

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 2009/2024

In the application between

HERBST, QUINTIN

Applicant

And

OSSEMANE, ZAIDA

Respondent

JUDGMENT

EF Dippenaar AJ

[1] This is an application in terms of which the Applicant, the natural father of a minor child, Cleo Kimberly Herbst ("Cleo"), seeks an order awarding him full parental responsibilities and right of care, guardianship and contact in respect of Cleo, together with ancillary relief. More particularly, he wants:

- 1.1 to be awarded full parental responsibilities and rights with regard to the care of Cleo, as contemplated by Section 18(2)(a) of the Children's Act;
- 1.2 an order that primary residence of Cleo be awarded to him;

- 1.3 to be awarded full parental responsibilities and rights with regard to the guardianship of Cleo as contemplated in Sections 18(2)(c) and 18(3) of the Children's Act; and
 - 1.4 an order that he be awarded specific parental responsibilities and rights with regard to contact with the minor child as contemplated in Section 18(2)(b) of the Act to the Respondent which contact is to be exercised by the Respondent on prescribed terms.
- [2] By way of a notice of amendment dated 1 April 2010, the Applicant's prayers were amended to introduce certain further relief which would prevent removal of Cleo from the Republic of South Africa ("RSA"). An interim order is currently in place affording the Applicant certain interim contact with Cleo.
- [3] The papers in this matter amount to some 941 pages indicating the level of acrimony which currently exists between the parties. When the matter was first called, there was a difficulty with the pagination of the papers in accordance with the new Practice Manual Directives and the Respondent's Counsel sought an order that the matter to be struck from the roll with costs.
- [4] Despite the matter not complying with the Practice Manual and in what I consider to be the interests of the minor child so as not to delay the matter further, I allowed the Applicant's legal representatives an opportunity to put the papers in order.

- [5] I have also been asked to grant a punitive costs order against the Applicant's attorney of record, *de bonis propriis*, consequent upon the filing of the Applicant's supplementary affidavit dated the 1st of April 2010. It is regrettable that the level of acrimony between the parties has expanded to the level of involving their respective legal representatives.
- [6] Having read through the papers, I must comment that they are replete with accusations and counter-accusations of improper and violent behaviour which do very little to assist in determining the issues at hand, and do little to promote the best interests of the minor child.
- [7] On the 14th of May 2009 the Court requested a report from the Family Advocate and granted the parties leave to supplement their papers after the recommendation of the Family Advocate became available.
- [8] The Family Advocate's report became available during August 2009. In this report it was recommended that Cleo's primary residence be awarded to the Respondent.
- [9] The application was postponed on a number of occasions, being the 24th of November 2009 and the 24th of March 2010 and has now finally been argued.
- [10] On the 1st of April 2010 the Applicant filed a supplementary affidavit which, together with the amended notice of motion to which I have referred above, runs to some 296 pages.

[11] The Respondent contends that the supplementary affidavit which the Applicant filed with leave granted by the Court on 24th of March 2010, for the purpose of addressing the issues raised by the Family Advocate, failed to achieve its purpose. On this basis, the Respondent seeks an order that her costs incurred in dealing with the supplementary affidavits be paid by the Applicant's attorney *de bonis propriis*. The approach adopted by the Respondent is a technical one: she contends that the Applicant has failed to make out its case in its founding papers and cannot do so in supplementary affidavits. This is pertinently raised in the context of the Applicant's allegedly seeking to introduce a new cause of action, namely, the additional relief sought in respect of the removal of Cleo from the RSA.

[12] I am mindful that we are here not dealing with a normal commercial matter, but with a family matter where the interests of a four year old child are paramount. The approach adopted by the parties is that which is thus eloquently described in *Clemons v Clemons*¹: *"As so often happens in these matters, the rules of Court are utilised as weapons in a fight to destroy the opposition. As it happens in most wars of attrition, by the time the war has come to an end, both sides have lost."*

[13] With due regard to the Respondent's technical objection, I do not intend, in these circumstances, to deal with the matter on that basis. I consider Cleo's

¹ 2000 All SA 629 W

best interests as being sufficient to allow the Applicant to supplement his founding affidavit with additional facts supporting the removal relief in his supplementary affidavit. This is in accordance with the principle that a Court can allow this to be done in exceptional circumstances².

[14] In the application, the Applicant seeks an order that the primary residence of Cleo be awarded to him subject to the Respondent's defined rights of contact.

[15] It is common cause between the parties that Cleo was born on 6 May 2006, is four years old and was born of a relationship between the parties which had commenced in 2005 and terminated during or about March 2008. The parties never married. Since their separation, Cleo has been primarily resident with the Respondent.

[16] The Applicant has enjoyed unsupervised, albeit limited, contact with Cleo during the separation and plays an active role in Cleo's life. From the papers, it appears that this contact has been a source of ongoing and increasing conflict between the parties, on occasion resulting in physical violence.

[17] It is not disputed on the papers that the Applicant has an active interest in Cleo's life. He was present in Court when the matter was heard. The reports of the Family Advocate and the report of the Family Counsellor makes

² See *Union Finance Holdings Ltd v IS Mirk Office Machines II (Pty) Ltd and Another*, 2001 (4) SA 842 W at 847D-E

mention of the acrimonious relationship between the parties which is a serious area of concern. It is regrettable that two adults cannot put their differences aside, however hard it may be, in order to consider the best interests of their child as a matter of paramount importance.

[18] The Family Advocate's report confirms that Cleo has a healthy relationship with both her parents and the Family Counsellor confirms that "*there seems to be*" a positive bond between the minor child and both the Applicant and the Respondent. The observations of the Family Counsellor are however not detailed enough to enable me to make a proper finding on the important issues here at play and further detailed expert reports are required. Counsel representing the parties were in agreement that the matter is not ripe for a final determination of the application on the papers as they stand.

[19] It is common cause between the parties, as confirmed by the Family Advocate in the report that whilst the parties were living together, they both cared for the minor child with the assistance of their domestic helper and that since separation, the Respondent has been the primary caregiver.

[20] The Applicant in the papers contends that his contact with Cleo has been frustrated since his separation from the Respondent. The Respondent denies these allegations and it is impossible to make a determination on this issue without the hearing of oral evidence. The Family Advocate's observations that the Applicant is being "*melodramatic*" in his complaints against the Respondent are not useful in determining where the best interests of the

minor child may lie. The recommendations of the Family Advocate, based on the rather limited facts set out in the reports are that the parties be made co-holders of full parental responsibilities and rights in respect of Cleo which include guardianship, that the primary residence and care of Cleo should remain with the Respondent and that the Applicant be allowed to remove the minor child as per the standard guidelines. I am not satisfied that simply accepting the Family Advocate's recommendations in these particular circumstances would be appropriate as many important issues, such as the allegations and counter allegations of violence and drug abuse have not been adequately addressed. In my view it is necessary that a full and proper evaluation of all the parties be undertaken and reported upon.

[21] In summary, the personal circumstances of the parties are the following:

- 21.1 The Applicant is a educator, whilst the Respondent is a self-employed Karate Instructor. Both parties are gainfully employed;
- 21.2 Neither party is currently in a relationship;
- 21.3 Both parties have a regular income;
- 21.4 Of concern is that the parties accuse each other of smoking cannabis and using drugs. Both parties were sent for drug tests, but the results have not been made available.

- [22] It was suggested to the parties that they consult a Dr Van Onselen, a Clinical Psychologist, in order to obtain full psychological evaluations of each of the parties concerned, specifically in light of the accusations of violence and aggression which the parties make against each other.
- [23] The Respondent, however, refused to co-operate and neither Cleo nor the Respondent have been evaluated. Two reports were provided by Dr Van Onselen which relate mainly to the Applicant and refer to interviews conducted with certain individuals. Dr Van Onselen saw mediation between the parties as mandatory. One of his great concerns was the anger, stress, anxiety, frustration and destructive emotions which existed between the parties. It appears improbable, however, in light of the long history of the matter, that these differences can be resolved by means of mediation. The Respondent's refusal to submit herself and Cleo to evaluation is of concern as the best interests of Cleo can never be finally determined until this has been done properly.
- [24] The papers also contain a report of Mrs Garb, a Forensic Social Worker, who provided a report recommending the appointment of a Case Manager who would assist the parties to facilitate communication. A concern raised by her was that a mechanism for dispute resolution must be considered. Mrs Garb indicated in her report that primary residence was not at issue in this matter. A reading of the papers indicates this view to be incorrect. The relevant issues do not, as Mrs Garb suggests, relate purely to the Applicant's contact with

Cleo, but are much wider. Mrs Garb further emphasised the difficulties between the parties arising from the clear lack of trust in each other. In these dynamics the levels of acrimony between the parties appears set to continue and spiral.

[25] In my view it is not possible to make a proper and considered finding on the application with the information currently available. In light of the fact that both parties albeit unconsciously, may be acting within the parameters of their own agendas, it is in my view necessary to obtain separate legal representation for the minor child. I am mindful of the provisions of Section 28 of the Children's Act, 38 of 2005 ("the Children's Act") but do not think that the circumstances in the current matter are such that a State appointed legal representative would be appropriate and Cleo is too young to give any active input. In my view the parties, who both profess to be acting in the best interests of Cleo, would in these circumstances best act in her interests if they are jointly liable for the costs of such a legal representative.

[26] The application is essentially one in terms of Sections 23 and 24 of the Child Care Act.

[27] I was advised by Counsel that there is an interim order in place, the terms of which were agreed upon between the parties, which currently regulates the Applicant's contact with Cleo. The Applicant contends that the current order relating to contact has not been suitable and that his contact has been frustrated.

- [28] The Respondent seeks to underplay the incidences of frustration set out in the Applicant's supplementary affidavit by contending that she has not been the cause of this frustration and has attempted to advance explanations for specific instances where she was unable to allow the Applicant contact with the child. This position is unsatisfactory. I am however not dealing with a contempt application, but urge the parties to comply with the said order, failing which undoubtedly further unnecessary wasted costs will be incurred in contempt proceedings.
- [29] In my view, the interim order should not at this stage be varied dramatically as there is insufficient information available to gauge the appropriateness of the dual primary residence proposal mooted by the Applicant without having all the relevant facts. It would in my view be unwise to unsettle Cleo by alternating her primary residence. I am of the view that the Applicant should however have more contact with Cleo in order to foster their relationship.
- [30] Although the investigation conducted by Dr Van Onselen appears *prima facie* to have been far more extensive than that conducted by the Family Advocate, it is still not complete as the Respondent has refused to submit herself or Cleo to psychological assessment. This attitude adopted by the Respondent is inexplicable in the context that she professes to be acting in the best interests of Cleo. Her refusal appears strange in the circumstances and it is accordingly in my view important that she does subject herself and Cleo to such examination.

- [31] In his notice of amendment, the Applicant seeks to introduce a claim for ancillary relief aimed at preventing the Respondent from removing the minor child from the borders of South Africa. It is not disputed that the Respondent on occasion has done so. I intend granting an interim order granting the Applicant some relief in this regard.
- [32] The Respondent's objection to prayers 3 and 4 of the notice of motion in terms of which the applicant seeks relief against the South African Department of Home Affairs, which is not a party to these proceedings, is in my view well taken. It is at this stage however not necessary to make any finding in this regard as the application cannot be finally determined at this stage.
- [33] It does not appear that it is seriously in dispute between the parties that the Applicant is entitled to full parental responsibilities and rights in regard to the guardianship of the minor child as contemplated by Sections 18(2)(c) and 18(3) of the Children's Act.
- [34] What is at the centre of the dispute between the parties is the care and primary residence of the minor child and the contact between Cleo and her respective parents.
- [35] From the papers, the Applicant further appears entitled to acquire parental responsibilities and rights as envisaged in Section 21(1) of the Children's Act. There is no dispute that at the time of Cleo's birth he was living with the Respondent in a permanent life partnership and he has consented to be

identified as Cleo's father. In relation to the third requirement under this section, whether the Applicant has contributed or attempted in good faith to contribute to Cleo's upbringing and expenses in connection with the maintenance of Cleo for a reasonable period as envisaged by Section 21(b), it is not clear from the papers whether this issue is strenuously in dispute but, insofar as a dispute exists, Section 18(3)(a) provides a remedy and the parties must refer this issue for mediation prior to the hearing of the matter by this Court.

[36] There are so many disputed facts regarding what would be in the best interests of Cleo in relation to her primary residence and care, that the matter cannot be determined on paper and these disputes must be referred to oral evidence. To await the expert reports , which are in my view required, prior to ordering such a referral, would only serve to delay the proceedings further and would increase the incidence of costs.

[37] In light of the nature of these proceedings and in accordance with Section 29(5) of the Children's Act, a Court is granted certain powers:

"The Court may for the purposes of the hearing order that:-

- (a) a report and recommendations of a Family Advocate, a Social Worker or suitably qualified person must be submitted to the Court;*
- (b) a matter specified by the Court must be investigated by a person designated by the Court;*

- (c) *a person specified by the Court must appear before it to give or produce evidence; or*
- (d) *The Applicant or any party opposing the application must pay the costs of any such investigation or appearance."*

[38] Of further relevance is Section 29(6) of the Children's Act, which provides as follows:

"The Court may, subject to section 55: -

- (a) *appoint a legal practitioner to represent the child at the court proceedings; and*
- (b) *order the parties to the proceedings, or anyone of them, or the State if substantial injustice would otherwise result, to pay the costs of such representation."*

[39] Section 28(1)(h) of the Constitution, 1996 states that every child has the right to have a legal practitioner assigned to the child by the State and at State expense, in civil proceedings affecting the child, if substantial injustice would otherwise result. The Constitutional Court has interpreted this section, relying in part on International Law, to give effect to children's right to participation in litigation affecting their interests. In *Du Toit and Another v Minister of Welfare and Population Development & Others (Lesbian and Gay Equality Project as*

Amicus Curiae)³ the Court invoked this section to appoint a *curator ad litem* to protect the interests of very young children. My likewise invoking this provision in the present instance will ensure that Cleo's rights are catered for and will also ensure her right to participate (in the technical sense) in the proceedings as she will be directly affected by the decision of the Court⁴. The wording "a legal practitioner" is wide enough to include the appointment of a *curator ad litem*.

[40] Section 62(a) of the Children's Act states one of its principles as being that "*all proceedings, actions or decisions in a matter concerning a child must respect, protect, promote and fulfil the child's rights as set out in the Bill of Rights. The best interests of the child stand as set out in Section 7 and the rights principles set out in this Act.*" The child's right to have separate representation during legal proceedings is clearly included in the ambit of Article 12(2) of the Convention on the Rights of the Child and Article 4(2) of the African Charter on the Rights and Welfare of the Child.

[41] A child's right to separate legal representation is a relatively new principle and has not been raised in many cases. In *R v H and Another*⁵ Moosa J appointed a legal representative for a minor child in proceedings relating to

³ 2003 (2) SA 198 CC at para 3

⁴ *S v M* (Centre for Child Law as *Amicus Curiae*, 2008 (3) SA 232 CC at paragraphs 16 and 31

⁵ 2005 (6) SA 535C at 539

Section 21(1)(b) of the Children's Act. Soller NO v G and Another⁶ deals fully with the interpretation of Section 28(1)(h) wherein it is stated "*The significance of Section 28(1)(h) lies in the recognition, also found in the Convention on the Rights of the Child, that the child's interests and the adults interests may not always intersect and that a need exists for separate representation of the child's view.*"⁷

[42] Kassan in Sloth-Nielsen and Du Toit (editors) Trials and Tribulations, Trends and Trials, pages 237 to 238 suggests the following useful guidelines in considering whether a representative should be appointed in a matter:

- 42.1 The presence of allegations of sexual, physical or emotional abuse;
- 42.2 If the parents have been involved in lengthy and acrimonious litigation over care, contact and maintenance issues;
- 42.3 The complexity of the matter, including the length of the hearing or trial, a number of expert witnesses involved and allegations that one parent is emotionally unstable; and
- 42.4 Where there is reason to believe that one of the parties is withholding information from the Court.

⁶ 2003 (5) SA 430W paragraphs 7 and 8

⁷ Ex Parte Van Niekerk & Another: In re Van Niekerk v Van Niekerk, [2005] JOL 1421 at para 7

[43] In addition to the powers conferred by Section 29(5) and (6) of the Children's Act, the Court also has an inherent power at common law to appoint a *curator ad litem* for the minor child. By virtue of Cleo's tender age and the fact that she is too young to provide any input, I am of the view that the appointment of a *curator ad litem* would be more appropriate than the appointment of a legal representative.

[44] In terms of Section 29(5) of the Children's Act, the Court is expressly authorised to appoint a legal representative for a child and may order that the parties to the matter be held responsible for payment of the legal costs of this representation. This section echoes Section 6(4) of the Divorce Act. The duty of the *curator ad litem* is to assist the Court and the child during legal proceedings and to look after the child's interests. In my view, the best interests of Cleo would be served if the parties are jointly directed to pay the legal costs of the *curator ad litem*.

[45] I have approached an independent advocate who has not acted for either party, Adv Sarieta Liebenberg, an experienced practitioner in this field who has consented to be appointed as *curatrix ad litem* and I intend to appoint her as such. The costs of the *curatrix ad litem* must be borne by the parties equally, who must, via their attorneys of record, deposit funds in trust for the purpose of paying the *curatrix ad litem*'s fees. If either of the parties fail to do so, the non defaulting party is granted leave to approach the Court on the same papers, supplemented if necessary, for appropriate relief. I intend

granting the *curatrix ad litem* sufficiently wide powers to enable her to ensure that all necessary investigations are conducted to enable the matter to be finalised and to ensure the appropriate monitoring of Cleo's hand over, in the interim, when the Applicant exercises his rights of contact.

[46] It is also necessary to provide an interim mechanism whereby the acrimony between the parties is contained during the handing over of Cleo when the Applicant exercises contact with her via the intervention of an independent third party. Detailed provisions can be made in this regard as guided by the *curatrix ad litem* and relevant experts, but the question then arises as to who must pay such costs. In my view, it would be equitable if the parties shared these costs jointly. Hopefully, the fact that costs will be incurred by the parties in this regard will go some way to convince them to act reasonably. Both parties are gainfully employed and on the papers there is no reason why either of them should be excused from liability for these costs. I urge the parties to adopt a reasonable and sensible approach in order to limit costs as their available funds could be much better spent attending to Cleo's needs, rather than their own. This is however a choice each of them will have to make.

[47] I do not intend at this stage to make any punitive costs orders.

[48] I accordingly make the following order:

1. The application is referred to oral evidence on the following issues:-

- i. Whether the primary residence of Cleo Kimberly Herbst ("Cleo") should be with the Applicant or the Respondent;
 - ii. The terms on which contact with Cleo should be exercised in her best interests.
2. The evidence shall be that of any witness whom the parties or either of them may elect to call, subject however to what is provided hereunder.
3. Save in the case of the parties, neither party shall be entitled to call any witness unless a statement was served on the other party at least fifteen (15) days before the date appointed for the hearing (in the case of a witness to be called by the Applicant and at least ten (10) days before such date (in the case of a witness to be called by the Respondent) containing the evidence to be given in chief by such person aforesaid; unless the Court at the hearing permits such person to be called, despite the fact that no such statement has so been served in respect of his evidence.
4. Either party may subpoena any person to give evidence at the hearing whether such person has consented to furnish a statement or not.
5. The fact that a party has served a statement in terms of paragraph 3 above, or has subpoenaed a witness shall not oblige such a party to call the witness concerned.

6. Within twenty (20) days of the making of this order, each of the parties shall make discovery on oath of all documents relating to the issues referred to in paragraph 1 hereof which are or have at any time been in the possession or under the control of such party. Such discovery shall be made in accordance with Rule 35 and the provisions of that Rule with regard to the inspection and production of documents discovered shall be operative.
7. A report and recommendations of a clinical psychologist who has evaluated the Applicant, the Respondent and Cleo on all issues relevant to the best interests of Cleo, including her care, primary residence and contact, must be submitted to the Court hearing the referral to oral evidence, which report must be submitted no later than 45 calendar days before the date allocated for hearing.
8. Pending the finalisation of this application, the Respondent shall not remove the minor child, Cleo, from the Republic of South Africa without the prior written consent of the Applicant, which consent shall not be unreasonably withheld.
9. Pending the final determination of this application, the interim order relating to contact and specific parental responsibilities remains in force, as amended by 10 hereunder.

10. In addition to the contact provided for in the interim order referred to in 9 above, the Applicant will be entitled to unsupervised contact with Cleo every alternative Friday from 18h00 to Saturday 18h00.
11. Advocate Sarita Liebenberg is appointed as *curatrix ad litem* for the minor child, Cleo Kimberly Herbst.
12. The *curatrix ad litem* is directed to investigate:
 - i. the best interests of Cleo regarding her care and contact;
 - ii. where Cleo's primary residence should be;
 - iii. the fitness of the Applicant and Respondent as primary caregiver of Cleo, including any allegations of violence and drug abuse;
 - iv. any suitable arrangements to contain and limit conflict between the parties during the hand over of Cleo when the Applicant is exercising his rights of contact to Cleo;
 - v. any other matters which are relevant to the best interests of Cleo,and to report to this Court on these issues on the date oral evidence is to be heard.

13. The *curatrix ad litem* is clothed with the following powers:
- i. to appoint an appropriate psychologist or other suitable experts whose services are required to obtain the report(s) referred to in 7 and 12 above;
 - ii. to obtain the results of drug tests performed on both parties, and if deemed necessary, to request further drug tests to be performed and to obtain the results thereof; and
 - iii. to appoint a social worker or other suitably qualified person to be present at or perform the handover of Cleo between the Applicant and the Respondent.
14. The *curatrix ad litem* shall have the power to instruct any clinical psychologist, social worker or other appropriate expert to provide a report and recommendations on the following issues:
- i. The best interests of Cleo in relation to her care and contact;
 - ii. The relationship between the Applicant and Cleo and the relationship between the Respondent and Cleo and any other relevant person and the child;

- iii. The suitability and fitness of the Applicant and Respondent as primary caregiver of Cleo;
 - iv. The degree of commitment that the parties have shown towards the child;
 - v. The nature and extent of future contact between Cleo and the parties;
 - vi. The appropriate method to be employed to limit negative interaction and/or conflict between the parties when contact is exercised by the parent with whom Cleo does not reside; and
 - vii. Any other factor which may have an impact on the best interests of the minor child.
15. Pending the final determination of this application, whenever the Applicant exercises his rights of contact to Cleo as stated in 9 and 10 hereof, the handover of Cleo will take place under the supervision of and in the presence of a social worker or other suitably qualified person, whose identity and terms of engagement will be determined by the *curatrix ad litem* in accordance with generally accepted norms appropriate to the level of acrimony which exists between the parties from time to time, until such time as, in the view of the *curatrix ad litem* and the duly appointed social worker or other suitably qualified person

there is no conflict between the parties and there is no need for the handover to be conducted in the presence of and under the supervision of such social worker or other suitably qualified person.

16. The parties shall be jointly and severally responsible for the following costs:

- i. the costs of the *curatrix ad litem*;
- ii. the costs of the clinical psychologist referred to in 7 above;
- iii. the costs of any expert(s) appointed by the *curatrix ad litem* in accordance with 13 and 14 hereof and any person assisting with the contact and handover of Cleo between the Applicant and the Respondent as referred to in 13, 14 and 15 hereof.
- iv. such expert, social worker and any person assisting with the contact and handover of Cleo between the Applicant and Respondent as referred to in 12, 13, 14 and 15 hereof.

17. The parties shall on demand by the *curatrix ad litem* each pay equal amounts into trust at their respective attorneys of record, which funds shall be utilised to pay on demand the costs of the respective parties referred to in 16 hereof.

18. In the event of either party defaulting in their obligations as detailed in 16 and 17 hereof, the non-defaulting party is granted leave to approach this Court on the same papers, supplemented if necessary, for appropriate relief.
19. The costs of the application are reserved.

EF DIPPENAAR
ACTING JUDGE OF THE HIGH COURT

Date of hearing	:	13 May 2010
Date of judgement	:	28 September 2010
For applicant	:	Adv F Bezuidenhout
	:	E Da C Luiz Attorneys
For respondent	:	Adv R Gosslett
	:	Clorinda Scalco Attorneys