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

JUDGMENT

REPORTABLE

Case no: A83/2024

In the matter between:

S[...] E[...] T[...]

FIRST APPELLANT

G[...] L[...] B[...]

SECOND APPELLANT

R[...] B[...]

THIRD APPELLANT

and

THE DEPARTMENT OF JUSTICE

FIRST RESPONDENT

THE PRESIDING OFFICER:
MAGISTRATE Y SIPOYO

SECOND RESPONDENT

Neutral citation: *S[...] E[...] T[...] and others v The Department of Justice and another* (Case no A83/2024) [2025] ZAWCHC (4 July 2025)

Coram: **CLOETE J AND MAYOSI AJ**

Heard: 11 June 2025

Delivered: 4 July 2025

Summary: This is an appeal from orders made by the Children's Court, Atlantis dismissing an application to set aside a no-contact order made by it in terms of section 46(1)(h) and (x) of Act 38 of 2005; to place baby R in the care of the second appellant, alternatively both minor children in the care of the first appellant subject to various safeguards; and thereafter placing the minor children that form the subject matter of this application in permanent foster care.

ORDER

- 1 The application for leave to place further evidence before this Court is granted.
- 2 The appeal is upheld, and the following orders are made.
- 3 The no-contact order granted by the Children's Court, Atlantis, on 5 December 2024 in relation to X and baby R (the minor children) and their maternal and paternal family members is set aside.
- 4 The order made by the Children's Court, Atlantis, on 23 April 2025 placing the minor children in the permanent care of foster parents is set aside, subject to the further terms of this order.
- 5 The minor children shall be returned to the custody and care of the second and third appellants who remain the legal guardians of the minor children with parental rights and responsibilities in terms of the Children's Act 38 of 2005.
- 6 Baby R's return to the custody and care of the second and third appellants shall occur forthwith.

- 7 X's return to the custody and care of the second and third appellants shall occur only in the event that the bail conditions applicable to the second and third appellants in connection with the pending criminal case against them have been amended to permit such return.
- 8 In the interim, pending X's return to the custody and care of the second and third appellants as envisaged in paragraph 7 above or the finalisation of the criminal proceedings against them, whichever occurs first, X shall be placed in the care of the first appellant as soon as the second and third appellants have secured suitable alternative accommodation which shall be paid for by them, at which accommodation the first appellant shall reside with X; and in such event the second and third appellants shall be allowed daily contact with X as follows:
 - 8.1 on school days after school until 18h00.
 - 8.2 during weekends between 11am until 18h00.
 - 8.3 under the supervision of a person approved by Dr Astrid Martalas, at the cost of the second and third appellants.
- 9 All costs relating to X's daily living expenses, including but not limited to those for her food, education, medical care, therapy, childcare, transportation and entertainment as well as the costs of running and maintaining the residence at which she will reside with the first appellant shall be borne by the second and third appellants.
- 10 The second and third appellants' contact with X as envisaged in paragraph 8 above shall occur only in the event that the bail conditions applicable to them in connection with their pending criminal case have been amended to permit such contact.
- 11 The appellants shall not discuss with the minor children, or in their presence, any details concerning or in connection with the second and third appellants' arrest, their incarceration and the pending criminal proceedings; and furthermore, the appellants shall ensure that no such discussions are held by any other parties in the presence of the minor children.
- 12 The second and third appellants shall reside with baby R, and X should her return be permitted by the bail court, at [...] A[...] Way, Atlantic Beach Golf

Estate, Melkbosstrand or at any other alternative address that they may from time to time be permitted to reside in, in terms of their bail conditions.

- 13 Dr Astrid Martalas shall act as the case manager in relation to X, and shall compile monthly reports regarding her welfare, which reports may be submitted to a competent court if called upon to do so. The costs for the services of Dr Martalas shall be borne by the second and third appellants.

JUDGMENT

Mayosi AJ:

[1] This case concerns what is in the best interests of two minor children – a six-year-old girl X, and a one-year-old boy I shall refer to herein as baby R (**the minor children**), in the peculiar circumstances that are set out below.

[2] Their mother is the second appellant. She is the wife of the third appellant, who in turn is the father of the minor children (**the parents**). The minor children have a half sibling, 13-year-old H[...] who was born to the third appellant from a previous marriage. H[...] lives in New Zealand with her mother but has visited the family regularly over the years in Doha, Qatar, where the family has been living, and is therefore very much a part of the family set-up.

[3] The second appellant is a British citizen. She has no prior convictions and is the owner and CEO of R[...] E[...] and other businesses operating in Doha, Qatar, whilst the third appellant is a South African businessman employed at M[...] C[...] for the past 14 years. The family has been living in Doha, Qatar; and the parents also own a property at [...] A[...] Way, Atlantic Beach Golf Estate in Melkbosstrand, near Cape Town which I understand to be their home base when they are in South Africa.

[4] The first appellant is a British citizen, and she is the aunt of the second appellant. She therefore forms part of the extended family of the minor children from the maternal side.

[5] The genesis of this case is the arrest of the parents on 31 October 2024 on charges that include human trafficking, rape and sexual assault. This includes the alleged sexual abuse of their six-year-old daughter X. The complainant in the criminal matter is a former employee of the second and third appellants, one J[...] O[...] (**the complainant**). By virtue of her being the subject of some the charges which her parents face in the impending criminal trial, X is a potential witness in that case.

[6] The complainant made the first set of her accusations against the second and third appellants on or about 14 October 2024. On 16 October 2024, members of ACVV conducted an unexpected home visit at the parents' home in Melkbosstrand. The third appellant was overseas at the time, and the second respondent was present in the home with the minor children. The minor children were medically examined and a J88 was completed by the examining doctor, who found no indications of sexual abuse of the minor children and the findings were all normal. During a second visit conducted by the ACVV members on 17 October 2024, the second appellant was requested to submit to a drug test, which she did, and the results were negative.

[7] The complainant made a second set of accusations to the police later in October 2024, in which she alleged that the second and third appellants were sexually abusing or had abused their daughter X, after which further accusations the parents were arrested on 31 October 2024 and the minor children were removed from them.

[8] Furthermore, on that same date, the minor children were again subjected to medical assessments. This time the medical assessments were performed by a Dr Swanepoel of the Thuthuzela Care Centre at Victoria Hospital. She reported that she had no concerns regarding baby R but that there were alarming signs in respect of X, in regard to whom she reported that the condition of her hymen was suggestive of historical blunt force trauma and was in keeping with the history provided by the complainant that X had been repeatedly raped.

[9] After the parents' arrest the second appellant was incarcerated in Pollsmoor Prison from where she awaited trial. At the time of his mother's arrest baby R was four months and two weeks old and was being breast-fed by her. They were then separated. The third appellant was incarcerated at Malmesbury Prison awaiting trial.

[10] After the arrest of their parents the minor children were placed, first, in foster care and when that proved unsuccessful, they were placed at the Baitul-Ansaar Child and Youth Care Centre in Mitchells Plain.

[11] On 5 December 2024, the Children's Court in Atlantis made an order in terms of section 46(1)(h) and (x) of the Children's Act 38 of 2005 (**the Act**), that there shall be no contact between the minor children and their respective maternal and paternal family members pending the finalisation of the children's court proceedings. This is order, which was granted *ex parte*, is what is referred to in these proceedings as the no-contact order that is at the heart of these proceedings, amongst other issues.

[12] On 21 February 2025, the parents' application for bail was refused by the Magistrate, Atlantis Court. The parents lodged an appeal to this Court, which was upheld on 23 May 2025 when they were granted bail by Mapoma AJ, subject to various conditions.

[13] On 6 March 2025, the appellants brought an application in the Children's Court in Atlantis, seeking the setting aside of the no-contact order, and further that baby R be placed in the care of the second appellant subject to appropriate safety provisions; alternatively that both minor children be placed in the care of the first appellant subject to various safeguards, whilst the parents remained incarcerated. The matter came before the second respondent (**the magistrate or the learned magistrate**), who postponed it for hearing on 20 March 2025 in order to afford the ACVV more time to file a report, and to afford the ACVV an opportunity to respond to the application.

[14] On 20 March 2025, Legal Aid appeared on behalf of the minor children at the request of the magistrate. The Legal Aid representative requested a postponement to consider the application papers and the ACVV requested a further extension to file their report pertaining to permanent foster placement on the basis that family members were not being considered, given the no-contact order made earlier. It bears noting that at this point when permanent placement was being considered, no interaction had been had by ACVV with the parents regarding their suitability to continue to hold parental rights and responsibilities in relation to the minor children; their response/s to the allegations they faced in relation to X (no concerns had been expressed relating to baby R) and, ultimately, their suitability to care for their minor children should they secure bail.

[15] The application to set aside the no-contact order and place the minor children with the first appellant or their mother (in the case of baby R) was postponed to 4 April 2025.

[16] The ACVV filed their report on 2 April 2025 and Legal Aid filed an opposing affidavit on 3 April 2025. The ACVV had an interview with the first appellant on 3 April 2025 and handed a supplementary report to the Court and the appellants' representatives on 4 April 2025 regarding the suitability of the first appellant to care for the minor children.

[17] Ms Louw, a social worker from the Department of Social Development (**DSD**), also attached a forensic assessment report prepared by Captain Golding in respect of X to her report. Attached to the Legal Aid opposing affidavit was a report of Ms Kriel, X's therapist who met with the State's team.

[18] After hearing argument on 4 April 2025, judgement was reserved and the matter was postponed to 16 April 2025.

[19] On 16 April 2025, the second respondent dismissed the application to set aside the no-contact order and place the minor children with the first appellant and indicated to Ms Louw that she intended to formalise the permanent foster care placement as recommended by the ACVV. The second respondent advised Ms Louw to attend court on 23 April 2025.

[20] After the court adjourned on 16 April 2025, the appellants filed and served a notice of appeal. By operation of law, any execution of the second respondent's dismissal of the application to set aside the no-contact order and the ancillary orders sought therein ought properly to have been suspended by the delivery of the notice of appeal. However, this did not occur, because the second respondent nonetheless proceeded to execute her decision by placing the minor children in permanent foster care on 23 April 2025.

[21] The minor children were handed over to the foster parents at Court on 23 April 2025. This was their third placement in the almost-six-month period since they were removed from their parents on 31 October 2024.

[22] This appeal, therefore, is against the second respondent's decision to refuse the setting aside of the no-contact order and the ancillary relief sought in that application. It was initially set down for hearing on 13 June 2025 but was heard earlier on 11 June 2025. The appeal papers were served on the respondents, the Legal Aid representative for the minor children, DSD and the ACVV and we were provided with proof of notification of the earlier hearing to all parties concerned. The Legal Aid representative informed us in writing that she had no mandate to represent the children at the hearing of the appeal.

[23] The appeal was not opposed by any party.

[24] At the hearing of this appeal on 11 June 2025, the appellants made application for leave to place further and new evidence before this Court. The further evidence

related to the following events that occurred after the second respondent's refusal of the setting aside of the no-contact order on 16 April 2025; i.e.; (a) the fact that the second respondent had proceeded to place the minor children in permanent care on 23 April 2025, notwithstanding the appellants' delivery of a notice of appeal on 16 April 2025; (b) the fact that the second and third appellants had been granted bail on 23 May 2025; (c) the details regarding when the second and third appellants discovered X's historical sexual abuse by a third party in Doha, and the steps taken by them to support her and seek appropriate curative medical intervention for her, which efforts were interrupted by their arrest on 31 October 2024; (d) Dr Astrid Martalas' s report on the long-term impact of separating children from their primary caregivers and attachment disruptions, as has happened to the minor children; and (e) the willingness of the minor children's maternal grandmother, in addition to the first appellant, to care for the minor children subject to any safeguards that this Court impose.

[25] The application to place further evidence was granted by this Court, on the basis that the new information was material and relevant to the issues for determination in the appeal.

The authorities' interaction with the parents of the minor children

[26] In the period of eight months since the removal of the children from their parents, the second appellant has received only two updates in respect of them, and both updates were given to her by her social worker at Pollsmoor Prison where she was awaiting trial, after many requests to see photographs and be provided with information regarding her children.

[27] The first update that the second appellant received was on 3 December 2024 and the second update was four months later on 3 April 2025. The children's father – the third appellant - was not provided with a single update regarding the children whilst he was incarcerated – from 31 October 2024 until 23 May 2025.

[28] Letters addressed by the attorneys of record of the second and third appellants to ACVV, on 28 March and 3 April 2025, recording, *inter alia*, the dismissive conduct of the ACVV and their failure to provide information to the second and third appellants regarding their children's wellbeing went unanswered. Similarly, numerous attempts by the first appellant to contact ACVV requesting updates regarding the children and their wellbeing went unanswered.

[29] This conduct forms an important backdrop against which the best interests of these minor children was approached by DSD, ACVV, the legal representative appointed for the minor children and the learned magistrate. In this backdrop, the following factors appear to have been lost sight of by all those seized with what was in the best interests of the minor children in this matter, including the learned magistrate, that: (a) the parents are innocent of the charges against them until proven guilty; (b) human nature is complex; (c) parents are not perfect; and, (d) except in the clearest of cases to the contrary, children are entitled to and deserve the love, care, attention of, and upbringing by, their biological parents and extended family.

The no-contact order granted on 5 December 2024

[30] In terms of section 2(a) of the Act, one of its main objects is to promote the preservation and strengthening of families. In my view, the word '*family*' refers to a child's nuclear family and extended family. The Act defines a family member, in relation to a child, as, *inter alia*: (a) a grandparent, brother, sister, uncle or aunt or cousin of the child; and (b) any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship. The first appellant, who is a great aunt of the minor children and with whom, on the uncontested evidence, X in particular has developed a close bond, is clearly a member of the minor children's family.

[31] Similarly, section 2(b)(i) of the Act states that it aims to give effect to the constitutional rights of children to family care or parental care or appropriate alternative

care when removed from the family environment. These rights are to be found in section 28 of the Constitution.

[32] Section 7(1)(f) of the Act particularly emphasises the importance of family and the need for children to remain in the care of their family and extended family wherever possible, and to maintain a connection with their family, extended family, culture or tradition.

[33] Section 157(1)(a) stipulates that before a Children's Court can make an order in terms of section 156¹ is made by a court for the removal of a child, the court must obtain and consider a report by a designated social worker on the conditions of the child's life, which must include-

- 33.1 an assessment of the developmental, therapeutic and other needs of the child;
- 33.2 details of family preservation services that have been considered or attempted; and
- 33.3 a documented permanency plan taking into account the child's age and development needs aimed at achieving stability in the child's life and containing the prescribed particulars.

[34] In the view of this Court, and against these legal principles, the second respondent erred in granting the no-contact order on 5 December 2024, and in refusing to set it aside on 16 April 2025, for the reasons that follow.

[35] We were also provided with a transcript of the proceedings before the second respondent. The no-contact order appears to have been granted on the basis of a report dated 22 November 2024, in which Ms Louw opined that it would be in the best interests of the minor children to have no contact with any family members until completion of the investigation due to the sensitivity of the matter and the children's need to be brought up

¹ This deals with orders made when a child is in need of care.

in a stable home. She further stated that: *“Further to this, as it seems there are allegations that family often travelled with the family or possibly resided with family, it is not clear if they are involved in any way or could possibly influence the children in any way.”*

[36] It does not follow from the fact that family members travelled together, which is what family members do, that those family members are then to have no contact with the minor children of that family when the other family members they travelled with become accused of crimes against those minor children. Furthermore, the above statement itself by Ms Louw expresses nothing definitive or conclusive regarding all the maternal and paternal family members that were ultimately ordered to have no contact with the children. She says it is not clear if they were involved, and yet those very (unnamed) family members were ordered by the second respondent to have no contact with the minor children at all, seemingly indefinitely.

[37] In the hearing of the application to set aside the no-contact order, the magistrate accepted as correct the following factual submissions, which were incorrect: (a) that were the children to be given to the first appellant to live in their house in Melkbosstrand, they would return to where some of the sexual abuse took place and this would further then subject X to secondary trauma. First, no sexual abuse has been found to have taken place, and second, such sexual abuse as is alleged allegedly took place in Qatar, not in the residential home in Melksbosstrand. There are therefore no issues of secondary trauma that would arise at the Melkbosstrand home as was found by the learned magistrate.

[38] Another fact, which appears to have influenced the magistrate in her findings, and which was incorrect, is her assertion in her judgment that the third appellant accused his oldest daughter of taking X to a neighbour who sexually abused her. This is factually incorrect. The third appellant’s oldest daughter H[...] lives in New Zealand and visits the family occasionally. It was the second and third appellants’ then-nanny Chet whom they suspected had facilitated the alleged sexual abuse of X by their

neighbour in Doha, in that it was Chet who took the child to the neighbour where these acts allegedly occurred.

[39] The magistrate made a factual error in another respect as well, which also influenced her finding in regard to the non-suitability of the first appellant to care for the minor children. She found that the minor children, if placed in the care of the first appellant, may be caught in a constant struggle between the first appellant and *“the maternal aunt whom [the first appellant] alluded to as the potential support system if she were granted care of the minor children as she views her as her rival in wanting to take care of the children.”* On the facts before us, the person that the magistrate meant to reference was the maternal grandmother of the minor children, not their maternal aunt who is the first appellant. The children’s maternal grandmother resides in the UK and stands ready to come to South Africa to care for the children should her services and assistance be needed to do so. There is no rivalry between the first appellant and the maternal grandmother. They are both available and willing to care for the children, and in the event of one not being available the other will step into the breach and care for the children, in the absence of the parents.

[40] The court *a quo* erred in refusing to set the no-contact order aside on 23 April 2025 and furthermore erred in thereafter placing the children in permanent foster care, in all the circumstances of this case. In particular given that a notice to appeal her order had been delivered on 16 April 2025.

[41] The decisions of the learned magistrate are not in keeping with the objectives of the Act and are not in the minor children’s best interests.

[42] Those objectives in the Act include promoting the preservation and strengthening of families, which the learned magistrate did not have regard to. The learned magistrate did not have regard to the importance of promoting the preservation and strengthening of families because she, like the ACVV and DSD, moved from the premise that the parents were guilty of the offences with which they have been charged.

[43] It also appears from the learned magistrate's judgment that a main consideration for her reaching her decision was the State's fear that X's testimony in the criminal trial would be influenced by family members should she have contact with them or be placed with them. In this regard, the magistrate found that the first appellant poses a potential external influence in favour of the biological parents as she is a family member who is supportive of the parents and, as a result, she may in turn expose the minor children to undue pressure and influence and, in the magistrate's view, the children's safety and emotional security should outweigh all the other considerations.

[44] The second respondent, unjustifiably, simply accepted that the first appellant would deliberately influence X because the first appellant honestly stated that she was not aware of the accusations against the second and third appellants and has a good relationship with the second appellant – her own niece.

[45] First of all, it does not follow from the fact that the first appellant is supportive of the parents that she will exert undue pressure and influence on the children. The first appellant's support for the minor children's parents has no bearing on the children's safety and emotional security. The children's safety and emotional security, as I see it, is primarily dependent upon the environment that is created for them to thrive – by the first appellant or their parents; the love, and care they receive; the routines set up and maintained for them in the promotion of their needs, desires and welfare; and ultimately the attention they receive from those charged with their care. The first appellant's support for the minor children's parents does not negate any of these things.

[46] Second, the fact of a family member or members expressing their support for the second and third appellants (who are, it must be remembered, innocent until proven guilty) is not on its own, and without more, a disqualifying factor in terms of that family member's ability to care for the minor children. If this were the case, then all those related to the second and third appellants who, believing in their innocence, support them would be disqualified from caring for the minor children, and only those family

members who did not support the parents, or who did not have a good relationship with them, would qualify to care for the minor children. All of this needs only be said in order for its absurdity to be apparent, and the magistrate erred in finding the first appellant unsuitable to care for the children for these reasons.

[47] There was no factual basis for granting the no-contact order, in the manner in which it was couched, or at all. There was no evidence placed before the magistrate when she granted the no-contact order that any members of the maternal and paternal family who fell under the ambit of the no-contact order had any knowledge of the allegations against the parents at all or had taken part in the activities that the parents are accused of. All of the maternal and paternal family members who became effectively banned from interacting with these minor children were not before the second respondent, and there was no information before that court regarding them. Such information was necessary, given that the proceedings were *ex parte*, and furthermore given the drastic nature and effect on the minor children, and their constitutional and statutory rights to family, of the no-contact order granted by the learned magistrate. There was some limited information about the first appellant, but even that was not such as to disqualify her from interacting with or caring for the minor children.

[48] Furthermore, the learned magistrate did not consider at all, and this is apparent from her judgment, the safeguards proposed by the appellants in the application to set aside the no-contact order, which were furnished in order to ensure that no undue influence and pressure as feared would take place in the event that the no-contact order were lifted and the children were placed in the care of the first appellant. These safeguards included the support of a therapist for the minor children whilst in the care of the first appellant; the expertise and oversight of psychologist Dr Astrid Martalas, who has extensive experience as a case manager; and the oversight offered by a trained *au pair* for the children. The learned magistrate was wrong not to consider these or any safeguards at all.

[49] I do not believe there to be any safeguards necessary in regard to the placement of baby R with his parents, now that they are out on bail. He should never have been removed from his mother in the first place, and to impose safeguards regarding the care of him by his parents would be tantamount to robbing them of their right to innocence before guilt, and baby R to the care of his parents, and would circumscribe the second the third appellants' parental rights and responsibilities in relation to baby R, where no case has been made out for this. Moreover, and as stated above, there is no evidence at all that his care by his parents places him in any risk or danger.

[50] For all of the above reasons, the magistrate erred in granting the no-contact order; she erred in refusing to set it aside on 16 April 2025 and she furthermore erred in finding the first appellant unsuitable to care for the minor children, for these reasons that she did. There was no factual basis for granting the no-contact order; and both its granting and the refusal to set it aside were not in the best interests of the minor children.

The care of baby R

[51] The second respondent correctly identified in her judgment the importance of the provisions of section 9 of the Act which stipulates that in 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. However, the learned magistrate does not appear to have had regard to the provisions of section 7 of the Act that deals with the factors that must be taken into consideration where relevant, whenever a provision of the Act requires the best interests of the child standard to be applied. That the magistrate paid no heed to these factors is apparent in her judgment insofar as her consideration of the interests of both minor children is concerned. It is particularly glaring when regard is had to her consideration of what is in the best interests of baby R, to whom I turn now, as compared to what was in the best interest of X. The second respondent appears to have proceeded from the premise that both minor children constituted a homogenous entity with the same interests, in terms of what was in their

best interests. This was one of her errors, as the two children are separate individuals who have different interests that are best for them, in particular when regard is had to their respective ages and the issues that the criminal matter raises.

[52] When baby R was removed from his mother on 31 October 2024, he was four months and two weeks old. He was being breast-fed by his mother. For this reason alone, and other reasons as set out below, he should never have been separated from his mother or, failing her, his extended family at that juncture in his life.

[53] The factors that ought properly to have guided and influenced the learned magistrate in determining what was in the best interests of baby R included: (a) the likely effect on him of separation from his mother at that tender age, when he was so vitally connected to and dependent on her for his very sustenance and his emotional and psychological wellbeing; (b) the likely effect on baby R of separation from not only his then family unit, but how that could have been ameliorated by the continued presence of his extended family, the latter for some semblance of the stability provided by a continuation of familiarity in the persons and surroundings in which he lived; (c) the need for baby R to remain in the care of his mother, and failing her, his extended family; (d) the need for him to maintain a connection with his family and extended family, culture or traditions; and (e) which actions or decisions would avoid or minimise further legal or administrative proceedings in relation to baby R.

[54] There is no evidence from her judgment that the learned magistrate considered these factors in her determination of what was in the best interests of baby R.

[55] And so, as a result and after the severance of baby R's bond with his mother on 31 October 2024 when he was just four months old, the learned magistrate ordered on 5 December 2024 when he was six months old, that he was to have no contact with any member of his paternal and maternal family. On 16 April 2025 when baby R was ten months old, the learned magistrate upheld her initial no-contact order and on 23 April,

she ordered that he be placed in permanent foster care, resulting in the appeal that is before us.

[56] The learned magistrate made these orders knowing that, since his removal from his parents on 31 October 2024, baby R had no contact with his mother who had been breastfeeding him, or his father or any member of his extended family. She did not question this reality, with reference to what was in the best interests of this baby.

[57] Instead, the learned magistrate ordered that baby R be placed permanently with foster parents, meaning that from the age of ten months, because of unproven (and admittedly serious) allegations against his parents, he is not to benefit from the love, attention, care, protection, influence and upbringing from them and any and all other members of his family.

[58] Moreover, there are no accusations of any sort against members of the minor children's paternal and maternal extended family (except that they travelled with the nuclear family, and supported them), yet they too stand effectively banned by the no-contact order from exercising contact with the minor children, which order was granted in their absence and without their knowledge.

[59] Whilst still on baby R, the rationale behind the no-contact order must not be lost sight of; i.e.; that the maternal and paternal family members of these minor children with whom they were to have no contact until the finalisation of the criminal case (effectively for an indefinite period of time, if one has regard to the time the prosecution of criminal cases takes) were likely to influence the children in relation to the allegations that their parents are facing in the criminal case, thereby prejudicing the State's case in the criminal matter. In my view, this is not only an unfounded conclusion (that these relatives will influence the minor children) but it is a totally irrational conclusion in relation to baby R, for there can be no basis – there is none in fact before this Court - for a conclusion that a four month old baby in general, or that this baby in particular, is capable of even grasping the issues raised in the criminal case, let alone being

influenced about them. No such facts were presented in any of the reports that served before the magistrate regarding baby R.

[60] This is another demonstration of how the learned magistrate failed to consider, and distinguish, what was in the best interest of baby R versus what was in the best interests of X.

[61] In the event, the date on which this appeal was heard on 11 June 2025 was the date on which baby R turned one years old. This means that he has been apart from his parents and extended family members for a period that is longer than the time that he has been alive. It is important for this statement to be said, and for it to be allowed to sit in the room, in order that there may be a full grasp of the impact of the removal of this infant from his mother and entire family set-up at that stage in his life. And to what end, this Court asks rhetorically.

[62] All of this occurred in circumstances where, in my view, what was in the best interests of baby R was not considered by the second respondent before she ordered that baby R: (a) was to have no contact with any member of his maternal and paternal family members for what effectively will be an indefinite period; (b) be placed permanently in the care of strangers – a third set of strangers within a six month period after his removal from his parents – thereby being permanently separated from his parents and extended family members, again indefinitely. All of this in circumstances where his parents were appealing the dismissal of their bail application and also when there were family members willing and able to care for baby R in the absence of his parents.

[63] As things turned out, the second and third appellants were granted bail on appeal to this Court on 23 May 2025, an eventuality which the second respondent ought to have anticipated the possibility of in her judgment, and before she placed the minor children in permanent foster care, had she been motivated by what is in the best

interests of both minor children. She did not do so and this was a grave error on her part.

[64] The parents are now able to take care of both of their children, from their residential home in Melkbosstrand which they have been ordered to reside in in terms of the bail conditions applicable to them, subject to what is said below insofar as it relates to X.

[65] Given their release from incarceration, there is no reason why, in my view, both minor children should not benefit from the care, love, attention and support of their parents that they are constitutionally entitled to, subject to certain safeguards when it comes to X.

[66] The second and third appellants remain the holders of parental rights and responsibilities to both minor children under the Act, and no evidence has been presented before this Court to the effect that they are otherwise unsuitable parents.

[67] When it comes to baby R, the magistrate seems to have accepted, incorrectly so in my view, the submissions made to her that the placement of baby R with his mother in Pollsmoor Prison was not ideal as he could only be there with his mother for two years. What the magistrate lost sight of is that two years spent with his mother is a significant period for an infant, a fact of which the social workers seized with this matter and who placed numerous reports before the magistrates ought to have been aware. The importance of this period for an infant is evident from a report of Dr Martalas placed by the appellants before this Court, to the effect that, *inter alia*, the threat of separation or loss of an attachment figure is a major stressor, especially during infancy and early childhood which is where baby R is.

[68] Furthermore, the magistrate appears to have accepted the submission made to her that baby R had then already been separated from his mother for the past five

months and to *'return'*² him to prison and to subsequently remove him again when he turns two years old will have a detrimental effect on him. The magistrate's acceptance of this submission, which was glib, was wrong for at least two reasons: (a) there was no consideration of the impact on baby R of removing him from his mother in the first place, at four months old when he was being breastfed and the importance of re-introducing that bond and the need to correct that attachment disruption; and (b) the magistrate's acceptance of this submission evinces an assumption by her that the second appellant will remain in prison where she was awaiting trial for a period longer than two years. This submission, which the magistrate accepted incorrectly, was unfounded given that the second appellant had not been found guilty and sentenced of any crime and was in fact awaiting the outcome of her bail appeal, which turned out to be successful.

[69] It is for all of the reasons stated above that this Court finds that it is in the best interests of baby R to be returned to the custody of his parents, and for this to happen forthwith. The reunification of baby R with his parents, and his extended family, is critical for his short- and long-term development, if regard is had to the report of Dr Martalas. The respondents have placed no evidence before this Court to rebut this.

The care of X

[70] The consideration of the proposed safeguards was of particular importance when it came to what is in the best interests of X, because the allegations faced by the parents in the criminal trial also relate to her and she is a potential witness in those proceedings. The magistrate's failure to consider the proposed safeguards suggests that she too, as did the ACVV, DSD and the children's legal representative, moved from a premise that the parents were guilty of the offences with which they are charged and therefore there was no need to even fathom a world where they could have contact with X pending the criminal trial, and what conditions that could occur under.

² This word was used incorrectly as baby R had never been placed with his mother in prison.

[71] After their removal from their parents on 31 October 2024, X, like baby R, was placed with the first set of foster parents and when that failed, she was placed in the Children and Youth Centre and, thereafter, the permanent foster parents.

[72] Since her removal from her parents, X has been extensively medically examined; interviewed by a social worker at the hospital; interviewed by Ms Louw of DSD; interviewed by Dr Swanepoel and interviewed by Captain Golding. The minor children were summarily removed from their parents without the children being given any explanation on the evidence before us, a factor which is more pertinent to X given her age, than baby R.

[73] The allegations of the sexual abuse of X by the parents are pertinent to the contact arrangements that can be made between X and her parents, in her best interests.

[74] These contact arrangements, accompanied by the necessary safeguards, are furthermore pertinent to the protection of the integrity of the criminal proceedings that X's parents face, at least insofar as concerns the charges relating to X, as buttressed by the bail conditions that were imposed on the parents on 23 May 2025 when they were released on bail by Mapoma AJ of this Division.

[75] In relation to the placement of X with the first appellant, the learned magistrate held that *“with the pending sexual and child abuse charges against the parents it would not be in [X’s] best interests to stay with [the first appellant] who is a close family member and directly related to the biological mother as the possibility exists that she may be conflicted and inclined to align herself with the parents of the child.”*

[76] The reasoning evinced in the above statement is problematic. On the contrary, the fact of the first appellant being a close family member who is directly related to X's mother is not the stigma that the magistrate ascribed to that relationship, one that disqualifies the first appellant from associating with the children of the second appellant.

If anything, that close familial relationship, in the absence of any other objective disqualifying factors on the part of the first appellant, places the first appellant in a prime position of suitability to care for the children. In addition, the fact that the first appellant is supportive of the parents of the minor children as well as the interests of the minor children presents no conflict. On the contrary, once again, this presents a position of alignment that qualifies, rather than disqualifies her to care for the children.

[77] The allegations facing the second and third appellants are indeed serious, including those relating to X. However, what the application to place further evidence before this Court in this appeal reveals is that, subsequent to their arrest, neither the ACVV, DSD nor the children's representative appointed by the second respondent ever approached the second and third appellants for their version regarding the allegations of the abuse of X levelled against them, for the purposes of determining what was in the best interest of the minor children, and X in particular.

[78] Had they done so, which on their part would have been conduct that accorded with the principles of natural justice in the best interests of the minor children, they would have learnt that the second and third appellants had an explanation that was worth considering at least in that context and included it in their reports to the second respondent who herself seemingly, and concerningly, did not consider this necessary either.

[79] What is of relevance to the present proceedings, in regard to what is in the best interests of X is the further evidence which the appellants have placed before this Court in regard to the sexual abuse of X.

[80] And that evidence is as follows.

[81] According to the second appellant, she and her husband became aware after they returned to South Africa earlier in 2024 that something had happened to X whilst in Qatar as she was making alarming and strange comments. They immediately took

steps to investigate and find out what had happened. At the time that they became aware of the suspected abuse by their neighbour in Qatar, who they believed was assisted by a nanny named Chet that was employed by them at the time, X was already seeing an occupational therapist in South Africa, as a result of certain concerns they had about X.

[82] The second appellant contacted X's occupational therapist and requested her to assist her regarding the concerning statements made by X and asked her to refer her to a paediatric gynaecologist. X attended a session with her occupational therapist during July 2024, and the latter suggested that the second and third appellants appoint a private investigator to ascertain what had occurred in Qatar, which they did.

[83] They also reached out to their legal representative in Qatar to seek his advice. He advised them that they should not proceed to take X to a gynaecologist as, should the gynaecologist find any scarring or abnormalities, the gynaecologist would be obligated to report sexual abuse and since the suspected incident was not yet confirmed, the parents opted to first involve the services of the private investigator and involve a psychologist for X. They had one initial consultation with the psychologist and were in the process of arranging further consultations with someone more experienced to deal with their matter when they were arrested on 31 October 2024. This version is largely supported by correspondence annexed to their application.

[84] There is nothing on the evidence before us to indicate that Captain Golding had this version of the parents prior to her conclusion that it was the the second and third appellants who had abused X to the exclusion of anyone else. Neither did the legal representative for the minor children nor the DSD or ACVV social workers before they reached the same definitive conclusions, and sealed the parents' fate insofar as their entitlement and ability to exercise contact with their children was concerned. Their approach to the whole best interest's inquiry was thus regrettably not balanced, nor was it child-centric, and the uncontested evidence, buttressed by the report of Dr Martalas,

lead to the conclusion that the consequences to these two very young children may well already have been catastrophic.

[85] I see no reason on the facts before this Court, including the information contained in the further evidence placed before us, why X should be deprived of contact with her parents, and they of her now that they are out on bail. There is also no reason why the first appellant cannot care for both minor children, in the absence of the parents, which is now no longer the case.

[86] However, the criminal case against the second and third appellants and X's potential role in it cannot be thought away, for the purposes of considering what is in the best interests of X in the circumstances of this matter. It impacts on the manner in which the second and third appellants can exercise contact with their daughter.

[87] X, is a potential witness in the criminal case, and two of the bail conditions imposed by Mapoma AJ in his order granting the second and third appellants bail on 23 May 2025 stipulated that: (a) the second and third appellants shall reside at their residential property at [...] A[...] Way, Atlantic Beach Golf Estate in Melkbosstrand; and (b) the second and third appellants may not have direct or indirect contact with the complainant or any other witness for the State in the criminal matter.

[88] As a potential witness in the criminal case, X cannot reside with her parents in their home in Melkbosstrand as this would place the parents in breach of their bail conditions. Furthermore, any contact between them and X must first be permitted by the bail court and thereafter be subject to certain safeguards until finalisation of the criminal proceedings.

[89] An appropriate order which not only advances the best interests of X but also does not intrude on the integrity of the criminal proceedings is one to the effect that X be returned to the custody and care of her parents, but only after the bail conditions

applicable to the second and third appellants in connection with the pending criminal case against them have been amended to permit such return.

[90] In the interim, and pending X's return to the custody and care of her parents or the finalisation of the criminal proceedings against them, whichever occurs first, X should be placed in the care of the first appellant as soon as the second and third appellants have secured suitable alternative accommodation which shall be paid for by them, at which accommodation the first appellant shall reside with X; and in such event the second and third appellants should be allowed daily contact with X as follows:

90.1 on school days after school until 18h00.

90.2 during weekends between 11am until 18h00.

90.3 under the supervision of a person approved by Dr Astrid Martalas, at the cost of the second and third appellants.

[91] All costs relating to X's daily living expenses, including but not limited to those for her food, education, medical care, therapy, childcare, transportation and entertainment as well as the costs of running and maintaining the residence at which she will reside with the first appellant shall be borne by the second and third appellants.

[92] The second and third appellants' contact with X as envisaged above shall occur only in the event that the bail conditions applicable to them in connection with their pending criminal case have been amended to permit such contact.

[93] It is another necessary safeguard that the appellants be ordered not discuss with the minor children, or in their presence, any details concerning or in connection with the second and third appellants' arrest, their incarceration and the pending criminal proceedings; and furthermore, the appellants are to ensure that no such discussions are held by any other parties in the presence of the minor children.

[94] The second and third appellants shall reside with baby R, and X should her return to the parents be permitted by the bail court, at [...] A[...] Way, Atlantic Beach Golf Estate, Melkbosstrand or at any other alternative address that they may from time to time be permitted to reside in, in terms of their bail conditions.

[95] Dr Astrid Martalas shall act as the case manager in relation to X, and shall compile monthly reports regarding her welfare, which reports may be submitted to a competent court if called upon to do so. The costs for the services of Dr Martalas shall be borne by the second and third appellants.

[96] The appeal being unopposed, there shall be no order as to costs.

N MAYOSI
ACTING JUDGE OF THE HIGH COURT

I agree. And it is so ordered.

J CLOETE
JUDGE OF THE HIGH COURT

Appearances

For Applicants: Adv A De Wet
Instructed by: Maurice Phillips Wisenberg – CAPE TOWN

For Respondents: No Opposition