

IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 4813/2021

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

L[...] **P[...]**¹

First Applicant

R[...] **W[...]** **P[...]**²

Second Applicant

And

C[...] **M[...]** **P[...]**

Respondent

HEARD ON:

01 DECEMBER 2022

JUDGMENT BY:

DANISO, J

DELIVERED ON:

20 APRIL 2023

[1] In this opposed application, Part B, the applicants seek assignment of contact, care and guardianship rights in respect of the minor child “A[....]” in terms of section 23 and 24 of the Children’s Act (“The Act”).¹

[2] The respondent is A[....]’s biological mother and she is also the primary care-giver.

[3] The applicants are married to each other. They are not related to A[....] or the respondent. They approach this court on the basis that they are A[....]’s care-givers pursuant to a written parental rights and responsibilities agreement concluded by the parties on 17 June 2020 (the agreement)² and a subsequent oral agreement concluded in April 2021 which respectively granted the applicants contact and care rights in respect of A[....].

[4] The allegations are that the respondent has reneged on the terms of agreement by curtailing the applicants’ contact rights and it is in that regard the applicants sought and obtained an order on an urgent basis (Part A) on 28 October 2021 on the following terms:

“1. That part A of this application be enrolled and heard as an urgent application in terms of Rule 6(12). That the normal Rules pertaining to time and service be dispensed with and that the applicants’ deviation from the normal Rules pertaining to time and service be condoned;

2. That the parental rights and responsibilities in respect of the minor child pertaining to contact as set out in section 18(2)(b) of the Children’s Act 38 of 2005 be awarded to the first and second applicants in terms of section 23 of the Children’s Act 38 of 2005 pending the finalization of part A of this application and that such rights be exercised in the following manner:

¹ Act No, 38 of 2005.

² Annexure “FA5” of the applicants’ founding affidavit.

- 2.1. *The right to take the minor child with them on alternative weekends. A weekend shall be deemed to commence on Friday at 15h00 and terminate on Sunday at 17h00,*
- 2.2. *Telephonic or WhatsApp video call contact between 16h00 and 18h00 on Wednesdays, Fridays and Sundays.*
- 2.3. *That the Social Worker, Esti Smit, be appointed with immediate effect to conduct weekly visits to the minor child and compile a report on the best interest of the minor child with specific reference to care and contact of said child with the applicants and the biological mother and to submit the report to the Court, the parties to this litigation and the Office of the Family Advocate on or before the 1st of February 2022.*
3. *The Applicants to pay for the services of the Social Worker, Esti Smit.*
4. *The Office of the Family Advocate is ordered to conduct an investigation to ascertain what would be in the best interest of the minor child with specific reference to her care and contact with the applicants and her biological mother.*
5. *Leave is granted to the applicants, the respondent and the Office of the Family Advocate to approach the Court on the same papers, duly amplified, depending on the outcome of the reports of the Social Worker and the Office of the Family Advocate, to move for one or more prayers in part B of the application or any other relief that would serve the best interest of the minor child.*
6. *No order is made as to costs."*

[5] In the report from the family advocate, Astrid Davis incorporating the report of the family counsellor, Ms E. van der Westhuizen was compiled on 30 November 2022 pursuant to an enquiry attended by the parties and the minor child it is contended that the relationship between the plaintiff and A[....] should be viewed as that which grandparents enjoy with their grandchildren should continue on the basis that the respondent retains her rights as a primary care-giver and the applicants are awarded permanent care and contact rights defined as follows:

“10.3.1. Alternate weekend contact from a Friday to the Sunday.

10.3.2. One short school holiday per year and long school holidays to be shared equally between the parties, with contact on Christmas, New Year, Easter and other Public Holidays rotating between the parties annually. Contact during school holidays may not exceed (07) nights consecutive sleepover contact.

10.3.3. Contact with the child on her birthday as well as the respective birthdays of the Applicants.

10.4. A parenting/family co-ordinator to be appointed to assist the parties with exercising of care and contact rights and drafting of a structured and detailed parenting plan. The parties to assist each other with the costs of such parenting/family coordinator. The parenting /family coordinator to assist the parties with the extension of contact rights and the amendment of the agreed parenting plan.”

[6] The report from the social worker, Ms Estie Smit was procured on 26 January 2022. Ms Smit conducted several weekly home visits to the respondent's residence for the purpose of investigating the living conditions of the respondent's family including A[...]. Her observations are that, the respondent lived in ahome and the allegations alcohol abuse and found that the and found it to be modes and...the respondent is a stay at home Mom, looks after A[....] and her sibling born after A[....] while the respondent's partner is gainfully employed in his own business earns about R52 000.00. they are not destitute or rowdy.

[7] Ms Smith could not find any evidence of alcohol abuse despite interviewing allegations of alcohol abuse and found no evidence even after interviewing a host number of people close to the respondent her own mother, the domestic worker and respondents mother ., respondent's friends Adriaan and Anneline Laubscher including her colleagues at The Pub despite the fact that the visists were carried out unannounced unexpected

[8] Ms Smith concludes that at the age of 20 months, A[....] is in the developmental phase (7 -36 months) where attachment with her care-giver is of outmost importance it is therefore not in A[....]'s best interest that she visits the applicants every second weekend as suggested by the family advocate. Sleepovers should not be allowed, A[....] can visit the applicants twice a month on a Saturday from 8am to 5pm.

[9] In the founding affidavit, allegations of child neglect enduring from the time the respondent was still pregnant with A[....] are averred. The respondent is accused of having smoked cigarettes and imbibed on alcohol whilst pregnant, after A[....] was born, she also failed to care and provide for A[....] financially, physically and emotionally.

[10] The applicants state that the respondent's financial situation was so dire that on the very same day that she met the second applicant at a local social establishment ("The Pub") she had confided in him that she was considering aborting A[....] due to her financial circumstances and lack of support from A[....]'s biological father who was apparently living in Namibia. The second applicant was able to persuade the respondent against aborting A[....].

[11] The applicants then offered to assist the respondent by providing financial support with the result that the parties established a very close relationship. On 22 May 2020 the respondent went in labour while at the applicant's. Her life partner, Mr Cilliers drove her to hospital with the applicants' vehicle and after giving birth on 23 May 2020 the respondent returned to the applicants' residence with A[....] and her partner where they stayed for about ten months and thereafter moved to their own home during April 2021.

[12] The applicants state that whilst the respondent and A[....] lived with them, she (the respondent) abrogated her parenting duties to the first applicant. She would wake up early in the morning around 6am, hand over A[....] to the first applicant and retreat to her room where spent days drinking alcohol. It became the first applicant's duty not only to provide A[....] with necessities such as clothing and medical needs. She was also responsible for feeding and bathing A[....].

[13] At the time the respondent vacated the plaintiff's residence she agreed that the applicants could have contact with A[....] on every second weekend. By June 2021 the respondent's attitude towards the applicants had changed to an extent that she reduced the contact to one weekend per month. Later, she began to avoid the applicants' calls and messages and would pick a fight about petty matters ultimately the contact was seized altogether.

[14] It is the applicant's case that the respondent's unilateral termination of the applicants' contact rights is not in the best interest of A[....] who has developed a very strong bond with the first applicant, she was even referring to the first applicant as "Mamma." The respondent's actions have also adversely affected A[....]. She has become emotionally withdrawn, she would be sad when she was picked up from the respondents' home, blossom into her normal happy self when she is at the applicants' home and then become clingy when she is returned to the respondent's care.

[15] The respondent's failure to care for the needs of A[....] is still evident. She would bring A[....] in the morning unkempt, dirty and without having been fed breakfast and based on these reasons, the applicants contend that it would be in A[....]'s best interest that they are awarded full parental responsibilities pertaining to the care, contact and guardianship over A[....] as recommended by the family advocate.

[16] On the other side, the respondent is of the view that Ms Smit's recommendations should prevail under these circumstances. It is undisputed that the applicants provided the necessary shelter, support and including financial care to A[....] from the time the respondent was pregnant with A[....].

[17] The application is opposed on the grounds that the applicants' actions herein are not intended to safeguard A[....]'s best interest but to take over the respondent's role as A[....]'s biological hence obtain care and control of A[....] and this is merely because they believe that they can do a better job of parenting A[....] than the respondent.

[18] The respondent denies having contemplated aborting A[....]. She states that her partner was always willing to take over the responsibility and assist her in raising A[....].

[19] Her acceptance of the applicants' assistance is akin to that of a new mother living with her parents in the first weeks after giving birth for comfort and support and nothing more.

[20] Except for the fact that she had the usual parenting and financial challenges there is nothing untoward about her child rearing skills and this is also evidenced by the fact that the applicants' allegations of child neglect are not supported by any evidence.

[21] The respondent states that agreement was concluded on the applicant's request and for the sole purpose of registering A[....] on their medical aid it was certainly not intended for the surrender of the respondent's parental rights to the applicants. It is clear from clause 3 of the agreement that the applicants undertook not to purport to be A[....]'s biological however, soon after A[....] was born the first applicant began to assume the respondent's parental role by making decision about when A[....] should bath, be changed or fed and what kind of meals. She even took A[....] for medical attention without the knowledge and consent of the respondent and it is this behaviour that prompted the respondent and her partner to vacate the applicants' residence. Since then, the respondent's mother-daughter relationship with A[....] is thriving it should not be interfered with.

[22] The respondent recognizes that the applicants and A[....] have a special and close bond however that does not entitle them to co-parent with the respondent. The respondent also acknowledges that it is not in A[....]'s best interest that contact is terminated abruptly it is in that regard that she contends that the contact should continue as recommended by Ms Smit but it should be phased out.

[23] Sections 23³ and 24⁴ of the Act provide a mechanism for a care-giver⁵ to acquire rights for care and contact including guardianship in respect of a child.

[24] It is tested law that in matters of this kind, the interest of a child are of paramount consideration⁶ as well as: the relationship between the relevant parties (the applicants and the child concerned; the degree of commitment that the applicants have shown towards the child; the extent to which the applicants have contributed towards expenses in connection with the child's birth and maintenance and any other factor that should in the opinion of the court, be taken into account.

[25] On the facts germane to this matter, it is common cause that the applicants enjoy a close bond with A[....]. It is also it is indisputable that the applicants have contributed vastly to A[....]'s maintenance before and after she was born. The only issue in dispute is whether having regard to these established facts, it would be in A[....]'s best interest that the applicants are awarded full parental responsibilities pertaining to the care, contact and guardianship over A[....].

[26] The reports filed by the family advocate and the social worker Ms Smith present divergent views with regard to whether it would be in A[....]'s best interest that the applicants are granted the relief they seek.

[27] Having regard to the fact that on the family advocate's own submission the report was compiled based merely on an enquiry that was conducted at the family advocate's offices. On the other side, Ms Smith, conducted a thorough investigation of the circumstances of the parties and the child which involved unannounced weekly home visits to the respondent's home not only to investigate the living conditions of the child but the allegations of child neglect and alcohol abuse as alleged by the applicants.

³ 23(1)(a), (b), 2(a) to (e).

⁴ 24(1), (2)(a) to (c).

⁵ In terms of s1 of the Act, a "Care-giver" means any person other than a parent or guardian who factually cares for a child and includes a person who cares for a child with the implied or express consent of a parent or guardian of the child.

⁶ Section 7(1) of the Act; s28 (2) of the Constitution Act No, 108 of 1996; *J v J* **2008 (6) SA 30** (C) para 36.

[28] A comprehensive professional report which is generated from an investigation of the circumstances of the child within its family and environment setting enables the court make sound decisions based on evidence based facts other than the information obtained by merely interviewing the parties. For these reasons, I cannot rely on the family advocate's insubstantial and flimsy report. I am satisfied that I can safely rely on Ms Smith's report for the determination of whether it would be in A[....]'s best interest that this matter is determined in favour of the applicant.

[29] It is also important to highlight that in considering the best interest of A[....], I also take into consideration the conduct of the applicants and how it shaped the proceedings. The applicants launched an irate application on an urgent basis for that matter. *AD and DD and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* [\[2007\] ZACC 27](#); [2008 \(3\) SA 183](#) (CC) para 30,

[30] Serious allegations of child neglect and alcohol abuse are levelled against the respondent in the founding affidavit. The applicants went further to seek expert reports which after all do not bear out these disparaging allegations. I am thus inclined to agree with the respondent's contentions that this application did not arise from a genuine concern for A[....] but an attempt to usurp her parental responsibilities and rights. The applicants are not entitled to the relief sought, the application must fail.

[31] Having regard to the facts of this matter, I am in agreement with the respondent's contention that it would be in A[....]'s best interest that the prevailing contact rights are gradually phased out instead of an abrupt termination thereof.

[32] In the circumstances, I make the following order.

1. The applicants' application is dismissed.

2. In terms of section 18 (2) read with section 19 of the Children's Act, 38 of 2005 the respondent retains her full parental responsibilities and rights in respect of the minor child ("A[...]").

3. The applicants are granted temporary contact to the minor child to be exercised as follows:

3.1. Every alternate Saturday from 8h00 to 17h00.

3.2. The applicants shall collect the minor child from the respondent's residence and return the minor child to the respondent's care at her residence.

3.3. The contact shall be phased out. A social worker alternatively, Ms Estie Smith shall facilitate and oversee the phasing out process.

4. The applicants shall pay the costs of this application including the costs for the services of the social worker / Ms Estie Smith.

NS DANISO, J

APPEARANCES:

Counsel on behalf of the applicants:	Adv. R. van der Merwe
Instructed by:	Phatshoane Henney
	email: ilze@phinc.co.za

BLOEMFONTEIN

Counsel on behalf of the respondent:	Adv. A.P. Stone
Instructed by:	Vermeulen Attorneys
	C/O Pieter Skein Attorneys
	email: ilze@skein.org.za

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