IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE No: 1986/2011

In the matter between:

PIERRE NEL **Applicant**

And

OLA NEL **Respondent**

JUDGMENT

HENNEY, AJ:

[1] The Applicant and the Respondent are currently embroiled in divorce proceedings in the Regional Court since June 2010. The parties have 2 children ages 3 and 8 years of age. In terms of a Court Order issued by Desai J, in this court on 23 June 2009, the children are primarily resident with the Respondent subject to reasonable contact being afforded to the Applicant as set out in the order.

[2] This current application concerns the school arrangements of the two children.

[3] The eldest child was a learner at Kenridge Primary school in Bellville, after he attended the pre-school at the same school in 2007, Grade R in 2008 and or 2009 and 2010 he attended Grades 1 and Grade 2 respectively.

[4] It seems that the eldest child was happy at the school and did not have any problems.

[5] The youngest child attended Pixie Daycare in the same area, and would have attended Fledglings Pre-Primary School, adjacent to Kenridge Primary School in 2011.

[6] When the new school year commenced, it came to the notice of the Applicant that the Respondent had without informing or consulting the Applicant, removed the eldest child from Kenridge Primary School and did not enrol the youngest child as agreed with the Applicant at Fledglings Pre-Primary School in Kenridge, Bellville. This is common cause. The provisions of Section 31(1)(a), read with Section 31(b) (iv) of the Children's Act 38 of 2005 are applicable. These are:

> ***"Major decisions involving child - (1)(a) Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b) involving the child, that***
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> ***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.***
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> ***(b) a decision referred to in paragraph (a) is any decision -***
>
> ***(i) .....***
>
> ***(ii) .....***
>
> ***(iii) .....***
>
> ***(iv) which is likely to significantly change, or to 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."***

[7] The Respondent enrolled the children at Islamia College in Rondebosch East.

[8] It is also common cause that the Respondent did not advance any reason why she did not inform the Applicant thereof, at that time when this happened.

[9] In later correspondence from her attorneys it emerged that to ease her travelling burden, she took this step. In her Answering Affidavit, she only states that the children were granted bursaries to attend the new school.

[10] For whatever reason this was done, it is clear that there had to be consultation. The crisp question would be, notwithstanding the parental rights of the Applicant, whether the fact that they were removed from one schooling environment to another, was in the best interests of the children.

[11] Although the Respondent in her papers avers that by moving the children back to their previous schools will not be in their best interests. This bold statement, however is not convincing.

[12] It is clear that the actions and conduct of the Respondent was in contravention of the law, and a court should not lightly condone such conduct on the part of a parent, where it is clearly not justified, under the guise that it is in the best interests of the children.

[13] Apart from stating boldly, that by moving the children back to their previous school environment, would not be in their best interest, the Respondent does not give substantial reasons why she believed that it was in their best interests to remove them

from Kenridge Primary School or to have the younger child enrolled at Fledgings Pre-Primary School as agreed to with the Applicant.

Both children are at a young age, the older child had been in that school environment since 2007 and the younger child since 2009.

[14] There is clear evidence from the Applicant and the school that the children were happy and content with this environment. The Respondent disturbed the status quo, the onus was on her to show why it would be in the best interests of the children to disturb this, she clearly did not.

[15] In fact she in a clandestine and under hand manner, without sufficient justification to do so, removed the children. This clearly cannot be said to be in their best interests.

Furthermore, there is no objective evidence to suggest that the removal of the children from the one schooling environment to the one the Respondent chose was in their best interests so as to disregard the rights of the Applicant to have been properly informed or consulted about the fact that the Respondent had removed the children from one schooling environment to another.

[16] The next question one would ask at this stage, is whether it would be in the best interests to move the children back to their previous schooling environment?

[17] At this stage, I am of the view that having regard to the short time the children had spent at Islamia College and also it being a whole new environment compared to the longer time they had spent at Kenridge which is a known and stable environment

to them, there would be a greater harm if they are not moved back to their previous schooling environment.

[18] A proper assessment and investigation by the Family Advocate would be of great assistance in determining the future schooling plan of the children.

[19] I am of the view having regard to the fact, that we are dealing with young vulnerable children, and the fact that the school year had basically reached one month, the harm would have been greater to the children had this application not been heard on an urgent basis.

[20] The Applicant therefore made out a case why this application should have been heard in terms of Rule 6(12) of the Uniform Rules of Court.

[21] In conclusion after consideration of the papers and after hearing Counsel for both parties, the following order is made:

1. The application is postponed for hearing in Third Division to Friday the **25th of March 2011;**

2. The Respondent is ordered to immediately return to and/or re-enroll the minor children **B N,** born on 7 June 2002 and **S N,** born on 5 September 2006 at Kenridge Primary School and Fledgings, the pre-school facility at Kenridge respectively by no later than **Friday the 18th of February 2011;**

3. The Family Advocate is directed to urgently investigate what school and aftercare arrangements would be in the best interests of the children, pending the finalisation of the parties' divorce and to deliver their written report containing their recommendations

in this regard by no later than the **18th of March 2011;**

4. Both parties are directed to fully co-operate with the office of the Family Advocate in order to enable them to complete their assessment in this regard and that the parties shall make the minor children available for said assessment when so required by the Family Advocate.

5. The costs of this application stand over for later determination.

HENNEY, AJ