



IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Appeal Case No.: **A46/2024**

Case No.: **1762021/000227**

In the matter between:

F C P

Appellant

and

S T C

Respondent

CENTRE FOR CHILD LAW

Amicus Curiae

Date of hearing: 13 September 2024

JUDGMENT DELIVERED ON 29 JANUARY 2025

GORDON-TURNER, AJ:

Introduction

1. This is an appeal from a judgment handed down by Acting Additional Magistrate Horn on 4 October 2023 in the Maintenance Court Wynberg (**the maintenance judgment**), which held that the Maintenance Court enjoyed jurisdiction to continue maintenance proceedings brought by the respondent during January

2023 on behalf of her minor son M, now aged 13 years, of whom the appellant is the biological father, notwithstanding an intervening Children's Court order whereby the court '*hereby terminates the rights and responsibilities of the [appellant] in respect of the child [M]*'.

2. This appeal engages the proper interpretation to be placed upon that order and upon the statutory provision which purportedly empowered it, being section 28 of the Children's Act 38 of 2005 (**the Children's Act**).¹

Case management, condonation and the issue of appealability

3. The appeal underwent case management by the Court (Slings J and Pangarker AJ) prior to the hearing. As a result, the Centre for Child Law (**CCL**) was admitted as *amicus curiae* on 20 May 2024. Slings J brought the appeal to the attention of the Office of the Family Advocate, invoking section 28(1)(h) of the Constitution,² and expressing concern that it was not clear what steps, if any

¹ Section 28 of the Children's Act provides:

"28 Termination, extension, suspension or restriction of parental responsibilities and rights

- (1) A person referred to in subsection (3) may apply to the High Court, a divorce court in a divorce matter or a children's court for an order-
 - (a) suspending for a period, or terminating, any or all of the parental responsibilities and rights which a specific person has in respect of a child; or
 - (b) extending or circumscribing the exercise by that person of any or all of the parental responsibilities and rights that person has in respect of a child.
- (2) An application in terms of subsection (1) may be combined with an application in terms of section 23 for the assignment of contact and care in respect of the child to the applicant in terms of that section.
- (3) An application for an order referred to in subsection (1) may be brought-
 - (a) by a co-holder of parental responsibilities and rights in respect of the child;
 - (b) by any other person having a sufficient interest in the care, protection, well-being or development of the child;
 - (c) by the child, acting with leave of the court;
 - (d) in the child's interest by any other person, acting with leave of the court; or
 - (e) by a family advocate or the representative of any interested organ of state.
- (4) When considering such application the court must take into account-
 - (a) the best interests of the child;
 - (b) the relationship between the child and the person whose parental responsibilities and rights are being challenged;
 - (c) the degree of commitment that the person has shown towards the child; and
 - (d) any other fact that should, in the opinion of the court, be taken into account."

² Section 28(1) (h) of the Constitution provides that:

were taken to give effect to Section 10 of the Children's Act³ (which provides for the voice of the child to be heard) before the Children's Court order terminating the appellant's responsibilities was granted. Thereafter on 28 May 2024, the Court requested Legal Aid South Africa to appoint a legal representative for the child, and directed the Office of the Family Advocate to investigate and report on whether a termination of the appellant's parental responsibility to contribute to his maintenance as set out in Section 18(2) of the Children's Act 38 of 2005 (**the Children's Act**) is in the best interests of the child. Ms Rene Carstens was appointed as the child's legal representative, and the Office of the Family Advocate duly undertook an investigation regarding the welfare of the child and filed a detailed report. The Court is grateful to all the above persons for the careful and thorough manner in which they undertook their tasks.

4. The CCL was directed to pay particular attention to the following, the answers to which are subsumed in the body of this judgment:

- 4.1. What would the consequences be for the administration of justice and for maintenance applicants in general where a biological parent of a minor child (the father) successfully has his parental rights and responsibilities terminated where a maintenance application in respect of the child is pending?

- 4.2. To what extent was the Maintenance Magistrate allowed or authorised to comment on the decision of the Children's Court, bearing in mind that the

"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 justice would otherwise result;"

³ Section 10 of the Children's Act provides:

"10 Child participation

Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration."

Maintenance Court is a creature of statute and has no power to review either?

- 4.3. To what extent may the Court of Appeal address and consider the Children's Court order bearing in mind that the latter Court's order is not the subject of this appeal?
5. Throughout case management and thereafter in the adjudication of this appeal, this Court has remained cognisant that an appeal against the maintenance judgment was before it, not an appeal against or review of the Children's Court judgment. Nonetheless, the appeal record included references to the proceedings in the Children's Court and the resulting order: this appeared in an affidavit sworn by the appellant on 27 January 2023, in correspondence addressed by the appellant to the maintenance office during August 2023, in written submissions made by the appellant and by the maintenance officer to the maintenance court, in the learned magistrate's contemporaneous notes during the enquiry in terms of Section 16 of the Maintenance Act 99 of 1998 (**the Maintenance Act**), in the order of Magistrate McKellar granted in the Children's Court on 11 August 2023, in the maintenance judgment itself and in the respondent's opposing affidavit to the appellant's condonation application (referred to below), to which she annexed the appellant's affidavit in support of his application to the Children's Court dated 27 January 2024. All of this material, as with the remaining contents of the appeal record, has been taken into consideration.
6. The appeal against the maintenance judgment was lodged out of time by a month. The appellant applied for condonation. The respondent delivered an opposing affidavit, which in essence set out protracted delays over many years

in obtaining satisfaction in maintenance proceedings, of which the delay in this appeal hearing was the latest. Her frustration with the failings in the administration of justice was understandable, and these are revisited in a different context below. However, for purposes of deciding upon condonation, the relevant period to consider is that between the date of the judgment under appeal, and the date upon which the appeal was lodged.

7. The granting or refusal of condonation is a matter of judicial discretion. It involves a value judgment by the court seized with a matter based on the facts of that particular case.⁴
8. The appellant's default was partly due to the delay in obtaining a transcript of the learned magistrate's judgment, and partly due to his own hesitation when deciding whether to take the magistrate's order on appeal or on review. He did not fully motivate why he enjoyed prospects of success on appeal, as he ought to have done.⁵ Despite these unsatisfactory features, the Court considered that it is in the interests of justice to condone his default and allow the appeal to proceed: to do otherwise would cause further potential delay in determining the parties' positions, to the prejudice of M and of the respondent. In addition, this appeal raises issues that are of wider importance, and merit deliberation by the High Court.
9. A further preliminary issue was to consider whether the learned magistrate's judgment is appealable. Her judgment dealt only with the point raised *in limine* by the appellant at the hearing. The appellant framed the point as the absence of *locus standi* on the part of the maintenance officer, who, after conducting the

⁴ *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC) at paragraph [35]

⁵ *Ibid* at paragraph [50]

And see *Paf v Scf* 2022 (6) SA 162 (SCA) at paragraph [15]

enquiry required of him in terms of section 6(1) of the Maintenance Act 99 of 1998 (**the Maintenance Act**) had recommended that the respondent's complaint be referred for trial before the learned magistrate.

10. The appellant had contended that the magistrate could not entertain the respondent's maintenance application as the Children's Court had terminated his parental responsibilities and rights. In effect, his contention was that the maintenance officer exceeded his powers by referring the matter to the magistrate, and the magistrate exceeded her powers by hearing the matter.
11. Accordingly, the point *in limine* before the learned magistrate was one of jurisdiction. The import of her judgment is that notwithstanding the order of the Children's Court, she retained jurisdiction. If her judgment is overturned on appeal, (absent any further appeal), the learned magistrate will enjoy no power or jurisdiction to continue the maintenance proceedings on the merits. This appeal is therefore potentially dispositive of the pending maintenance trial,⁶ and the learned magistrate's judgment on the point *in limine* is appealable.⁷

Factual background

12. The child, M, was conceived during 2010. The parties disagree on the nature of their relationship. In his affidavit in the Children's Court, the appellant states that the parties "*were never in a relationship*". The respondent asserts that they had "*a fling for almost 2.5 years and the last time I was with him was at 8 months pregnant*".
13. On 04 August 2011, M was born. At that time the respondent believed M was the child of another man and accordingly did not notify the appellant.

⁶ *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532J to 533A

⁷ *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA) at paragraph [1]

Approximately a year after M's birth, the respondent discovered that M was not the biological child of the "man ... [she] *had thought*". Realising her error she notified the appellant of the existence of his son. According to the respondent, the appellant persistently denied paternity until the results of the paternity test were known.

14. On or about 13 April 2013, the respondent instituted maintenance court proceedings against the appellant out of the Simonstown Magistrate Court, which were not finalised. At the first appearance on 13 May 2013, according to the court's notes, the appellant '*does not confirm paternity so he requires DNA test. He will pay for the test*'. The case was postponed to 6 June 2013 for this purpose. The court notes reflect that on 6 June 2013 "[the appellant] *called yesterday to advise he could not have money for the [paternity] test and requested a postponement. Complainant [the respondent] moved for 09h00 on 24/6/2013 for DNA. Defendant [the appellant] advised of the 24/06/2013*". A subsequent court note dated 24 July 2013 reflects that the appellant had called to advise he would be away in Kimberley for 3 months for cricket, that he undertook to pay R500.00 pm for 3 months and "*will continue with DNA when he comes back*".
15. The respondent averred, with reference to supporting bank statements that during 2014 the appellant was paying an amount of R750.00 to R800.00 per month, and she had no reason to believe he would stop doing so. However, she had to 'redo the application' because the maintenance court was not able to 'get hold of him'.
16. New maintenance proceedings were instituted on 25 March 2021 under a new case number, with the first set down date of 12 July 2021 for an 'Investigation / Mediation session'. According to the respondent the maintenance court was

unable to locate the appellant. A further directive was issued by the maintenance officer for 5 October 2021. Again, the appellant did not attend. The respondent is aggrieved that the steps taken by the maintenance officer to trace the appellant, as evidenced by the tracking report, were inadequate and based on dated information. She holds the view that the maintenance court had the power to ascertain correct information about his whereabouts, despite protection of personal information imposed by law, and bearing in mind that as a (then) professional sportsman the appellant's name regularly appeared in the media.

17. Ultimately, under circumstances not explained in the papers, the appellant underwent a paternity test in November 2022 that confirmed he is M's biological father. It appears from the record that the respondent bore the costs of that test in the sum of R2 160,00.
18. Thereafter, on or about 6 January 2023, the respondent again instituted maintenance court proceedings against the appellant out of the Wynberg Magistrates Court. This time, service of the process⁸ upon the appellant at his place of employment on 19 January 2023 was successful. The first appearance before the maintenance officer was scheduled for 27 March 2023.
19. The respondent reported that the appellant paid an amount of R2000 on 14 April 2023 and a similar sum in May/June of 2023. During the course of the maintenance proceedings (by which she must mean the mediation before the maintenance officer) the appellant made an offer of maintenance which the respondent declined as inadequate. She avers that the case could have been concluded had she not been missing proof of certain expenses which she was

⁸ Directive by the Maintenance Officer in terms of Regulation 3(1) read with Section 44 and Section 6 of the Maintenance Act 99 of 1998

due to provide at the next appearance.

20. However, in the interim, only eight calendar days after the directive by the maintenance officer of the Wynberg Maintenance Court was served on the appellant, and on 27 January 2023, the appellant instituted an application to terminate his “*parental rights*” out of the Wynberg Children's Court.

20.1. In support of his application to the Children's Court, the appellant alleged under oath that he “*had relations with [the respondent] while on [sic] university 10+ years ago (2010). We were never in a relationship. We move [sic] on with our lives. She got married, and we never had contact since*”. Taking account of the records maintained in the moribund maintenance application in the Simonstown Magistrate's Court (referred to above), and the evidence of maintenance payments made during 2014 and 2023, the latter statement about no contact was incorrect.

20.2. Also misleading is his averment under oath that “ [The respondent] *contacted me in November 2023, demanding a paternity test of her child and stating that I am the father. Test confirmed that I am the biological father*”. The Simonstown maintenance court records reveal that the appellant, not the respondent, had insisted upon a paternity test at his cost as early as 13 May 2013, yet the appellant had successfully evaded submitting to the test (until November 2022, not 2023). He had also escaped service of process to initiate maintenance proceedings until January 2023. He had, however, made maintenance payments for a limited period during 2014, and again in 2023 – facts he apparently failed and omitted to disclose to the Children's Court.

20.3. The appellant further alleged that the respondent “*made her intentions*

clear that she does not want a relationship (platonic) with me or a parental relationship between me and the child. The only reason for contacting me was for financial gain as she was getting divorced and needed money. I have no relationship with the child, was never in contact with the child and never had responsibilities towards the child in any way or form. The child was and is still raised by her and her husband, and calls the husband dad. I've started a partnership with someone. I have no intention of starting engagements with the mother or start (sic) a relationship with the child. The practicalities of the situation are not conducive for a relationship as the intent is driven on monetary gain. I've also applied for an interdict against the mother and husband due to them sending threatening messages and phone calls. Mother applied to maintenance court in November. Case on the roll to see Magistrate on 27/03/2023 at 9am". (underlining inserted)

21. Notably, the appellant did not allege that he was without means to contribute to M's maintenance. The underlined passages reveal that the appellant was preoccupied with the financial impact of a maintenance order, and this motivated his application to the Children's Court for an order to terminate his "parental rights". Plainly, on his own version, he had not, in practice, been burdened with any of the responsibilities of care, contact and guardianship, and no application was required to liberate him in that regard. In making his application he and the Children's Court took for granted that the appellant was a co-holder of parental responsibilities and rights to establish his *locus standi* in terms of section 28(3)(a). This assumption bears further scrutiny. I revert to it below.
22. The record of appeal contains no material indicating the respondent's attitude to the appellant's application to the Children's Court. However, the report of the

Family Counsellor records that the respondent did not oppose the proceedings as she had no legal representation and was told that the Children's Court matter does not affect the Maintenance Court matter. (The source of this advice was not identified). She was, however, present during that hearing on 11 August 2023, taking account of the court notes quoted below from which it appears that both parties appeared in person i.e., without legal representation.

23. On 11 August 2023, the Children's Court, with knowledge that maintenance proceedings were pending, handed down its order under case number 14/1/4-81/23. It reads: "*On application by the father FCP with ID ... the court hereby terminates the rights and responsibilities of the applicant in respect of the child MG with ID ...*". (underlining inserted)
24. For purposes of this appeal it was both unnecessary and inappropriate to have insight into the reasons for that order, or the record of the proceedings in the Children's Court. In their oral and written submissions in this appeal, the respondent, the Family Advocate and the *amicus curiae* all pointed out that the Children's Court had not exercised any of its powers to appoint a legal representative to the child under section 29 (6) of the Children's Act or to call for a report by the Family Advocate, a social worker or other suitably qualified person, under section 29 (5)(a), and as such, insufficient attention (if any) may have been afforded to the best interests of the child, as required by section 28 (4)(a). Those deficits in the Children's Court proceedings, if they are such, may well engage the attention of a court tasked with a review of or appeal against the Children's Court order, should such be possible – to which I revert below. This court on appeal, when undertaking the interpretation exercise required of it, can and does take into account those (apparently overlooked) provisions in sections 28 and 29 of the Children's Act.

25. The order of the Children's Court was brought to the attention of the Maintenance Officer who, on or about 20 September 2023, advanced reasons as to why the "*maintenance court has jurisdiction to hear the matter*". The matter was thereafter referred to the maintenance court for argument.
26. On 4 October 2023, the Acting Additional Magistrate Horn handed down her judgment and order dismissing the appellant's point *in limine* that the maintenance officer does not have *locus standi* to hear the application of the respondent [and/or the maintenance court does not have jurisdiction].
27. The appellant's application to the Children's Court occasioned multiple postponements of the maintenance court proceedings. The Wynberg Maintenance Court records reflect that after the initial enquiry held by the maintenance office on 27 March 2023, at which both parties were present and details of their respective means were recorded, the proceedings were postponed:
- 27.1. to 12 May 2023, when the appellant was absent;
- 27.2. on 12 May 2023 to 11 August 2023, to await the outcome of the Children's Court proceedings scheduled, the court notes stating "*Rem [remand] for outcome of Children's Court matter 11.08.2023 ... (Parties must also appear Children's Court at 9)*";
- 27.3. from 11 August 2023, when both parties were present, to 18 August 2023, when appellant was not present, resulting in a warrant for his arrest;
- 27.4. to 29 August 2023, when the appellant appeared, and the warrant of arrest was cancelled;
- 27.5. to 13 September 2023, which date was then amended to accommodate

the maintenance officer to 20 September 2023, on which date the appellant's point *in limine* was argued;

27.6. to 4 October 2023 when the learned magistrate delivered judgment on the point *in limine*;

27.7. to 25 October 2023 for resumption on the merits (which was interrupted by an approach by the appellant on 13 October 2023 to obtain the court file, at which time the maintenance officer advised him how the appeal process works and what he was required to do);

27.8. to 15 November 2023, as the appellant was intent on appealing and allegedly was unaware of the need to file process in that regard;

27.9. to 1 December 2023, to afford the appellant the opportunity to obtain the court transcript for purposes of this appeal;

27.10. to 11 January 2024, when the appellant reported that his legal team was reviewing the documents, and the respondent expressed her (understandable) frustration with the delays;

27.11. to 24 January 2024, to afford the appellant an opportunity to confirm whether he was appealing the judgment (which he was permitted to do by email); and

27.12. from 24 January 2024 (when the appellant's intention to appeal was confirmed) to 28 February 2024.

28. No doubt, pending the resolution of this appeal, further postponements would have been ordered by the learned magistrate. The history of respondent's multiple attempts to obtain relief in the maintenance courts, and the

intervention therein occasioned by the Children's Court proceedings, bring to mind the *dicta* of the Constitutional Court more than 20 years ago in *Bannatyne v Bannatyne*⁹ that “Courts need to be alive to recalcitrant maintenance defaulters who use legal processes to side-step their obligations towards their children. ... The respondent appears to have utilized the system to stall his maintenance obligations through the machinery of the Act. It appears from the evidence of the CGE that this happens frequently in the maintenance courts. The hardships experienced by maintenance complainants need to be addressed and the proper implementation of the provisions of the Act is a matter that calls for the urgent attention of the Department of Justice.”

29. The appellant's successful evasion of the machinery of the Maintenance Act was compounded by his approach to the Children's Court, akin to forum shopping. It is deeply unfortunate that the Children's Court unwittingly became an agent assisting the appellant to sidestep his obligations.

The appellant's case

30. The appeal was mounted on the basis that the Children's Court had exercised its powers in term of section 28 of the Children's Act and that the Children's Court Order must be understood to have terminated all his parental responsibilities and rights as set out in section 18(2) of the Children's Act, including the responsibility in sub-section 18(2)(b) in regard to maintenance¹⁰ of the child.

⁹ *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC) at para 32

¹⁰ Section 18 (1) and 18 (2) of the Children's Act provide:

“18 Parental responsibilities and rights

- (1) A person may have either full or specific parental responsibilities and rights in respect of a child.
- (2) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right-
 - (a) to care for the child;

31. The appellant's argument laid concerted emphasis on the fact that the Children's Court order had not yet been set aside on appeal or review, and it was not before this appeal court as such. The argument was further predicated on an interpretation of section 28 of the Children's Act from the perspective of the person (in this case a parent) who bears the parental responsibilities and rights.
32. The appellant submitted that the Children's Court Order states that the appellant's "*rights and responsibilities*" are terminated. This term is not defined in the order and, so it was submitted, one looks to the Children's Act to determine their meaning. The appellant submitted that the Children's Act defines these rights and responsibilities as including those listed in section 18(2) thereof. The Children's Court's Order does not specify which rights and responsibilities were terminated, nor were any conditions attached to that order. As such, it was submitted that the only logical conclusion is that the Children's Court intended that all of the appellant's rights and responsibilities would be terminated unconditionally, including his right and responsibility to contribute to the minor child's maintenance.
33. Based on this, the appellant submits that the effect of this order was to bring a final end to any and all of his rights and responsibilities towards the minor child M, including the appellant's right and responsibility to contribute to M's maintenance. The argument was developed that the Children's Court had decided, as it was empowered to, to terminate all of the appellant's rights and responsibilities towards M. Neither that order, nor the Children's Act stipulates that the appellant's maintenance obligations would persist following such termination. Consequently, the appellant submitted, that obligation was also

(b) to maintain contact with the child;
(c) to act as guardian of the child; and
(d) to contribute to the maintenance of the child."

terminated, the maintenance officer does not have *locus standi* to conduct a maintenance enquiry in terms of section 6 of the Maintenance Act, and the learned magistrate Horn erred in finding otherwise in the maintenance court.

34. The appellant's reasoning is premised on the assumption that section 28(1)(a) can and must be interpreted as authorising the termination of the responsibility of maintenance. In my view the interpretation of section 28(1)(a) requires rigorous consideration before this conclusion can be drawn.
35. The appellant's grounds of appeal set out in the notice of appeal are as follows:
 - 35.1. That the judgment of the Court *a quo* (the learned magistrate) is conflicting. This ground was not explained in written or oral submissions and no more need be said about it.
 - 35.2. That the learned magistrate erred in finding and/or proceeding on the basis that the appellant had the right and/or responsibility to contribute to the minor child's maintenance. This was the foundation of the argument, in turn based on the appellant's interpretation of the Children's Court order, set out above, and analysed below.
 - 35.3. That the learned magistrate erred in finding that there was no existing order regulating the parties' maintenance obligations towards the minor child. This ground assumes that the Children's Court can, and its order did, regulate the parties' maintenance obligations. It is related to the preceding ground of appeal, addressed below.
 - 35.4. That the learned magistrate erred in finding that all three prerequisites for a common law duty of support exist. Other than the appellant's reliance upon his interpretation of the effect of the Children's Court order, this

ground was not explained in written or oral submissions. It is at odds with the common cause fact that the appellant is M's biological father.

35.5. That the learned magistrate erred by reconsidering the appellant's application for the termination of his parental rights and responsibilities towards the minor child, in circumstances where it was not called upon to do so, nor had the necessary jurisdiction to do so. In my view, this is a mischaracterisation of the maintenance judgment. The application was not reconsidered; the import of the resulting order was interpreted with reference to the statutory framework and through the prism of the Constitution, as it is hereunder. The learned magistrate did not exceed her own powers in doing so.

36. The appellant submitted that when a person with parental rights and responsibilities seeks an alteration thereof, section 28(1)(a) (read with section 29(3) of the Children's Act) presents that person and the Court with a choice either to suspend those rights and responsibilities for a limited period or to terminate them. The applicant and the Court also have a choice between the suspension and/or termination of all or only some of those rights and responsibilities. Reference was also made to section 29(3) of the Children's Act that empowers the Court to attach conditions to any order it makes in terms thereof, and to the fact that in coming to a decision on such an application, a Court is obliged to consider various factors, including the best interests of the child.¹¹

37. The appellant submitted that had the legislature intended that a person's maintenance rights and responsibilities should always survive a termination order

¹¹ Sections 28(4)(a) and 29(4) of the Children's Act.

in terms of section 28(1)(a), it would have included a provision to that effect in the Children's Act, yet it did not do so and instead, the decision regarding which rights and responsibilities should be terminated and/or suspended, and which should not, was left to the Court. It was submitted that this decision was deliberate, as the Legislature did include a provision dealing specifically with maintenance obligations in section 21(2) of the Children's Act. That section, with the preceding sub-section for its context, provides:

"21 Parental responsibilities and rights of unmarried fathers

- (1) *The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child-*
 - (a) *if at the time of the child's birth he is living with the mother in a permanent life-partnership; or*
 - (b) *if he, regardless of whether he has lived or is living with the mother-*
 - (i) *consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law;*
 - (ii) *contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and*
 - (iii) *contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.*
- (2) *This section does not affect the duty of a father to contribute towards the maintenance of the child."*

38. Therefore, so the appellant submitted, had the legislature intended that a termination order in terms of section 28(1)(a) would not affect a party's maintenance obligations, it would have included a provision to that effect in the Children's Act.

Analysis

39. The foregoing argument is not tenable. The import of section 21(2) is that regardless of whether or not a biological father acquires any parental responsibilities and rights, he remains under a duty to contribute to the maintenance of the child. This underscores the importance attached by the legislature to the duty of maintenance, and undercuts the argument that it can readily be terminated via a section 28 application. If it were indeed the legislature's intention to permit a person who has parental responsibilities and rights to be able to terminate the duty to maintain their child by invoking section 28 of the Children's Act, then an anomaly arises: on the appellant's interpretation, the unmarried biological father who acquired parental responsibilities and rights under section 21(1) could apply under section 28 to terminate all those rights and thereby extinguish the duty to maintain his child, yet the unmarried biological father who did not ever acquire parental responsibilities and rights could not so apply under section 28, and is destined¹² to remain burdened by the duty to maintain by operation of section 21(2). The result is an arbitrary discrimination between different classes of unmarried biological father. It is irrational. It could not reasonably be accepted to be the intention of the legislature to so discriminate.
40. The appellant's interpretation suffers from the further flaws that insufficient regard was given to the full statutory framework, and insufficient attention was afforded to the meaning of 'parental responsibilities and rights'.
41. Significantly, the Children's Act places the word 'responsibilities' ahead of the

¹² Unless he could establish *locus standi* under sub-sections 28 (3) (b) or (d)

word 'rights' in this coupling of concepts,¹³ and both are qualified by the word 'parental'. The quartet of responsibilities and rights in section 18 of the Children's Act – care, contact, maintenance and guardianship - has adults as its subject, not children. The rights of children are not defined or limited by section 18 of the Children's Act; the rights of children are located in the Constitution,¹⁴ in the common law,¹⁵ in the Maintenance Act¹⁶ and in other specific sections of the Children's Act.¹⁷

42. It has been observed that parental responsibilities and rights are really two sides of the same coin.¹⁸ They are inextricably linked to each other. This follows from the fact that the word 'rights' connotes the powers to do what is required to fulfil parental responsibilities.

42.1. The responsibility of care¹⁹ for a child, encapsulating the child's housing,

¹³ The appellant consistently reversed this order in his written submissions – as summarised above. The Children's Court order also reversed the word order.

¹⁴ Constitution, Section 28

¹⁵ See *infra*

¹⁶ Section 15

¹⁷ Sections 6, 10, 11, 12, 13, 14, 15(2)

¹⁸ *GM v KI* 2015 (3) SA 62 (GJ) at paragraph [14];
SF v TD 2021 JDR 0847 (WCC) at paragraph [21].

¹⁹ The Children's Act definition in section 1 is:

"'care', in relation to a child, includes, where appropriate-

- (a) within available means, providing the child with-*
 - (i) a suitable place to live;*
 - (ii) living conditions that are conducive to the child's health, well-being and development;*
 - and*
 - (iii) the necessary financial support;*
- (b) safeguarding and promoting the well-being of the child;*
- (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;*
- (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;*
- (e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;*
- (f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;*
- (g) guiding the behaviour of the child in a humane manner;*
- (h) maintaining a sound relationship with the child;*
- (i) accommodating any special needs that the child may have; and*

nutrition, clothing and other needs, goes hand in hand with the power to determine where the child resides and how those basic human needs of the child are met.

- 42.2. The responsibility of contact²⁰ encapsulates the obligation to maintain a personal relationship with the child, and is coupled with the power to communicate with the child where they live with someone else.
- 42.3. The responsibility of guardianship²¹ affords the corresponding powers, among others, to administer the child's estate, and to consent to the child's adoption, marriage while a minor, and departure from South Africa.
- 42.4. The responsibility of maintenance is coupled with the power (the right) to seek on behalf of the child a contribution to the child's maintenance from any other person who is under a legal duty to support the child. "Maintenance", unlike other parental responsibilities and rights, is not

(j) *generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child;*"

²⁰ The Children's Act definition in section 1 is:

"**contact**", in relation to a child, means-

- (a) *maintaining a personal relationship with the child; and*
- (b) *if the child lives with someone else-*
 - (i) *communication on a regular basis with the child in person, including-*
 - (aa) *visiting the child; or*
 - (bb) *being visited by the child; or*
 - (ii) *communication on a regular basis with the child in any other manner, including-*
 - (aa) *through the post; or*
 - (bb) *by telephone or any other form of electronic communication;*"

²¹ The Children's Act definition of guardianship in section 1 read with section 18(3) is:

"(3) *Subject to subsections (4) and (5), a parent or other person who acts as guardian of a child must-*

- (a) *administer and safeguard the child's property and property interests;*
- (b) *assist or represent the child in administrative, contractual and other legal matters; or*
- (c) *give or refuse any consent required by law in respect of the child, including-*
 - (i) *consent to the child's marriage;*
 - (ii) *consent to the child's adoption;*
 - (iii) *consent to the child's departure or removal from the Republic;*
 - (iv) *consent to the child's application for a passport; and*
 - (v) *consent to the alienation or encumbrance of any immovable property of the child."*

defined in the Children's Act, and thus retains its common-law meaning.²²

The absence of a definition makes sense when one considers that from the perspective of the person under a duty of support (which includes, but is not limited to, those with parental responsibilities and rights), maintenance is only an obligation; that person holds no right in respect of themselves, and is limited to exercising, on behalf of the child, the right of the child to be financially supported.

43. Viewing parental responsibilities and rights as two sides of the same coin, Fisher J held, in *GM v KI*,²³ *"Thus on a purposive interpretation of s 28(1)(a), an order which terminated rights but left in place responsibilities, would be difficult, if not impossible, of application. Such a result could never have been intended by the legislature"*.
44. Subject to the qualification hereunder, I respectfully agree with the view of Fisher J, as did Binns-Ward J in *SF v TD*.²⁴ In the latter matter, the parent who was the maintenance debtor in terms of a high court divorce order as varied, applied to set aside a writ of execution on the basis that his maintenance obligation was cancelled in terms of an order made by the Children's Court. This required Binns-Ward J to consider and interpret the order of the Children's Court. The matter differs from the present matter in that a maintenance order had come into existence at the time of the parties' divorce, whereas none exists in relation to the present appeal. The application was unsuccessful due to the Court finding that on a proper construction of the Children's Court order, the magistrate had not intended his order to deal with an issue that was not before the Children's

²² *WW v EW* 22011 (6) SA 59 (KZP) at para 14

²³ At paragraph 14

²⁴ At paragraphs 20 and 21

Court in the case that he was determining, that being limited to care and contact of the minor children.²⁵

45. For completeness, Binns-Ward J also considered the jurisdictional question whether the magistrate exceeded his powers, assuming hypothetically that (as contended by the father) the magistrate had made an order varying the extant maintenance order.

46. I respectfully agree with Binns-Ward J's observations²⁶ (underling inserted):

"The issue is not altogether free from difficulty as the ambit of the children's courts' jurisdiction is not as clearly delineated by the Children's Act as perhaps it should be. That much was pointed out more than 10 years ago by a full court of the KwaZulu-Natal Division in Ex parte Sibisi 2011 (1) SA 192 (KZP). The full court exhorted the legislature to consider clarifying amendments to the Act, but its suggestion seems to have fallen on deaf ears. Sibisi was concerned with the question of guardianship, but the jurisdiction of the children's courts in respect of questions of maintenance is even less clear. Children's courts are empowered to deal with certain child maintenance issues, but whether their remit is co-extensive with that of the maintenance courts seems unlikely.

A maintenance order simpliciter is not listed in s 46 of the Children's Act as one of the orders that a children's court may make."

47. Without intending any criticism of the findings of both Fisher J and Binns-Ward J, which I consider to have been correctly made, the 'two sides of the same coin' metaphor obfuscates one issue: in the instances of care, contact and guardianship, the holder of parental responsibilities and rights is the subject of that right/power and the subject of the concomitant duty/obligation – they sit on

²⁵ At paragraph 13

²⁶ At paragraphs 14 and 15, footnotes omitted

both sides of the coin, with the parent's right as heads and their responsibility as tails of the metaphorical coin. However, in the instance of maintenance they hold no right and have only an obligation. The right in question – to maintenance – is exclusively that of the child. When a maintenance order in respect of a child is granted by a divorce court or a maintenance court, the order serves to regulate the distribution of the duty of support between those responsible for the child's support. It does not serve to create a responsibility to support or maintain the child, as that arises *ex lege*. If one were to extend the metaphor, maintenance is a different coin: heads is the child's right, and tails is the parent's responsibility.

48. Counsel for the respondent, Mr Abduroaf, pointed to the fact that the Children's Act provides for "*Any person having an interest in the care, well-being or development of a child*" to apply to a High Court, a divorce court or the children's court for an order granting the applicant, on such conditions as the court may deem necessary, contact with or care of the child (section 23(1)) and to apply to the High Court or children's court for an order granting guardianship of the child (section 24). However, these sections do not provide for application to be made to have the responsibility of maintenance assigned to an applicant. The legislature recognised, as it were, that the responsibility of maintenance is on a different coin. It is an invariable consequence of being a parent.
49. For reasons that follow below, only in very circumscribed circumstances, which do not apply to the facts of the present appeal, could an order be granted terminating both the right (of the child) and the responsibility (of the parent).
50. It is now well established that the Children's Act changed the formerly prevailing paradigm of '*parental authority*' to one of parental responsibilities and rights. However it did not repeal and replace the common law notion of '*parental*

authority'. Importantly, whilst a parent's duty of maintenance could be seen as part of their parental authority, it was not limited to it: the "*maintenance duty exists even if the parent has no parental authority over the child*".²⁷

51. The basis or foundation of a parent's common-law duty to support (or put differently, a child's common-law entitlement to maintenance) is – the same for children born in and out of wedlock, and has been considered to be based out of fairness and the affection of a blood relationship, from a sense of natural justice, on a parental sense of obligation and on natural affinity due to the blood connection.²⁸
52. This common-law duty of support could only be terminated in very limited instances, namely: the child becoming self-supporting or the child having died.²⁹ The common-law simply made no provision for any other situation that would entitle a party to terminate his/her maintenance obligation towards his/her child. Even the child's attainment of the age of majority does not terminate the duty of support (and the consequent corresponding entitlement to maintenance).³⁰
53. In terms of the (now repealed) Child Care Act 74 of 1983 ("**Child Care Act**"), adoption comprised a single exception to this general rule that a parent's common-law duty to support the child could not be terminated. The Child Care Act provided that an adopted child is deemed, for all purposes, to be the 'legitimate' child of his or her adoptive parents, as if he or she had been born to

²⁷ N van Schalkwyk 'Maintenance for Children' in CJ Davel (ed) *Introduction to Child Law* (2000) 41

²⁸ *Ibid* at 41, 45 & 46;

and see ID Schaafer and B Clark 'Maintenance' in Schafer *Family Law Service* at C3

²⁹ *Ibid* at 57 & 58.

See also, and in respect of self-support, *Bursey v Bursey and Another* 1999 (3) SA 33 (SCA) at 38 C to D, and at G to H

There is a difference between the continuance of the maintenance duty and the continuance of the maintenance order in which the maintenance duty is stipulated. The maintenance duty could continue after the child has reached the age of majority.

³⁰ *Wessels v Wessels* 2005 JDR 1410 (T) at para 4.1

those parents during the existence of a lawful marriage.³¹ All existing rights and duties between the child and his or her pre-adoption parents were terminated.³² The Child Care Act was repealed by the Children's Act with effect from 1 April 2010. Section 242(1)(a) of the Children's Act provides that "*Except when provided otherwise in the order or in a post-adoption agreement confirmed by the court an adoption order terminates all parental responsibilities and rights any person, including a parent, step-parent or partner in a domestic life partnership, had in respect of the child immediately before the adoption*", while section 242(2)(a) provides that "*An adoption order confers full parental responsibilities and rights in respect of the adopted child upon the adoptive parent*". Under both the Child Care Act and the Children's Act, provision was made for the obligation to maintain the child to shift upon adoption to the adoptive parent. The right of the child to be maintained remained and remains intact under both statutes.

54. In summary, and prior to the introduction of section 28 of the Children's Act, the law made no provision for terminating the responsibility to discharge the duty of support of one's children. The question arises: Is this indeed its effect?

The submissions by the CCL (*amicus curiae*)

55. The CCL correctly submitted that absent intervention by the legislature exhorted by some judgments, one must have recourse to principles of statutory interpretation to engage with the statutory regime as it presently exists, to determine whether (or not) section 28(1) of the Children's Act bestows on a court the power to terminate the common-law duty of support and the child's concomitant right to maintenance. The process of statutory interpretation should

³¹ Section 20(2) of the Child Care Act 74 of 1983 ("**Child Care Act**").

³² Section 20(1) of the Child Care Act

be guided, among other things, by the following considerations:

55.1. First, the presumption that the legislature does not intend to alter the existing law more than is required and/or necessary.³³

55.2. Second, the court's duty to interpret statutes in such a way as to best give effect to the spirit, purport and objects of the Bill of Rights.³⁴ This is a duty in respect of which "*no court has a discretion*"³⁵ This duty is said to have two sub-components:

55.2.1. The first requires that a court when confronted by two interpretations – one of which is constitutionally valid and one of which is not – must adopt the constitutionally valid interpretation, provided that such an interpretation can reasonably be attributed to the section.³⁶

55.2.2. The second requires a court in instances where a provision is reasonably capable of two interpretations – both of which are constitutionally valid – to adopt the interpretation that "*better*" promotes the spirit, purport, and objects of the Bill of Rights.³⁷

55.3. Third, the principle of statutory interpretation that requires that all statutes must be interpreted purposively.³⁸

55.4. Fourth, that a statute should be read, and understood, in accordance with

³³ *Skyway Management v Telkom Suid Afrika* 2001 (2) SA 780 (T) at 784H to I

³⁴ Section 39(2) of the Constitution.

³⁵ *Phumelela Gaming & Leisure Ltd v Grundlingh* 2007 (6) SA 350 (CC) at para 26 and 27.

³⁶ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motors Distributors (Pty) Ltd v Smit* N.O. 2001 (1) SA 545 (CC) at pars 22 and 23.

³⁷ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 (1) SA 337 (CC) at pars 46, 84 and 107.

³⁸ *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at paragraph [28].

the rules of the grammar of a language.³⁹

55.5. Fifth, statutes must be interpreted and understood through the lens of 'best interests of the child'.⁴⁰ In this regard, the Constitutional Court held in *S v M (Centre for Child Law Amicus Curiae)*⁴¹ that: "While section 28 [of the Constitution] undoubtedly serves as a general guideline to the courts, its normative force does not stop there. On the contrary, as this court held in *De Reuck, Sonderup and Fitzpatrick*, section 28(2), read with section 28(1), establishes a set of children's rights that the courts are obliged to enforce ... The ambit of the provision is undoubtedly wide. The comprehensive and emphatic language of section 28 indicates that just as law enforcement must always be gender-sensitive, so must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children and that courts must function in a manner which at all times shows due respect for children's rights. " Sachs J approved the view expressed by Professor Sloth-Nielsen⁴² that courts and administrative authorities will be constitutionally bound to give consideration to the effect their decisions will have on children's lives.

56. In *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development*⁴³ the Constitutional Court similarly held that, where possible, statutes must be "interpreted so as to exclude a construction that would

³⁹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA) at paragraph [24] and para [18].

⁴⁰ Sec. 28(2) of the Constitution.

⁴¹ *S v M (Centre for Child Law Amicus Curiae)* 2007 (12) BCLR 1312 (CC) at para 14 and 15.

⁴² Sloth-Nielsen 'Chicken soup or chainsaws: some implications of the constitutionalisation of children's rights in South Africa' (1996) *Acta Juridica* 6 at 25.

⁴³ *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC) ; 2009 (7) BCLR 637 (CC) at para 84.

be inconsistent with the principle of the best interests of the child”.

57. The CCL correctly submitted that the Children’s Act did not repeal or replace the common-law duty of support (which is reciprocal between parent and child), but merely listed maintenance as a part of “*parental responsibilities and rights*”. In so doing it did not, however seek to include support for the child as a right that may be *inter alia* terminated in terms of section 28(1)⁴⁴ of the Children’s Act.

58. The CCL motivated its interpretation as follows:

58.1. First, the default position for fathers of children who are born out of wedlock is that they do not automatically acquire parental responsibilities and rights.⁴⁵ Notwithstanding, they expressly retain the “*duty*” [as opposed to responsibility] to maintain their child.⁴⁶ The choice of the language by the legislature is significant. The legislature clearly framed the obligation as a “*duty*” rather than a “*responsibility*”. Despite the language used in the list provided in section 18 of the Children’s Act, the legislature plainly had no intention to recast the common-law duty as a responsibility capable of being terminated in terms of section 28 of the Children’s Act.

58.2. Second, the inclusion of maintenance as a responsibility for purposes of section 28 of the Children’s Act (purportedly susceptible of termination) would have several (at best) unintended and/or irrational consequences for the section as a whole. For example, section 28(1)(b) of the Children’s Act provides for extending or circumscribing the exercise of any parental

⁴⁴ Quoted in footnote 1

⁴⁵ Section 21 of the Children’s Act, quoted above.

⁴⁶ Section 21(2) of the Children’s Act.

responsibility and right. This would, notionally, vest a children's court with the requisite jurisdiction to determine the issue of maintenance: the CCL submitted that this clearly was not so intended, and is at odds with the express provisions of the Maintenance Act 99 of 1998. As observed in the judgments in *Ex parte Sibisi* and in *SF v TD*,⁴⁷ the delineation of the jurisdiction of the Children's Court remains problematic.

58.3. Third, if an application to terminate parental responsibilities and rights terminated all obligations and/or duties of both the parent and child (including the child's right to maintenance and the child's right to inherit) then it would be expected that the legislature would have used similar terminology in the sections governing the effects of an adoption, but it did not. In section 242(1)(c) of the Children's Act, the legislature expressly provided for the child's rights to be extinguished, as follows: *"Except when provided otherwise in the order in a post adoption agreement confirmed by the court an adoption order terminates all rights and responsibilities the child had in respect of a person referred to in paragraph (a) or (b) immediately before the adoption"*. No such provision is made in Section 28.

59. The CCL further submitted that any interpretation that Section 28 allows for the termination of the duty of support would, moreover, do violence to several constitutional rights and international law obligations. In particular:

59.1. It would impugn a child's right to have his or her best interests considered of paramount importance.⁴⁸ There can be no legitimate scenario in which

⁴⁷ See *infra*

⁴⁸ Section 28(2) of the Constitution and Section 9 of the Children's Act

the termination of the obligation to pay maintenance, where there is a need, would ever be in a child's best interests. During argument, the appellant's counsel was invited to describe any such scenario, and conceded that she was unable to do so.

59.2. Termination of the duty of support would violate the obligations on the government (the state) to create conditions to protect children and ensure that their needs are adequately and satisfactorily met. The following dictum of Sachs J in *S v M*,⁴⁹ referring to section 28 of the Constitution, is particularly apt: *"Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of their fathers and mothers should not be visited on their children. Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how to make choices in the wide social and moral world of adulthood. And foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma. No constitutional injunction can in and*

⁴⁹ *S v M* (Centre for Child Law Amicus Curiae) supra at para 18, 19 & 20.

of itself isolate children from the shocks and perils of harsh family and neighbourhood environments. What the law can do is create conditions to protect children from the abuse and maximize opportunities for them to lead productive and happy lives. Thus, even if the state cannot itself repair disrupted family life, it can create positive conditions for repair to take place, and diligently seek wherever possible to avoid conduct of its agencies which may have the effect of placing children in peril". In my view, one such positive condition is the preservation of a system that facilitates the recovery of maintenance for a child from all those that owe the child a duty of support.

59.3. Termination of the duty of support would compromise the international obligations imposed by the United Nations Convention on the Rights of the Child to which South Africa is a party⁵⁰, particularly article 27 which provides that:

- "1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.*
- 2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial*

⁵⁰ South Africa acceded to the United Nations Convention on the Rights of the Child on 16 June 1995.

The preamble to the Maintenance Act is instructive, in that it includes the following passage that directly refers to and quotes Article 27 of the Convention (underlining inserted):

*"AND WHEREAS the Republic of South Africa is committed to give high priority to the rights of children, to their survival and to their protection and development as evidenced by its signing of the World Declaration on the Survival, Protection and Development of Children, agreed to at New York on 30 September 1990, and its accession on 16 June 1995 to the Convention on the Rights of the Child, signed at New York on 20 November 1989;
AND WHEREAS Article 27 of the said Convention specifically requires States Parties to recognise the right of every child to a standard of living which is adequate for the child's physical, mental, spiritual, moral and social development and to take all appropriate measures in order to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child;"*

capacities, the conditions of living necessary for the child's development.

3. *States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.*
4. *States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements."* (underlining inserted).

60. The foregoing submissions by the CCL are sound.

61. The relevant factors in statutory interpretation identified by the CCL, militate, so it was submitted, against an interpretation that section 28(1) of the Children's Act was intended to allow a parent to escape their obligation to maintain their child. I agree.

61.1. The CCL's interpretation is supported by the presumption that the legislature does not intend to alter the existing law – which imposes a duty of support upon parents - more than is required and/or necessary.

61.2. It gives effect to the spirit, purport and objects of the Bill of Rights, particularly the rights of children set out in section 28 of the Constitution.

61.2.1. The appellant's counsel submitted that an interpretation that

countenanced the termination of the responsibility of maintenance was constitutionally valid because the court deciding the section 28(1) application enjoys a discretion under section 29(3) to “*grant the application unconditionally or on such conditions as it may determine, or may refuse the application, but an application may be granted only if it is in the best interests of the child*”.

61.2.2. The injunction to apply the best interests standard does not, however, address the antecedent question whether an interpretation that would have the effect of diminishing (or even extinguishing) a child's right to maintenance could ever be constitutionally valid. I think not. The termination of a parent's maintenance obligation towards a child will inevitably affect the child's socio-economic well-being as fewer resources will be available for the child's support. This will of course be a matter of degree in each particular case, but the child will be affected even if the parent with less means than the other is liberated from their maintenance responsibility. As such, in practice, the child's rights in terms of Section 28(1)(b) and (c) of the Constitution will be limited. This limitation will arise on a case by case basis in the courts determining Section 28(1) applications. Although the Children's Act is a law of general application, no argument was advanced, with reference to section 36 of the Constitution, why any child's rights should be limited by a section 28(1) application (on the appellant's interpretation of Section 28(1)).

61.2.3. Compared with the appellant's interpretation, in my view, the interpretation for which the CCL contends "*better*" promotes the spirit, purport, and objects of the Bill of Rights. It is the interpretation that is consistent with the State's obligations under Article 27 of the United Nations Convention on the Rights of the Child.

61.3. The CCL's interpretation causes no grammatical offence, and it enables a sensible purpose⁵¹ to be attributed to section 28(1)(a). It is congruent with the imperative in section 9 of the Children's Act to attach paramount importance to the child's best interests, and it is child-centred.

61.3.1. One can readily conceive of scenarios when a child's best interests would be served by the suspension or termination of the responsibilities and rights of care and contact, as when the person holding those responsibilities and rights has caused harm to the child or poses a risk to the child's well-being. Similarly, where that person has exercised the responsibilities and rights of guardianship in a manner adverse to the child's interests, for example, by maladministration of the child's estate, a termination of that responsibility and right may be appropriate.

61.3.2. Sub-section 28(3) affords standing to a wide group of persons to bring such an application, including a co-holder of parental responsibilities and rights in respect of the child, any other person having a sufficient interest in the care, protection, well-being or development of the child, the child or any other person

⁵¹ *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC), para 28

applying in the child's interest (acting with leave of the court) and a family advocate or the representative of any interested organ of state. The underlined wording frames the legislature's intention: the termination or suspension must serve the child, not the holder of the parental responsibilities and rights sought to be terminated or suspended. It is so that such holder enjoys standing, to bring such an application, and to be the person who 'challenges'⁵² their own parental responsibilities and rights. However, on a reading of section 28 as a whole, it is plain that the purpose was not to afford such holder an opportunity to relieve themselves of the burden of responsibility. The purpose is to safeguard the child and advance the child's best interests.

62. I concur with the CCL's reasoning, as summarised and amplified above. To this, I add that section 28 of the Children's Act should not be evaluated as if it exists in its own silo. Due regard must be afforded to other statutory provisions that impinge upon the issue at hand.

63. No attention has been given by the appellant to the provisions of the Maintenance Act itself, and in particular, section 15 which provides (underlining inserted):

"15 Duty of parents to support their children

(1) Without derogating from the law relating to the liability of persons to support children who are unable to support themselves, a maintenance order for the maintenance of a child is directed at the enforcement of the common law duty of the child's parents to support that child, as the duty in question exists at the time of the issue of the maintenance order and is expected to continue.

⁵² As contemplated in Section 28(4)(b)

(2) *The duty extends to such support as a child reasonably requires for his or her proper living and upbringing, and includes the provision of food, clothing, accommodation, medical care and education.*

(3)

(a) *Without derogating from the law relating to the support of children, the maintenance court shall, in determining the amount to be paid as maintenance in respect of a child, take into consideration-*

(i) *that the duty of supporting a child is an obligation which the parents have incurred jointly;*

(ii) *that the parents' respective shares of such obligation are apportioned between them according to their respective means; and*

(iii) *that the duty exists, irrespective of whether a child is born in or out of wedlock or is born of a first or subsequent marriage.*

(b) *Any amount so determined shall be such amount as the maintenance court may consider fair in all the circumstances of the case.*

(4) *As from the commencement of this Act, no provision of any law to the effect that any obligation incurred by a parent in respect of a child of a first marriage shall have priority over any obligation incurred by that parent in respect of any other child shall be of any force and effect."*

64. The plain language of section 15 of the Maintenance Act codifies the common law duty upon parents to support their children, and thereby entrenches the concomitant common law right of the child to receive that support.

65. The codification of the parent's common law duty of support appears in a statute (the Maintenance Act) specially directed at maintenance matters. The Children's Act is a general statute pertaining to children which refers, among many other things, to maintenance. When interpreting section 28 of the Children's Act, one

must call into aid the maxim in a passage from *In re Smith's Estate* (35 Ch.D. 589) which reads:

“When there is an Act of Parliament which deals in a special way with a particular subject-matter and that is followed by a general Act of Parliament which deals in a general way with the subject-matter of the previous legislation, the Court ought not to hold that general words in such a general Act of Parliament effect the repeal of the prior and special legislation unless it can find some reference in the General Act to the prior and special legislation.”

66. Most of the Maintenance Act, including section 15, commenced on 26 November 1999. The Children's Act was published in the Government Gazette on 19 June 2006. A limited number of sections, and some items in the schedules, came into effect on 1 July 2007. Section 28 of the Children's Act came into effect only on 1 April 2010, more than ten years after the Maintenance Act took effect. The Children's Act did not, in express terms, amend or repeal⁵³ section 15 of the Maintenance Act, or indeed any part thereof, and there is no wording in the Children's Act from which one can infer such a repeal or amendment.
67. The interpretation that the appellant seeks to place upon section 28 of the Children's Act permits a termination of the parental responsibility of maintenance, thereby extinguishing the parent's duty of support and its corresponding right. That interpretation conflicts with the clear wording of Section 15 of the Maintenance Act. The appellant's interpretation amounts to an argument that the former repealed the latter by implication. This interpretation is not sustainable. The Supreme Court of Appeal explained as follows in *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and*

⁵³ Section 313 read with Schedule 4

Others⁵⁴ (underlining supplied):

“(R)epeal by implication is not favoured. An interpretation of apparently conflicting statutory provisions which involves the implied repeal of the earlier by the later ought not to be adopted unless it is inevitable. Any reasonable construction which offers an escape from that is more likely to be in consonance with the real intention of the Legislature. As it was put in Wendywood Development (Pty) Ltd v Rieger and Another 1971 (3) SA 28(A) at 38:

It is necessary to bear in mind a well-known principle of statutory construction, namely, that statutes must be read together and the later one must not be so construed as to repeal the provisions of the earlier one, unless the later statute expressly alters the provisions of the earlier one or such alteration is a necessary inference from the terms of the later statute.”

68. Applying this principle, section 28 of the Children's Act cannot be construed so as to repeal section 15 of the Maintenance Act. It can and must be interpreted so as to preserve the parent's duty and the child's right. That interpretation is constitutionally compliant: it attaches paramount importance to the best interests of the child⁵⁵, and is consistent with the subsidiary legislation and the common law which flesh out every child's right to family care, to basic nutrition, shelter, basic health care services and social services.⁵⁶

⁵⁴ *Minister of Justice and Constitutional Development and Others v Southern Africa Litigation Centre and Others* 2016 (3) SA 317 (SCA) 317; 2016 (4) BCLR 487; [2016] 2 All SA 365; [2016] ZASCA 17) at paragraph [118]

And see also *Durban Corporation and Another v Rex* 1946 NPD 109 and *Kent, N.O. v South African Railways and Another* 1946 AD 398 at p 405

⁵⁵ Section 28(2) of the Constitution;
Convention on the Rights of the Child (CRC) 1989

Section 9 of the Children's Act, which provides:

"9 Best interests of child paramount

In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied."

⁵⁶ Sections 28(1)(b) and (c) of the Constitution

69. Ms Carstens, who appeared as M's legal representative, correctly submitted with reference to the authorities, that Section 28(1)(b) of the Constitution in defining every child's right to family care or parental care has direct horizontal application: the duties that those rights impose rest primarily on the parents and family and pass to the state only if the child's parents or family fail(s) or are/is unable to care for the child. She further submitted that sections 28(1)(b) and (c) must be read together, and the state is thus responsible for ensuring that there are legal obligations to compel parents and the family to fulfil their responsibilities towards children.⁵⁷ She submitted with reference to *S v M*⁵⁸ that section 28(1) read with the best interest principle in section 28(2) of the Constitution required the law to make the best possible effort to avoid where possible any breakdown of family or parental care that may put children at risk. It is self-evident that when a child is deprived of the benefit of a parent's resources, this may put the child at risk (of inadequate nutrition, housing, health care, education).
70. Once it is accepted, as it must be, that section 28 of the Children's Act cannot be construed so as to repeal section 15 of the Maintenance Act or the parent's common law duty of support, then it follows that the Children's Court order granted on 18 August 2023 must be interpreted as having left intact the appellant's duty to support M. The termination of the appellant's parental responsibilities and rights did not terminate his duty of support towards M, nor can the Children's Court order be interpreted as having terminated M's right to maintenance by both his parents.
71. In assessing the implications of the Children's Court order in the present appeal, the Court is mindful that these proceedings relate to a child. As proclaimed in

⁵⁷ *Bannatyne v Bannatyne*, supra, at para 28

⁵⁸ *S v M*, supra, at para 20

“Child law is an area that abhors maximalist legal propositions that preclude or diminish the possibilities of looking at and evaluating the specific circumstances of the case. Unduly rigid adherence to technical matters, such as who bears the onus of proof, should play a relatively diminished role; the courts are essentially guarding the best interests of the child, not simply settling a dispute between litigants”. (underlining inserted)

72. To safeguard M's best interests, his right to be supported by both his parents should be preserved until he is self-sufficient.

72.1. It is not acceptable to retort (as did the appellant) that M has another parent (the respondent) under a duty to support him. If M was obliged to suffice with the support of only one of his two parents, M will necessarily be precluded from the benefits of the resources of his father (who was a professional sportsman and is now employed by a major financial institution) – the very resources which may enable him to enjoy more than just basic health care, to advance his development by attending a better school than his mother can afford from her limited resources, and to fulfil his own potential by participating in sports and extra-mural activities and undertaking tertiary education. It is inconceivable that any parent would want to deny their child those advantages and opportunities, particularly when it is within the parent's means to provide them.

72.2. It is also not an answer to say that M's mother (the respondent) has married, and that her husband, as M's stepfather, has assumed

⁵⁹ AD v DW (Centre for Child Law as Amicus Curiae) 2008 (3) SA 183 (CC) at para 55.

responsibility for M. First, this is disputed by the respondent. In any event, the respondent's husband is under no legal duty to support M, and he may provide or withhold support to M as he wishes, without fear of any judicial oversight. It is not in M's best interests for his father's duty of support (which is enforceable) to be abdicated in the hope that his stepfather may or may not make up the shortfalls in M's support which the respondent has struggled to meet for his entire lifetime.

73. With the foregoing analysis in mind, the conclusion reached by Acting Magistrate Horn is sound. As she aptly put it:

"Now taking into account the role of the courts upholding of the constitutional rights of the child, how can the very institution that it created to protect the rights of the child, terminate the right to claim maintenance. Who then must maintain the child if there is no alternative source? The respondent is employed and is financially capable of supporting this child. How can it be in the child's best interest that the source of care, of support be taken away from him? It is because of the constitutional rights that there is a Maintenance Act, a maintenance court to enforce the rights contained in the constitution [sic] for the protection of the children to give the child a voice. It is for all these reasons that the court must now look at, and employing the best interests of the child principle, I hereby find that the maintenance officer does have locus standi to proceed with this application. That is my finding."

74. The appeal against her judgment fails.

Alternative submissions by the amicus curiae

75. Because the Court rejects the appellant's contention that section 28(1) of the Children's Act allows for the termination of the duty of support, it is unnecessary to adopt the alternative approach mooted by the CCL, viz. to *mero motu* raise the constitutionality of section 28 of the Children's Act.

76. The CCL raised a further alternative approach, arguing that the Children's Court order could be found to be a nullity. The argument was advanced that the issue of maintenance was already pending before the maintenance court (and it was therefore *lis pendens*), that the Children's Court had failed to consider the aspects identified in section 28(4)⁶⁰ and section 29⁶¹ of the Children's Act and that the appellant had no standing to apply for a termination of parental responsibilities and rights under Section 28(1)(a) because he is not a co-holder of parental responsibilities and rights and has never, at least as is apparent from the record,

⁶⁰ Sub-section 28(4) of the Children's Act provides (underlining inserted):

- "(5) When considering such application the court must take into account-
- (a) the best interests of the child;
 - (b) the relationship between the child and the person whose parental responsibilities and rights are being challenged;
 - (c) the degree of commitment that the person has shown towards the child; and
 - (d) any other fact that should, in the opinion of the court, be taken into account."

⁶¹ That section of the Children's Act provides (underlining inserted):

"29 Court proceedings

- (1) An application in terms of section 22 (4) (b), 23, 24, 26 (1) (b) or 28 may be brought before the High Court, a divorce court in a divorce matter or a children's court, as the case may be, within whose area of jurisdiction the child concerned is ordinarily resident.
- (2) An application in terms of section 24 for guardianship of a child must contain the reasons why the applicant is not applying for the adoption of the child.
- (3) The court hearing an application contemplated in subsection (1) may grant the application unconditionally or on such conditions as it may determine, or may refuse the application, but an application may be granted only if it is in the best interests of the child.
- (4) When considering an application contemplated in subsection (1) the court must be guided by the principles set out in Chapter 2 to the extent that those principles are applicable to the matter before it.
- (5) The court may for the purposes of the hearing order that-
 - (a) a report and recommendations of a family advocate, a social worker or other 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.
- (6) 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 any one of them, or the state if substantial injustice would otherwise result, to pay the costs of such representation.
- (7) If it appears to a court in the course of any proceedings before it that a child involved in or affected by those proceedings is in need of care and protection, the court must order that the question whether the child is in need of care and protection be referred to a designated social worker for investigation in terms of section 155 (2)."

sought to regularise his position in terms of section 26 of the Children's Act.

77. In view of the findings made above, it is not strictly necessary to adjudicate the CCL's alternative approach, but for the sake of completeness, and due to this Court's careful case management of this matter and the specific directions the CCL was requested to address, its alternative argument merits discussion.

77.1. The *lis alibi pendens* point is predicated upon the Children's Court enjoying concurrent jurisdiction with the Maintenance Court, which is doubtful in my view, for reasons explicated above. It is not evident from the appeal record whether the issue of concurrent jurisdiction and the issue of *lis alibi pendens* were raised and/or considered by the Children's Court. Having regard to the above analysis of the relevant statutory provisions, to M's right to be supported by both parents, and the imperative to afford paramount importance to his best interests, the Children's Court ought to have so applied its mind.

77.2. The criticism that the Children's Court had failed to consider the aspects identified in section 28(4) and section 29 of the Children's Act is an aspect which this Court sought to remedy, in the exercise of its wide powers as M's upper guardian and to meet its constitutional obligations, by granting the case management orders of 20 May 2024 and 28 May 2024 referred to above.

77.2.1. The case management of this appeal was directed not only at the circumstances of the parties thereto, but also at the wider ramifications of Section 28(1)(a) orders, which have received little attention to date, but which have the potential to affect many children and holders of parental responsibilities and

rights, and consequently the administration of justice. For that reason, the criticism is afforded attention in this judgment.

77.2.2. But for the Family Advocate's report to this Court and the submissions made by the *amicus curiae* and M's own legal representative, this Court would not have been in a position to evaluate this criticism.

77.2.3. Affording the child a voice (where age appropriate) and/or their own representation, and procuring the input of independent parties such as the Family Advocate are salutary aides to the court determining a section 28(1) application. Much as these are to be deployed in the court's discretion, given the gravity of the decision called for, one can conceive of few situations when the court would dispense with such input. The appellant was acting in his own cause in the Children's Court, not that of his child M. In the circumstances, the matter before the Children's Court was a case *par excellence* for calling into aid the representations of other persons as contemplated in sections 29(5) and (6). The failure of the Children's Court to do so is an egregious neglect of its duty to place the child first and to show respect for M's rights, and is to be deprecated.

77.3. For reasons that follow, there is merit in the CCL's submissions that the appellant had no standing in the Children's Court and that the resulting order is a nullity.

77.3.1. As alluded to above, the Children's Court and the parties took for granted that the appellant was/is a co-holder of parental

rights and responsibilities. As an unmarried father he would have had to acquire such by satisfying the requirements in section 21(1) of the Children's Act (quoted above).

77.3.2. It has been a matter of debate whether the three requirements of section 21(1)(b) are conjunctive, or whether it suffices to meet only one or two to acquire parental rights and responsibilities. In this Court, Desai J held in *RRS v DAL*⁶², without any detailed textual interpretation, that they are conjunctive, so all three requirements must be met to qualify for automatic parental responsibility. However, Fisher J adjudicated the matter of *GM v K*⁶³ on the basis that fulfilment of only one requirement sufficed (in that case the requirement in section 21(1)(b)(i) was met). In *KLVC v SDI*⁶⁴, the SCA declined to resolve the debate, and instead upheld the finding of the court *a quo* that it was unnecessary to make a determination on the correct interpretation of section 21(1)(b) because on the facts of that case and even if the matters referred to in sections 21(1)(b)(i) to (iii) were self-standing and distinct requirements, all had been met. The SCA held that determining whether or not an unmarried father has met the requirements in s 21(1)(b) is an entirely factual enquiry. The SCA approved the reasoning that a consideration of sections 21(1)(b)(ii) and (iii) required that a court consider the facts, exercise a value judgment and come

⁶² *RRS v DAL* (22994/2010) [2010] ZAWCHC 618 (10 December 2010)

⁶³ *Supra* at para 3

⁶⁴ *KLVC v SDI* (20334/2014) [2014] ZASCA 222; [2015] 1 All SA 532 (SCA) (12 December 2014) at para 10 to 14

to a conclusion, and that in doing so a court would have to consider a wide range of circumstances because the language used in those subsections was deliberately broad permitting of a range of considerations on which minds may differ and the exercise of a value judgment may determine a different outcome and, such as an exercise does not equate to a judicial discretion.

77.3.3. I respectfully agree with the approach and reasoning in *Marima v Lesele*⁶⁵. Noting that in *KLVC v SDI* the SCA had left the debate open, Movshovich AJ carefully analysed Section 21(1)(b) as follows:

“17. In my view, the Act is clear that the requirements are cumulative. ...

18. The requirements set forth in sections 21(1)(b)(i), (ii) and (iii) are separated by the conjunction "and". In ordinary parlance, that denotes cumulative or conjunctive criteria, and is to be juxtaposed with the disjunctive "or". It is also noteworthy that Parliament used "or" in the immediately preceding section 21(1)(a), to emphasise that sections 21(1)(a) and 21(1)(b) were alternatives. The lawgiver was thus, in my view, well aware of the distinction between those conjunctions and purposely chose to use "and" in section 21(1)(b). That choice should ordinarily, and in the absence of absurdity, unreasonableness, inconsistency or injustice, be given effect and it is not open to the Court simply to substitute "and" with "or".

19. No such absurdity, unreasonableness, inconsistency, injustice or other incongruity results in this case. Subsections (i) to (iii) of section 21(1)(b) can operate without any difficulty in tandem; the factors they delineate are certainly not mutually exclusive. This is reinforced by the fact that the cumulative effect of those factors is akin to the legal effect of a relationship such as marriage and permanent life-partnership, being the alternative qualifying criteria for parental rights and

⁶⁵ *Marima v Lesele* (1065/2019) [2022] ZAGPJHC 380 (6 June 2022) at para 17 to 19 (footnotes omitted)

responsibilities set out in sections 20 and 21(1)(a) of the Act. It would be a natural consequence of those relationships that the parents in such relationships would have to contribute to a child's upbringing, care and expenses at least for the duration of the relationship but would often have duties of support after the relationship terminates."

77.3.4. The appellant plainly did not acquire parental responsibilities and rights in terms of section 21(1)(a), because at the time of the M's birth he was not living with the respondent in a permanent life-partnership.

77.3.5. As for the three factors set out in set out in Section 21(1)(b), the appellant did not consent to be identified or successfully apply to be identified as M's father. To the contrary he placed paternity in dispute and succeeded in evading a resolution of M's paternity until November 2022. On his own version, he has not contributed to M's upbringing at all. He has made only intermittent contributions to M's maintenance expenses in 2014 and in 2023. Even if the appellant's erratic contributions to M's maintenance are viewed in his favour, he has failed to meet the other two requirements in Section 21(1)(b). It follows that he did not acquire parental responsibilities and rights in terms of section 21(1)(b).

77.3.6. The appellant was not a co-holder of parental responsibilities and rights as at January 2023 when he brought his application under section 28(1). In his statement to the Children's Court, quoted above, the appellant professed to have no interest in M's care, protection, well-being or development. It is not apparent

from the Children's Court order that leave was sought or granted to the appellant to bring his application. It follows that the appellant had no standing, as contemplated in sub-sections 28(3)(a), (b) or (e) to seek the relief he was granted.

77.3.7. Absent the appellant's standing, the Children's Court had no jurisdiction to adjudicate the appellant's application. Absent its jurisdiction, the resulting Children's Court order is a nullity⁶⁶. The learned magistrate in the Maintenance Court was entitled to disregard it.

78. Accordingly, on the alternative basis advanced by the CCL also, the appeal must fail.

M's future

79. This Court on appeal had the benefit of the investigation and report of the Family Advocate, Adv J Gerber, supported by a report by the Family Counsellor Manager, Mrs T Buttress. An alternative vision for M's future family life was sketched in their reports.

80. The reports noted the parties' history and the appellant's feelings of distrust but remarked that it appears that the respondent has not negatively influenced M against the appellant, and that M idolises him to some extent. M has met the appellant only once (this appears to be at the court appearance related to the 2022 paternity test). Neither party raised concerns regarding the other's ability to care for M, and both have the capacity to cater for his needs. No reason was

⁶⁶ *Master of the High Court Northern Gauteng High Court, Pretoria v Motale* NO 2012 (3) SA 325 (SCA) at paragraph [11] to [13]
See also MN de Beer 'Invalid Court Orders' (2019) 9 *Constitutional Court Review* 283 at 288 to 289

discerned why appellant should not have contact with M. Adv Gerber weighed up the reluctance shown by the appellant to exercise contact with M, with M's views. Consideration was given to the possibility that if M is prepared for contact, the appellant may not remain committed to it. Without diminishing the positive relationship between M and his stepfather, Adv Gerber concluded that at the very least M should have the opportunity to experience the care, love and support of a father.

81. Mrs Buttress' report recorded that M is aware of his father's success as a professional sportsman, and had described him as 'a good guy'. He expressed that he would want to see the appellant again but if he could not see him he would accept it. Attached to her report were letters she had asked M to write to his mother and his father, as well as a letter she requested the respondent to address to the appellant setting out her proposals regarding the appellant's contribution to the maintenance of and his contact with M.

81.1. To the respondent, his mother, M wrote "*I love when you take time from work to come to my soccer practice and matches. That's why I love you.*"

81.2. His poignant letter to the appellant read "*Hello Dad, I know we haven't got the chance to meet each other but I would love to get to know you better and see what your (sic) like.*"

81.3. The respondent's letter to the appellant set out two different options for a maintenance structure. She expressed her concern to provide for M's schooling and to make provision for him to attend university, and proposed a weekend contact schedule that would involve the appellant in M's soccer practices and matches. At face value, these proposals are reasonable. However, the report does not indicate that the appellant

responded to the respondent's proposals.

82. Operating on the mistaken premise that the appellant was/is a holder of parental responsibilities and rights, the Family Advocate and the Family Counsellor do not recommend that they be terminated. Instead they recommended, among other things, that the parties (continue to) be co-holders of such responsibilities and rights, with M remaining in the respondent's care and residence, commencing therapy to prepare him for contact with the appellant and to support him with issues arising from the development of their relationship, and enjoying phased in contact with the appellant. The appellant would also have therapy to assist with unresolved issues between the parties. Co-parenting sessions for the parties were also advised. Quite correctly, the appellant's obligation to maintain M, was taken for granted with a recommendation that the parties agree on sharing M's expenses according to their respective means.
83. These recommendations may derive from an overly sanguine view of the appellant's capacity to commit to parenting responsibilities, but the possibility of a consensual resolution cannot yet be excluded. The appellant had indicated in consultation with Mrs Buttress that if a proposal was provided he would give it consideration, and that he does not shy away from his responsibilities. The respondent appears receptive to concluding a parenting agreement that would afford some parental responsibilities and rights to the appellant, which can competently be done in terms of section 22 of the Children's Act⁶⁷.

⁶⁷ **22 Parental responsibilities and rights agreements**

(1) Subject to subsection (2), the mother of a child or other person who has parental responsibilities and rights in respect of a child may enter into an agreement providing for the acquisition of such parental responsibilities and rights in respect of the child as are set out in the agreement, with-

(a) the biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of either section 20 or 21 or by court order;

...

(3) A parental responsibilities and rights agreement must be in the prescribed format and contain the prescribed particulars.

84. The investigation and the consultations held with the parties and with M have laid the groundwork for the appellant to come to terms with his parental duties, and to assume a more significant role in M's life – which can only serve to enrich the appellant's own life. The work done by the Office of the Family Advocate is a firm foundation for continued mediation between the appellant and the respondent for purposes of arriving at a parenting agreement that serves M's best interests. In my view it would be premature for this Court to order the conferral of parental responsibilities and rights as recommended by the Family Advocate without further mediation with a view to arriving at an agreement between the parties.
85. I concur with the view articulate by Movshovich AJ in *Marima v Lesele*⁶⁸ when motivating his order that the parties therein undergo mediation (underlining inserted):

“The Court should, as far as possible, in matters involving children, seek out all relevant and accurate information within a reasonable time to place it in a position to do justice to its role as the upper guardian of minors and to vindicate and give effect to the best interests of children. It must also take care to ensure that the proceedings do not simply proceed in the usual adversarial fashion, but rather, if appropriate, incorporate opportunities for parties to conciliate, professional mediation assistance, professional reports by family advocates, family counsellors and others, and structured orders to ensure that the parties disclose all relevant information to court and report on their progress in following extra-curial resolution.... Should any areas of disagreement still subsist by the end of the mediation, those should be clearly identified by the parties, with the assistance of the professional, and then presented to Court with supporting documentary or witness evidence and the parties' contentions. The attainment

(4) Subject to subsection (6), a parental responsibilities and rights agreement takes effect only if-
(a) registered with the family advocate; or
(b) made an order of the High Court, a divorce court in a divorce matter or the children's court on application by the parties to the agreement.
(5) Before registering a parental responsibilities and rights agreement or before making a parental responsibilities and rights agreement an order of court, the family advocate or the court concerned must be satisfied that the parental responsibilities and rights agreement is in the best interests of the child.

⁶⁸ Supra at para 12 to 15

of the objectives in the Act may require the Court in adjudicating such a dispute to call for further information or oral evidence. Proceedings concerning children's rights and parents' rights and responsibilities under the Act cannot and should not neatly be compartmentalised into motion and trial processes. The unique role of the court in such proceedings renders them quintessentially sui generis, where flexibility of procedure and practical justice must prevail to reach an accurate, just and expeditious outcome."

86. Movshovich AJ was invoking a mandatory mediation possible under section 21 of the Children's Act. That does not apply to the present matter. However, I consider that the guiding principle in Section 6(4) of the Act⁶⁹, which resonates with the underlined *dicta* above, affords this Court the power, and indeed, the duty, to direct the parties to attend further mediation with the Family Advocate, in accordance with the order and structured timetable set out below. The purpose is to obviate any need for the parties to return to contested court proceedings in the Maintenance Court, or in this Court. The parties remain free to secure independent advice from their respective legal representatives on the terms of any mediated agreement.

87. The Constitutional Court has observed in *SS v VVS* ⁷⁰, a matter concerning a dispute about the payment of a maintenance obligation: "...*There is little doubt that the payment of maintenance is an important factor in the ability of a custodian parent to provide for the needs and interests of a minor child. Those needs and interests are, however, best served when a child is able to enjoy the recognition of its parents and the love and care that is almost symptomatic of being a parent. When that is missing, one can only speculate about the manner in which*

⁶⁹ (4) In any matter concerning a child-

(a) an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; and

(b) a delay in any action or decision to be taken must be avoided as far as possible.

⁷⁰ *SS v VVS* (CCT247/16) [2018] ZACC 5; 2018 (6) BCLR 671 (CC) (1 March 2018) at para 42 & 43

it redounds on the wellbeing of a young child.” The Constitutional Court recorded its dismay about the father’s insistence, some seven years after the parties’ divorce, that the child undergo a (further) paternity test, and his reluctance to recognise the child as his own, then observed “... Impressive as its powers are, no court can direct a parent to love and recognise a child, critical as that may be to the full development of a child. What we can do and are enjoined to do, is to point out that every child is deserving of the love and care that is necessary for their development and that the duty to provide that rests primarily on the parents of the child. We can only hope that in the young life of the minor child whose interest is the subject of this litigation, that that transpires in the fullness of time.”

88. The orders that follow hereunder are directed, in M's best interests, to that end.

89. It is ordered that:

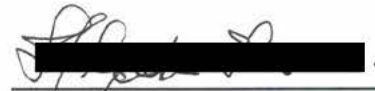
89.1. The appeal is dismissed with costs.

89.2. The appellant and respondent are directed forthwith jointly to approach the Family Advocate's office for mediation to assist them in the conclusion of a parental responsibilities and rights agreement between the parties as contemplated in section 22 (1) (a) and section 22 (3) of the Children's Act, 2005.

89.3. The mediation shall take place without delay and the mediation process shall be completed by no later than 28 February 2025. If, with the assistance of their respective legal representatives, the parties reach agreement before consulting the Family Advocate, they must promptly provide a copy of their agreement to the Family Advocate for purposes of

its report to the Court contemplated below.

- 89.4. The parties shall use all reasonable endeavours to reach agreement on all areas of dispute, particularly contact between M and the appellant, and his contributions to retrospective and future maintenance for M.
- 89.5. By no later than 10 days after the finalisation of the mediation or by 31 January 2025, whichever is the earlier, the parties shall deliver to the child's representative, Ms Rene Carstens, and to this Court the duly executed parenting agreement, together with the Family Advocate's report thereon, whereafter, the Court, may if so satisfied, make it an order of this Court under sections 22 (4) (b) and 22 (5) of the Children's Act, 2005.
- 89.6. The parties are directed to furnish a copy of this judgment forthwith to Acting Additional Magistrate Horn in the Wynberg Magistrate's Court.
- 89.7. If the parties do not reach agreement by 28 February 2025 on the appellant's contributions to maintenance for M, they are directed to notify the maintenance officer in the Wynberg Maintenance Court immediately and to request the earliest available date for the resumption of the maintenance proceedings in that Court.



GORDON-TURNER AJ

I agree, and it is so ordered.



NDITA J