that, given his attitude, they had no option but to launch urgent proceedings.

[11] On Saturday, 11 September 2021 at 14h18, MBA served the unsigned papers on the respondents. At 16h55 the applicants served the signed papers on the respondents. The matter was set down for Tuesday 14 September 2021.

[12] The applicants attended the meeting on Monday 13 September 2021. They submitted that the outcome of the meeting was inconclusive as Mr Darby had stated that he may allow the applicants' daughter to return to school, but first he needed to discuss this with the attorneys. He did not indicate when he would contact his attorneys or when he would allow her to return to school, in the event that he decided to reverse his decision to expel her.

[13] Later on 13 September 2021, Mr Van der Berg (VDB), the Montessori respondents' attorney, addressed a letter to the applicants stating that the matter had become settled at the meeting. MBA responded to this letter, disputing that the matter had been settled.. They submitted that the letter from VDB did not provide an undertaking not to expel the applicants' daughter without proper process once again, nor did the Montessori respondents state whether they were willing to agree to an order of court in respect of the pending application, and if so, on what basis. MBA requested VDB to revert with instructions from the Montessori respondents. VDB did not respond but filed a practice note in which

he declared that the matter had been settled, it was not urgent, and that the only issue to determine was costs. In the same practice note, VDB stated that the application should be dismissed on its merits with punitive costs.

[14] This, according to applicants, clearly demonstrated that the matter had not become settled. On 14 September 2021, MBA sent an email to VDB asking if the applicants' daughter was allowed to come back to school that morning. MBA further asked VDB if his clients were amenable to settling the dispute on the terms of the draft order that was attached to his email.

[15] According to the applicants, VDB refused to entertain any further settlement negotiations and did not confirm if the applicants' minor daughter was allowed to return to school on 14 September, or at all. At the hearing, VDB informed the court that the matter had been settled save for costs, and he sought punitive costs against the applicants.

[16] The applicants contended that VDB's practice note, refusal to engage and failure to confirm whether or when their daughter could return to school that morning, showed that the matter had not been settled. Thus the applicants contended that they were left with no alternative but to approach the Court for an order compelling the Montessori respondents to permit their daughter to attend school.

[17] At the hearing of the matter, VDB claimed that the school had expected the applicants' daughter to arrive that morning following the agreement reached at the meeting. The applicants' counsel repeated their submissions that the matter had not been finally settled. They were not informed when she could return or whether the other parts of the order would be agreed to. Having made their submissions, the Montessori respondents then agreed to the order which I granted.

Costs

[18] The applicants contended that the Montessori respondents violated the constitutional rights of their children and refused to reconsider their

decision, with the required urgency. The applicants accordingly contended that the Montessori respondents' conduct had been 'unlawful, unapologetic and reprehensible'. They submitted that the conduct of the respondents met the requirements of a punitive costs order.

[19] The issue of the expulsion of a child from a school was dealt with in *AB and Another v Pridwin Preparatory School and Others*⁴, where the Constitutional Court stated as follows:

'Section 28(2) of the Constitution

[143] The "overarching principle" in matters involving children's rights and interests is that their best interests must be considered. This "overarching principle" has been codified in the provisions of the Children's Act. ...

[153] ... section 28(2) requires that a fair process be followed by an independent school when it takes a decision that affects the rights of children to a basic education... That the best interests of the children have been given due consideration should be objectively evident.

[154] Section 29(1)(a) of the Constitution provides that "everyone has the right to a basic education". Section 29(1)(a) is an overarching right to basic education that applies to all persons. This Court has held that the right to a basic education is enjoyed by children at public and independent schools alike...

[157] The rights set out in section 29 are not mutually exclusive; to the contrary, within the private education sphere, they are cooperative. Section 29(1)(a) speaks to the right of children to be educated and section 29(3) speaks to the freedom given to independent schools to provide education. In providing that education, independent schools are to fulfil their negative obligation in terms of section 29(1)(a) and not obviate children's rights to basic education. In terms of section 29(3), they also assume a positive obligation, upon establishment of an independent school, to maintain standards not inferior to that of comparable public schools...

⁴ *AB and Another v Pridwin Preparatory School and Others* (CCT294/18) [2020] ZACC 12; 2020 (9) BCLR 1029 (CC); 2020 (5) SA 327 (CC) (17 June 2020)

[194] ... the focus ought to have been whether the decision to terminate the Parent Contract was consistent with the rights and best interests of the children and how best to protect their interests.' [footnotes omitted]

[20] In *Pridwin*, as in this case, the Montessori respondents failed to explain the process it undertook to determine what was in the best interests of the children, in their decision to expel them forthwith. It does not appear that any legitimate process was undertaken.

[21] However, it appears that the applicants rushed to launch the urgent application, consisting of nearly 170 pages, with many annexures not relevant to the issue at hand. They launched it on a Saturday, giving the respondents one day to respond. They also could certainly have waited for the meeting on the Monday morning to establish what the Montessori respondents would decide. As such, no punitive costs order will be granted in their favour. Accordingly, the following order is granted:

1. The Montessori respondents are to pay the applicants' costs, jointly and severally, the one paying the other to be absolved.

JUDGE S WEINER

Judge of the Gauteng Division of the High Court

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 13 January 2022.

Date of hearing: 15 September 2021

Date of judgment: 13 January 2022

Appearances:

Counsel for the plaintiff: Advocate MD Stubbs and Advocate C Shahim

Attorney for the plaintiff

MOTSOENENG BILL ATTORNEYS INC

Counsel for the defendant:

BC Van der Berg

Attorney for the defendant:

BC VAN DER BERG ATTORNEYS