Reportable

IN THE HIGH COURT OF SOUTH AFRICA
[CAPE OF GOOD HOPE PROVINCIAL DIVISION]

CASE NO: A101/2008

In the matter between:

F J **Appellant**

and

E J **Respondent**

JUDGMENT DELIVERED ON 20 MAY 2008

HJ ERASMUS, J

Introduction

[1] This is an appeal against the dismissal by Motala J of an application which was on 15 January 2008 brought as a matter of urgency and in which the following relief was sought:

1. Condoning the Applicant's failure to comply with the Rules of the above Honourable Court in relation to forms, time periods and service, and permitting this matter to be heard urgently in accordance with the

provisions of Uniform Rule 6(12(a).

2. That a rule *nisi* do issue calling upon the Respondent to show cause on the 31st January 2008 why: --

2.1 The minor child, J, should not be enrolled at St George's Grammar School (Grade 6) with immediate effect;

2.2 The Respondent should not be prohibited from having the minor child assessed by any expert without a Court Order allowing her to do so;

2.3 The Respondent should not be ordered to pay the costs relating to Part A of this application.[1]

3. That the relief referred to in paragraph 2.1 above operate forthwith as an interim order, pending the outcome of this application.

[2] In paragraph 2.1 of the Notice of Motion, the applicant seeks in effect a final order for the enrolment of the child at the St George's Grammar School. In the founding affidavit, the purpose of the application and the relief sought are set out in significantly different terms. In paragraph 6 of the founding affidavit, deposed to by the applicant, it is stated:

The purpose of this application is to apply to this Honourable Court for an order:

6.1 That J be enrolled at St George's Grammar School, Cape Town in Grade 6 with immediate effect and that he remains there until the Respondent has complied with the provisions of the Children's Act,

[1] The Notice of Motion also contained a Part B in which different relief was sought which was not pursued at the hearing before Motala J.

> Act No 38 of 2005 (Children's Act) and/or until this Honourable Court orders otherwise with specific reference to the provisions of the Children's Act.

[3] At the hearing of the appeal, counsel for the appellant submitted that this Court should make an order along the lines of the order made by the Full Bench on appeal to it in *Simleit v Cunliffe*[2]: an order that the child be sent back to St George's Grammar School at a specific, convenient date, and a mandatory order on the respondent directing her not to remove the child from the St George's Grammar School as long as the appellant pays the school fees.

[4] On the afternoon of 15 January 2008 the Court by agreement between the parties appointed Adv J McCurdie, a member of the Cape Bar, to represent the interests of the minor child. On 16 January 2008 Ms McCurdie's report was made available to the parties. Annexed to her report was a report from a clinical psychologist, Mr Bernard Altman. Prior to Ms McCurdie's report becoming available, the respondent filed a brief answering affidavit; the applicant did not file replying papers.

[5] The matter was heard in the afternoon of 16 January 2008. At the hearing, the evidence of Mr DG Bester, the principal of the St George's Grammar School (Preparatory) was adduced on behalf of the applicant. No other oral evidence was heard. After hearing argument by Mr Pincus SC on behalf of the applicant, Mr Olivier SC on behalf of the respondent, and Ms McCurdie as *curator ad litem* on behalf of the child, Motala J dismissed the application. On 7 February 2008 the learned Judge furnished reasons for the dismissal of the application.

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[2] 1940 TPD 67 at 83.

The background

[6] The appellant and the respondent were previously married to each other. The minor child was born from their marriage relationship on 10 October 1995. The marriage was dissolved on 6 October 2000. An Agreement of Settlement was incorporated in the final order of divorce. "Custody and control" of the minor child is dealt with in paragraph 2 of the Agreement of Settlement. In terms of the clause, "custody and control" of the child was awarded to the respondent subject to the appellant's rights of reasonable access. It was further provided that the appellant should have the right, subject to certain conditions, to decide which school the child should attend. The clause reads as follows:

> Custody and control of the minor child, F J J, shall be awarded to the Defendant, subject to the Plaintiff's right of reasonable access. It is further recorded that the Plaintiff will have the right deciding which school the minor child shall attend as well as what age the child shall start commence his schooling. If the Plaintiff in any way should fail to pay the school fees in full, this right shall fall away and the Defendant will be entitled to nominate the school which the child shall attend.

The clause is further dealt with in paragraphs [31] and [32] below.

[7] The schooling of the child has been the subject of much litigation. The current application and appeal are but part of the torrent of litigation between the parties. The circumstances giving rise to the current application are set out in the following paragraphs.

[8] On 5 October 2002 the respondent married Mr JM J. Mr J is in the service of the South African Diplomatic Corps. During 2003 he took up the position of first secretary of the South African Embassy in Libreville, Republic of Gabon. On 1 September 2004 an order was made in the Transvaal Provincial Division authorising the removal of the child to the Republic of Gabon. In Libreville, the child attended the American International School.

[9] During 2007 the respondent and her husband returned to South Africa and settled in Cape Town. From July 2007 the child was enrolled at the St George's Grammar School in Mowbray, Cape Town. Mr Bester said in evidence that the child –

> … fitted in very well into the school, academically he performed extremely well, in fact at the end of the year he won the prize for academic excellence.

[10] The respondent decided to enrol the child at the Jan van Riebeeck Primary School as from the beginning of the first term of 2008 which commenced on 14 January 2008.

[11] The respondent in her answering affidavit set the reasons for the enrolment of the child at Jan van Riebeeck out as follows:

> 6. Ek meld egter kortliks dat ek en my huidige eggenoot, in oorleg met J, oorweging daaraan skenk[3] dat J sy hoërskoolloopbaan voortsit aan die Hoërskool Jan van Riebeeck te Tuine, Kaapstad, Wes-Kaap. Ons is geadviseer dat, aangesien die Hoërskool Jan van Riebeeck 'n Afrikaans medium skool is, dit aangewese is dat J die laaste twee jare van sy laerskooljare meemaak by 'n

[3] Mr Bester said in evidence that the respondent told him that for various reasons "her plans were for him [the child] to attend Jan van Riebeeck High". Counsel's effort to extract some fundamental contradiction between the respondent's answering affidavit and what Mr Bester said the respondent told him, was not successful.

Afrikaans medium laerskool, omdat dit die onderrigproses in sy hoërskooljare sal vergemaklik. Die Laerskool is aan beide my en my eggenoot bekend as ‘n uitstekende skool, waar alle aspekte betreffende die onderrig van leerders, van goeie standaarde, dissipline en resultate spreek.

7. Ons het vooraf vir J geneem na die Laerskool Jan van Riebeeck, hom in kontak gebring met die prinsipaal, sowel as a mede-leerder, wat ook vanaf ‘n Engels medium skool afkomstig is en ingeskryf was by die Laerskool Jan van Riebeeck, ten einde vas te stel watter probleme, indien enige, J in die proses te wagte kan wees. Gedurende gemelde bekendstelling het J ook gesien en ervaar watter fasiliteite by die Laerskool Jan van Riebeeck tot sy beskikking sal wees, waarmee hy ingenome en tevrede was. Dit het ook geblyk dat die mede-leerder, waarna verwys is, geen noemenswaardige probleme ondervind het met die oorgang vanaf ‘n Engels medium to ‘n Afrikaans medium laerskool nie. Aangesien J in ‘n Afrikaanssprekende huishouding is, verwag ons in elk geval nie dat hy probleme sal ondervind nie.

8. Die hele kwessie rondom die plaas van J in die Laerskool Jan van Riebeeck is dus volledig ondersoek, behoorlik oorweeg en het ons, J inkluis, tot die gevolgtrekking gekom dat dit in sy beste belang is dat die verskuiwing plaasvind met die aanvang van die huidige skooltermyn, synde ook die begin van ‘n nuwe skooljaar.

[12] Other considerations which also weighed with the respondent were that the fees at the St George’s Grammar School, which is a private school, are considerably higher than those at Jan van Riebeeck, which is a government school. Jan van Riebeeck is also geographically more convenient in that the school is close to the home of the respondent; the St George’s Grammar School is several kilometres away in a different suburb.

[13] The respondent's decision to enrol the child at Jan van Riebeeck as from the first term of the new (2008) school year precipitated the appellant's urgent application.

The judgment of the Court *a quo*

[14] In the reasons furnished for the dismissal of the application, the Court *a quo* held:

1. The applicant failed to pay the school fees and thereby forfeited the right, given to him in clause 2 of the Agreement of Settlement, to decide which school the child should attend.

2. The respondent's failure to consult the applicant before enrolling the child at Jan van Riebeeck did not, even if she was obliged to do so, invalidate her decision.

3. The applicant's concerns that J is an English speaking child whose educational progress, emotional and social well being would be deleteriously affected by being transferred to an Afrikaans medium school were not borne out by the evidence, and were dispelled by the unequivocal evidence of Mr Bester that he would not be prejudiced at all, and that if he is ultimately to go to an Afrikaans medium high school, the sooner he did so the better.

4. There is no evidence to support the applicant's apprehensions; all indications are that the child will not be prejudiced by the proposed move.

5. The respondent discussed the proposed move with the child; she took him to Jan van Riebeeck before the start of the current academic year; the headmaster introduced him to an Afrikaans speaking pupil who had previously attended an English medium school. Moreover, J had already made friends in his grade at Jan van Riebeeck and he was excited at the facilities which will be available to him there.

New matter on appeal

[15] On 4 April 2008 the respondent's attorneys addressed a letter to the appellant's attorneys in which reference is made to a further (second) report by the educational psychologist, Dr Eunice L van Deventer. Included in the body of the letter is an extract from the report, and annexed to the latter are copies of a number of paragraphs in the respondent's answering affidavit in the proceedings in Part B of the Notice of Motion which were continued after judgment had been handed down in regard to Part A.[4] In the final paragraph of the letter, the respondent's attorneys informed the appellant's attorneys that they have been instructed to place the letter before the Court hearing the appeal by filing a copy thereof in the record on appeal.

[16] Dr Eunice L van Deventer submitted a first report dated 26 January 2007 at the instance of the office of the Family Advocate in Pretoria. Her first report is attached to the founding affidavit – the appellant refers to it as "this very important report" – and forms part of the papers of the record on appeal. Reference is made to this report elsewhere in this judgment. The second report was obtained at the instance of the appellant and is dated 31 March 2008.

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[4] See above footnote 1.

[17] In the letter, the following passages are quoted from Dr van Deventer's second report:

> With the information available it seems that the size of the two mentioned schools is very much the same. With the information at hand it seems whether there are more than enough facilities and support at Laerskool Jan van Riebeeck to provide in J educational, emotional, social and developmental needs at present. With the little information available from St Georges Grammar School, I cannot comment on their facilities.
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> …..
>
> RECOMMENDATIONS
>
> J should remain in Laerskool Jan van Riebeeck. He has special intellectual abilities and comes from a mixed Afrikaans/English background. He was also exposed to other cultural challenges and succeeded. These experiences can support him in his transitional phase. There had been too many changes during the past years, whether it is school placement or physical residence. Another change towards the middle of the school year would create new challenges to J in an already difficult situation. It can be argued that he will have a better chance to succeed if he is placed in an English medium school. This could very well be the case. If he however experiences that such a placement is again an enforcement of his father's will, without his mother's approval, it may not succeed. His motivation and own sense of responsibility will however determine whether he will be able to succeed. This needs to be addressed seriously ….
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> J should remain in Grade 6. He is according [to] many reports well placed in his grade and peer group. Even with special help, an advancement to Grade 7 will place unnecessary pressure and stress on him. There are many other issues that need to be addressed.

[18] Counsel for the respondent submitted that this Court can take cognisance of the second report. Counsel for the appellant objected to the

second report being placed before this Court, and said that it was improper to put it before the Court in the way it had been done.

[19] In *Van Eeden v Van Eeden*[5], after giving consideration to the provisions of section 22(a) of the Supreme Court Act 59 of 1959, and the decisions of the Appellate Division in *Goodrich v Botha and Others*[6] and *Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd and Others*[7], Comrie J concluded[8]:

> The Court exercising an appellate jurisdiction has a discretion whether or not to allow the evidence to be re-opened. In my respectful opinion the matter can be adequately controlled by the sparing exercise of such discretion. Furthermore, cases do arise from time to time which cry out for the reception of *post*-judgment facts.

The approach of Comrie J was approved by the Constitutional Court in *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others*[9]. It was held that further evidence on appeal –

> ….. should only be admitted in exceptional circumstances. Such evidence must be weighty, material and to be believed. In addition, whether there is a reasonable explanation for its late filing is an important factor. The existence of a substantial dispute of fact in relation to it will militate against its being admitted

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[5] 1999 (2) SA 448 (C) at 450I – 453C.

[6] 1954 (2) SA 540 (A) at 545G – 546C.

[7] 1992 (2) SA 489 (A) at 507B – G.

[8] At 453A.

[9] 2005 (2) SA 359 (CC) at 388F—389B (paragraphs [42] and [43]).

[20] As the upper guardian of minors, this Court is empowered and under a duty to consider and evaluate all relevant facts placed before it with a view to deciding the issue which is of paramount importance: the best interests of the child.[10] In *Terblanche v Terblanche*[11] it was stated that when a Court sits as upper guardian in a custody matter –

> ….. it has extremely wide powers in establishing what is in the best interests of minor or dependent children. It is not bound by procedural strictures or by the limitations of the evidence presented or contentions advanced by the respective parties. It may in fact have recourse to any source of information, of whatever nature, which may be able to assist it in resolving custody and related disputes.

In *P and Another v P and Another*[12] Hurt J stated that the Court does not look at sets of circumstances in isolation:

> I am bound, in considering what is in the best interests of G, to take everything into account, which has happened in the past, even after the close of pleadings and in fact right up to today. Furthermore, I am bound to take into account the possibility of what might happen in the future if I make any specific order.

In *AD and DD v DW and Others* [13] the Constitutional Court endorsed the view of the minority in the Supreme Court of Appeal that the interests of minors should not be "held to ransom for the sake of legal niceties"[14] and

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[10] *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 (5) SA 184 (SCA) at 200E (par [32]); see also at 201B (par [36]). See further below paragraph [36].

[11] 1992 (1) SA 501 (W) at 504C.

[12] 2002 (6) SA 105 (N) at 110C—D.

[13] 2008 (4) BCLR 359 (CC) at 370A (par [30]).

[14] *De Gree and Another v Webb and Others (Centre for Child Law as Amicus Curiae)* 2007 (5) SA 184 (SCA) at 220I (par [99]).

held that in the case before it, the best interests of the child "should not be mechanically sacrificed on the altar of jurisdictional formalism".[15]

[21] In the present matter, the circumstances are certainly exceptional. The second report is by the same expert whose first report, the appellant annexed to his founding papers in support of his application. The appellant does not wish this Court to take cognisance of the further report which the expert produced at his instance after the judgment in the Court *a quo* had been handed down and after the appeal had been noted. There is no dispute between the parties that the appellant elicited the second report and that the extracts placed before the Court are correct. The recommendations in the second report are material in so far as the stance adopted by the expert in her first report is concerned in the light of *post*-judgment facts. The manner in which extracts from the second report were placed before the Court is not satisfactory, and it would have been preferable if the full report had been placed before the Court. The respondent's attorneys did alert the appellant's attorneys to the fact that the extracts from the second report would be placed before the Court hearing the appeal. The question, however, arises whether it was not in any event and from the outset incumbent upon the appellant's legal representatives to place the full second report before the Court?

The issues on appeal

[22] The issues on appeal will be considered under three broad heads:

(i) Alleged errors of fact in the judgment of the Court *a quo*.

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[15] *AD and DD v DW and Others* 2008 (4) BCLR 359 (CC) at 370A (par [30]).

(ii) The provisions of the Children's Act 38 of 2005 regarding parental responsibilities and rights

(iii) The best interests of the child.

Alleged errors of fact

[23] In argument before us, counsel for the appellant submitted that the learned Judge in the Court *a quo* made two fundamental errors of fact. The first is the Judge's finding that the appellant created the "misleading impression" that the child is English speaking and whose educational progress, emotional and social well being would be deleteriously affected by being transferred to an Afrikaans medium school. The applicant said in the founding affidavit:

> I wish to confirm that J has never attended an Afrikaans school before. I am of the opinion, taking J previous academic performance into consideration, that not only the removal but also the change from English to Afrikaans schools will impact very negatively on J academic performance as well as his social and emotional well being.

The statement is misleading, though I accept not deliberately so, in that it does not reveal, as Mr Bester did in his evidence in response to a question as to what language the child speaks, that --

> J is fully bilingual. He speaks English at our school and Afrikaans at home.

The respondent's statement in her answering affidavit that the child is in

an “Afrikaanssprekende huishouding” was not disputed at the hearing.

[24] The second factual error in the judgment, the appellant says, is the statement that the appellant’s reliance of clause 2 of the Agreement of Settlement was “misplaced, if not dishonest”. The submission was made that the appellant did not rely on the clause in his application. The appellant cites the full text of the clause in his founding affidavit, he refers to remarks made by Boshielo J apropos the clause in earlier litigation between the parties, he refers to the fact that prior to November 2006 the respondent had indicated to him that he had not complied with the provisions of the clause, an allegation which he said he denied at the time and indeed still denies. He adds that he “decided not to force this issue by way of litigation”. In my view, clause 2 of the Agreement of Settlement was part and parcel of the case he made out in the founding affidavit.

Parental responsibilities and rights

[25] Subsequent to the parties signing the Agreement of Settlement, and on 1 July 2007, certain provisions of the Children’s Act 38 of 2005 (“the Act”) were implemented. Sections 6(5), 18, 20, 30 and 31, which deal with parental responsibilities and rights, are relevant to the present matter. In these sections, the terms “parental power” and “parental authority” are replaced by the term “parental responsibilities and rights” and the term “custody” by “care”. Section 1(2) of the Act provides that in addition to the meaning assigned to the term “custody” in any other law or the common law, it must now be construed as also having the meaning of “care” as defined in section 1(1) of the Act. That definition encompasses the topics covered by the traditional concept of custody, although it also

includes matters (for example, paragraphs (h) – (i) of the definition) which would seem to be the responsibility of all who have parental responsibilities and rights, however limited these may be.[16]

Section 6(5) provides:

> A child, having regard to his or her age, maturity and stage of development, and a person who has parental responsibilities and rights in respect of that child, where appropriate, must be informed of any action or decision taken in a matter concerning the child which significantly affects the child.

Section 18 deals with "parental responsibilities and rights" and provides as follows:

> (1) A person may have either full or specific parental responsibilities and rights in respect of a child.
>
> (2) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right –
>
> (a) to care for the child;
> (b) to maintain contact with the child; and
> (c) to act as guardian of the child; and
> (d) to contribute to the maintenance of the child.
>
> (3) Subject to sections (4) and (5), a parent or other person who acts as guardian of a child must –
> (a)….
> (b)….
> (c) give or refuse any consent required by law in respect of the child, including –
> (i) consent to the child's marriage;

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[16] *Wille's Principles of South African Law* (9th ed by Francois du Bois *et al*) 350.

(ii) consent to the child's adoption;
(iii) consent to the child's departure or removal from the Republic;
(iv) consent to the child's application for a passport; and
(v) consent to the alienation or encumbrance of any immovable property of the child.

(4) Whenever more than one person has guardianship of a child, each one of them is competent, subject to section (5), any other law or any order of a competent court to the contrary, to exercise independently and without the consultation of the other any right or responsibility arising from such guardianship.

(5) Unless a competent court orders otherwise, the consent of all the persons that have guardianship of a child is necessary in respect of the matters set out in subsection 3(c).

Section 19 confers full parental responsibilities and rights in respect of a child on the biological mother of the child. Section 20 confers full parental responsibilities and rights in respect of a child on the biological father of the child who was married to the child's mother at the time of the child's conception or birth or any time in between.

Section 30, which deals with the co-exercise of parental responsibilities and rights, provides as follows:

(1) More than one person may hold parental responsibilities and rights in respect of the same child.

(2) When more than one person holds the same parental responsibilities and rights and rights in respect of a child, each of the co-holders may act without the consent of the other co-holder or holders when

exercising those responsibilities and rights, except where this Act, any other law or an order of court provides otherwise.

(3) A co-holder of parental responsibilities and rights may not surrender or transfer those responsibilities and rights to another co-holder or any other person, but may by agreement with that other co-holder or person allow the other co-holder or person to exercise any or all of those responsibilities and fights on his or her behalf.

(4) An agreement in terms of subsection (3) does not divest a co-holder of his or her parental responsibilities and rights and that co-holder remains competent and able to exercise those responsibilities and rights/

Section 31 deals with "major decisions involving child" and provides as follows:

(1)(a) Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b), that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development.

(b) A decision referred to in paragraph (a) is any decision –

(i) …..

(ii) …..

(iii) …..

(iv) which is likely to significantly change, or have an adverse effect on, the child's living conditions, education, health, personal relations with a parent or family member or, generally, the child's well-being.

(2)(a) Before a person holding parental responsibilities and rights in respect of

> a child takes any decision contemplated in paragraph (b), that person must give due consideration to any views and wishes expressed by any co-holder of parental responsibilities and rights in respect of the child.
>
> (b) A decision referred to in paragraph (a) is any decision which is likely to change significantly, or to have any significant adverse effect on, the co-holder's exercise of parental responsibilities and rights in respect of the child.

[26] In terms of sections 19 and 20 of the Act, the appellant and the respondent both hold full parental responsibilities and rights in respect of the minor child: they are co-holders of parental responsibilities and rights. As holders of parental responsibilities and rights, they have the responsibilities and rights set out in section 18 of the Act. The section envisages that a person may have either full or specific parental responsibilities and rights in respect of a child. Section 30(3) provides that a co-holder of parental responsibilities and rights may by agreement with another co-holder allow the other co-holder to exercise some or all of the parental responsibilities and rights on his or her behalf.

[27] Under section 30 of the Act, holders of parental responsibilities and rights enjoy a large measure of autonomy. In terms of section 30(2), the appellant and respondent, as co-holders of parental responsibilities and rights, may exercise those responsibilities and rights without each other's consent unless the Act, any other law or an order of court provides otherwise. Section 31(2) provides that a holder of parental responsibilities and rights must give due consideration to the views and wishes of a co-holder of parental responsibilities and rights before he or she takes any decision which is likely to change significantly or to have a significant adverse effect on the co-holder's exercise of parental responsibilities and

rights.

[28] It is not in dispute that the appellant did not pay the school fees when the child attended the American International School in Libreville and the St George's Grammar School in Cape Town. Mr Bester said in evidence that the appellant visited the St George's Grammar School shortly after the child's enrolment there. He did not offer to pay the school fees for 2007, and the respondent's averment that the appellant ignored accounts for fees which were faxed to him is not disputed. The appellant did make a belated offer in a letter to Mr Bester dated 10 January 2008 to pay the school fees for 2008.

[29] The question which arises for decision in this appeal is whether the respondent as holder of parental responsibilities and rights, in coming to a decision in regard to the schooling of the minor child, was obliged to give due consideration to the views and wishes of the appellant as co-holder of parental responsibilities and rights in respect of the child?

[30] The respondent's contention, which was upheld by the Court *a quo*, is that the appellant failed to pay the school fees and thereby forfeited the right, given to him in clause 2 of the Agreement of Settlement, to decide which school the child should attend. The appellant contends that whatever the meaning of clause 2 of the Agreement of Settlement there was, under the provisions of the Act, a legal obligation on the respondent to have both consulted with the appellant in regard to her decision to move the child and furthermore to have advised the appellant of her decision.

[31] By clause 2 of the Agreement of Settlement, the custody of the

child was awarded to the respondent. The custodian parent generally has the right to have the child with him or her, to regulate its life and to decide all questions of education, training and religious upbringing.[17] In terms of clause 2 the parties agreed to vary the normal incidence of the rights of the custodian parent by giving the non-custodian parent (the appellant), subject to compliance with a condition, the right to decide which school the child shall attend. By reason of his non-compliance with the condition, the appellant has forfeited that right conferred on him. The right to decide all questions of education, including the right to decide which school the child shall attend, accordingly reverted to the respondent as the custodian parent. As holder of custodial rights, the respondent was in terms of section 30(2) of the Act entitled to act without the consent of the appellant.

[32] There was some debate before us as to the effect of the partial implementation of the Act on the Agreement of Settlement, in particular whether or not the agreement is rendered nugatory by reason of being in conflict with the spirit and policy underlying the Act. In my view, the principle that the incidents of parental responsibilities and rights may be dealt with by the co-holders thereof by way of agreement *inter se*, and such an agreement being made an order of court upon the divorce of the parties, is embedded within the Act.[18] In terms of section 30(3), a holder of parental responsibilities and rights may by agreement with a co-holder allow the co-holder to exercise on his or her behalf any or all of those responsibilities and rights. That would include the care (custody) element of parental responsibilities and rights. Such an agreement does not, in terms of section 30(4), divest a co-holder of his or her

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[17] Mitchell v Mitchell 1904 TS 128 at 130; *Calitz v Calitz* 1939 AD 56 at 63; *Simleit v Cunliffe* 1940 TPD 67 at 75 *in fine* – 76; *Van Oudenhove v Gruber* 1981 (4) SA 857 (A) at 867F—G.

[18] Section 23 of the Act which contains express provisions in this regard has not as yet implemented.

parental responsibilities or rights. This is in line with the common law principle that the award of custody to (for example) the mother of a child does not diminish the natural guardianship of the father. In the words of Van den Heever JA in Edelstein v Edelstein NO and Others:[19]

> An order awarding the custody of a minor to the mother merely suspends in the interests of the minor certain of the incidents of parental authority and does so for the rest *sine diminutione patriae potestatis.*

[33] The appellant further contends that it was, in terms of section 31(2) of the Act, incumbent on the respondent, before she took the decision in regard to the child's schooling, to give due consideration to the views and wishes of the appellant. In terms of the sub-section, such consideration must be given if the decision contemplated is one which is likely to change significantly, or to have a significant adverse effect, on the co-holder's exercise of parental responsibilities and rights.

[34] In the founding papers, the appellant's attack on the respondent's decision was confined to the alleged adverse effect the removal of the child to an Afrikaans-medium school would have on the education of the child. No facts were placed before the Court to indicate in what way the change of school would be likely to change significantly, or to have a significant adverse effect, on the appellant's exercise of parental responsibilities and rights. In view of the fact that the right to decide all questions of education, including the right to decide which school the child shall attend, vests in the respondent, the decision to change the child's school would have no effect on the exercise by the appellant of his parental responsibilities and rights.

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[19] 1952 (3) SA 1 (AD) at 10C. See also *Sumleit v Cunliff* 1940 TPD 67 at 75—77.

[35] If the appellant's contention is correct that the respondent was indeed obliged to give due consideration to the views and wishes of the appellant before coming to her decision, she was in no way bound to give effect to the respondent's views and wishes. Once she has given such consideration, she may act independently.[20] Moreover, failure to give consideration to the views and wishes of the appellant, and failure to inform the appellant of her decision in terms of section 6(5) of the Act, do not in themselves render the decision made by the respondent void or invalid – the decision is subject to review, the determining factor being whether or not the decision is in the child's best interests.

The interests of the child

[36] Section 9 of the Act echoes section 28(2) of the Constitution and provides as follows:

> In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.

Section 28(2) of the Constitution provides:

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

The Constitutional Court has held that section 28(2) extends beyond and creates a right independent of the other rights listed in section 28(1).[21] In

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[20] Davel and Skelton *Commentary on the Children's Act* 3—30.

[21] *Minister of Welfare and Population Development v Fitzpatrick* 2003 (3) SA 422 (CC) at 428C—D

Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Department van Onderwys en Andere[22] Bertelsmann J stressed that section 28(2) –

> ….. inderdaad die fundamentele reg van elke kind vestig om in die opweging van strydende partye se botsende belange – en dus ook die strydende partye se aansprake op fundamentele regte en die handhawing daarvan – in die eerste gelid te staan.

It is the interests of the child that are paramount in all matters concerning the child and the interests of the child take preference over the interests of the parents.

[37] The principal concern raised by the appellant is that the enrolment of the child in an Afrikaans-medium school would have a detrimental effect on his education progress, emotional and social well being and may not be in the child's long term interests. These concerns were not shared by Mr Bester who, it will be recalled, was called at the instance of the appellant to give *viva voce* evidence at the hearing. In this regard, the following extract from the cross-examination of Mr Bester is significant:

> *Mr Olivier* : So in other words if that's the motivation for Mrs J to consider putting him in Jan van Riebeeck Primary School because he will be taught in Afrikaans, which is preparing him for high school in Afrikaans you can't criticise that?
>
> *Mr Bester* : Not at all.

(par [18]). In *B v M* 2006 (9) BCLR 1034 (W) at 1067B (par [141]) it is said that the "best interests" principle provides "a framework for addressing the entire range of major issues affecting children".

[22] 2003 (4) SA 160 (T) at 178C—D.

I have already adverted to the evidence that the child is fully bilingual and that he finds himself in an Afrikaans speaking household.

[38] From the respondent's answering affidavit (the relevant paragraphs are cited above in paragraph [11]) it is apparent that the decision to move the child to Jan van Riebeeck Primary School was prompted by consideration of the long term interests of the child. Of considerable importance, in my view, is the fact that the child is in an Afrikaans speaking household and that the Jan van Riebeeck schools are situated close to the home of the respondent. As to the standing of the Jan van Riebeeck schools, there is the evidence of Mr Bester that "from reputation they are outstanding schools".

[39] the ,Though this appeal is concerned with the placing of the child at a particular school elevantinterests of the child must be considered within the wider context of an objective regard of "all r .factors"[23] Reference was made above to the spate of litigation between the parties. The question arises whether all that is in the best interests of the minor child. I am reminded of the words of Davidson J in Ressel v Ressel:[24]

> I would like to say, in conclusion, that it is an undesirable thing for so much litigation to proceed over the head of a boy of this age of eight years *[in casu, a boy of twelve]* who cannot fail to be aware of it and be influenced in some way by what is happening between his parents in Court, and I think the parties would be very well advised to show some reasonableness in their dealings with each other and have regard to the interests of the child as being

[23] *Segal v Segal* 1971 (4) SA 317 (C) at 323B.

[24] 1976 (1) SA 289 (W) at 294A.

paramount and not the interests of themselves.

[40] Within the context of the endless litigation between his parents, the child has through the years been assessed by a number of professionals. Initially, the assessments were concerned with learning problems which he seemed to have experienced, but by January 2007 a situation had been reached which caused Dr Eunice van Deventer to observe in her first report dated 26 January 2007:

> J was met die eerste kennismaking op 23/01/2007 baie negatief en emosioneel oor die feit dat hy weer geëvalueer moes word. In sy eie woorde: "I feel very mad, angry, cross when I get test *(sic)* like this because I am not a lab rat that has to be tested my whole life!!!". Dit is op rekord dat hy reeds deur 'n groot aantal professionele persone met die verloop van tyd geëvalueer is. Dit het tans 'n baie negatiewe uitwerking op hom.

At the end of her report, Dr Van Deventer recommends:[25]

> Geen verdere evaluering moet met hierdie kind gedoen word nie, behalwe in die geval waar omstandigede dit ernstig noodsaak en albei ouers daartoe toestem.

[41] Ms McCurdie in her submissions to this Court stated that should an order be granted in the –appellant's favour

> [t]he potential harm to him [the child] being required to return to St George's and cope with a further change, at the instance of the Appellant, should not be underestimated.

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[25] In her report the recommendation is emphasised by being printed in capital letters.

This view is underscored by Dr Van Deventer in her second report where she says the following in :regard to an enforced return of the child to St George's Grammar School

> If he however experiences that such a placement is again an enforcement of his father's will, without his mother's approval, it may not succeed.

[42] In her second report, Dr van Deventer's unequivocal recommendation is that "J should remain in Jan van Riebeeck".

[43] In my view, it is in the best interests of the child that his schooling at Jan van Riebeeck should not be interrupted by an order to enrol him at St George's Grammar School in grade 6, nor should he be the subject of a further "full, thorough and proper investigation".[26] The time has come for the child to be allowed to settle down without further litigation, assessment and investigation.

[44] The Court is indebted to Ms McCurdie who represented the child in the Court *a quo* and before this Court. Her reports and submissions have been very helpful.

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[26] The quote is from the written heads of appellant's counsel.

[45] I would make the following order:

The appeal is dismissed with costs, such costs to include the costs of the *curator ad litem*.

HJ ERASMUS, J

I agree and it is so ordered **CLEAVER, J**

I agree **YEKISO, J**