IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 8675/2009

DATE: 28 FEBRUARY 2011

In the matter between:

CRAIG THEO SCHNEIDER N.O.	1st Applicant
CRAIG THEO SCHNEIDER	2nd Applicant
ISABEL SHAPIRO N.O.	3rd Applicant
ISABEL SHAPIRO	4th Applicant

and

ALLISON ASPELING	1st Respondent
MASTER OF THE HIGH COURT	2nd Respondent

J U D G M E N T

Application for Leave to Appeal

DAVIS, J:

This is an application for leave to appeal against the judgment of this court of 8 January 2010. That in itself, given that the hearing and the judgment which I am delivering *ex tempore*, are given on 28 February 2011, is cause for some question.

The application for leave to appeal was filed on 29 January 2010. Ms Weyer, who appears on behalf of the applicants (the respondents in this application for leave to appeal, but I shall continue to refer to them as the applicants) informs me that the first respondent took no steps to set down this matter (application for leave to appeal) until October 2010.

In other words, some nine months elapsed before the first respondent took any further steps in respect of the application for leave to appeal. No explanation has been provided nor has an application for condonation been received insofar as this issue is concerned. In itself, this should be a ground for dismissing the application, particularly when the matter in dispute concerns children, their schooling and what is in their best interests. Had this matter been so critical to the interests of the children, it could have been expected that an appeal be prosecuted expeditiously and not to have allowed at least nine months to have elapsed before any activity took place. This means, in effect, that were an appeal to be heard, that almost two years would have elapsed from the time that the judgment was given until the matter was settled on appeal, in itself indicative of a problem with regard to the exact dispute confronted by this court.

However, I would prefer not to deal with the matter on this

basis, but to canvass the merits of the application for leave to appeal. Let me make clear at the outset what this case is not about. This case is not about whether the first respondent is a good parent. I have no basis to conclude, on any other premise, that first respondent is a good and caring parent who worries anxiously about her children. Thus this case, in no way, should be interpreted as being condemnatory of the conduct of first respondent and, to the extent, that it could be read that way, this would be incorrect.

This case is not about the conduct of the legal representatives who appeared on behalf of the respondents (the applicants in his application for leave to appeal). Much has been said about this issue and I prefer to refrain from further comment. The case is only about what is in the best interests of two small children. Occasionally, in the fury and fire of litigation, this simple and yet agonising question is lost as being the focal point of this dispute. To the extent that the principal judgment, against which leave to appeal is sought, raised questions about the role of experts and the professional responsibility of legal representatives, these are ancillary to the primary inquiry, what, in essence, is in the best interests of two small children, whose case came before this court.

Unfortunately, because of one of the issues with regard to the

application for leave to appeal, it will be necessary to say something about the conduct of the matter. However, it is important to evaluate this case in the context of the child centred approach, which is clearly the cornerstone of jurisprudence dealing with children in the constitutional democracy of our country.

The application for leave to appeal is, in many ways, curious, because the key issue was fought out with such degree of intensity, has now disappeared, that is whether the children should be "home schooled". It is important to emphasise that all of the other issues that have been raised today, were ancillary to the focal point of the case, the evidence that was brought before this court, and the central decision made by this court.

A further point that needs to be made is the following. The day before judgment was to be delivered, that is on 8 January 2010, I received a notice filed in terms of Rule 34(2) of the rules of the High Court (the notice dated 4 January 2010), in which the first respondent made a written offer to settle the application. It is thus necessary to make one further comment. That application was signed by the attorneys for the first respondent, Badenhorst Schnetler. It was delivered to the attorneys for the applicants, Mr Schneider and a copy was

provided to the court. I accept readily that the counsel who then represented the respondents, Mr Theron, was unaware of this notice and that his advice was not sought with regard thereto. Accordingly that he bears no responsibility for the formulation of this notice. But there can be no question that the notice was provided to the court, by first respondent, through her attorney. Presumably therefore it was drafted by her attorney in the manner in which these matters are so drafted.

In other words the court was provided with a detailed offer of settlement, canvassing all of the substantive points which were disputed prior thereto. Mr Van Nieuwenhuysen, who appears together with Mr Theron on behalf of the respondents, and I might add *pro amico* (and as a result of which the court is indebted to both counsel for their assistance this morning) sought to suggest that, notwithstanding this offer of settlement, somehow the court should have looked through the offer and made significant qualifications thereto rather than accepting certain of the provisions which, in his view, leave far too much open to discretion and accordingly should be set aside by a court on appeal.

In my view this is an extraordinary submission. The case is heard by a court, a detailed and considered offer of settlement

is then provided, the court examines the offer of settlement, compares it with the evidence and with an earlier interim order which had been agreed between the parties in August 2009, which in itself was indicative of the parties' views with regard to the interests of the children, and notwithstanding that the final order of court broadly follows this agreement of settlement, somehow the court has erred. It is true that a court needs to apply its own mind to what is in the best interests of the children, but in this case the court made a decision, based on the evidence, and clear offer which is made in this case by the respondent, after having taken legal advice and then takes care to make the provisions of the offer both more precise and open to less discretion. It thus appears rather strange for it to be argued that this could not be in the best interests of the children nor that the particular framing of the Rule 34(2) should have been accepted by the court, or that the offer was so vague so as not to be utilised for the purpose of crafting an order.

But that is not the only obstacle in the face of the various grounds for leave to appeal. Let me deal with them, therefore, in order. The first is that the court ordered that the fourth applicant be entitled to two weekend days per month access to the minor children. That, of course, was contained in the earlier order by agreement of 31 August 2009 and followed the

Rule 34(2) notice. There did not seem to be any basis, therefore, that no contact should take place in the manner ordered by the court. The only issue is whether the words "reasonable periods", as may be agreed between Ms Shapiro and the first respondent from time to time were sufficiently carefully drafted.

Mr Van Nieuwenhuysen submitted that further words such as "taking into account the scholastic and sporting needs, requirements and obligations of the children" should have been added thereto, in that it may well be difficult for contact to take place on the Saturday or Sunday, when sport takes place. A further submission was made, rather speculatively about the competing religions of the various parties, although I am somewhat uncertain as to the implication thereof. It appeared during the argument this morning, that Ms Weyer, accepted that some formulation could be inserted in an agreed amended order, which in itself, would dispense with any further debate as to whether an application for leave to appeal could be sustainable on that ground.

The next ground was the provision "for so long as it may be reasonable required and agreed" a third party will accompany the children to their visits to third applicant. This follows almost exactly the Rule 34(2) notice. On first respondent's

own version, the contact between fourth applicant and the children was to take place under supervision. Given that it was common cause that the contact should be supervised, no evidence was required in respect of the reasons as to why a third party should accompany the children, or whether first respondent had been obstructive in respect of contact between the fourth applicant and the children. There was, however, correspondence placed before the court with regard to the difficulties which had taken place in respect to contact. In the August 2009 order, even though it was an interim order, there was provision for Ms Ester Aspeling to accompany the children to their visits with Ms Shapiro. The only issue in dispute, therefore, appears who was to be the supervising party, hardly a point that could not have been sorted out by the parties or which needs to detain a court on appeal.

The next ground for application for leave to appeal is the order that the siblings of the deceased and Ms Shapiro shall have reasonable telephonic and electronic contact with the minor children at all reasonable times. This, of course, was not contained in the Rule 34(2) notice. But in the August 2009 order, the parties had agreed "the siblings of the deceased and Ms Shapiro shall have reasonable telephonic and electronic contact with the minor children at all reasonable times". It was clear, therefore, that the parties accepted that it was in the

interests of the children that such contact should take place. Indeed, as noted in the principal judgment, respondents' own expert, Mr Van Oostrum, made recommendations in respect of contact to be limited to an absolute minimum, and to be supervised, in the event of applicants not supporting the children's home education. He thus proposed supervised and monitored contact. There is no evidence to suggest that such an order should, therefore, not have been included in the order granted by the court, or that any of the parties regarded it as not in the best interests of the children for such a provision not to have been included in the principal order.

The next ground of appeal is, in the event of deceased's siblings or their immediate families wish to have contact with the children, this should be arranged directly with the respondent, shall attempt to facilitate rather than obstruct such reasonable conduct. This particular ground can be dealt with in a similar to the previous ground. Nothing was further proposed in the Rule 34(2) notice, but in the August 2009 order, the parties agreed that in the event of the deceased's siblings or their immediate families wishing to have contact with the children, this should be arranged directly with the respondent. In the final order, the words "who shall attempt to facilitate" were inserted. The issue of contact and the difficulty which was raised in respect of such contact between

the children and the paternal family, was canvassed in correspondence between the parties' respective attorneys of record and by the first respondent in an affidavit.

It certainly did not seem, in the light of all this evidence, that it would have been advisable for this court, in its discretion, not to have made such a provision. No suggestion was raised that it is not in the best interests of the children for such a provision not to have been included.

The penultimate ground of leave to appeal is that the future educational needs of the minor children shall be monitored by Dr Worrall up to Grade 7 and what further schooling should be in their best interest moving to secondary education. The Rule 34(2) included a provision that:

> "First respondent enrol the two minor children... for the commencement of the 2010 academic year at one of the educational institutions referred to in the recommendations of the jointly appointed expert, Dr Anita Worrall, contained in the reports prepared by her in respect of the children and filed of record on 3 November 2009. First respondent shall provide documentary proof to this Honourable Court, such action not later than Monday 18 January 2010.

Continue with the education and manner consistent with the recommendations of Dr Worrall in the best interests of the children."

A further submission was made this morning by Mr Van Nieuwenhuysen that in effect Dr Kockett's evidence was correctly rejected in favour of Dr Worrall's, namely that home schooling was inadvisable. Accordingly, it appears to be common cause that Dr Worrall's evidence, notwithstanding the earlier dispute, constituted of a programme that was in the best interests of the children. It is implicit in the offer made in terms of Rule 34(2). Mr Van Nieuwenhuysen, submitted that the problem is that Dr Worrall was granted a blank cheque, as it were, to provide guidance insofar as the best interests of the children were concerned, that is that the order is excessively open-ended.

I am not certain as to the purport of this submission, save that I must assume that somehow, notwithstanding the Rule 34(2) notice, Dr Worrall's powers are regarded as excessive. To this there are two responses. Firstly, the order that was granted narrowed the scope of the offer in terms of Rule 34(2). Secondly, Dr Worrall's role ends at some point during the children's Grade 7 year. At worst, it would appeal, that by the middle of next year (2012), Dr Worrall will be *functus officio*.

On what possible basis this could be construed as being an open-ended invitation to Dr Worrall to interfere in the broader educational concerns of the children beyond that period, is beyond me, nor was it explained by Mr Van Nieuwenhuysen.

In short, when each of the substantive points of appeal are examined, nothing is put up to indicate that the the order was not in the best interests of the children. At best, it appears that certain provisions may not able to be implemented due to tension between the parties. No explanation is provided as to why this court should have ignored *in toto* the offer made in terms of Rule 34(2), read with all the evidence which was accepted by the court at the time.

There is thus no basis for granted an application for leave to appeal in this case. Indeed I wonder (and since this is an *extempore* judgment, I have not had the time to research the point fully) whether there has ever been a case brought in this country in which the applicants, for leave to appeal, have sought to reject an order of court made where much of the principal framework follows an offer tendered by them in terms of Rule 34(2)?

Consider what the implications are if one was to follow this logic. It would mean that a court should not trust the offer or

the attorney or the *bona fides* of the parties or the care with which the offer was made, while a court is still obliged to make an order which is in the best interests to the children. However, when it comes to issues which are admittedly peripheral to the case and which require management rather than a principial decision, to so cavalierly reject all of that which was contained in the Rule 34(2) notice, makes applicants' arguments this morning, in my view, somewhat unique in the annals of our jurisprudence.

That brings me to what Ms Weyer, I think, probably correctly characterised as the true motive for this morning's hearing; the granting of a cost order *de bonis propriis* against first respondent's attorney on a scale of between attorney and client. Regrettably, therefore, this ground entails a brief analysis of conduct which earned the disapproval of the court and which caused the court to make such an order. The thrust of the justification for the granting of the order, can be summarised thus: Evidence on affidavit was tendered by Mr Van Oostrum. It purported to be an opinion of an independent expert, who would provide the court with an unbiased opinion as to why, in this particular case, home schooling was the indicated educational route. It is clear that a the time that first respondent's attorney of record was involved in the case, he was aware that Mr Van Oostrum, who deposed to the affidavit,

was, as was stated in the affidavit, the chief executive officer of the Pestalozzi Trust, but further that the trust was actually funding first respondent's litigation. He was thus an interested party.

Mr Van Nieuwenhuysen submitted that I should have been aware of this by elementary reading of the affidavit. As I said to him in argument, he is far cleverer than I. I was unable to discern this fact from the affidavit. It was only when the matter emerged during the trial that I became aware that the Pestalozzi Trust was funding first respondent's litigation. Never was this important point drawn to my attention by the legal representatives of the first respondent. I would have thought that it was an elementary professional obligation imposed upon them.

The second point concerns the question of Dr Kockett, who was an expert on behalf of the respondent. During the course of the trial, it emerged that an e-mail had been generated by Mr Van Oostrum, 30 November 2009, headed "Core issues in Shapiro v Aspeling". There can be no doubt, nor was it disputed by Mr Van Nieuwenhuysen that Mr Van Oostrum sought to guide Dr Kockett to provide testimony to this court as to the obvious merits of home schooling. If one reads the e-mail from start to finish, it is clear that the objective was that

the dispute was set up as a trial case to push the agenda of home schooling.

It is not necessary for me to make a finding as to whether both counsel and the attorney, who act on behalf of the first respondent, knew of this e-mail. It is, however, clear that the e-mail was addressed, *inter alia* to first respondent's attorney. Had first respondent's attorney denied that he ever received it, this may have been a different issue. It is important to emphasise a further point. When the court considered what approach it should adopt to this revelation, it provided the attorney on behalf of first respondent (and counsel) an opportunity to explain the failure to place before the court the role of the Pestalozzi Trust and the appointment of Dr Kockett. In other words, the court strictly adhered to the principle of *audi alteram partem*, that is it provided the attorney with an opportunity to explain what appeared to be a disturbing omission on his part. This aspect was never dealt with by Mr Van Nieuwenhuysen in his attack on the cost order.

When Mr Badenhorst Schnetler deposed to an affidavit on 9 December 2009, he failed to address the concerns raised by the court in respect of the letter of instruction to Dr Kockett from Mr Van Oostrum, in which reference is made to him. He further failed to address the concern raised by the court as to

the basis upon which Mr Van Oostrum deposed an affidavit purportedly as an independent expert, where, to his knowledge, the Pestalozzi Trust had funded first respondent's litigation. In other words, an affidavit was sent to Mr Badenhorst Schnetler in which it was clear that their expert had been "schooled". He, therefore, since he does not deny it, must have had a copy of the email.

I fail to understand on what plausible basis an argument could be raised that it was not his duty as an officer of this court, to draw the attention of the court to the conduct of Mr Van Oostrum, who not being a lawyer, cannot be held responsible. The fact of the matter is that Mr Van Nieuwenhuysen never even sought to explain this, save to say that Mr Badenhorst Schnetler could not, in his words, be considered to be a puppet of Mr Van Oostrum. But consider the facts. Mr Van Oostrum hired Dr Kockett as an expert. Mr Van Oostrum informs Mr Badenhorst Schnetler accordingly, since he has a copy of the e-mail. Mr Badenhorst Schnetler accepts this particular course of conduct and does not concern himself to draw the attention of the court to the fact that an expert witness has been schooled to provide a biased opinion rather than expert evidence.

Mr Van Nieuwenhuysen submitted that there was a reasonable

inference that could be drawn the other way. I fail to see how this could be so in the light of the fact that Mr Badenhorst Schnetler failed to explain himself adequately, when given the opportunity to do so on 9 December 2009, that is a month prior to the judgment of this court having been delivered.

Costs, in any event do not generally form an exclusive basis on which to grant leave to appeal where it is the only issue so remaining, see Tsosane v Minister of Prisons 1982 (3) 1075 (A) at 1076-1077, and Erasmus at A1-50. In my view, even though there are exceptions, where leave will be granted in respect of costs, this was a case where absent any plausible explanation to conduct that, in my view, was reprehensible in the light of the inherent difficulty of a case dealing with the interests of children and this court's often articulated concern that this was the prime consideration the order was justified in the circumstances.

The only issue that now remains concerns costs of the application for leave to appeal. Ms Weyer submits that the costs for the application for leave to appeal should be borne by first respondent's attorney of record, given first respondent's financial circumstances, the fact that the litigation was funded by the Pestalozzi Trust. Her submission has great weight, given that when the analysis that I have

undertaken is examined in its totality, there is no merit at all in any of the submissions that had been raised by the respondent this morning. However, it appears that, given that Mr Van Nieuwenhuysen and Mr Theron are acting *pro amico*, this is a case where no order as to costs should be made.

ACCORDINGLY THE APPLICATION FOR LEAVE TO APPEAL IS DISMISSED subject, of course to one amendment to the order, which will be taken by agreement to which I have made reference regarding the scholastic needs of the children. There is no order as to costs.

DAVIS, J

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