

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape, Kimberley)

Case No: 1222/09
Case Heard: 27/08/2009
Date Delivered: 02/10/2009

In the matter:

J H JONKER
H J J A JONKER

1st Applicant
2nd Applicant

v

FRANCOIS C STOFFELS

Respondent

JUDGMENT

KGOMO JP:

1The dispute in this matter concerns the custodianship of an angelic little girl named "C S" who was born by means of a Caesarean section in Tygerberg Hospital, Cape Town, on 26 January 2006. Her mother Ms Ursula Yvette Ross who was born on 26 January 1976 suffered from a congenital heart defect and underwent a heart

bypass operation (a second in few years) with the birth of "C " as her heart was unable to withstand the strain of labour. "C " was born out of wedlock as her mother and her respondent biological father, Mr Francios Christiaan Stoffels, whose surname Curstan carries, were unmarried.

- 2] Ms Ross and the respondent stayed together in the former's flat for a period of about one to two years, before the birth of the child. Accounts on the period of their cohabitation differ but this is not material. Ms Ross was discharged with her new-born baby from Tygerberg Hospital on 02 February 2006, when "C " was about six days old. Understandably the respondent cared for mother-and-child from such discharge until 05 March 2006. On 06 March 2006 Mrs Jacoba Hendrina Jonker, "C "'s maternal grandmother and the first applicant in this matter, arrived in Paarl from Keimoes, Northern Cape, where she resides with her husband and second applicant Mr Hans Johannes Jacobus Albertus Jonker, to care for her daughter and granddaughter.
- 3] On 13 March 2006 Mrs Jonker left for Keimoes with her daughter and "C ". On the applicants' version the purpose was to nurse their daughter to health and care

for "C ". On respondent's account the purpose was to show "C " to the Jonker family. In my view the versions are reconcilable and inseparable. The fact of the matter is that the Jonker family had not seen "C " and Ms Ross was indubitably still quite sick and in the process of recuperation. On 17 March 2006 she had a relapse and was advised to by the Jonker family doctor to return to Tygerberg Hospital post haste. Mrs Jonker escorted them back. The hospital was unable to save Ms Ross' life (henceforth the deceased) and she died on 28 March 2006. Mrs Jonkers was looking after "C " in Paarl at that stage.

- 4] Mrs Jonkers departed to Keimoes with "C " on 30 March 2006 while the funeral arrangements of the deceased were underway. She claims to have done so with the full knowledge and consent of the respondent whereas he disclaims such implication. Ms Anderssen, counsel for the respondent, argued fervently that the Jonkers took the law into their own hands and virtually accused them of abducting "C " from the custody of her father or removing her under false pretences. She urged that the Court should not countenance such conduct. As this aspect was also pivotal in the Family Advocate's recommendations that "C "'s custody be awarded to her father it is necessary to deal in some detail with the

removal.

- 5] The respondent says the following in his answering affidavit on "C "'s removal (Translated):

"Mrs Jonkers took "C " to Keimoes (on 30 March 2006) without my consent after Ursula's death (on 28 March 2006). On the day in question she offered to take care of "C " to enable me to attend to the payment of some bills. On my way back from running these errands I came accross Mrs Jonker, Ursula's sister and "C " along the way. I was informed that they were on their way to Cape Town to attend to some business. On arriving home I discovered that "C "'s clothing was missing. Mrs Jonker told me later by phone that she was taking "C " to Keimoes. I informed her that I will return with "C " to Paarl after the funeral. When the funeral was over (on 8 April 2006) Mr and Mrs Jonker (the applicants) refused to hand over "C " to me. Instead they showed me a document which purports to place "C " in their custody."

- 6] In his report dated 18 February 2009 Mr A H Nel, the Family Advocate, makes these observations, *inter alia*:

"I have, however, reservations regarding the child's removal from the first respondent's care 3 years ago. Although the nature of our investigation curtails us from properly testing the evidence, there are indications that the minor child was probably removed from the respondent's care without his consent. However, we have to keep in mind that the 'removal' of "C " happened before the Children's Act, Act 38 of 2005 came into operation on the 1st of July 2007. The respondent's legal

position was somewhat different at the time.

Be that as it may, the shunting about of children should be strongly deprecated. There is, however, a strong indication that the applicants precipitated the shunting about of the child when they removed her and set into motion proceedings to permanently remove the child from the respondent's care.

If the applicants acted unlawfully at the time, and it appears to be the case, the child should be returned to the respondent's care even if it might disrupt her life. A change in circumstances in "C "'s life seems unavoidable in order to rectify the actions of the applicants.

If the change in circumstances is managed properly the traumatic effect thereof could be minimized.

Finding. If "C " is removed from the applicants' care it would definitely disrupt her life. However, a change in circumstances is necessary due to her apparent unlawful removal from the first respondent's care.

THE NEED FOR THE CHILD TO REMAIN IN THE CARE OF HIS OR HER PARENT, FAMILY AND EXTENDED FAMILY, CULTURE OR TRADITION

The minor child has been in the applicants' care for the past 3 years. As I have already indicated, "C " has received excellent care over the years from the applicants. She is a well adjusted little person who has been very fortunate to have the applicants in her life. It will definitely be very traumatic for "C " and the applicants if she has to return to the respondent's care.

The only parents "C " has come to know over the past 3 years are the applicants. It is therefore of the utmost importance that this bond be maintained. The applicants love her and will be able to enrich her life even further if they are allowed to

maintain contact with her over the years to come.

Finding. It would be in the best interests of "C " if the applicants have regular contact with her in future.

CONCLUSION

I would like to emphasize the fact that this matter turns on the fact that the minor child was unlawfully removed from the respondent's care. If the child had been in the lawful care of the applicants my recommendations regarding permanent residency would have been different.

Based on the available information and provided my assumption regarding the unlawfulness of the minor child's removal from respondent's care is correct, I am of the opinion that it would be in the best interests of the minor child if the permanent residency of the child is awarded to the respondent provided and subject thereto that a proper integration process is followed over a reasonable period of time.

I am furthermore of the opinion that the applicants should receive the right to have reasonable contact with the minor child in future."

- 7] I am not at all persuaded by the contention by respondent's counsel and the Family Advocate that "C " was illegally removed by her grandmother from respondent's custody. To start with the respondent moved into the deceased apartment and shackled up with her. The partners were obviously not married to each other, neither were they engaged to marry, nor were they in a permanent love relationship. To the extent that the Family Advocate was of the opinion that

their relationship was permanent and used the presumed permanency as a factor in favour of the respondent or against "C "'s grandparents he was mistaken. It was incumbent upon the respondent to produce by way of an affidavit with supporting documents, if any, evidence that he and the deceased were involved in a permanent life-partnership that is contemplated in s21(1)(a) of the Children's Act, 38 of 2005. In **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs** 2000(2) SA 1 the Court (at para 86) said:

"Permanent in this context means an established intention of the parties to cohabit with one another permanently."

The Court then gave the following guidelines at para 88, which may be suitably adapted to the situation of heterosexual partners:

"[88] Whoever in the administration of the Act is called upon to decide whether a same-sex life partnership is permanent, in the sense indicated above, will have to do so on the totality of the facts presented. Without purporting to provide an exhaustive list, such facts would include the following: the respective ages of the partners; the duration of the partnership; whether the partners took part in a ceremony manifesting their intention to enter into a permanent partnership, what the nature of that ceremony was and who attended it; how the partnership is viewed by the relations and friends of the partners; whether the partners share a common abode; whether the partners own or lease the common abode jointly; whether and to what extent the

partners share responsibility for living expenses and the upkeep of the joint home; whether and to what extent one partner provides financial support for the other; whether and to what extent the partners have made provision for one another in relation to medical, pension and related benefits; whether there is a partnership agreement and what its contents are; and whether and to what extent the partners have made provision in their wills for one another. None of these considerations is indispensable for establishing a permanent partnership. In order to apply the above criteria, those administering the Act are entitled, within the ambit of the Constitution and bearing in mind what has been said in this judgment, to take all reasonable steps, by way of regulations or otherwise, to ensure that full information concerning the permanent nature of any same-sex life partnership is disclosed."

The respondent has failed to reach this threshold, even if the guidelines were to be applied much more liberally or less stringently.

- 8] Why, it may be asked, and regard also being had to the family ties of "C " to the parties to this dispute, should it be said that the child was in the *de facto* custody of the respondent and not concomitantly in that of her grandmother. She shared the care of the child with the deceased from 06 March 2006 and became her predominant care-giver after the deceased's death on 28 March 2006. When the deceased died an emergency situation existed which called for the child's

grandmother to take charge along similar lines as a *negotiorum gestio*. Which right-thinking person would have expected the grandmother to say to "C "'s unmarried father: "There is your child. You are on your own. I am out of here. I am going to arrange her mother's funeral (some 700km away)." I am also unconvinced that the respondent had a better right than the applicants during March 2006, moreso in that the applicable provisions of the Children's Act 38 of 2005 only became operational on 01 July 2007. If the respondent withheld permission for Mrs Jonkers to depart with her two-months old granddaughter, as he alleged he did, which I doubt very much, then such conduct was extremely insensitive, unreasonable and unjustified.

- 9] The respondent attended the deceased funeral in Keimoes on 08 April 2006. It was common cause that all the funeral expenses were borne by the deceased's former husband Mr Nico Meyer. This includes the transportation of the deceased's body from Paarl to Keimoes. The respondent pleaded lack of funds. Immediately after the funeral he insisted on leaving with "C ". The applicants sought and obtained the intervention of the police and a social worker. A so-called Form 4 Departmental pro-forma procedure was

invoked by the social worker of Uppington, Ms R S E Coetzee, relying on the Child Care Act, 74 of 1983. She found the following clause in Form 4 to be applicable and ticked it.

"Artikel 12(1): Ek het rede om te glo dat bogenoemde kind ["C S"] sorgbehoewend is soos bedoel in artikel 14(4) van die Wet en dat die vertraging van die lasbrief tot nadeel van die veiligheid en welsyn van die kind sal strek, op grond" that the child has no parents or guardian. It was therefore recommended by her that the child be kept *"in 'n plek van veiligheid by die materne grootouers --- hangende verdere kinderhof ondersoek ten einde die verdere wetsposisie van die kind te bepaal."*

- 10] The respondent was notified that the parties have to appear before a Commissioner of Child Welfare on 10 April 2006 in Keimoes to determine whether "C " is indeed a child in need of care. Magistrate Frans Erasmus, at an informal inquiry, basically approved the Form 4 procedure adopted by the police and social worker (Ms Coetzee) and made an interim order that "C " remain in the care of her grandparents pending a formal inquiry which was instituted before another magistrate, Mr Van Zyl.
- 11] In an unfortunate turn of events, which should not only be avoided at all cost but also deprecated when very

young children are involved, the inquiry was postponed on numerous occasions due to the absence of the respondent or a witness for one of the parties or one required to be called by the Commissioner or as a result of the absence or the termination of the mandate of a legal practitioner. The matter was only concluded on 26 February 2008 when the child was two years and one month old and had stayed with the applicants uninterruptedly. This delay has serious implications and consequences for the parties and "C " because the essence of the Commissioner's order, dealt with below, was to reverse the interim order of Magistrate Erasmus which had been in existence from 10 April 2006 to 26 February 2008 (one year 8 months).

12] The papers show that the Commissioner did not give reasons for the following final order that he made:

- "(a) *Custin word geplaas in die sorg van Mnr Stoffels.*
- (b) *Mnr Stoffels moet die geleentheid gebied word om natuurlike kontak met "C " te hê met tussenkoms van die plaaslike Maatskaplike werker. Die Stoffels egpaar en die Jonker egpaar word beveel om die band te bewerkstellig.*
- (c) *Die hof gelas dat Mnr Stoffels en die Jonker egpaar enige redelike opdrag van die Maatskaplike werker/werkster om bogenoemde te bewerkstellig uitvoer.*
- (d) *Die plasing moet gefinaliseer wees voor of op einde Augustus 2008.*" (The numbering is mine).

13] It is this order in para 12 (above) which gave rise to the current application. On 30 August 2008 Olivier J granted the applicants an interim interdict which suspended the operation of the Commissioner's order in respect of the handing over of "C " to respondent the following day (31 August 2008) pending the determination of the custody issue by this Court. The integration process ordered by the Commissioner was thankfully left undisturbed.

14] On 07 November 2008 Majiedt J ordered by consent that each party appoints its own psychologist to oversee and facilitate the integration process ordered by the Commissioner and to compile their respective reports by not later than 30 January 2009 (after "C " shall have turned 3 years). Before I deal with these reports regard must be had to Dr J D Stemmet's report dated 28 July 2008 which forms Annexure "JHJ1" to the application and precedes the order granted by Majiedt J. The more relevant portion reads:

"EVALUERING:

Die Jonker egpaar: Hulle is `n hegte gesin wat gesonde beginsels handhaaf. Die oupa het `n goeie inkomste, hulle woon op `n plasie (Keimoes) en besit hulle eie huis. Meneer Jonker kom emosioneel stabiel voor en dit is duidelik ook uit die navraag dat hy sy beginsels uitleef. Sy kinders is blykbaar almal

gelukkig en kom graag by hulle ouers kuier.

Ouma is permanent by die huis en sy kan gevolglik goed omsien na die dogtertjie ("C ") se daaglikse behoeftes. Op die oomblik raak sy effens emotioneel wanneer sy aan die moontlikheid dink dat hulle klein "C " kan "verloor." Sy is egter stabiel en nie een van die grootouers ly aan depressie nie of het sover ek kon vastel, swak emosionele balans nie.

Die dogter op wie se mediese fonds "C " is, werk by die Staatshospitaal. Sy het 'n gesonde huwelik en self is sy baie selfstandig, volwasse en verantwoordelik.

"C " is baie kalm en weetgierig. Sy hou van prentjies teken en is nie teruggetrokke nie. Dit is duidelik uit haar verhouding met ouma, oupa en tannie, dat sy 'n gelukkige klein meisie is. Sy is elke keer mooi aangetrek en is baie gehoorsaam.

SAMEVATTING:

Samevattend kan ek beweer dat die jonker gesin in "C " se emosionele, fisiese en geestelike behoeftes kan voorsien.

Ek dink dat dit ook vir haar 'n negatiewe emosionele ervaring gaan wees indien sy nou hierdie omgewing en geliefdes moet verlaat.

Verder is dit belangrik om te meld dat sy bedags by ouma kan bly wat goed na haar omsien en waar sy baie veilig voel.

Selfs op haar ouderdom kan dit 'n emosioneel-negatiewe ervaring wees om na meer as twee jaar van die "ouers" wat sy as haar ouers leer ken het, weggeneem te word."

- 15] The integration reports which Majiedt J ordered to be compiled serve a specific purpose: to seek to establish whether the integration process was a success or not:

15.1 Dr Stemmet was once more appointed by the

applicants. She reckons that the process was successful mainly due to the full co-operation of the applicants who made several trips to Paarl at great expense to afford the respondent ample access and natural contact. Her latest report is dated 24 January 2009.

15.2 Ms Mandi Bouwer is a guidance and counselling psychologist. She brought out her report on 28 January 2009 on behalf of the respondent. She also maintains that the integration process ran smoothly and goes on to say:

"Dit het geblyk dat alle rolspellende volwassenes hul bes gedoen het om hul eie emosionele stand sekondêr te stel ter wille van die dogtertjie se geluk. Van beide partye is daar opofferings en groot finansiële uitgawes aangegaan wat groot waardering en op positiewe ingestelheid toon.

Die verhouding tussen die volwassenes was respektvol en konsiderend bv. telkens moes die besoektye aangepas word om by die vervoerreëlins aan te pas. Elke minuut tydens die besoeke was kosbaar en met die verskuiwings van tye het almal positief ingeval.

"C " was sprankelend, spontaan en vriendelik met mnr Stoffels. Sy het vanaf die eerste besoek gemaklik by hulle ingeskakel. Met die eerste besoek in die Paarl het sy sonder twyfel by haar pa se motor ingeklim – op sy skoot gesit en saam met hom gery. Die skeiding van haar grootouers was spontaan. Sy het nie eens verbaal gevra of haar grootouers ook na dieselfde bestemming gaan nie."

Ms Bouwer recommends:

"Aangesien die gesinsadvokaat se ondersoek nie voltooi is nie word aanbeveel dat "C " alleen vir drie weke in die Kaap by haar vader tuis gaan tot die verslag uitgereik is om die konstante en realiteit vir "C " vas te maak van verskuiwing. Dit word aanbeveel dat van haar grootouers naby moet wees in die tyd om oorgang te vergemaklik. Ek sal die gesin in die tyd monitor en opvolg om emosionele stabiliteit en veiligheid te help verseker. dit word aanbeveel dat die terapeut sal opvolg, selfs 'n voorgestelde jaar tydperk na die intergrasie."

I am impressed by the objectivity and professionalism of these psychologists. Their inputs and involvement in facilitating the integration process have been extremely helpful to the respective families, the child and the Court to come to a well informed and reasoned decision.

- 16] It should be mentioned that the respondent has since married and a child was born to the couple during 2008/2009. This brings in a different dimension to contend with. It seems that the initial impression of the psychologists on both sides of the new Mrs Stoffels is reasonably favourable. However, it is early days yet. Not much information is available concerning her except that she is a clerk with the South African Police Services. It is unclear what part respondent's daughter from his first marriage plays in his life. It is not stated

who will care for "C " when the Stoffels are at work.

- 17] Commissioner Van Zyl's intervention is useful to the extent that it brought about the integration process, and "C "'s bonding with her father. Other than that the stand-alone order is not of much use unaccompanied by a judgment or the reasons for the order which would have related why it was made or how it was arrived at.
- 18] The applicants, the grandparents of "C ", have brought "C " up as their own child to this point (she is now 3 years and 8 months) without any demur from any quarter. At 53 and 55 years of age they are relatively young and homebound. Their children are grown up and are able to care for themselves and support their parents with "C ". The Jonkers own the seven-roomed house in which they live. Prospects of an environmental change are unlikely. The Family Advocate, though his report was comprehensive and helpful, misconstrued the circumstances under which "C " was removed from Paarl. I can conceive of no cogent reasons why the child should be uprooted from the secure, familiar and warm environment she finds herself in. It is not only her grandparents that "C " is attached to emotionally but also her aunts (one on whose medical aid scheme she has been registered),

her uncles and little friends.

- 19] The applicants stated that the respondent has not maintained "C " since she has stayed with them on 30 March 2006. Respondents counters the allegation by saying that the applicants have rebuffed his offer of maintenance. Respondent has produced proof that he has been banking the money meant for "C "'s maintenance which amounts to several thousand rand (over R3000-00) by now. He can now pay over the money in a show of good faith and not adopt a cynical attitude of "I will maintain my child only if she is with me." The upshot is, as of now he has not maintained his daughter. The papers show that "C " receives a Government grant which, I understand, was initiated *mero motu* by the Commissioner. This does not say much for the respondent's lofty assertions which he has not walked.
- 20] I am accordingly satisfied that it would be in the best interest of "C " that her custody and guardianship be awarded to the applicants subject to respondent's right of reasonable access to her. See: S28(2) of the Constitution of the Republic of South Africa, 108 of 1996. The factors stipulated in s7 of the Children's Act, 38 of 2005, have been taken into account. In **Du**

Toit v Minister of Welfare & Population

Development 2003(2) SA 198 (CC) the Constitutional Court had this to say on the best interest of the child in para 20.

"Paramountcy of the child's best interests"

[20] The applicants submitted that the impugned provisions violate the 'best interests' principle protected by s 28(2) of the Constitution. Section 28(2) of the Constitution states that:

'A child's best interests are of paramount importance in every matter concerning the child.'

In *Minister of Welfare and Population Development v Fitzpatrick and Others*¹ Goldstone J observed that:

'Section 28(2) requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of s 28(2) cannot be limited to the rights enumerated in s 28(1) and s 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in s 28(1). This interpretation is consistent with the manner in which s 28(2) was applied by this Court in *Fraser v Naude and Others*.'²

Both international law and the domestic law of many countries have affirmed the paramountcy of 'the best interests of the child'.³ Similarly, s 18(4)(c) of the Child

¹ 2000(3) SA 422 (CC) (2000(7) BCLR 713 at para [17]).

² 1999(1) SA 1 (CC) (1998 (11) BCLR 1357) at para [9].

³ Examples of African Countries which incorporate children's clauses in their constitutions include Namibia (art 15 of the Constitution of the Republic of Namibia); and Uganda (s34 of the Constitution of the Republic of Uganda). The paramountcy of the best interests of children is confirmed in many international conventions on the Rights of the child, 1989. The convention was adopted by the United Nations General Assembly on 20 November 1989 and entered into force on 2 September 1990. See also, art 4 of the African Charter on the Rights and Welfare of the Child, 1990.

Care Act, which sets the best interests standard for the adoption of a child, provides that:

'A children's court to which application for an order of adoption is made . . . shall not grant the application unless it is satisfied -

. . .

(c) that the proposed adoption will serve the interests and conduce to the welfare of the child' "

[21] In matters of this nature there is no winner or loser. The dispute was bona fide. There shall be no order as to costs.

22] In the premises I make the following order:

1. Custody and guardianship of the minor child "C S", born on 23 January 2006, is awarded to the applicants, Mrs Jacoba Hendrina Jonkers and Hans Johannes Jacobus Albertus Jonkers.
2. The applicants are awarded full parental responsibilities and rights as contemplated in s18(2)(a) – (d) of the Children's Act, 38 of 2005, in respect of the child, which incorporate to care for the child, to maintain contact with her, to contribute to her maintenance and generally to act as her guardians.

3. The permanent residency of the child is awarded to the applicants.
4. The respondent, Mr Francois Christiaan Stoffels, as father of the child has the right of reasonable access to the child the terms of which access must be drawn up by counsel with the aid of the Family Advocate, Mr A H Nel; the psychologists Dr J D Stemmet (representing the applicants) and Ms Mandi Bouwer, representing the respondent.
5. If agreement concerning the terms of the respondent's access rights is reached an order by consent should be obtained in the Chambers of the Judge President at 09h00 on Tuesday 20 October 2009 or otherwise be argued in court on the very stipulated date and time.
6. There shall be no order as to costs.

F DIALE KGOMO
JUDGE PRESIDENT
NORTHERN CAPE DIVISION

For Applicant :	Adv J J Schreuder
On Behalf of:	ELLIOTT, MARIS, WILMANS & HAY
For the First Respondent:	Adv. J S ANDERSSEN
On behalf of:	VAN DE WALL & PARTNERS