

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO:2023-113226

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

Date: 17 November 2023

E van der Schyff

In the matter between:

M[...] D[...] B[...]

FIRST APPLICANT

A[...] D[...] B[...]

SECOND APPLICANT

and

C[...] N[...]

RESPONDENT

JUDGMENT

Van der Schyff J

- [1] The applicants approached the Family Court on an urgent basis, seeking relief in terms of s 23 of the Children's Act 38 of 2005 (the Children's Act). The applicants seek contact with minor child M, a child who was in their care for the past three years. In this court, they seek interim alternative weekend contact pending the finalisation of an investigation by the Family Advocate. The child is currently nine years old. The Children's Court at Brits awarded primary care and residence to her biological father, who is living with his fiancée and their two children.

- [2] Section 23 of the Children's Act provides that anyone 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 the applicant, on such conditions as the court may deem necessary, contact with the child. In *R.C. v H.S.C.*¹

a Full Court of this Division found that the absence of a biological link with a child is not a bar to an application in terms of s 23 of the Children's Act.

- [3] Each matter's unique facts and context must be considered whenever an application is considered. Since this application came before the court as an urgent application, the court has to determine whether the applicants made out a case for the matter to be heard on an urgent basis. The paramountcy of the 'best interests of the child' – principle does not automatically render each matter wherein the interest of a child is to be considered urgent. It does, however, compel the court to consciously regard the question of whether the best interests of the child in question necessitate the matter to be dealt with in the urgent court, although the applicant in the application, who is generally not the child itself, may strictly speaking be able to obtain substantial relief in due course.

- [4] When dealing with issues relating to the care and contact of minor children, courts should be alive to the fact that any order granted has profound, long-term, and, more often than not, life-changing implications. Decisions are not to be taken lightly.

- [5] *In casu*, I have to regard the history of the matter preceding the s 23 application being instituted in this court. It is common cause that the applicants provided a haven to M (the minor concerned) for approximately three years. She came into their home as a sexually abused, neglected child at the age of 6 when she was placed in their temporary safe care. Shortly thereafter, her biological father, who, I must state from the onset, was never implicated in her sexual abuse, became aware of the fact that she was placed in the applicants' care 'through the

¹ 2023 (4) SA 231 (GJ).

grapevine', and instituted legal proceedings in the Children's Court of Brits for contact and primary residence. Protracted proceedings in the Children's Court ensued. Ms. H. Sangster, a social worker in private practice, explains in her report attached to the founding affidavit:

'The children's court proceedings have produced continuous litigation regarding what the minor child's best interest is. The conflict and disputes seem to be focusing on Mr. N[...]s view that [M] should be reunited with him as he is her biological father versus whether the minor child should be placed in foster care with her temporary safe care parents as she has allegedly formed a bond with them.'

- [6] M and her biological father (Mr. N[...] or the respondent) received bonding therapy, and contact between them was phased in. However, the applicants are of the view that the phasing-in period was too short. Much to the applicants' dismay, the Children's Court granted the respondent primary care and residence of M on 15 August 2023. The Children's Court also prohibited any contact between M and the applicants for the first sixty days of her transitioning to her father's home. M left the applicant's residence three days after the order was granted. The handing over of the minor was traumatising for both herself and the applicants.
- [7] The record reflects that several social workers interacted with all the parties concerned at different times. The reports before the Children's Court indicate that M formed a secure attachment with the applicants and their children. At the same time, none of the social workers raised any concerns about the respondent's ability to parent M, or her safety in his presence. The reports highlight the need to forge a secure bond between M and her father and the progress that has gradually occurred. At this point, all concerned need to realise that it is in M's best interest to securely establish the bond with her biological father as her primary caregiver. The reality is that the transition from M's temporary place of safety to her father's residence occurred. The issue, whether it might have been abrupt or could have been phased in over a more extended period, is no longer of any concern.

- [8] Where a matter had a protracted history in the Children's Court with several social workers involved who provided numerous reports, and where a legal representative was appointed for the minor in that court, another court must be very slow to alter the dynamics that came about as a result of the Children's Court order. The High Court is the upper guardian of all minor children, but this does not mean that the High Court should adjudicate every matter relating to a child when proceedings relating to the same parties were recently considered in the Children's Court. This matter is not, strictly speaking, *lis pendens*, since it does not deal with the issue of the minor child's primary residence. However, I am of the view that the forum best equipped to pronounce on the s 23 application, is the forum that explicitly ordered that the applicants are not to have any contact with the minor for a specified period. If I had to make a finding in this regard, I would have found that it is in the child's best interest that the Children's Court hear the s 23 application. I am, thus, not inclined to consider the application regarding contact *per se*, but for the reason set out below, and considering the principle enunciated in *R.C v H.C.S.*, *supra*, it is in the child's best interest to provide alternative relief.
- [9] The reports attached to the founding affidavit to the application reflect, amongst others, that the respective social workers whose reports were considered by the Children's Court were of the view that the prolonged litigation between M's biological father and the applicants resulted in anxiety for the child concerned. The aim of providing the minor with stability and security so that she can start dealing with the traumatic experiences she endured, underpins Ms. Petro Fourie's recommendation that M be placed in her biological father's care. Ms. Fourie also recommended that M continues with therapy with Ms. Eunice Uys. Ms. Fourie's recommendations were captured in the Children's Court order.
- [10] Against this background, I find it inexplicable that the applicants failed to attempt to discuss the possibility of restoring contact and its ensuing advantages and disadvantages for M with Ms. Eunice Uys, before approaching the court for the relief sought. Ms. Uys is the court-appointed therapist. I cannot ignore Ms. Uys' recent recommendation that to assist M in adapting to her new circumstances, it is

necessary to extend the period without contact with the applicants until M requests contact. The applicants' view of Ms. Uys' suitability as therapist is of no concern because they did not challenge her appointment. The reality is that she is M's therapist. To institute urgent court proceedings without consulting and obtaining her view on the issue is premature.

[11] If I have regard to the tone and content of the opposing affidavit, the possibility does exist that the respondent might hold the view that the applicants are not entitled to discuss any matter relating to M with Ms. Uys. Since the applicants' notice of motion contains a prayer for further and alternative relief, I believe it is prudent to grant an order in this regard to establish the applicants' right to discuss the desirability of restoring contact with M, with Ms. Uys at a round-table discussion where all parties are present.

[12] This leaves the issue of costs. In this matter, it would be unfair to merely state that costs must follow success. The applicants, who deeply care for M, approached this court only because they were concerned for M's well-being and safety. The respondent does not deny the bond they formed with M. One would expect that the respondent would be eternally grateful for the role that the applicants played in his daughter's life at a time when she was severely neglected and abused. I am of the view that the animosity between the parties is rooted in the fact they came to view each other as adversaries. One cannot fault the applicants' initial skepticism regarding the respondent's dedication towards M. On the other hand, one can understand the respondent's frustration with the system that he ultimately redirected to the applicants. Being human, all parties erred.

[13] The respondent is aware that the applicants care deeply for his child. However, he failed to honour his commitment to inform them of her well-being continuously. I understand that he might have been informed that they wanted to appeal the Children's Court order, but he could have communicated formally through his attorney if he had a problem with the more informal WhatsApp communication. The break in communication contributed significantly to this application being instituted, and for this reason, I am of the view that each party should pay its own costs. I am

further of the view that the respondent should, for the next six months, communicate on a six-weekly basis with the applicants regarding M's progress. These updates need not be overly comprehensive but should provide general insight into her physical and emotional well-being. All parties concerned should acknowledge that the minor child's behavior might regress as she starts to become more secure with her father and transition from adapting to her new place of residence to dealing with the trauma she experienced throughout the first nine years of her life. Acting out and negative behaviour should not summarily be attributed to her being unhappy or not properly cared for in her current environment.

[14] The refrain through all the reports is that M needs stability and security to deal with the trauma she experienced. A difficult road lies before this child. Difficult years lie ahead. She will need all the support she can get, as will the people in her immediate environment. I urge the parties to bury the hatchet and find a way to overcome their differences, having M's best interests at heart.

ORDER

In the result, the following order is granted:

- 1. The applicants are entitled to consult with Ms. Eunice Uys regarding the desirability of restoring contact with M at a round-table discussion where all parties are present;**
- 2. The respondent is to provide the applicants with updates regarding M's physical and emotional progress on a six-weekly basis for the next six months;**
- 3. Each party is to pay its own costs.**

E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be emailed to the parties/their legal representatives as a courtesy gesture.

For the applicants:	Adv. M. Hennig
Instructed by:	Coetzer and Partners
For the respondent:	Mr. J Lazarus
Instructed by:	Shapiro & Ledwaba INC
Date of the hearing:	15 November 2023
Date of judgment:	17 November 2023