

**IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)
JOHANNERSBURG**

CASE NO: 4377/02

2003-10-21

In the matter between

KAREN PERREIRA

Applicant

and

THE BUCCLEUCH MONTESSORI PRE-SCHOOL

First Respondent

AND PRIMARY (PTY) LTD

Second Respondent

SISTER HELGA CRECHE (PTY) LTD

Third Respondent

THE MINISTER OF EDUCATION

Fourth Respondent

THE MINISTER OF SOCIAL DEVELOPMENT

JUDGMENT

MAILULA, J:

This is an application for a declaratory order. The applicant, Karen Perreira, seeks against the Buccleuch Montessori School and Primary (Pty) Ltd, the first respondent, a constitutional declarator in the following terms:

1. “That by virtue of the minor child’s (Tholakele Nkosi’s) HIV status, and the failure by the private nursery school (the first respondent) to admit such HIV positive child, same constitutes discrimination in terms of the guarantees to equality in terms of section 9(3) and (4) of Chapter 2 of the Bill of Rights of the Constitution of South Africa, 1966 (‘the Constitution’);
and
2. Costs of suit.

Just briefly, when the applicant initially instituted the proceedings against the first respondent and three others, she sought an order –

1. Declaring the conduct of the First Respondent in refusing to enrol the minor child Tholakele at their nursery schools discriminatory and unlawful;
2. Directing the First Respondent and the Second Respondent to enroll Tholakele at either of their nursery schools at the option of the Applicant.

Prayer 1 is now being re-formulated as stated above and the applicant seeks only a constitutional declarator. She no longer pursues the relief as set out in prayer 2 of the initial notice of motion.

The applicant is the foster parent of the minor child Tholakele. She was awarded custody of Tholakele in terms of an order dated 19 December 2000. She by virtue of the provisions of section 53 of the Child Care Act, 1983 as well as section 38 of the Constitution of South Africa Act, 1996 has *locus standi* to bring this application, Tholakele being a child.

She presently proceeds against the first respondent only pursuant to an order by this court granted on 18 June 2003 in terms of which the proceedings as between the applicant and the first respondent were separated from the

proceedings between the applicant and the second respondent which order was granted by agreement between the parties.

The applicant also cited the Minister of Education, third respondent, and the Minister of Social Development, the fourth respondent. No relief is sought against both the third and fourth respondents save for costs in the event of opposition. Neither the third nor the fourth respondent opposed the application. They are cited as they might have an interest in the outcome of this matter.

There is no doubt that this court has jurisdiction to deal with the constitutional matters raised. There was numerous authorities to which this court has been referred, *inter alia*, section 169 of the Constitution, and I agree that this court does have jurisdiction to hear the present application. (See: Section 169 of the Constitution, Section 19 of the Supreme Court Act, 1959 and *Naptose and Others v Minister of Education, Western Cape Government and Others*, 2001 (4) BCLR 388 (C).

The salient facts of this matter are that the minor child, Tholakele Nkosi, was born on 23 May 1998. She is HIV positive. Her mother apparently had no means to support Tholakele. She did not know who fathered the child and Tholakele was in terms of section 15 of the Child Care Act committed to Cotlands Baby Sanctuary. She was on 19 December 2000 placed in the applicant's and her partner's foster care.

The first respondent is a private company carrying on business as a private pre-school and primary school. It takes learners between the ages of 18 months and 12 years. The learners are allocated into four groups, namely the 18 months to 3 years group, the 3 years to 6 years group, 6 years to 9 years group and 9 years to 12 years group.

In January 2001 the applicant made enquiry about enrolling Tholakele at the first respondent's school. The applicant was advised by the principal that there were three vacancies in the relevant age group. At the relevant time Tholakele was 2½ years of age and would have been enrolled in the first group, the 18 months to 3 years category. The applicant during that conversation advised the principal that Tholakele was HIV positive. An appointment was made for the applicant and Tholakele to attend at the school on 19 January 2001. Subsequent thereto the principal called a staff meeting where it appeared that the issue of Tholakele's HIV status and her possible enrolment at the school was discussed. On 19 January 2001 the applicant did attend at the school. The principal made mention of Tholakele's application for enrolment being deferred until she had reached the age of 3 years and "had passed the biting stage". The applicant was given an application form to complete and was shown around the school. A further appointment was made for 26 January 2001.

The following day, that is 20 January 2001, the applicant delivered a letter to the school, which forms Annexure "C" to the founding affidavit, where she *inter alia* expressed her displeasure about the exclusion of Tholakele from the school based on her HIV status. The first respondent never responded thereto. The applicant did not honour the appointment for 26 January 2001 nor did she return the application form.

In this present matter the crux of the applicant's case is that during the discussions on 19 January 2001 she was informed that the teachers had expressed some reservations and were not very happy about the immediate enrolment of Tholakele at the school, and that it has been decided not to admit Tholakele to the school until she turned 3 years "and was past the biting stage". She did explain to the principal that Tholakele's HIV status did not pose any threat to any of the learners nor the teachers. The applicant states that she clearly understood from the conversation on that day that Tholakele was not

going to be accepted as a learner at the school because of her being HIV positive.

The respondent, on the other hand, denies that Tholakele was outright rejected. She explained that at the meeting which the teachers had attended there was mixed reaction when the issue was discussed. Others were of the view that this should not present a problem whilst the others were more concerned, the reason being because at that age the children were “unpredictable” and one would not know what could happen. An incident was discussed where a learner had sustained a mosquito bite and the other children helped scratching him at the bite until it bled. To some teachers, being aware of this, and the fact that the children were prone to biting each other, this was perceived to be in itself a difficult situation. She states further that the other major concern for the teachers was that they were not well equipped to deal with HIV positive children. None of them had undergone any training at that stage. She states, however, in paragraph 10.10 of her affidavit that:

“No decision was reached at the meeting although I resolved that I would convey the perceived difficulties to the applicant and would suggest to her that Tholakele’s application should be deferred until she had turned three years old and was ‘past the biting stage’.”

The respondent states further in her answering affidavit that there are certain procedural issues to be determined before a learner could be accepted. She states that for a learner to be considered for enrolment, the applicant would first fill in an application form and thereafter Tholakele would be required to attend a 3 day orientation programme. Two days of the three days the learners’ parents or parent are/is expected to be present. The purpose of this three day programme is to submit and to assess the child to see whether the child is a suitable learner in the particular environment, and also for the parent to make an informed decision whether they would still like their child to be enrolled at the school. If the parties are happy then the child may be enrolled at the school which is obvious that

much would depend on whether they would have a vacancy for the child at the relevant stage at the first respondent school.

The applicant relies on the provisions of the Constitution relating to the right to equality and the children's right to education. The law is very clear. No one ought to be unfairly discriminated against.

It was conceded on behalf of the first respondent, in my view correctly, that indeed if it is found that the first respondent did discriminate against the minor child, Tholakele, simply because of her HIV status, then that conduct would be unconstitutional and there are various authorities which I was referred to, *inter alia*, *Harksen v Lane N.O. and Others* 1998 (1) SA 200 (CC) and *Hoffmann v South African Airways* 2001 (1) SA 1 (CC).

The real issue with which this court is seized is whether the first respondent did exclude the minor child Tholakele on the ground of her HIV status. There is clearly a dispute between the parties as to whether she was excluded at all and, if so, whether such exclusion was based upon her HIV status.

It was submitted on behalf of the applicant that the dispute which has arisen can be decided on the papers, that the court has to take a robust approach in order to deal with the matter. However, should the court be of the view that a dispute cannot be resolved on paper, then the matter ought to be referred to oral evidence. I do agree with the submission that this is one of the matters where the court can and needs to take a robust approach to the issues and to deal with the matter as it is on the papers before it.

The legal position is clear in this regard that the matter would have to be decided on the facts which are common cause and where there is a dispute of fact the court will rely on the facts which are common cause and averments as stated by the respondent, and if the balance of probabilities favour the applicant's case

then she would be entitled to relief. (See: *Ngqumba en 'n Ander v Staatspresident en Andere; Damons N.O. en Andere v Staatspresident en Andere; Jooste v Staatspresident en Andere* 1988 (4) SA 4 224 (A).) And as I have already indicated, the first respondent denies that it excluded the minor child, Tholakele Nkosi, as a result of her HIV status but that it was merely suggested to the applicant that her application for enrolment be deferred until she had reached three years of age and passed the biting stage.

I should mention that both parties agreed that there were media interviews and discussions relating to HIV transmission and the possibility of affecting other learners and that the first respondent's principal also did attend such meetings. However, as to what transpired and in what perspective the discussions were held, it is not common cause. From the applicant's point of view it would appear that the subsequent media interviews and discussions and releases related to the issue of Tholakele's application for enrolment and the refusal thereof whereas the from the first respondent's answer it appears that such discussions would merely have been general and would not have been directed at the particular child's status or her possible enrolment or, as alleged by the applicant, her exclusion from the school. However, what is common cause and emerges from such discussions is that the first respondent did express concern about the fact that the teachers at the school had not been trained in dealing with HIV positive children. But there was an effort on the part of the first respondent to expose the teachers to training, that that training had been done. It was only during or about May 2002 that the teachers were better equipped to deal with HIV positive children.

The first respondent stated in her answering affidavit that the meeting which was held between the principal and the staff members was merely to inform and to discuss the question of the possible enrolment of an HIV positive child at the school; that there were concerns raised and she decided that she would suggest to the applicant that the application be deferred for a certain period. This, in my

view, is supported by the fact that there was a follow up appointment which was made between the applicant and the first respondent only a few days later, on 26 January 2001. It is further supported by the fact that the applicant was given certain forms to fill in, whether it be application forms or information relating to the child, full particulars relating to the child, is in my view not really important at this stage. The fact of the matter is she was given these forms to fill in and return same to the school. It is common cause that these forms were never completed and the applicant never honoured the subsequent appointment to attend at the school.

The fact that that first respondent's principal had expressed concern or had expressed a view suggesting that the minor child's enrolment be deferred, in my mind did not constitute a final decision. It is clear on the objective facts that the first defendant was still prepared to consider the application for the enrolment of the minor child.

In the result I am of the view that the first respondent had not taken a decision to exclude the minor child from the school simply because of her HIV status. Accordingly the application ought to be dismissed with costs.

I must mention with regard to costs, it was asked that such costs should include the employment of two counsel. It is my view that this is a very important and involved matter justifying the employment of two counsel and such costs ought to be allowed.

Accordingly the order I make is that the application is dismissed with costs and such costs to include the employment of two counsel.