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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: **2024-058240**

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED: YES/NO

In the matter between:

V[...] **R[...]** **N[...]**

Applicant

and

B[...] **L[...]** **S[...]**

Respondent

JUDGMENT

VON LUDWIG, AJ

INTRODUCTION

[1] Applicant is the biological father of twins, a boy and a girl, conceived by artificial fertilisation, and born to the Respondent in October 2021.

[2] He seeks a declaratory order that:

- a. *“The gamete donor agreement between the applicant and the respondent dated 11 January 2021, is valid and enforceable”*
- b. *It is declared that the applicant is not considered to be the children’s father or a person holding parental responsibilities and rights as envisaged by the Children’s Act 38 of 2005 (as amended) nor does the applicant have any right responsibility, duty of obligation that would arise in the common law, of the children MS and SNS...*
- c. *That the Respondent pay the costs hereof, in the event of opposition, on the scale as between attorney and client.”*

BY AGREEMENT

[3] I was advised at the outset by counsel that, by agreement, the costs of the application to stay the maintenance court proceedings will be costs in this application.

IN LIMINE

[4] The Respondent has sought condonation for the late filing of her answering affidavit. The Applicant opposes this.

[5] The affidavit was 37 days out of time and her reasons for the late filing: the need to raise funds, and additionally to deal first with an application brought by the Applicant to stay her maintenance court proceedings.

[6] The prejudice that she, and more seriously, the minor children, will suffer if her affidavit is disallowed and the Applicant is permitted to proceed unopposed, could be considerable (which is not to say that the Applicant proceeding unopposed would necessarily result in his order being granted).

[7] Within the context and circumstances of this matter, where the best interests of children are concerned, to ignore the basic principle of *audi alterem partem* is not justified.

[8] I accordingly condone the late filing of the answering affidavit.

FACTUAL BACKGROUND

[9] Applicant – who was and remains married – has one child (now a major) with his wife, and 2 older children.

[10] He and the Respondent (who had no children before these) were involved in a relationship with each other from 2002 to late 2004/2005 (the versions differ). Thereafter, although the exact dates and nature of the relationship are not common cause, it is common cause that they resumed seeing each other, communicated via WhatsApp (“WA”) and engaged in intimate relations from time to time.

[11] It is the Applicant’s version that around December 2020, the Respondent asked him to be gamete donor for her to have a child. When he agreed to do so, it was because of his care and affection for her, to allow her to fulfil her dear wish. He did not want and could not afford another child and his condition was clearly expressed in WA messages on 11 January 2021, which she accepted and upon which basis he donated his sperm.

[12] At the clinic, the Applicant, using an alias, signed a standard “Sperm Donor Consent” form. The document contemplated donation to an anonymous recipient and no contact by the donor or any of his family with any child which might be conceived. He does not have it, nor any copies.

[13] It is common cause that after the fertilisation process, the Applicant and Respondent kept in touch, in person and by WA messages, although the extent and nature of those communications is in issue.

[14] In paragraphs 37 and 38 of his founding affidavit, the Respondent avers that he has not exercised any parental responsibilities and rights nor engaged with the children. This is contrary to the Respondent’s version as set out below.

[15] He contends that the Respondent went on to make financial demands from him and that he “assisted her” because he “cared for her”, not “imposing on himself” any financial obligation.

[16] On 19 March 2024, the Respondent approached the maintenance court. In May 2024, she amended her claim to more than double. The Applicant then brought this application because the Respondent’s actions are “contrary to their agreement” and he must “protect his rights”.

[17] The Respondent contends that the Applicant has failed to satisfy the requirements necessary to secure declaratory relief.

[18] Her factual matrix differs as regards the nature of their relationship. It ended in 2004 when he moved offices but was rekindled (at his urging) in 2006. From 2010 they began to try for a child together. In 2018, they tried IVF and no mention was made of him being a gamete donor. Over 2019 she was not ready to carry a child but in late 2020 they spoke once more about it. This resulted in the January 2021 process.

[19] His message dated 11 January 2021 came “out of the blue” and her response which he contends was an agreement, *“did not mean that I was agreeing with what he said. I simply said, what I said, out of frustration and in light of the fact that we had already invested a lot of time and energy into bringing a child to this earth. I also said, to demonstrate to him, that I was not using the child in order to trap him or break up his marriage.”*

[20] She quotes conversations between them thereafter which she contends illustrate his involvement and delight in the pregnancy and the imminent children.

[21] She further contends that he visited, supported and *“built a relationship with the children to the extent that their (sic) children know him as their father”*. He is further contended to have *“suggested and made plans for their future.”*

[22] Once her work contract was not renewed and she asked for an increase in the “stipend” he paid for the children, he reportedly “*played the sperm donor card*”.

[23] In his replying affidavit, the Applicant’s version is that his “*willingness to assist her conceiving was conditional and aimed at fulfilling her desire while maintaining my own boundaries.*” He denies any intentions to “*have a child as mother and father*” and contends that in all the conversations his intention was to donate his sperm but not take on any financial responsibility.

[24] The Applicant denies the Respondent’s version and persists with allegations of wanting to help “her” (which word he underlines) because he cared for her, and cautions that she must not mistake the “*hand of friendship*” for a paternal role. He accuses her of mischaracterising his involvement because she wanted more from their relationship, but nowhere does he expressly deal with or explain her specific allegations about suggesting names, suggesting activities and enrichment, visiting and forming relationships with the children, all of which are met with standard blanket denials.

THE LAW

[25] In the Applicant’s words, his case will “*demonstrate that I fall within the ambit of s40(3) of the Children’s Act¹ and therefore no rights and responsibilities accrue to me.*”

[26] Section 40(3) states that

“*...no right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial fertilisation and any person whose gamete has or gametes have been used for such artificial fertilisation or the blood relations of that person, except when –*

(a) *That person is the woman who gave birth to that child; or*

(b) *That person was the husband of such woman at the time of such artificial fertilisation”*

¹ Act 38 of 2005.

[27] The relief sought by the Applicant is in the nature of a declaratory order and for that we turn to s21(1)(c) of the Superior Courts Act.²

21. Persons over whom and matters in relation to which Divisions have jurisdiction

[28] (1) *A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all of offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and had the power—*

- (a) *To hear and determine appeals from all Magistrates' Courts within its area of jurisdiction;*
- (b) *To review the proceedings of all such courts;*
- (c) *In its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation notwithstanding that such person cannot claim any relief consequential upon the determination.”*

[29] In essence, the purpose of a declarator is to confirm a legal position against a backdrop of common cause facts.

CASE LAW

[30] The cases cited by the Applicant in support of his case are not in fact helpful to the Applicant and are materially distinguishable.

[31] In *QG and another v CS and another*³ there was an undisputed donor agreement with specific and detailed terms. The gamete recipients were already married to each other and there was no question of the donor and the recipient ever having had any kind of intimate, sexual, romantic or possible co-parenting relationship. The biggest distinction however is that the undisputed gamete donor

² Act 10 of 2013.

³ 2021 ZAGPPHC 366 (17 June 2021).

later sought contact with and involvement with the child, which is the exact opposite of what applicant herein seeks. The fact that s40(3) had the effect of excluding the gamete donor from parental responsibilities and rights (which is the result Applicant herein wants), does not help the Applicant in this case to illustrate applicability of the section to his facts, because the exclusion in the quoted case was to preserve the best interests of the child and the gamete-donee couple.

[32] I do not find the case of *AV and another v DC and others*⁴ helpful to the Applicant either. Once again, the facts are materially different, with the gamete recipients being a couple. There was no formal gamete donor agreement and the donor was very involved in the child's life. But the material difference yet again is that the donor was seeking inclusion as opposed to exclusion. Although, the Respondent was held to be a gamete donor, the court awarded him contact, he had a role to play in signing travel documents, and his maintenance obligations to the child were to be dealt with. This is precisely the result that the Applicant does not want, but there is little in the arguments and learning set out in that case to support the conclusion he seeks in this one.

[33] *EJ and others v Haupt NO*⁵ also dealt with the acquisition of rights as opposed to confirming the absence of responsibilities or rights. It was not the gamete donor who sought relief, but the spouse of the gamete-donee. Yet again, the inclusionary approach was favoured, which does not support the stance of the Applicant herein.

[34] On a different track, and with regard to the fact that there appears clearly to be a material dispute of fact, the Respondent referred to the Constitutional Court authority for her proposition that the Court cannot refer the matter to oral evidence if this relief is not sought by the Applicant.

Overall Analysis

⁴ [2024] ZAGPJHC 626 (26 June 2024).

⁵ [2021] ZAGPPHC 556 (11 August 2021).

[35] Applicant fathered twins with Respondent, with whom he had an on-off but long term romantic and intimate relationship.

[36] Because this was done by artificial fertilisation the Applicant contends that the provisions of s40(3) of the Children's Act apply and he cannot in any respect be considered as having any responsibilities or rights in respect of the twins.

[37] The wording of the relief sought by the Applicant is clumsy and it seems that he relies on the Court to follow the logical trail which he would require to succeed with his submissions, namely that:

- There is a binding gamete-donor agreement between himself and the respondent;
- Because of such agreement s40(3) is of application and there is no right, responsibility, duty or obligation between him and the children born of respondent.

[38] Instead, he begins with the assumption that there is a gamete-donor agreement between himself and respondent and asks the court to find that it "is *valid and enforceable*" and as consequence thereof. *"It is declared that the applicant is not considered to be the children's father or a person holding parental responsibilities and rights as envisaged by the Children's Act 38 of 2005 (as amended) nor does the applicant have any right, responsibility, duty of obligation that would arise in the common law, of the children MS and SNS"* which is not what the Act expressly says.

[39] It is abundantly clear from the Respondent's answering affidavit that she disputes that there was any such agreement in place between the parties. Her version is not improbable and is far from a bald denial.

[40] Much as Applicant slates Respondent for referring to him as a "seasoned legal practitioner" and calls this "a jab, hoping to somehow influence the court's view." his own papers correctly cite him as "practising senior counsel" and the fact that he did not reduce his alleged agreement with the Respondent to a formal document cannot be ignored, especially in light of all the emotional messages

exchanged between them over the years and at the particular time relevant to this “transaction”.

[41] The Applicant has thus failed very simply at the first hurdle in that he has not shown to this Court that there is a gamete-donor agreement between himself and the Respondent which this Court could declare to be “*valid and binding*” even if it were disposed to do so (which I would not be, having regard to what say about discretion below).

[42] In seeking a declaratory order it is for the Applicant, in the way he has worded the relief sought, to give this Court the agreement which he wants declared to be binding. He has not sought a referral to evidence for the Court to determine if there is in fact an agreement in place because that is not his case. He does not ask this Court to firstly find that there was an agreement and secondly to then declare it to be valid and binding, as a consequence of which s40(3) would apply. He begins with the premise that there is such an agreement in place, but has not been able to satisfy the Court, even on his own version, that this is the case.

[43] Accordingly, the question of whether or not I can refer the issue of the existence of an agreement to evidence when not asked to do so is irrelevant.

[44] Even if I am wrong on any aspects of the above, the Court still has a discretion in terms of s21(1)(c) to conduct the enquiry sought and/or make the determination sought, and the Applicant has failed to satisfy the Court that there is any basis for such discretion to be exercised in favour of the relief the Applicant seeks.

[45] The relief which the Applicant seeks will have the effect of declaring that these children do not have a father and to deprive them of all the benefits attendant on such relationship. The Children’s Act provides that in all child related matters the interests of the children are paramount. Yet the Applicant asks the Upper Guardian of children to apply a section of that very Act to achieve a result which directly prejudices the children. This cannot be what the legislation intended.

[46] Erudite and eminent Judges have fortunately, before me, dealt with the intention of s40(3). It is clear that has a vital role to play in artificial fertilisation and the protection of parties donating gametes to enable childless persons to bear children without risk to the donors. However it is not there as an escape for biological fathers from their parental responsibilities.

[47] The effect of the declaratory order which the Applicant seeks, on the minor children, whose interests must be paramount, would be gravely prejudicial. The prejudice to the Respondent in carrying the entire financial burden for these children alone especially in her current financial predicament, albeit unforeseen by both parties, is likewise severe. The “prejudice” to the Applicant in having to comply with a duty to support children whom he participated in bringing into this world, as a highly qualified, employed adult is negligible by comparison.

[48] For the Applicant to rely on case law which focuses on inclusion of child-centric donors in an attempt to motivate his exclusion from responsibilities was unwise.

[49] The stated purposes of the Children’s Act include “to promote the perseverance and strengthening of families”⁶ and “generally to promote the protection, development and well-being of children.”⁷

[50] To use a section of the Children’s Act to “protect my rights”, as the Applicant says, over the rights of children, and over his responsibilities, cannot ever be what the legislation intended and this court will not exercise its discretion to make any determination which has that effect.

[51] I am thus of the view that the Applicant’s application must fail.

COSTS

⁶ Section 2a.

⁷ Section 2b(i).

[52] It is distasteful that the Applicant, seeking to use this application to put an end to the Respondent's claim for maintenance for her children, should seek costs against her, let alone on an attorney and client scale in the circumstances of this matter.

[53] In argument, the Applicant sought the costs of 2 counsel both on scale B. The Respondent contended also for costs and that leading counsel's costs ought to be on Scale C and the junior on Scale B. The Applicant responded that since none are senior counsel all should be on Scale B.

[54] Since the Applicant considered the use of two counsel to be necessary, and since the Respondent is opposing relief which will have a material effect on the futures of her children and herself, I am inclined to permit the costs of two counsel as my order below indicates.

ORDER

[55] I thus made the following Order:

- A. The Applicant's application is dismissed;
- B. The Applicant shall pay the Respondent's costs, to include the costs of two counsel, all to be on Scale B.

C VON LUDWIG
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant:

Adv L Grobler and Adv TM Makola instructed by Ramushu Mashile Twala

For the Respondent:

Adv VD Mtsweni and Adv SS Maelane instructed by ST Mahlangu Attorneys

Date of Hearing: 26 March 2025

Date of Judgment: 18 July 2025

