SCHNEIDER NO AND OTHERS v AA AND ANOTHER 2010 (5) SA 203 (WCC)

2010 (5) SA p203

Citation	2010 (5) SA 203 (WCC)
Case No	8675/09
Court	Western Cape High Court, Cape Town
Judge	Davis J
Heard	August 31, 2009
Judgment	January 8, 2010
Counsel	PK Weyer SC (with JL McCurdie) for the applicants. EL Theron and A Botha for the first respondent. No appearance for the second respondent.
Annotations	Link to Case Annotations

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Flynote : Sleutelwoorde

Evidence - Expert evidence - Duties of expert - Must be objective and unbiased - Must not assume role of advocate or hired gun - Expert witnesses must confine themselves to area of expertise and not go beyond limits of specialised knowledge they claim to possess.

Minor - Schooling - Home-schooling - Whether advisable - Interests of child C paramount - Applicable legislation to be complied with - Court pointing out that case not test case for legality of home-schooling.

Attorney - Misconduct - Non-disclosure - Expert witness, brought in as hired gun with connivance of attorney, having also funded litigation - Such not disclosed to court by attorney or advocate - As result of conduct of D advocate and attorney, real issues not properly ventilated - Matter referred to Bar Council and Law Society for investigation and report-back - Costs order *de bonis propriis* on attorney and own client scale made against attorney.

Headnote : Kopnota

An expert witness comes to court to give the court the benefit of his or her E expertise. The fact that the expert is called by a particular party because his or her opinion is in favour of that party's line of argument does not absolve the expert from his duty to provide the court with as objective and unbiased an opinion as possible. An expert witness is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert witness does not assume the role of an advocate, nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which that F expert claims to possess. (At 211J - 212B.)
In deciding whether to sanction home-schooling for a particular child, it is the duty of the court to act in the best interests of that child. (At 215I.) Parents who want to home-school their children have to comply with the relevant legislation, particularly ss 3(1) and 51 of the South African Schools Act 84 of 1996. G (At 216I - 217J.)
In the present case, in which the issue before the court was whether it was appropriate for two young children to be home-schooled by their mother (the first respondent), a certain O, a purported expert in home education, submitted an affidavit on behalf of the mother in which he

made certain recommendations. He was the CEO of an organisation that promoted H home education, and his affidavit reflected this fact. What was never mentioned, however, was that the said organisation had actually funded the litigation. It furthermore appeared that another expert witness was brought in as a hired gun, specifically to discredit the evidence of a third expert witness. None of this was revealed to the court by the respondents' legal I team. The court pointed out that cases dealing with best interests of children were serious matters, and that the respondents' legal representatives owed the court a fiduciary responsibility even as they pursued the best interests of their clients. (At 218H - 219A.) In the present case the respondents' legal representatives failed in this duty by not informing the court of the true nature and objectives of the case. (At 220E - H.) The court accordingly resolved to submit a copy of its judgment to the Law Society of J

DAVIS J

A the Western Cape and to the Johannesburg Bar Council so as to enable them to investigate the conduct of respondents' attorney and advocate and to submit a full report to the court as to their conclusions.* (At 220H - I.)

Cases Considered

Annotations

B Reported cases

Southern Africa

B v S 1995 (3) SA 571 (A): applied

S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC) (2007 (2) SACR 539; 2007 (12) BCLR 1312) dictum in paras [16] - [18] applied

C *Segal v Segal* 1971 (4) SA 317 (C): dictum at 322H - 323A applied

Terblanche v Terblanche 1992 (1) SA 501 (W): dictum at 504C - D applied

Van Oudenhove v Gruber 1981 (4) SA 857 (A): referred to.

England

National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The 'Ikarian Reefer') [1993] 2 Lloyd's Rep 68: dictum at 81 applied

D *Re KD (a minor) (ward: termination of access)* [1988] 1 All ER 577 (HL): applied.

Statutes Considered

Statutes

The South African Schools Act 84 of 1996, ss 3(1), 3(5) and 51: see E *Juta's Statutes of South Africa 2009/10* vol 7 at 1-181 and 1-194.

Case Information

Application for the appointment of a *curator ad litem* for two minor children to enable him to prepare report on appropriate schooling for the children, and ancillary relief. The facts appear from the reasons for judgment.

F *PK Weyer SC* (with *JL McCurdie*) for the applicants.

EL Theron for the first respondent.

No appearance for the second respondent.

G *Cur adv vult*.

Postea (January 8).

Judgment

Davis J:

Before I deliver this judgment, I want to state for the record that I H received this morning (although I accept the document was generated on 4 January and a covering letter of 6 January) a notice from first respondent in terms of rule 34(2) of the Rules of the High Court that first respondent has unconditionally accepted to enroll the two children, S and D, at one of the educational institutions referred to in the recommendations of Dr W.

I This notice obviously came long after I had prepared the judgment. It does cause me to alter the order that I was proposing to make. As I am working on the assumption that this is an unconditional offer, I want to make it absolutely clear that the order that will follow is thus based on this notice and means that first respondent has accepted the children J must proceed to school.

2010 (5) SA p205

DAVIS J

It does, however, appear to me to be appropriate to set out the reasons A for the order that I was going to give, because there are very serious implications in relation to this matter which require full examination. In the course of the judgment I will indicate what order I would have granted, were it not for this offer which came so late in the day. Given this introduction, I move to the substance of the judgment. B

This matter was initiated by way of an application by the applicants in terms of the following notice of motion:

> '1. That Advocate Andre Heese, or such other person as this Honourable Court may deem appropriate, be appointed as *curator* ad *litem* to the minor children, [S] and [D], and to prepare a report for this C Honourable Court in which recommendations are made regarding:
>
> 1.1. The most appropriate schooling for the children both now and in respect of their high schooling.
>
> 1.2. Their reasonable maintenance, including the reasonable accommodation required. D
>
> 1.3. Any other matter affecting their best interests that she may deem necessary and appropriate in the context of her mandate.
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> 2. That pending the report of Advocate Heese, the first respondent is ordered not to remove the children from their current school and not to commence home-schooling.' E

The background to this application can be briefly summarised as follows. First respondent is the biological mother of two children, born out of wedlock on 22 December 1998, while she was in a relationship with the deceased, the late JS. The first applicant has approached this court as executor of the estate of the late JS and as a nominated trustee of the will F trust to be formed pursuant to the deceased's last will and testament. He also claims to act in his personal capacity as an interested party in terms of the provisions of both the Children's Act, 2005, and the Constitution of the Republic of South Africa, 1996 (the Constitution) in regard to the two minor children, twins, D and S (the children). The children are the G sole beneficiaries in terms of the last will and testament of the deceased.

The third applicant, IS, the mother of the late JS and the paternal grandmother of the children, has joined this application in a representative capacity as a nominated trustee of the will trust to be formed, and in her personal capacity, again in terms of the Children's Act and the Constitution. H

First applicant sets out in his affidavit the basis of this background. He avers that the deceased, whom he knew personally as a friend and a client for more than 20 years, placed considerable store on education, holding a master's degree from the University of Cape Town as a qualified town I planner. At the age of 46, while holidaying in Madagascar on 6 October 2008, he died suddenly and unexpectedly. According to first applicant, at the time of the birth of the children the deceased and respondent had lived together, and continued to live together for a number of months after the birth of the children, whereafter respondent moved out with the children, first to Wynberg, and subsequently, some two years later, to H, J

DAVIS J

A where she lived for approximately seven years. Accordingly, it appears that the children spent most of their lives in the H area, but respondent moved to Durbanville in January 2008, two days before the start of the term.

According to first applicant, respondent moved to this location owing to B a lack of employment prospects in H and, further, respondent's disagreement with the school which the children had attended, being the M school in Durbanville. According to first applicant, first respondent announced that she then wished to 'home-school' the children, relocated back to H, whereupon the children were removed from the M school.

C First applicant avers that both he and third applicant were extremely concerned about this decision to home-school the children and uproot them from their current schooling and environment. First applicant avers that shortly before the deceased's death in the middle of 2008, he insisted on a full evaluation by educational psychologists of both children, since it appeared that they were encountering certain learning D difficulties.

A report was prepared by an educational psychologist, M, on 12 December 2008, in which mention was made of certain problems of a scholastic nature being experienced by at least one of the children. The psychologist's E report indicated that while home-schooling might have been 'an option' for S, it was not recommended for D. The report noted that D was suited to a small teacher/pupil ratio environment and that he needed not to be moved to an alternative school placement, that he was progressing pleasingly scholastically, and that 'he seemed to be content F in his school and home environment'.

When the application was initially launched, first applicant in his affidavit noted that there was a discrepancy between what the respondent claimed and what was reasonably required for the children's needs, and it was thus important that the matter be resolved by way of appointment G of a *curator ad litem.* He then proceeds:

> 'It was necessary for me to work prudently both with the executor and trustee. I believe that as trustee and executor it is essential to establish with the inception of fair and reasonable basis upon which to move forward in the best interests of the children, without attack/criticism or fear of recriminations. I believe that an independent investigation by a H curator who may choose, if deemed necessary, to obtain expert opinion from an appropriately qualified educational psychologist and/or clinical psychologist as to what is in the best interest of the children, would be in the best interests of the administration of the estate and the children.'

First respondent vigorously opposed this application, both on the I grounds of the locus standi of applicants, and on the basis that it constituted an unfair interference with her parental responsibilities which she had reasonably undertaken over the lifetime of the children. In her answering affidavit she states:

> 'If the applicant knew anything about home-schooling, taking the children's specific needs into consideration, enquired about it, and J shown reasonable interest, they would not have been concerned. There

DAVIS J

> is nothing unstable about home-schooling, and from the children's A point of view they will be moving back into a stable environment in [H]. I wish to refer the court to the affidavit of [O], where he deals more specifically with these aspects.'

In this reporting affidavit one O, who is the executive officer of the P Trust, described by him as a trust set up for the legal defence of home B education, purports to be an expert in home education. He then provides a detailed report of home education and its many merits. He then states as follows:

> 'None of the applicant's stated concerns about home education are supported by any empirical observations recorded in the literature by C the specific home education program provided to his children or by the educational environment in which they are situated. Conversely it cannot be shown and not [*sic*] responsible teacher would claim that any of the assumed benefits to be derived from attendance at the best

schools proposed to these children will be reaped by both or either of these children. It is common knowledge that there are children in the best of schools for whom that school is not the best school.' D

O then makes certain recommendations;

'I find no reason to advise first respondent to change her choice of home education for these children or, at this stage, to change any aspect of the E program offered to them. In my opinion respondent can best serve the educational interest of her children by continuing the home education in the present manner, adjusting for the development needs of the children as necessary and obtaining specialist services where possible, necessary and affordable. Assessment of the children's progress by an independent educational psychologist after one year of home education will assist her in deciding a further course of action. Such assessment F should be repeated at least once every three years thereafter. . . . If, on the contrary, involvement of their late father's relatives in the children's education remains negative and destructive as the present evidence suggests, consideration should be given to asking a court to limit their access to the children to an absolute minimum or to supervised access. Such restriction should be determined and implemented and G monitored with the assistance of a forensic psychologist. It should be maintained until the children are less vulnerable to negative labelling of the kind of education their mother has chosen for them and to denigration of or refusal to recognise their short and long term achievements and progress. This could take several years.'

On 31 August 2009 the parties agreed to deal with the disputes which H I have outlined in terms of the following order:

'Dr [W], who is hereby jointly appointed to assist in an investigation and the preparation of report(s) containing her recommendations in regard to what is educationally in the best interests of the two minor children, [S] and [D], both now and in respect of their future secondary I schooling. The parties shall cooperate fully with Dr [W] in carrying out her mandate and the children are to be made available at her request for such sessions as she may deem necessary to assist her in her conduct of the assessment and report . . . . The parties agree to be guided by the recommendations

DAVIS J

A of Dr [W] but in the event of either the applicants or the respondents refusing and/or failing to accept the recommendations of Dr [W] the matter may be determined by this Honourable Court on the postponed date.'

The order then provided for certain matters with regard, for example, to maintenance *pendente lite.*

B Dr W then produced her report, which proved to be unacceptable to first respondent. Pursuant thereto first respondent commissioned a further report from Dr K. The evidence of both experts was then subjected to examination and cross-examination by way of an oral hearing before this court. I turn therefore to deal with this evidence.

C The evidence

Dr W interviewed both children and their mother. It appeared that she spent at least five hours with each child. She also involved other professionals to assist her with certain of the testing which was required, and this was performed separately by different members of the 'Pro Ed' D team of professionals specialising in the field of remedial education. In addition, Dr W visited the M School, which had previously been attended by the children, as I have noted, and interviewed the former principal. She also had a discussion with the M School in Durbanville, which the children had attended between January 2007 and April 2009, whereafter they had been removed by first respondent. In addition she E visited the OL Learning Academy in H to assess its suitability as a possible school for the children.

Pursuant to her investigations Dr W concluded that both S and D, but in particular S, had shown significant gaps in the essential learning areas which in the old parlance are referred to as the three R's: reading, writing F and arithmetic.

In her view, in S's case the gap was as much as two years in respect of these areas. While D did not, in her view, exhibit the same educational deficit as S, he had also shown inconsistent patterns of knowledge, G particularly insofar as mathematics was concerned

Dr W highlighted a concern regarding the children's non-attendance at school since April 2009, and the effect that she considered this had on them losing competence, to some extent,

compared to that which had been exhibited when tested by M. In addition she questioned why first respondent allowed the children effectively to remain under-stimulated H throughout this period, and further why first respondent had in her view acted precipitously in withdrawing the children from the schooling environment.

It was Dr W's view that this conduct was particularly disturbing because I both children, on the tests that she had administered, required structure and discipline in order to make up the gap which had developed at this particular point. She questioned whether either of the two children was capable at present of proceeding to grade 6, which is the grade they should have been in at the commencement of the 2010 schooling year. She advanced the view that S most certainly should not enter grade 6, J and that D might be able to be admitted to this standard, but this could

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DAVIS J

not be confidently predicted in the light of the testing that she had A undertaken.

She gave evidence that she had applied the Welchsler Individual Scale 4 (UK Edition) tests in support of her assessment of both children. Her conclusion was that they were 'bright boys', but that their educational problems were manifest. She did not regard the test results obtained by B her as being indicative of the children being 'exceptionally bright or gifted', a view which had been taken by respondent's expert, Dr K. She did not consider that they had extraordinary needs that had to be stimulated outside of the normal parameters of schooling. Dr W objected to the notion, in any event, that highly intelligent children could not be more successfully and happily catered for in a schooling system, C or indeed in a special school such as that established by Dr K herself in Johannesburg, Radford House, which had been created to cater for children whom Dr K had referred to as gifted or exceptional.

According to Dr W, given the remedial educational needs, in particular, D of S, the children's best interests would be served by attending the type of school which she had identified in her report, together with the children being subjected to the necessary remedial therapy from outside therapists.

In summary, she rejected the option of home-schooling as being in the E best interests of these particular children, given the test that she had administered, their educational profile, and the results which she had established pursuant to the tests which I have outlined. Unquestionably, children would require a skilled educationist to supervise and coordinate a programme which would be required for them to catch up with other children of their age group. In her view, the fact that a person such as first F respondent could simply coordinate a schedule of remedial teachers could not in this case be considered to be in the best interests of these children, given their particular needs. Dr W emphasised to the court that a home-schooling option would constitute too great a risk for these children. The chances of them successfully reintegrating into mainstream education, in the event that home-schooling failed after six G months, would be even more difficult.

She also expressed concern regarding first respondent's ability to put in place the type of structure and routine that is required to 'home-school' children, given the first respondent's past failure to display any such ability. She also questioned the mother's general ability to cope with the H task of home-schooling two children with the complex educational needs exhibited by the two boys.

In short, she concluded thus:

> '[S] cannot be home-schooled. He requires very considerable routine, structure and organisation, something that has not been shown in I "home-schooling" so far. Furthermore the twins are at very different levels and will both be frustrated, [S] because he cannot catch up with [D], and [D] because he will be held back by [S]. . . .'

So much for a summary of Dr W's evidence. First respondent placed two reports before the court, both designed to refute these recommendations. Dr K, of the Centre of Integrated Learning Therapy, produced a J

DAVIS J

A report, as did Ms JEM Coetzee, a psychologist, although the latter was never called as a witness. It appears that Ms Coetzee interviewed the first respondent, and found her to be in psychological distress and recommended psychological counselling, both at present and for the foreseeable future. She also made a recommendation that first respondent be B allowed to home-school only if she underwent a fairly rigorous course of psychotherapy.

The key witness on behalf of first respondent was Dr K. Significantly, when asked about Ms Coetzee's report, she conceded that she had never been shown these recommendations, which itself was somewhat curious.

C The thrust of Dr K's evidence can be summarised thus: The children were particularly gifted, which I took to mean that they were extraordinarily intelligent, by virtue of the scoring which they had achieved in accordance with a further set of tests undertaken by Dr K, which were based on 'a South African individual scale'. I should add that Dr W had certain problems with this particular test, but I do not need to resolve D these particular epistemological difficulties.

The test was not, however, administered by Dr K, but rather by Ms M. I should add that these tests were not made available to the court, nor to Dr W (according to whom they had been requested). Based on these E findings, Dr K concluded that they were gifted, and, as gifted children, they required more than was offered at any regular school, where their exceptional intelligence would not receive the ordinary stimulation that they required. On this basis she considered home-schooling to be a viable option.

F Significantly, when pressed by the court to indicate whether, if the children lived in the Gauteng area, she would prefer them to attend her school rather than home-schooling, she desperately tried to avoid answering the question. Finally, after persistence from the court, she conceded, with extraordinary reluctance, that she would have recommended attendance at her school.

G Dr K accepted that the children were in need of urgent remedial intervention because she accepted that they had certain significant scholastic gaps:

> '[S] is experiencing stress in the academic environment and is not coping with scholastic demands, in particular he is said to struggle with H spelling, writing, working memory and concentration.'

She accepted that D had problems with regard to his sensory motor systems, his auditory memory and his eyesight. In her view, this set of descriptions indicated that the two children were 'doubly exceptional', I by which I understood her to mean that they had two reasons to attend her school or home-schooling. Her preferred programme was that of integrated learning therapy. According to her, this program could be run, if first respondent so wished, in conjunction with other remedial programmes, although a six-week initial period would be preferable. Further remedial therapy would not have to wait indefinitely, as it could J work in tandem with her therapy. That therapy would, in her view,

DAVIS J

together with other remedial therapy, be able to resolve many of the A problems which the tests had identified.

I regrettably need to deal in more detail with concerns regarding the evidence of Dr K.

The first turns on her expertise, the second on her mandate. In her B CV she indicates that she had been an associate professor at the University of South Africa until December 2006. Nonetheless, she described herself as 'Professor' K. Usually, and I consider the court can take cognisance of this, associate professors are not full professors and cannot retain the title of professor upon resignation from their office. Indeed, the only time that a retired professor can retain the title of C professor is when he or she has attained the status of emeritus professor.

This point may seem to be trivial, but people who claim qualifications or titles which they do not

possess need to be treated with some measure of circumspection. Furthermore, she conceded that educational psychologists, which was the area in which she had been trained, do not train D formally in neurology or neurological development. When asked by the court as to her qualifications in this regard, she claimed to have done a number of courses over a number of months. It does raise serious questions about her expertise in this complex field, but I do not need, for the purposes of this judgment, to do more than raise these questions.

The second concern regarding Dr K's evidence is of far greater import. E In this connection it is necessary to deal with the role of an expert. In Zeffertt, Paizes & Skeen *The South African Law of Evidence* at 330, the learned authors, citing the English judgment of *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The 'Ikarian Reefer')* [1993] 2 Lloyd's Rep 68 at 81, set out the duties of an expert witness F thus:

> '1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
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> 2. An expert witness should provide independent assistance to the G court by way of objective, unbiased opinion in relation to matters within his expertise . . . . An expert witness should never assume the role of an advocate.
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> 3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion. H
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> 4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
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> 5. If an expert opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not I assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.'

In short, an expert comes to court to give the court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in J

A favour of the line of argument of the particular party. But that does not absolve the expert from providing the court with as objective and unbiased an opinion, based on his or her expertise, as possible. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor gives evidence which goes beyond the logic which is dictated by the B scientific knowledge which that expert claims to possess.

Sadly every single one of these strictures was breached by the evidence of Dr K. I regrettably have to deal with this issue in some detail. Under cross-examination Dr K was asked whether she was given any instructions C as to the evidence which she would provide to the court. Notwithstanding strenuous objection, she reluctantly stated that she had been given certain instructions, initially described as oral, but then it appeared that an e-mail had been generated by O, dated 30 November 2009. It was headed 'Core issues'. It appears to have been sent to Dr K, as well as to first respondent's instructing attorney, on which more presently. O D wrote as follows:

> 'I have taken the liberty to summarise below the core issues that we need to be able to answer in response to the views of Dr [W]. I am sending this to Jan (first respondent's instructing attorney) as well so that he can tell us if he disagrees with me. At issue in this case is whether the court E is justified in infringing the children's constitutional right to parental care by overruling the decision by the mother to educate them at home.'

Thereafter O provides something of a summary of the law. He then continues:

> 'Our enquiry from Professor [K] and Ms Coetzee is whether they agree F on the evidence that the home education will be contrary to the best interests of the [S] children. . . . The reports from Professor [K] and Mrs Coetzee should therefore, in addition to a general conclusion whether home education will be contrary to the best interests of the children, and to the extent that it is possible for them to answer that on information available to them and that they can obtain, answer the following specific questions.'

A set of questions is then provided and the e-mail continues;

> 'It seems that Dr [W] relates this in some way to the fact that [S] now irritates [D] and the boys fight. They see too much of each other. My response: wow! And how are they to learn and live and work with co-workers one day? Will they never serve in the army or on ships or yachts or might they not, given their heritage, go and live on a kibbutz where they might have to live cheek by jowl with others for extended periods of time.'

He then continues:

> 'What is the construction of independence that Dr [W] refers to? This is an *opportunity for us to infuse our own constructions into the debate*.' [My emphasis.]

The e-mail concludes:

> 'I think that the above covers the most important elements at issue at the present time. No doubt others will arise along the way, and might be

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DAVIS J

> flung at us in the witness-box without warning, but these are the ones we must answer at this time. *Jan should let us know if he disagrees on the above*.' [My emphasis.]

It is clear from his e-mail that Dr K was hired as a person specifically to undermine Dr W's evidence before she considered the facts. Although I have to accept that she did try to place an impartial gloss on much of the evidence, her reluctance to concede when faced with a clear obstacle, her inability to acknowledge the possibility of another expert's view, and the general contradictory nature of her evidence, particularly with regard to whether home education was suitable, preferable, or simply in equipoise with school education, have to be evaluated in terms of the mandate that she was given.

It also appears that she recommended home-schooling without ever discussing with first respondent the choice of the home-schooling method favoured and identified by the latter. A particularly interesting illustration of the difficulties that she encountered took place when it was put to her that first respondent had chosen the 'Son Light Program'. It appeared that this particular programme, developed by a self-proclaimed 'Evangelical Christian proselytising' group, adopted a particular religious line, ironically a line with which even O, presumably, would disagree, given his earlier reference to the children's Jewish heritage.

What was so significant about Dr K's performance was the fact that it was obvious, both from her demeanour and her reluctance to answer, that she knew that this was an unsuitable programme. After the most intricate of evidential egg dances, she finally reluctantly conceded that it may well not have been suitable. In my view her evidence raises significant problems as to its independence, credibility and her expertise.

That takes care of the evidence. I turn to deal firstly with first respondent's arguments. Mr *Theron*, who appeared on behalf of first respondent, submitted that, generally speaking, on the subject of the welfare of children, the custodian parent, in this case first respondent, has the right to have the children with her, to control their lives, to decide questions of education, training, and religious upbringing. In this connection he cited the case of *Van Oudenhove v Gruber* 1981 (4) SA 857 (A) at 867. In his view the opinion and desires of the custodian parent could not be ignored by the court.

Mr *Theron* submitted that the applicants' founding affidavits did not contain any primary facts which would justify the court's exercise of its jurisdiction as upper guardian of the children and which therefore would justify it overriding the decision taken by first respondent as the mother. He submitted that Dr W did not have regard to any of the qualitative or quantitative studies comparing mainstream education to home education, and had to resort to anecdotal evidence to support her view that home-schooling was unsuitable for the minor children. He submitted further that, when Dr W was questioned on the factors that would militate against home-schooling, she primarily contended that home-schooling could not provide the necessary structure and the necessary specialist teachers, and that other professionals might not be available,

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DAVIS J

A and that she believed that a normal mother could not teach without formal qualifications.

In his view Dr K's evidence indicated clearly, to the contrary, that the two children were potentially suitable for home education. Mr *Theron* submitted further that the court was asked to exercise its jurisdiction as B the upper guardian of minors, and therefore to invade the private sphere of first respondent in a drastic manner, both by the appointment of a *curator ad litem* and by taking away the decision which first respondent had made with considerable care.

These submissions necessitate some inquiry into the applicable legal C principles. Section 28(2) of the Constitution provides that the child's best interest is of paramount importance in every matter concerning the child. The concept of the 'interest of the child', being of paramount consideration, is reflected in art 3(1) of the United Nations Convention on the Rights of Children. The Convention was adopted by the General D Assembly of the United Nations on 20 November 1989, and South Africa became a signatory on 29 January 1993, with ratification taking place on 16 June 1995.

I should note that even before the Constitution came into force and before ratification of the Convention, it was said in *Terblanche v Terblanche* E 1992 (1) SA 501 (W) at 504C - D 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 F information, of whatever nature, which may be able to assist it in resolving custody and related disputes.'

Even earlier, in *Segal v Segal* 1971 (4) SA 317 (C), Tebbutt AJ (as he then was) said (at 322H - 323A) that in previous cases it was considered that the court would not interfere with parental decisions -

> G 'unless the foundation had first been laid by proof to the satisfaction of the Court that there had been an abuse by the custodian parent of his power; either that no discretion had been exercised at all, that is to say, that the actual decision had been capricious or vitiated by unreason in the sense that no reasonable person could have arrived at it or that the decision was inspired by a motive which was quite foreign to a due and H proper regard to the interests of the child'.

In *B v S* 1995 (3) SA 571 (A) at 581A (a case which did take place after the creation of our constitutional dispensation) Howie JA (as he then was) said, citing *Re KD*,* a House of Lords decision:

> I 'Parenthood, in most civilised societies, is generally conceived of as conferring on parents the exclusive privilege of ordering, within the family, the upbringing of children of tender age, with all that that entails. That is a privilege which, if interfered with without authority,

DAVIS J

> would be protected by the courts, but it is a privilege circumscribed by A many limitations imposed both by the general law and, where the circumstances demand, by the courts or by the authorities on whom the Legislature has imposed the duty of supervising the welfare of children and young persons. When the jurisdiction of the court is invoked for the protection of the child the parental privileges do not terminate. They do, however, become immediately subservient to the paramount consideration which the court has always in mind, that is to say the welfare B of the child.'

Further, Howie JA says:†

> 'Whatever the position of the parent may be as a matter of law, and it C matters not whether he or she is described as having a right in law or a claim by the law of nature or as a matter of common sense, it is perfectly clear that any right vested in him or her must yield to the dictates of the welfare of the child.'

The Constitution and international instruments now provide concrete amplification of these dicta. D

All of these dicta can now be viewed through the prism of the most recent articulation of what constitutes the best interests of the child by the Constitutional Court in *S v M (Centre for Child*

Law as Amicus Curiae) 2008 (3) SA 232 (CC) (2007 (2) SACR 539; 2007 (12) BCLR 1312), where the court said: E

> '[Section] 28 must be seen as responding in an expansive way to our international obligations as a State party to the United Nations Convention on the Rights of the Child. . . . Section 28 has its origins in the international instruments of the United Nations. . . . The four great principles of the CRC which will become international currency, and as F such guide all policy in South Africa in relation to children, are said to be survival, development, protection and participation. What unites these principles and lies at the heart of s 28, I believe, is the right of a child to be a child and enjoy special care. Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or G her parents, umbilically destined to sink or swim with them.' [In paras 16 - 18.]

If a child-centred approach is adopted in this particular set of facts, as must be the case in terms of the law as I have set it out, the following emerges: H

(1) What method of education can be regarded as best suited to the particular needs of these children? In this case the court is not concerned, as unfortunately appeared to have been the case, with a test case with regard to home-schooling. This is not a test case about home-schooling, and thus this judgment is not to be construed as an I evaluation of the merits or demerits of home-schooling. It is a case which deals only with one question - the determination of the best interests of two vulnerable, young children, and what in fact will be

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A in the best interest of them not just now, but which will impact upon them for the rest of their lives. The court is not concerned, in this case, with the 'great' questions of home-schooling - these will have to wait for some other occasion, which mercifully is not this case.

(2) The court is required to evaluate the evidence of Dr W versus that B of Dr K. As I have already said, the latter was a questionable expert: there were doubts about her independence, there were doubts about the quality of her evidence, her reluctance to answer candidly.

(3) Even if Dr K's evidence is placed in the best possible light, it amounts to no more than a hesitant acceptance that home education may be no worse than education in a special school, which is C effectively the thrust of Dr W's unequivocal evidence.

(4) In this case there may be other interests, interests of the first respondent to look after her children, but the paramount principle dictates that the child's interest is of cardinal concern, not the child as an instrument to decide as to whether one form of education in D some grand scheme is better than another.

(5) The evidence suggests that first respondent is a concerned parent who has strong views about the best interests of these children. This view must be taken seriously. Expressed differently, there is no evidence that first respondent is not deeply concerned about her children, is not concerned about the best interests of her children, or E that she does not have strong convictions about home education. Three further facts emerge which are of critical importance:

(i) First respondent removed the children from a school in which they appeared to be making progress. I find it significant that no reports or copies of reports were procured by first respondent to F assist this court with regard to this line of enquiry. It was suggested by applicants that the children were progressing well at the M School. It was suggested that a request had been made for reports to be provided. I was informed that the reports had been lost, but no suggestion was ever provided to this court as to why copies could not have been procured, which would have G indicated in an unequivocal fashion the extent of the development of the children at the school prior to them being removed.

(ii) Little education took place once the children were removed from school in April 2009. There was some suggestion on the basis of the evidence of O that a gap between the formal school H and home-schooling should take place, but it was never explained to this court as to the reason for such a lengthy period.

(iii) Of particular importance is that the decisions of first respondent in this connection are contrary to the law. I need therefore briefly to deal with this.

I In terms of the South African Schools Act 84 of 1996, and particularly s 3(1) -

'every parent must cause every learner for whom he or she is responsible to attend a school, from the first school day of the year in which such J learner reaches the age of 7 years, until the last school day of the year

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DAVIS J

in which such learner reaches the age of fifteen years or the ninth grade, A whichever occurs first',

Section 3(5) provides that:

'(5) If a learner who is subject to compulsory attendance in terms of subsection (1) is not enrolled at or fails to attend a school, the Head of Department may - B

(a) investigate the circumstances of the learner's absence from school;

(b) take appropriate measures to remedy the situation;

(c) failing such a remedy issue written notice to the parent of the learner requiring compliance with subsection (1).'

Section 3(6) provides that - C

'(6) Subject to the Act and any other applicable law -

(a) any parent who, without just cause and after written notice from the Head of Department, fails to comply with subsection (1), is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months, or

(b) any other person who, without just cause, prevents a learner who D is subject to compulsory attendance from attending a school, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months.'

Section 51 of the Act is also significant. It provides that for the registration of a learner for education at home: E

'(1) A parent may apply to the Head of Department for the registration of a learner to receive education at the learner's home.

(2) The Head of Department must register a learner as contemplated in subsection (1) if he or she is satisfied that -

(a) the registration is in the interests of the learner;

(b) the education likely to be received by the learner at home - F

(i) will meet the minimum requirements of the curriculum at public schools; and

(ii) will be of the standard not inferior to the standard of education provided at public schools; and

(c) the parent will comply with any other reasonable conditions set by the Head of Department. G

(3) The Head of Department may, subject to subsection (4), withdraw the registration referred to in subsection (1).

(4) The Head of Department may not withdraw the registration until he or she -

(a) has informed the parent of his or her intention to so act and the reason therefor; H

(b) has granted the parent an opportunity to make representations to him or her in relation to the action; and

(c) has duly considered any such representation received.

(5) A parent may appeal to the Member of the Executive Council against the withdrawal of a registration or the refusal to register a learner in terms of this Act.' I

There is no evidence that first respondent has complied with s 51 of the Act, nor that she is not in breach of s 3 of the Act. In short, this case was, ironically, run on the basis of requesting this court to sanction a continued breach of the relevant law. Had it not been for the rule 34(2) notice, in which the first respondent has now unconditionally accepted J

DAVIS J

A that the children must be enrolled at school, I would have considered, and was going to order, that it was not necessary to determine whether home-schooling was in the best interests of the children, nor ultimately to decide whether the first respondent's discretion should trump the evidence of Dr W, because I would have found that first respondent must B comply with the applicable law.

The order that I proposed would have been interlocutory of nature, that is, pending relevant authorisation by the education department, the children had to be registered in school. Were authorisation to be granted then either party was free to approach this court on papers duly C supplemented. That, however, is no longer necessary because I have worked on the assumption that first respondent has unconditionally accepted the children must now go to school. I make these observations because there must be no retreat from this unconditional offer. If so, first respondent would be in breach of the law, and applicants would be free D to approach this court accordingly.

Before I deal, however, with the order that I must make in the light of these findings, I have to deal with some unfortunate conduct on this whole matter. I do this, and I wish to place on record that I do so for the first time in my judicial career.

E This is not an issue which I take lightly, and it has taken me a long time, after anxious consideration, to make the following comments and decisions.

The disturbing conduct to which I make reference can be summarised thus: I was provided with a very lengthy affidavit from O. He correctly F describes himself as the chief executive officer of the P Trust, which deals with the defence of home education, but outside of that there was no indication of his involvement in this case. The entire affidavit purported to be that of an expert providing this court with independent evidence with regard to the merits of home education. Nowhere in the affidavit, nor anywhere else, was I ever informed that the P Trust had funded this G litigation.

Secondly, O's e-mail reveals that Dr K was brought in as an expert, apparently with the connivance of first respondent's attorney, as a 'hired gun'. Again, none of these facts were ever brought to the attention of this H court until cross-examination took place.

This is an agonisingly difficult case. Were this to have been a case dealing with a commercial matter, I am not certain that I would have been as distressed by the relevant conduct of the first respondent's representatives. But this was a case dealing with the best interests of two children. I said to Mr *Theron* early on in his cross-examination that I did not wish I this case to be conducted as a criminal trial, but as a quasi-inquisitorial process so that the court could truly come to the best decision in the interests of the children. See *Terblanche*'s case, supra.

I find these cases the most difficult for a judge. These are not my children. That is a difficult enough task. These are other people's J children for which I, as a judge of this court, am now to assume

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DAVIS J

responsibility. That is a terribly weighty decision to make in a case such A as the present dispute. Respondent's legal team, as officers of this court, owe a fiduciary responsibility to the court as they pursue the best interests of their client.

This case appeared to be run as a test case for home-schooling, not as a case about what was in

the best interests of the children. I asked first B respondent's attorney to explain his conduct. He deposed to an affidavit. In it he informed me of the following:

> 'Shortly after the application was served I received a telephone call from [O] as the Chairman of the [P] Trust Legal Defence Fund for its members. [O] advised me that the first respondent is a member of their C association and requires legal assistance for which the Trust would pay. I thereupon required [O] to arrange that the papers be forwarded to me either by courier or by way of electronic means to enable me to assess the position of the first respondent, *viz a viz* the application with regards to her right as sole guardian of the children, and the rights of the children seen in the light of the Children's Act, the Schools Act, and the Constitution. D
>
> At no stage did I consult with [O] with regard to the merits of the matters, and only requested him to supply me with an affidavit setting out his involvement as well as his opinion as an expert with regard to home-schooling. I only advised him that I was satisfied that the respondent did have a plausible defence to the application. On receipt E of the application I perused it and on Saturday 9 May 2009 I had an extensive telephonic consultation with applicant, took instructions to get background with regard to the application and discussed the merits of the application with her, and was satisfied on the papers that, in my opinion, not a proper and sufficient case is made out for the applicants to be successful with the application. I thereupon drafted an answering F affidavit for the first respondent and after I finalised the draft I again had a long telephonic discussion of about an hour with the first respondent . . . .
>
> At no stage during my consultations with the first respondent did I take instructions from the said [O] or any other third party with regard to the G matter. My only contact in this regard with [O] was my advice to him that I was of the opinion that the first respondent's rights were in fact infringed on by the application, and I was satisfied to act on her behalf . . . .
>
> At all times [O] knew that by taking the instruction, my objective would be to look after the interests of the members and not to endeavour to H enhance the objects and principles of home-schooling. Being in practice for some time there are ethical standards to which I adhere to and will not be influenced by any third party . . . . In my initial instruction to Advocates Botha and Theron it was directly stated by myself that although the [P] Trust would be paying our fees, that we are acting on behalf of the first respondent, and the first respondent is our client and I we abide to her instructions. It can also be explicitly stated that both counsel stated that under no circumstances they would be prepared to act in advancement of the principle of home education and would only act in the interests of the first respondent and the children . . . .
>
> After receipt of Dr [W]'s report I contacted and discussed the report with the first respondent and suggest that we obtain the services of J

DAVIS J

> A Mrs JE Coetzee to investigate and render us a report and as there are cost implications involved I contacted [O] and advised him that I would like to make use of the services of Mrs Coetzee. He advised me that he knows of a certain Dr [K] whom he would contact . . . .
>
> Prior to receiving Dr [K]'s report I did not have any contact with her, B and only discussed the report in short with her telephonically prior to meeting with her in Cape Town with advocate Theron. Judge Davis also mentioned correspondence being referred to in the evidence which was an e-mail forwarded by [O] to Dr [K]. I attended a meeting in Judge Davis' chambers on 30 November 2009, and only recall having seen the letter on 2 December 2009. . . .
>
> C Taking into consideration that I have a fairly busy practice and preparing for a Supreme Court trial . . . I did not have time to contact or to communicate with Dr [K] and/or [O] with regard to his e-mail.'

Unfortunately this affidavit does not explain the nature of O's suggestions that 'Jan' would also give his input, contains no denial that there D appears to have been a strategy between the two, does not explain the repeated references to Mr Schnetler in the e-mail of O, nor does it explain how an affidavit was deposed to by O, who is effectively the funder of first respondent, and who was then represented as being an independent expert in this case.

E Reluctantly, I must come to the conclusion that there are very serious questions about the conduct of this case. Mr *Theron* never informed the court of any of these facts, nor was the court ever informed about the manner in which Dr K had been instructed, the role of the P Trust, or that O, who had a very significant interest in this particular case, deposed F to an affidavit, purporting to be that of an independent expert, in which he makes very serious averments that third applicant should have no access to her grandchildren.

In the ordinary course there would have been no objection to the P Trust G being admitted as amicus curiae. Certainly there would have been no objection on the part of this court to Mr

Theron and Mr Schnetler acting on behalf of the P Trust and effectively generating the same sort of evidence and argument. But the court would then have known the nature of their purpose and the objective of the entire case. That did not happen. For this reason I am going to submit a copy of this judgment to H the Law Society of the Western Cape and to the Johannesburg Bar Council. I want the conduct of both Mr Schnetler and Mr *Theron* to be investigated, and I want a full report to be provided to this court as to the conclusions of the Bar Council in Mr *Theron*'s case, and in Mr Schnetler's case by the Law Society.

I The court takes this conduct very, very seriously. I emphasise that this is the first time in my career, which spans more than eleven years on the bench, that I have ever done this, but, given the nature of a case concerning small, vulnerable children, I do not consider that I have any other alternative, particularly because I wish to remind the legal community J that they have a duty to this court, as they do also to their clients.

DAVIS J

With these remarks I can now turn to the relief. As I have already A indicated, the order that I now must make takes cognisance of the notice in terms of rule 34(2). There is one last issue, however, that I must now raise, the question of costs. Ms *Weyer*, who with great distinction appeared on behalf of the applicants, urged me, as a mark of the disapproval of the court, to order costs on the basis of *de bonis propriis* B against the first respondent's attorney. Given the manner in which this case was conducted, the real issue, being the best interests of D and S, was not ventilated in a proper and cost-efficient manner between the parties, because the dispute was hijacked and prolonged by the complications to which I have made reference. There is no question that a costs C order against first respondent's attorney *de bonis propriis* on the scale as between attorney and client is justified, but not for the whole case. Evidence would have had to be led in any event, and accordingly the order will be granted for the second day of evidence, as a mark of the extreme displeasure of this court at the manner in which this case was prosecuted. D

For these reasons the following order will be made:

1. The first respondent shall:

    1.1 Enrol the two minor children, S and D (the children), forthwith for the commencement of the 2010 academic year E at one of the educational institutions referred to in the recommendations of the jointly appointed expert, Dr W, contained in the reports prepared by her in respect of the children and filed on record on 3 November 2009. First respondent shall provide documentary proof to this court of such action not later than Monday 18 January 2010. F

    1.2 Continue with the education in a manner consistent with the recommendations of Dr W, in the best interests of the children.

2. While at school the progress and educational remedial needs of the children shall be further monitored by Dr W at six-monthly G intervals, beginning June 2010, and fully investigated and assessed by her prior to 30 June of the year in which the children are, respectively, in grade 7. Dr W is requested to direct at that stage whether she requires the assistance of duly qualified experts to assist her to evaluate and recommend what schooling afterwards would be in the best interests of one or both of the said H children in respect of their secondary education. The deceased estate of the late JS (hereinafter the deceased estate), and represented in these proceedings by the first and third applicants, shall bear the costs of Dr W and such further experts that she may require to assist her in performing her duties and functions in terms of para 1 above. I

3. The first respondent is ordered to cooperate with Dr W in carrying out these duties.

4. The parties agreed that the following maintenance shall be payable by the deceased

estate in respect of the minor children until they attain the age of majority, which amount shall be J

DAVIS J

A payable monthly in advance on or before the 1st day of each calendar month into such account as first respondent may nominate in writing from time to time.

4.1 The amount of R5000 (five thousand rand) per month per child.

B 4.2 The amounts so payable shall be escalated annually by the average increase for the preceding year in the headline CPIX as published from time to time in the *Government Gazette* with effect from 1 January 2011.

4.3 The reasonable costs from time to time of accommodation and such rental with respect to the minor children.

C 4.4 The reasonable educational and related costs, including school fees, school clothes, reasonable extramural activities, extra tuition, remedial teaching/support and like or similar education expenses in respect of the minor children, provided that same is in accordance with the recommendations of Dr W or unless agreed to in writing by the parties.

D 4.5 The costs in maintaining the minor children (and the respondent until such time as the children attain the age of majority without accepting any legal obligations so to do) on the Discovery Health Coastal Core Medical Aid Plan or a plan offering similar benefits thereto. The deceased estate shall E also bear the costs of all reasonable medical, dental, pharmaceutical (on prescription), surgical, hospital, orthodontic, ophthalmic (including spectacles and/or contact lenses), and similar medical expenses reasonably incurred in respect of the minor children only, including any sums payable to a F physiotherapist, chiropractor, psychologist or psychiatrist which are not covered by the medical-aid scheme. The estate shall not be responsible for the payment of respondent's medical costs which are not covered by her one-third portion of the medical-aid-scheme benefits.

4.6 The deceased estate shall pay any such expenses not covered G by the medical-aid scheme within 14 calendar days of presentation of invoice/proof of payment being made to Mr S: all claims for the payment of excesses or claims not paid or not payable by the scheme against the deceased estate must be submitted to Mr S or his nominee within a H reasonable time of the scheme refusing to pay the claim.

4.7 First respondent shall ensure that she complies with the rules of the medical-aid scheme and she shall submit all claims to the scheme within 30 days of date of invoice to her. Any failure by her to comply with the rules of the scheme, I including authorisations or pre-authorisations, or failure to submit claims timeously to the scheme, shall result in the deceased estate not being liable in respect of that claim.

4.8 Any dispute in regard to the payment of any medical expenses defined herein shall be referred to a FAMAC-appointed facilitator who shall be entitled to facilitate the J dispute and make a ruling that is binding on both parties,

DAVIS J

unless it is varied by a court of competent jurisdiction, A alternatively, varied by the facilitator following a separate review. The costs of the facilitator shall be shared equally between the parties unless directed to the contrary by the

facilitator.

5. In regard to the issue of contact with the children, the paternal B family has agreed as follows;

   5.1 There shall be contact between the fourth applicant, Mrs S, on two weekend days per month, on either a Saturday or a Sunday, such reasonable periods as may be agreed between Mrs S and first respondent from time to time.

   5.2 For so long as it may be reasonably required, an agreed third party, C acceptable to both parties, will accompany the children to their visits to Mrs S.

   5.3 The siblings of the deceased and Mrs S shall have reasonable telephonic and electronic contact with the minor children at all reasonable times.

   5.4 In the event of the deceased's siblings or their immediate D families wishing to have contact with the children, this shall be arranged directly with the respondent who shall attempt to facilitate rather than obstruct such reasonable contact.

   5.5 In the event of there being any dispute regarding contact, howsoever arising, it is agreed to the matter being referred to E a facilitator as set forth in para 4.8 above.

6. The costs of the second day of the hearing shall be paid by the respondent's attorney *de bonis propriis* on a scale as between attorney and own client, as a mark of the court's displeasure at the manner in which the proceedings have been conducted by him. F There is no other award as to the costs.

Applicants' Attorneys: *Craig Schneider & Associates*, Cape Town.

First Respondent's Attorneys: *Badenhorst-Schnetler Attorneys*, Kempton Park.

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* The Johannesburg Bar Council considered the complaint against Advocate Theron (ref No P19/2010) and resolved that the complaint did not sustain a case of unprofessional conduct — Eds.

* The full citation is *Re KD (a minor) (ward: termination of access)* [1988] 1 All ER 577 (HL) - Eds.

† Citing *Re KD* at 590*c* - Eds.

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