REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(1) REPORTABLE: Electronic Reporting only.
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

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Case No. 27515/2011

In the matter between:

P First Applicant

P Second Applicant

and

S Respondent

JUDGMENT

MEYER, J

[1] This matter concerns the determination of all the parental responsibilities and rights in respect of a three year old girl, S, who was born on 25 June 2008. The first

applicant is her father and the respondent her mother. They were never married to each other. The second applicant is her paternal grandmother.

[2] The first applicant, in the first instance, sought a declaratory order that he had acquired full parental responsibilities and rights in respect of S, as envisaged in sections 18 and 21 of the Children's Act 38 of 2005, to care for her, to maintain contact with her, to act as her guardian, and to contribute towards her maintenance. This is a proper case in which such declaration ought to be made and this claim was correctly, in my view, not opposed by the respondent.

[3] Past attempts between the first applicant, the respondent, and their respective legal representatives, at defining the applicants' contact with S, and of quantifying the first applicant's responsibility to contribute towards her maintenance, have failed. A determination of these elements of parental responsibilities and rights also form part of the relief sought in these proceedings.

[4] The parties - at the doors of this court - resolved the issue relating to the applicants' future contact with S. Their agreement relating to the definition of the applicants' future contact with S essentially followed the recommendations of Ms Robyn Fasser, a clinical psychologist, and *inter alia* provides for the appointment of a case manager and the preparation of a parenting plan. I was satisfied that the draft order that had been prepared by the parties, which provides for a declaration that the first applicant had acquired full parental responsibilities and rights in respect of S, the definition of the applicants' future contact with S, the appointment of a case manager

and the preparation of a parenting plan, would benefit and serve the best interests of S. I accordingly granted an order in terms thereof.

[5] The only issue remaining is the quantification of the first applicant's duty to contribute to the maintenance of S. A consideration of the entire set of facts that are presented in the various affidavits filed in these proceedings leads me to agree with the submission of Mr Wim Trengove SC, who appeared with Ms Jenny Woodward SC for the applicants at the postponed hearing concerning the first applicant's duty to contribute to the maintenance of S, that even though the first applicant has been contributing towards the maintenance of S since her birth, the scope of the first applicant's maintenance obligation remains a very real and heated dispute between the first applicant and the respondent.

[6] It is undisputed that the parties previously agreed on the terms of a settlement in relation to the first applicant's duty to contribute towards the maintenance of S as well as a definition of the applicants' contact with S. They agreed that the first applicant would contribute the sum of R5, 000.00 per month as maintenance for S escalating at 10% per annum, maintain her on a medical aid scheme at his cost, and pay for her educational costs in due course. On 10 July 2009, the respondent refused to sign the agreement only because she did not wish the second applicant's contact with S to be 'in black and white'.

[7] On 11 August 2009, the respondent instituted proceedings against the first applicant in the maintenance court. She did so by a subpoena served on the first applicant at half-time in an international soccer match in which he played. A further

subpoena was subsequently served on the first applicant, which called on him to attend a maintenance enquiry on 22 September 2009. Attempts at resolving the maintenance court proceedings failed. The matter was set down for hearing on 3 June 2010. The first applicant was anxious for the matter to be determined and finalised, and he accordingly insisted that the enquiry proceed on the day allocated for the hearing thereof. On 31 May 2011, however, the respondent, without explanation, withdrew the maintenance proceedings against the first applicant.

[8] A few days prior to the withdrawal of the maintenance proceedings in the maintenance court, the respondent, on 26 May 2011, initiated maintenance proceedings against the first applicant in a court in England, which proceedings are presently pending. The respondent has also from time to time made different claims in respect of the amount that the first applicant ought to contribute to the maintenance of S.

[9] I interpolate by referring to the competence of the first applicant's present claim for the scope of his duty to maintain S to be determined in these proceedings where no claim for a contribution to the maintenance of S is made against him. The High Court is, in terms of s 19(1)(a)(iii) of the Supreme Court Act 59 of 1959, vested with the power,

> '… 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.'

[10] S 19(1)(a)(iii) of the Supreme Court Act calls for a two-stage enquiry. The Supreme Court of Appeal, in *Cordiant Trading CC v Daimler Chrysler Financial Services* 2005 (6) SA 205 (SCA), paras 16 and 18, said this:

> 'Although the existence of a dispute between the parties is not a prerequisite for the exercise of the power conferred upon the High Court by the subsection, at least there must be interested parties on whom the declaratory order would be made binding. …
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> [T]he two stage approach under the subsection consists of the following. During the first leg of the enquiry the Court must be satisfied that the applicant has an interest in an "existing, future or contingent right or obligation". At this stage the focus is only upon establishing that the necessary conditions precedent for the exercise of the Court's discretion exist. If the Court is satisfied that the existence of such conditions has been proved, it has to exercise this discretion by deciding either to refuse or grant the order sought. The consideration of whether or not to grant the order constitutes the second leg of the enquiry'

[11] In *Adbro Investment Co v Minister of Interior* 1961 (3) SA 283 (T), at p 285D, it was held that for a court to grant a declaratory order in the exercise of its discretion

> 'some tangible and justifiable advantage in relation to the applicant's position with reference to an existing, future or contingent legal right or obligation must appear to flow from the grant of the declaratory order sought.'

Also see: *Myburgh Park Langebaan v Langebaan Municipality* 2001 (4) SA 1144 (C), at p 1153F-G.

[12] I am of the view that the necessary conditions precedent exist to make a declaration regarding the quantification of the first applicant's maintenance obligation towards S and that it is 'eminently desirable' that it be done. See: *Compagnie Interafricaine de Travaux v SA Transport Services* 1991 (4) SA 217 (A), at p 231B. Both parties seek for the scope of the first applicant's support obligation to be determined, albeit in different courts. The best interests of S unquestionably demand that the scope of her father's responsibility for her maintenance be determined. The respondent states in her answering affidavit that '[i]t would not serve (S's) interests for

her maintenance, over the next 20 years, to be subject to (the first applicant's) moods and whims.'

[13] Relying on *Ex parte Sadie* 1940 AD 26, *Kethel v Kethel's Estate* 1949 (3) SA 598 (A), and *Wolman v Wolman* 1963 (2) SA 452 (A), Mr Warren Banks, who appeared for the respondent, submitted that if this application had been instituted for a declaration of rights in respect of a minor child then a *curator ad litem* would have to be appointed to represent the child. I disagree with counsel's submission in this regard. The decided cases on which counsel relied do not concern proceedings for the determination of the scope of a parent's maintenance obligation towards his or her minor child, but they concern proceedings relating to the interpretation or validity of wills and the appointment of a *curator ad litem* to represent minors and unborn issue whose possible rights might be affected.

[14] I should also mention that counsel did not rely on s 28(1)(h) of the Constitution of the Republic of South Africa Act 108 of 1996, which provides that '[e]very 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 injustice would otherwise result.' It has not been shown that injustice, let alone substantial injustice, would result if a *curator ad litem* is not appointed to S.

[15] The respondent has raised the defence of *lis pendens* on the grounds that the same issue, namely the scope of the first applicant's duty to support S, is pending in a court of a foreign state, England, having jurisdiction over the applicant. A court has a discretion whether or not to allow a matter to proceed notwithstanding that the same

issue is pending in another suit in a court of competent jurisdiction. Considerations of convenience and of equity are generally decisive in the exercise of that discretion (see: *Van As v Appollus en Andere* 1993 (1) SA 606 (CPD), at p 610D – F), although the provisions of s 28(1) of the Constitution, which provide that '[a] child's best interests are of paramount importance in every matter concerning the child', and of s 9 of the Children's Act, which provide that '[i]n 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', enjoin a court to apply that principle of paramountcy also in the exercise of the discretion whether or not to allow a defence of *lis pendens* to succeed in matters concerning children.

[16] Assuming in the respondent's favour that all the necessary elements of the *lis pendens* defence are present, I am of the view that the fact that a court of competent jurisdiction in England may make a maintenance order in time to come does not warrant a suspension of part of the relief claimed in these proceedings wherein this court is called upon to determine all the elements of parental responsibilities and rights pertaining to and in the best interests of S. Compare: *Hubert v Hubert* 1960 (3) SA 181 (WLD), at p 185 C – E. The considerations, which in the best interest of S, tip the balance against allowing the defence of *lis pendens* are that the respondent and S have always been resident within this court's jurisdiction. This court is the upper guardian of S. The first applicant is a South African citizen by birth who owns immovable and movable property here. This court in these proceedings is called upon to determine all the elements of parental responsibilities and rights pertaining to S. Parental responsibilities and rights, in terms of s 18(2)(d) of the Children's Act, include the

responsibility to contribute to the maintenance of a child. The respondent, in her answering affidavit, states that S '… is 3 years of age. Her needs and desires are going to change substantially from time to time.' The order which I have already granted includes the obligation upon the parties to jointly appoint a case manager to protect the best interests of S and to assist them in resolving any conflict which may arise between them. The Maintenance Act 99 of 1998 also provides a procedure tailor-made for the determination of any future disputes that may arise between the first applicant and the respondent relating to the legal duty of the first applicant to contribute to the maintenance of S. Other considerations of convenience and of equity include that the expenses relating to the maintenance of S are and will continue to be incurred in South Africa and that she must be maintained according to local standards.

[17] It is trite that a child is entitled to be maintained by his or her parents and that they are jointly obliged to provide the child '… with everything that it reasonably requires for its proper living and upbringing according to their means, standard of living and station in life.' See: *Herfst v Herfst* 1964 (4) SA 127 (WLD, at p 130C - H.

[18] The respondent is employed as a campaign manager in Johannesburg and her net monthly income is in the region of R5, 000.00. The first applicant is a professional soccer player and he is financially able to pay any amount of maintenance required to meet the reasonable needs of S. The parties have never lived together and the respondent has resided at her parental home in Roodepoort for as long as the first applicant has known her.

[19] The respondent has not refuted the first applicant's estimation of the reasonable requirements of S, nor has she presented any evidence that S's reasonable requirements exceed those proposed by the first applicant in terms of the draft order that was handed in on his behalf, which provides for payment of an amount of R12, 000.00 per month together with all S's medical expenses, all her reasonable educational expenses - including the cost of private schooling, reasonable tertiary education at a university or institution of higher learning in South Africa, and various expenses incidental thereto - and the reasonable costs in respect of an *au pair* for her.

[20] The amounts proposed by the first applicant in quantification of his duty to contribute to the maintenance of S, exceed the amounts to which the first applicant and the respondent agreed during 2009, and such amounts also exceed the first applicant's present payments towards the maintenance of S, which are monthly payments of £960.00 sterling, the retention of S at his cost on a medical aid scheme, and the payment of her medical expenses.

[21] I am accordingly, on the facts presented in this application, satisfied that the reasonable requirements of S are justly provided for in the proposed draft order.

[22] Finally the matter of costs. The applicants have been substantially successful in these proceedings. I have, however, been informed by counsel for the applicants that no order of costs is sought against the respondent. I consider an order that each party pays his or her own costs of the application, which is provided for in paragraph 2 of the proposed draft order, to be the appropriate order to make.

[23] In the result, I grant an order in terms of the draft order, which is signed and dated by me.

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P.A. MEYER
JUDGE OF THE HIGH COURT

12 April 2012

Dates of hearing:	1 December 2011 and 28 February 2012
Counsel for the applicants:	Mr Wim Trengove SC Ms Jenny Woodward SC
Counsel for the respondent:	Mr Warren Banks
Attorneys for the applicants:	Gary Janks, Sandton
Attorneys for the respondent:	Shields Chiat Attorneys, Illovo, Johannesburg