

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Appeal Case No: A5033/22

- | | |
|-----|----------------------------------|
| (1) | REPORTABLE: YES |
| (2) | OF INTEREST TO OTHER JUDGES: YES |
| (3) | REVISED YES/NO |

.....
SIGNATURE

.....
DATE

In the matter between:

RC

Appellant

and

HSC

Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 12h00 on 14 March 2023

JUDGMENT

Summary:

A Court can, as upper guardian of all children and in the best interests of a child, grant joint guardianship without finding that the existing guardian is unsuitable.

The Court found that the absence of a biological link with a child is not a bar to an application in terms of section 23 of the Children's Act subject of course to the best interests of the child standard. The Court held, contrary to the Court below, that the Appellant had an interest as contemplated in Section 23 of the Children's Act and had standing to apply for co-guardianship in terms of section 24 of the Children's Act.

The Court restated the principle that where the welfare of a minor is at stake, a Court should be very slow to determine the facts by way of the usual opposed motion approach. That approach is not appropriate if it leaves serious disputed issues of fact relevant to the child's welfare unresolved.

INGRID OPPERMAN J (with whom Makume J and Wilson J agree)**Introduction**

[1] This is an appeal against the whole of the judgment of Fisher J (*the Court*) delivered on 16 May 2022. The appeal is with the leave of the Court.

[2] On 1 February 2023, and after the hearing of this appeal, we granted the following order:

1. The appeal is upheld.
2. The order of the court *a quo* is set aside.
3. Lynette Roux, a clinical psychologist, or, in the event of Lynette Roux not being available, another suitably qualified and experienced clinical psychologist selected by the appellant, is appointed as expert (the expert) to conduct a thorough investigation of the parties, the minor children B and D, including but not limited to, doing a psychometric assessment, and providing a written recommendation as to whether it would be in the best interests of B, that the Appellant be granted rights of contact and care in respect of B in terms of section 23 of the Children's Act, 38 of 2005 and if so, what contact arrangements between the Appellant and B, would be in B's best interests.
4. The costs occasioned by the investigation conducted and written recommendation furnished by the expert, shall be paid by the Appellant.
5. The relief set forth in terms of Part B of the Appellant's application, is postponed *sine die*.

6. Pending the finalization of the investigation contemplated in paragraph 3 hereof, the Appellant shall enjoy the following contact with B in terms of section 23 of the Act:-
- a. every alternate Saturday from 08h00 to 17h00, commencing on Saturday 4 February 2023;
 - b. reasonable electronic and telephonic contact on a Monday, Wednesday and Friday between 17h00 and 19h00, commencing on Friday 3 February 2023;
 - c. on B's birthday for at least three (3) hours in the afternoon, and where the B's birthday falls on a weekend, from 09h00 to 13h00, unless his birthday falls on a day referred to in paragraph 6 a. hereof;
 - d. on the Appellant's birthday for at least three (3) hours, and where his birthday falls on a weekend, from 09h00 to 13h00, unless his birthday falls on a day referred to in paragraph 6 a. hereof;
 - e. on Father's Day from 08h00 to 17h00 unless Father's Day falls on weekend contemplated in paragraph 6 a. hereof; and
 - f. Christmas Day for at least three (3) hours alternatively, on New Year's Day for at least three (3) hours.
7. The Costs in respect of Part A of the Appellant's application and the Costs of the Appeal will be dealt with in the judgment containing the reasons for this Order, which judgment is reserved.

[3] These are the reasons provided for in paragraph 7 of the order.

Relief sought in the Court below

[4] In the application before the Court, the Appellant sought relief in two parts. In Part A he requested that a clinical psychologist be appointed to conduct an assessment and provide a recommendation as to whether it would be in the best interests of the minor child, born on 5 December 2017 (*Brad¹*), that the Appellant be awarded rights of contact and care in terms of section 23 of the Children's Act, 38 of 2005, as amended (*the Children's Act*). Pending the finalisation of Part B, the Appellant sought contact with Brad.

¹ This is not his name. His name has been changed to protect his identity.

[5] The relief which he sought provided that once the nominated expert's recommendation had been delivered, and the parties had supplemented their papers, the Appellant, in Part B, would then apply for an order that he be granted rights of contact with Brad, specified contact with Brad, and joint guardianship of Brad with the Respondent, Brad's mother.

The common cause facts

[6] The Appellant is about 52 years of age. He has no biological children. The Respondent is about 31 years of age. She has two biological sons, one born on 5 December 2017 (currently 6) and the other presently aged about 13. The Respondent's older son (*Dennis*²), was born from a relationship which she had with a certain Chris³. This matter was initiated by the Appellant due to the Respondent having terminated Appellant's contact with Brad in circumstances that are more fully described below.

[7] The parties met on the social media platform Tinder, also known as a dating site, which is where people invite others to contact them, when the Respondent was pregnant with Brad from her relationship with another man, whose details are unknown to the Appellant and whose details have not been disclosed by the Respondent in these papers. By putting themselves out there on Tinder the parties invited other Tinder users to ask to contact them, and if they allowed contact they could then get in touch. The Respondent did not immediately disclose her pregnancy to the Appellant and this only emerged later once they had started a relationship.

[8] The conduct of the Respondent must be seen in the light of the conduct of Brad's biological father who has not attempted to acquire parental rights and

² This is not his name. His name has been changed to protect his identity.

³ This is not his name. His name has been changed to protect Dennis's identity.

responsibilities in relation to Brad, has not shown any interest in Brad, has not had any contact with him nor made any contribution to his maintenance. During December 2018, when Brad was approximately one year old, the Appellant and the Respondent moved in together. The parties, Brad and his older half-brother Dennis, then lived together as a family unit for approximately 2½ years. The Appellant and Brad formed a very strong bond, which is hardly surprising as Appellant was in a position analogous to that of a father before, during and after Brad's birth. The Appellant and the Respondent separated on 2 June 2021. After the parties separated, they agreed on an informal contact arrangement in terms of which the Respondent allowed the Appellant regular contact with Brad which included that Brad could sleep over at the Appellant's residence. This contact arrangement lasted for 9 months until the Respondent revoked contact abruptly, a mere 2 weeks before the hearing of the Appellant's application in the Court below.

The papers which served before the Court

[9] Respondent had opposed the application, seeking relief by way of a counter application. The effect of the relief sought in the counter application was to introduce a condition on the assessment and recommendation by the nominated expert to determine if it would be in Brad's best interests that the Appellant be granted rights of contact or care in relation to him. The condition which the Respondent required added on to the assessment by the nominated expert was that Dennis should be included in the assessment process and that Chris also agree thereto. Chris gave his consent on 4 November 2021.⁴

⁴ The court noted Chris's consent as a dispute between the parties. There exists no dispute in this regard as Chris's attorneys, Bernice Bossert Attorneys, recorded such consent in a letter attached to the replying affidavit – 'RA1.2'

[10] Shortly before the hearing in the Court below, the Respondent unilaterally revoked the informal contact arrangement and refused to co-operate in the appointment of the nominated expert. She delivered two separate supplementary affidavits which the Court considered without formally admitting them. The Appellant was not afforded the opportunity to answer thereto.

[11] In the first supplementary affidavit, the Respondent alleged that the Appellant had overridden her rights to make decisions regarding the safety of Brad by taking him on a motor bike, on a speed boat and for a swimming assessment and lesson at Virgin Active; that the Appellant was overwhelming Brad with gifts and that he had arranged a birthday party for Brad which drove a wedge between Brad and Dennis; that Brad was allegedly becoming disinterested in the Appellant; that the Respondent wanted to avoid the cost of litigation and wished to embark on mediation which the Appellant's attorneys had rejected and had proceeded to enrol Part A of the application.

[12] In the second supplementary affidavit, the Respondent alleged that Chris had visited the Appellant on Saturday 19 February 2022 when Chris had exercised a right of contact in respect of Dennis and that Chris and Dennis had stayed overnight with the Appellant without consulting the Respondent. The Appellant had arranged for an advertisement of his practice to be put up at the school of Brad and Dennis. This, the respondent suggested, was a sign that something sinister was afoot.

[13] On 18 March 2022 the Court dismissed Part A. Brad and the Appellant did not have contact between then and the contact initiated under our order. It thus found that the Appellant had no *prima facie* right to contact to Brad but more importantly, the Court found that it was not in Brad's interests, then or ever, to have any form of contact with the Appellant.

The Approach of the Court below to the application

[14] The Court did not refer to any authorities in its judgment and the test applied to the evidence is thus to be inferred from its approach and reasoning.

[15] The relief sought in the Court was divided into parts A and B. The Court was seized of Part A. Part B was not before it. The Court was accordingly not called upon to finally pronounce on the issue of guardianship.⁵ Part A was simply whether the contact which had hitherto existed, should be continued pending consideration of Part B and that an expert be employed to report to the Court (not to usurp its functions but to assist) on all the issues to be decided on in Part B.

[16] The relief sought was interim and the *Webster v Mitchell*⁶ test, ought ordinarily to have been employed. That test requires the Court to consider the facts averred by the Appellant, together with such facts set out by the Respondent that were not or could not be disputed. On the basis of such facts, the Court ought to have formed a view on whether, having regard to the inherent probabilities, the Appellant would likely prevail in Part B. The Appellant could only be denied relief if the Respondent threw serious doubt on his case.⁷ In other words, the version of the Appellant should have been considered, if there was no inherent improbability therein and unless serious doubt was cast upon it by the Respondent, it should have been sufficient to carry the day. This approach, however, only if it were an adversarial matter (which it was not). More about the proper approach later.

⁵ *President of the Republic of South Africa vs Zuma and Others* (062027/2022) [2023] ZAGPJHC 11 (16 January 2023) at para [3].

⁶ 1948 (1) SA 1186 (WLD) at 1189

⁷ *Simon NO v Air Operations of Europe AB and Others* 1999 (1) SA 217 (SCA) at 228H

[17] But before even getting to what test to apply to a dispute of fact though, a court must establish the existence of a dispute of fact arising on the admissible evidence. Regarding admissibility, in our view the Court ought not to have admitted the supplementary affidavits without affording the Appellant the opportunity to respond to them. That the other side (the Appellant) should be heard, gives content to the rule of law. The Appellant was not heard on those facts contained in the supplementary affidavits. The matter could have stood down and an answer provided. This latitude is often afforded where the rights of a child are involved.

[18] This should be so particularly in a case such as the present where, before the supplementary affidavits were introduced, the parties were agreed that the relief in part A should be granted. Ms Amandalee de Wet SC argued quite strenuously in the appeal before us on behalf of the Appellant that it is quite evident why this change in stance occurred. She argued that the reason for the about turn was necessitated when Chris agreed that Dennis's interests should also be considered in the intended report. Once Chris gave his consent, there was no obstacle to the relief in Part A being granted. The Respondent realised that Part A would have to be granted once Chris consented so she cast about to find a belated new justification to persist with her opposition to Part A. We consider that there may be merit in this argument but it is unnecessary to decide what the motive was for Respondent putting in the supplementary affidavits. Our finding is that, in the absence of the Appellant having been given a fair opportunity to respond to them, they ought to have been disregarded.

[19] Faced then with the founding, answering and replying affidavits, on what facts should the Court have based its findings?

[20] The Respondent repeatedly (and under oath) stated that she was not opposed to the Appellant having limited contact with Brad⁸ and accepted the existence of a close bond between the Appellant and Brad. As far as this is concerned there is no dispute at all and the Court ought to have found that in that narrow bond between the Appellant and Brad, *prima facie*, it is in Brad's best interests to have contact with his psychological father, the Appellant. The Respondent's objection is directed at the effect the contact has on Dennis (there was some suggestion of sibling rivalry) and the effect it had on her relationship with Brad. We are not unsympathetic to the Respondent's concerns in this regard. There ought to be no competition between the parties for Brad's affections and certainly there ought to be no abuse of material advantage to advance such an unhealthy competition. However, cutting off all contact with the psychological father cannot be the only way of dealing with this phenomenon. Weighing the harm of cutting off all contact against the harm of having to negotiate a resolution to unhealthy competition for affection and material goods within the family, assuming it exists, we find that the harm inherent in cutting off contact is greater than the form of competition for affection alleged by the Respondent.

[21] The Respondent must have accepted this too, because in her answering affidavit, she agreed that the Appellant should have contact with Brad notwithstanding her concerns. That affidavit, the affidavit in which the Respondent sets out her limited opposition to the Appellant's application, concludes with the following statement (under oath) by the Respondent:

'Wherefore I pray for an order that: 1. Lynette Roux conducts an assessment which includes B., D., myself and the Applicant to furnish a report on what is in the best interest for all concerned;.....3. The Applicant exercises contact with B..

⁸ Para 73.4, para 77, para 99.2, para 103,

every alternate Saturday from 08:00 until 17:00 and electronic contact three times a week, the times to be flexible...'

[22] Applying the *Webster v Mitchell* test, not one single iota of doubt was cast on the version of the Appellant, the facts could be accepted and the balance of convenience, particularly when one takes the Court's role as upper guardian of all minors into account, which obliges the Court to give an order which in the circumstances will, as far as may be achieved on motion in interim proceedings, be in the best interests of the child, the application of the proper test would not have lead to a dismissal of Part A of the application.

[23] This is particularly so if regard is had to the psychological report of Mary Bothma (*Ms Bothma*). Ms Bothma consulted at length with the Appellant and subjected him to a battery of psychometric tests. She concludes that '*...It would therefore seem that [the appellant's] ongoing presence and parenting is not a "nice to have" from his son's perspective, it is essential, for B.'s healthy, holistic development.*' Ms Bothma also prepared a separate report (The Emotional and Attachment Report) which focuses primarily on Brad. The Appellant naturally concedes that this report is to a large extent theoretical, given that Ms Bothma could not consult Brad. The importance of the following potential dangers highlighted by Ms Bothma were not considered nor dealt with by the Court, which it was obliged to do in terms of sections 7(1) and 9 of the Children's Act:

'...It is further important to remember that a 3-4-year-old little boy does not have a concept of time. All he will experience is that the father he played with; sought soothing from; received love, nurturing, stimulation and care from; the father he used as an anchor and observed as a model in terms of learning, emotional functioning and behaviour; is no longer there. Egocentric thought makes him believe that it is his fault and that "other parent" could also leave.' and

“...disruption of attachment could have far reaching and catastrophic consequences for a child this age. Trauma of this nature could potentially negatively impact him throughout life...”

[24] The sudden withdrawal of a central care-giving figure from a child’s life is self-evidently going to impact adversely on the child. We are not saying that it can never be justified to do so, but the best interests of the child (or in this case, the children) must be paramount, as provided in section 9 of the Children’s Act. We are not satisfied that the best interests of the children were made paramount by the Respondent who, at the last minute, for reasons that appear impulsive and little-thought-through reversed her conditional consent to the relief on flimsy grounds and brought down the axe of separation without adequate consideration to the childrens’ interests, both Brad and Dennis.

[25] The Respondent herself in her counterclaim laid a foundation for a finding that there was a real prospect of the psychologist, if appointed, being able to assist the Court in making findings which would be in the best interests of Brad and Dennis.

Standing

[26] The Court found that the Appellant had, as a matter of law, no *locus standi*. This was so because, in respect of the co-guardianship, he had failed to show ‘...*the non-suitability of the existing guardian [which] is a jurisdictional fact needed for the court to entertain the application.*’⁹ In our view, this is, at worst for the Respondent, incorrect in law¹⁰, and at best for the Respondent, uncertain in law.¹¹ We favour the view that it is wrong in law, for a host of reasons including that the High Court can, as upper guardian of all children and in the best interests of a child, grant joint

⁹ Para [68]

¹⁰ *CM v NG*, 2012 (4) SA 452 (WCC)

¹¹ *CM v NG* (supra)

guardianship without finding that the existing guardian is unsuitable¹². No time was spent in this court debating this aspect because it is a matter which falls for consideration in Part B and the focus in this court was, primarily, on the rights of contact. But in any event, on the facts as they should have been found, the Appellant plainly has an arguable case that (a) he should be appointed Brad's co-guardian and that (b) he need not demonstrate that the Respondent is an unfit guardian in order to be so appointed.

[27] The Court also erred in identifying the relief sought in Part B as rights to guardianship only. It said:

'Is my enquiry a limited one that has regard to the interim order sought or does it take account of the fact that such an order is a means to an end- i.e. the granting of final relief for parental rights – which end must also be considered?'

[28] Of course the Court should have regard to the end i.e. the relief in Part B. It had a bearing on whether or not a *prima facie* right has been established.

[29] The 'end' considered by the Court in the above quoted passage i.e. the relief sought, was, if the Appellant were to be successful at the end of the day, the granting of rights of contact or care or joint-guardianship or a combination of them or all three. The conclusion that the Appellant could not establish the right to be appointed Brad's co-guardian, which was itself suspect in law, did not mean that he had failed to establish a *prima facie* right to the other relief he sought in Part B.

[30] Section 23 of the Act provides:

“ 23 (1) Any person having an interest in the care, well-being or development of a child may apply to the High Court, a divorce court in divorce matters or the children's court for an order granting to the applicant, on such conditions as the court may deem necessary—

¹² *Ex parte Kedar and Another*, 1993 (1) SA 242 (W) and section 45 (4) of the Act.

(a) contact with the child; or

(b) care of the child.

When considering an application contemplated in subsection (1), the court must take into account—

(c) the best interests of the child;

(d) the relationship between the applicant and the child, and other relevant person and the child;

(e) the degree of commitment that the applicant has shown towards the child;

(f) the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child; and

(g) any other fact that should, in the opinion of the court, be taken into account.

.....

(2) The granting of care or contact to a person in terms of this section does not affect the parental responsibilities and rights that any other person may have in respect of the same child.”

[31] The Court merged the concepts of ‘Contact’ and ‘Care’. ‘Contact’ and ‘Care’ are components of ‘parental rights and responsibilities’ in terms of section 18(2) of the Children’s Act. A very useful discussion of the differences (and overlaps) of the two concepts as understood in terms of the Children’s Act and the comparison of them to their common law equivalents of ‘access’ and ‘custody’, is to be found in the judgment of *CM v NG*¹³. We need not unpack this conceptual error as the focus ought to have been on Contact simpliciter.

[32] It is now settled law that the absence of a biological link with a child is not a bar to an application in terms of sections 23 of the Children’s Act subject of course to the best interests of the child standard.¹⁴

¹³ 2012 (4) SA 452 (WCC)

¹⁴ *Townsend-Turner and another v Morrow* (supra);

[33] In *QG v CS*¹⁵ Kollapen J postulated that to limit the category of persons who have an interest in the care, well-being and development of a child to someone who would constitute a *de facto* parent may well be too restrictive and may not accord with the best interests of the child principle. He suggested ‘*some tangible and clearly demonstrable interest and connection to the child*’. The Appellant, even on the restrictive interpretation, crosses the bar to qualify as an interested person for purposes of section 23 of the Children’s Act contact rights. As mentioned previously, no authorities were dealt with by the Court and one therefore does not know what authorities were considered and how they were distinguished both legally and factually from the facts under consideration. In our view, the Court a quo was bound to follow the judgment of Kollapen J unless it found it to be clearly wrong.

[34] It thus follows that the Court erred in finding, in law, that the Appellant was not an interested person for purposes of Part A or Part B insofar as the Appellant sought contact with Brad (contact having been sought in both Parts A and B).

Best interests

[35] The Court found that, even assuming *locus standi*, the Appellant had not established that the best interests of Brad would be served by granting the Appellant any legal rights ‘*which are enforceable by the applicant against the respondent, B..’s father, B himself and generally.*’

[36] Section 7 of the Children’s Act, deals with the best interests of a child standard and reads:

“7(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely—

¹⁵ *QG v CS (Professor DW Thaldar Amicua Curiae)*, 2021 JDR 1212 (GP) at [39]

- (a) the nature of the personal relationship between—
 - (i) the child and the parents, or any specific parent; and
 - (ii) the child and any other care-giver or person relevant in those circumstances;
- (b) the attitude of the parents, or any specific parent, towards—
 - (i) the child; and
 - (ii) the exercise of parental responsibilities and rights in respect of the child;
- (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
- (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from—
 - (i) both or either of the parents; or
 - (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
- (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
- (f) the need for the child—
 - (i) to remain in the care of his or her parent, family and extended family; and
 - (ii) to maintain a connection with his or her family, extended family, culture or tradition;
- (g) the child's—
 - (i) age, maturity and stage of development;
 - (ii) gender;
 - (iii) background; and
 - (iv) any other relevant characteristics of the child;
- (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural

- development;
- (i) any disability that a child may have;
 - (j) any chronic illness from which a child may suffer;
 - (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
 - (l) the need to protect the child from any physical or psychological harm that may be caused by—
 - (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
 - (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
 - (m) any family violence involving the child or a family member of the child; and
 - (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.
- (2) In this section “parent” includes any person who has parental responsibilities and rights in respect of a child.”

[37] A Court should, where a child’s welfare is at stake, ‘...*be very slow to determine facts by way of the usual opposed motion approach.....That approach is not appropriate if it leaves serious disputed issues of fact relevant to the child’s welfare unresolved.*¹⁶ The best interests of the child principle is a flexible standard and should not be approached in a formalistic manner.¹⁷ We find that a sufficiently child-centred approach was not followed by the Court. This is apparent from the wording used by the Court. The Court was concerned with the Appellant being afforded legal

¹⁶ *B v S*, 1995 (3) SA 571 (A) at 585E See too *Townsend-Turner and another v Morrow*, 2004 (2) SA 32 (C) at p44

¹⁷ *S v M*, 2008 (3) SA 232 (CC) at [24]

rights and embarked upon a process whereby it compared ‘*The aspects of the case that inure to a finding that the applicant should be accorded rights of contact and care*’ and with the aspects militating against the relief sought.

[38] The Supreme Court of Appeal has cautioned that this type of litigation is ‘*not of the ordinary civil kind. It is not adversarial*’¹⁸. The approach, in our view, was correctly summarised by Howie JA in *B v S* (supra) and has even more application now, having regard to the legislative changes which have been affected since *B v S* in 1995 and the section 7 considerations in terms of the Children’s Act:

‘In addition it seems to me to be necessary to lay down that where a parental couple’s access (or custody) entitlement is being judicially determined for the first time - in other words where there is no existing Court order in place - there is no *onus* in the sense of an evidentiary burden, or so-called risk of non-persuasion, on either party. **This litigation is not of the ordinary civil kind. It is not adversarial.** Even where variation of an existing custody or access order is sought, and where it may well be appropriate to cast an *onus* on an applicant, **the litigation really involves a judicial investigation and the Court can call evidence *mero motu*: *Shawzin v Laufer* 1968 (4) SA 657 (A) at 662G-663B. *A fortiori* that is so in the ‘first time’ situation.**

Strong support for the view that no *onus* lies is to be found in the above-quoted passage in *A v C* (supra at 456A-B) and its subsequent endorsement by the House of Lords in *Re KD* (supra).

Moreover, if the dispute were properly ventilated by way of as thorough an investigation as may reasonably be possible, it is, to apply the point made in *Re KD* at 590c, difficult to envisage when the welfare of the child will not indicate one way or the other whether there should be access. **That presupposes, of course, that all the available evidence, fully investigated, is finally in.** It follows that if a Court were unable to decide the issue of best interests on the papers, **it would not let the matter rest there.** While there might often be valid reasons (for example, expense or the nature of the disputed evidence) for not involving expert witnesses, **at the least the Court would**

¹⁸ *B v S* (supra) at 584 I - J

require, and if necessary call, oral evidence from the parties themselves in order to form its own impression (almost always a vital one) of their worth and commitment. Because the welfare of a minor is at stake, a Court should be very slow to determine the facts by way of the usual opposed motion approach (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)*). That approach is not appropriate if it leaves serious disputed issues of fact relevant to the child's welfare unresolved.'

¹⁹(emphasis provided)

[39] It would appear that the Court erroneously applied the test applicable to final relief ie the *Plascon Evans* test as it accepted the version of the Respondent on all disputed facts. But all the available evidence, fully investigated, was not yet in. The procedure chosen by the Appellant (the two staged enquiry) anticipated and catered for a full and proper ventilation of the facts which was regrettably not utilised.

[40] The adversarial weighing up of the pro's and con's by the Court focused on the rights of the adults whereas the enquiry ought to have been a child centred one ie the interests of Brad should have been the primary focus.

[41] The Respondent commenced a relationship with the Appellant whilst pregnant, commenced cohabitation with the Appellant a year after the birth of Brad, bringing the Appellant into the same family environment as her older son Dennis, continued to live in this arrangement with the Appellant for two and a half years throughout important formative years for Brad and Dennis and consented to the relief in Part A until suddenly, and for weak reasons, doing an about-turn shortly before the hearing which seemed calculated as much to punish the Appellant as to advance Brad's or Dennis's interests.

[42] We are mindful of the fact that Chris, Dennis's biological father, had no objection to the relief sought by the Appellant, which indicates to us that there is at

¹⁹ *B v S* (supra) at 584I to 585E

least a difference of opinion between Dennis's mother and father as to whether Dennis would suffer any adverse effects from the continued contact between Brad and the Appellant.

[43] The Court was not required to make a final decision on this, it could have had these facts more thoroughly investigated by granting the relief to enlist the help of the nominated expert on the issue of Brad's best interests (and Dennis') in view of the informal contact arrangement that had been in place for approximately 9 months since the parties separated and the counter application, which, but for the condition of Dennis' inclusion, obviously wise in the circumstances, in essence sought the same relief.

[44] The picture painted of the Appellant by the Respondent is that he had sought her out on Tinder due to her advanced stage of pregnancy. The Appellant says that the Respondent did not disclose her pregnancy on Tinder and this only emerged later after they started communicating via WhatsApp, well before Brad's birth. She portrays him as peculiar and obsessed with fatherhood to the extent that he allegedly asked his domestic helper for a 'township baby'. The domestic helper deposed to an affidavit denying this. The Appellant deals with this accusation quite persuasively when he says that if it were so that he wanted to hi-jack the family, he would've jumped at the opportunity offered to him by the Respondent to adopt the boys. If he had ulterior motives all along, that would have been his moment. He did not take that opportunity. In our view, this is a not insignificant probability which weighs against according the Respondent's contentions the status of 'serious doubt' sufficient to refuse the application for interim relief.

[45] The Respondent explains the relationship with Dennis as 'toxic'. The Appellant denies this and, by way of example, attached a card made by Dennis for

him which reads: '*Uncle R...., I love you.*' There are numerous examples on the undisputed facts which cast doubt on the description that their relationship is 'toxic'. An investigation and assessment by the nominated expert would reveal whether there is any merit in this, Dennis would be free to speak about the nature of his relationship with the Appellant, and how this can be addressed or whether the only solution is to terminate all contact between the Appellant and Brad.

[46] The Court clearly considered the psychologist's report by Ms Bothma submitted by the Appellant, as certain biographical information regarding the Appellant, was obtained from it, albeit inaccurately, and accepted as facts in the judgment.²⁰

[47] We have already drawn attention to the self-evident point (supported by Ms Bothma's report) regarding the detrimental effects of a young boy being alienated from his perceived father. The Court did not, however, appear to afford sections 7 and 9 of the Children's Act adequate consideration, did not see that which we consider self-evident and which view is supported by the psychologist's report regarding the detrimental effects of alienation from the perceived father. That Brad must perceive the Appellant as his father given the history of Brad's life with him is indisputable. Instead the Court considered that the following factors (which focus on Dennis to the exclusion of Brad, whereas both ought to have been given equal consideration) weighed in favour of the dismissal of Part A: Dennis's alleged

²⁰ These facts include that the Appellant had previously been married to one Ilze who was the mother of two school children, and that they repeatedly underwent IVF treatment but without success. The report does not contain the word 'repeatedly'. The court found that the Appellant had difficulty disciplining one of the school children who was diagnosed with ADHD and that this factor led to the breakdown of the marriage. The report does not state this. It says that Ilze had an acrimonious relationship with the biological father of such children. That Ilze now resides in Dubai with her children. The report does not say that. It says that the children are living independently and that the breakdown of the marriage was caused due to Ilze's career choice to go to Dubai and the Appellant not giving up his accountancy practice but that the Appellant and Ilze remain on friendly terms and contact each other intermittently.

feelings of inadequateness; the alleged psychological toll the Appellant's close relationship with Brad had on Dennis; and Dennis's alleged suicidal ideation.

[48] Some doubt must be cast on all of these reasons given that the Respondent was happy to allow the Part A relief to be granted, albeit with the condition that Dennis be included, until her last minute change of stance.

[49] It is a notorious fact, that sibling rivalry occurs even in the best 'traditional' homes and children's mental health is a complex and ongoing responsibility for all who care for the child. There are many and varied ways of treating mental health issues and to precipitously change tack at the expense of one sibling for the other against the background of a long family-type relationship is clearly not the only solution, nor does it suggest itself as the best one, which may of course be a conclusion that changes on the receipt of the report from the psychologist who will have to investigate these questions. Sibling rivalry, even sibling jealousy, has been around as long as time itself. To deprive Brad of a long-standing father figure who has proved himself in the role to date at a time when Brad is particularly vulnerable to such deprivation simply to avoid what may be no more than intense sibling rivalry, which all families have to deal with, seems too extreme given the timing and reasons given.

[50] At the hearing of the appeal we asked the parties whether Dennis was seeing Chris and were told that he does although it is erratic. One wonders how this feeds into the rivalry situation at home, and whether it could be addressed by the Appellant, the Respondent and Chris in mature negotiation with one another with a view to advancing and balancing the best interests of both boys with due sensitivity to that which has been aired in these proceedings and which will come to light in

the psychologist's investigation, who we consider should be furnished with a copy of this judgement.

Costs

[51] In paragraph 7 of the order granted on 1 February 2023, we undertook to deal with the costs of the Part A hearing and the costs of the appeal.

[52] The Appellant did not seek costs in Part A but asked that they be reserved for determination at the Part B stage, save in the event of opposition. In this court, the Appellant did not persist with the costs for Part A but requested that they be reserved for determination in Part B. In our view and despite us effectively finding that the Respondent ought to have consented to an order at the hearing before the Court *a quo* along the lines sought by her in her counterclaim and granted by this court on 1 February 2023, we would still order that the costs be reserved for determination in Part B.

[53] The Appellant has been successful and ordinarily, the Respondent would be ordered to pay the costs of the upholding of the appeal. However, we do not believe it in the best interests of either Brad or Dennis to add fuel to this fire. We trust that the Appellant will, in his dealings with Dennis and the Respondent, and even Chris, be sensitive to Dennis's best interests and the Respondent's challenges in raising these boys as a single mother. We, in exercising our discretion in regard to the award of costs, take cognisance of the disparity in the economic power of the Appellant, a chartered accountant, and the Respondent, a qualified pre-school teacher earning a living through online training. We intend ordering each party to pay their own costs in respect of the appeal.

[54] We thus add the following 2 orders to the order granted on 1 February 2023:

8. The costs in respect of Part A of the Appellant's application are reserved for determination in Part B.

9. Each party is to pay their own costs of the Appeal.

I OPPERMAN
Judge of the High Court
Gauteng Division, Johannesburg

Counsel for the Appellant : Adv Amandalee A De Wet SC and Adv J.G Botha

Instructed by : Coetzee Duvenage Inc

Counsel for the Respondent: Adv L. Swart

Instructed by : Gradwell - Viljoen Attorneys

Date of hearing : 1 February 2023

Date of Judgment : 14 March 2023