REPUBLIC OF SOUTH AFRICA

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

CASE NO: 42335/2014

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

[R…….], [B…….] [R…..] [M…..] First Applicant

[R……..], [S…….] Second Applicant

And

[M…….], [T……] [O…..] Respondent

In re:

[L…….] [R…….]

JUDGMENT

KATHREE - SETILOANE J:

[1] As will become clear during the course of the judgment, this matter is unusual in more than one way. Mr [B……] [R……] and Mrs [S……..] [R……] ("the first and second applicants") seek an order, inter alia, declaring that the first applicant is the biological father of the minor child, [L……] [R……], who was born on 18 April 2005 *("Leago")*, and is currently 10 years old. They also seek an order varying the interim order, which was granted by Tsoka J in a Rule 43 application on 4 September 2013 under case 21697/2013.[1]

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[1] The applicants seek the following relief in their notice of motion:

'1. Declaring the First Applicant to be the biological father of the minor child, [L…..] [R…….]

2. Declaring the First Applicant to be a co-holder of full parental responsibilities and rights in respect of LEAGO together with the Second Applicant, as provided for in section 18(2)(a)-(d) of the Children's Act, 38 of 2005.

3. Declaring that primary residence of Leago be awarded to both First and Second Applicants.

4. Declaring the First and Second Applicants to be the sole holders of parental responsibility of maintenance in respect of LEAGO.

5. Varying the order of the Honourable Judge Tsoka dated 4 September 2013 under case number 21697/2013 as follows:

5.1 by deletion of paragraph 1;

5.2 by deletion of paragraphs 3, 4, 5, 6, 7 and 8 and the substitution therefor of the following:

"3 The Applicant shall be entitled to exercise contact to Leago as follows:

3.1 Every alternative Saturday from 10h00 to 17h00 during the school term;

3.2 One week, during long school holidays and such week should not be the week during which [L……s] birthday falls provided Respondent shall provide suitable accommodation for her while Leago resides with him.

3.3 The Applicant shall collect and return [L……..] at the Respondents residential address unless otherwise agreed between the parties in writing;

3.4 The Applicant shall provide the Respondent with his address where [L…….] shall be staying and his telephone contact number before he removes Leago in terms of this order to exercise his rights of contact.

4. That the contact arrangements be reviewed annually by the Family Advocate and/or such other experts as this Honourable Court may deem appropriate having regard to the best interests of [L…….] and her .wishes."

[2] The respondent, Mr [T…….] [O…….]. [M……] (“the respondent”) and the second applicant married each other in terms of customary law, as envisaged by the Recognition of Customary Marriages Act 120 of 1998, on 21 March 2004. Two daughters were born of their marriage: [L……], who was born on 18 November 1993 and is now a major and Leago, who was born on 18 April 2005 and is currently 10 years old. On 1 August 2008, when [L……] was three years old the relationship between the respondent and the second applicant ended as she vacated the communal home. They have lived apart since 1 August 2008.

[3] Seemingly unaware that their customary marriage was recognized as legal, the second applicant and the respondent married other partners subsequent to their separation – the respondent married his current wife first by customary union and thereafter by civil law in 2013 and was blessed with a baby daughter, and the second applicant married the first applicant by customary union on 8 September 2012, and thereafter by civil law on 15 January 2014. On being advised that he had to file for divorce, the respondent instituted a divorce action against the second applicant on 20 June 2013. In his particulars of claim, the respondent attributes the break-down of his relationship with the second applicant to the extra-marital relationship which she had with the first applicant. He alleges that:

‘7. The marriage between the parties has irretrievably broken down and the marriage relationship between them has reached such a stage of disintegration that there is no reasonable prospect of restoring a normal marriage relationship between them in that;

…

7.3 The Defendant committed adultery at times and places at present to the Plaintiff unknown, with another man a certain [B……], during the greater part of the marriage and claims that she has born him the child of the marriage,[L……], who the Plaintiff has raised as his own child.

7.4 The Defendant was secretive about her relationship with [B…..] and led a double life with [B…….] on the one hand and Plaintiff on the other.’

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6. That the Respondent be ordered to make payment of the costs of the application only in the event of opposition.

7. Further and/or alternative relief.’

[4] In addition, the respondent alleges that it would be in the best interests of L….. that: (a) the parties retain full parental rights and responsibilities in respect of L…….. in terms of s 18 of the Children's Act 38 of 2005 ("the Children's Act"); (b) the parties shall have shared residency of L……; and (c) each party shall have contact with L…… in the terms as sought in prayers 4.1 to 4.7 of the particulars of claim. The second applicant defends the divorce action and pleads that L……. was born on 18 April 2005 of the relationship between herself and the first applicant, B……. R…….. She disputes that it would be in the best interests of L…… that the parties shall retain full parental rights and responsibilities in respect of L……. in terms of s 18 of the Children's Act; that they shall have shared residency of L…….; and that each of them will have contact with L……. in the terms sought by the respondent in prayers 4.1 to 4.7 of the particulars of claim.

[5] On 20 June 2013 the respondent also instituted Rule 43 proceedings against the second applicant in which he sought contact to L…... The second applicant counter-claimed seeking maintenance for L….. On 4 September 2013 Tsoka J granted an order in terms of which the respondent was awarded interim contact to L…… on certain specified terms and the second applicant was granted interim maintenance for L……. The respondent brought the Rule 43 application on the basis that the parties were married; that he was the biological father of L……. and had full parental responsibilities and rights in respect of L……. This was not disputed by the second applicant and Tsoka J awarded care and guardianship jointly to the respondent and the second applicant.

[6] Notwithstanding the order granted by Tsoka J, the applicants allege in the founding affidavit that from the time the respondent moved out of the shared home in 2008 until the Rule 43 proceedings in 2013, the respondent failed to maintain and have contact with L……, and that since 2008, the first applicant has been supporting L…… in that he provided for her everyday needs, paid for her schools fees, retained her on his medical aid and attended her school activities. In addition, they contend that in actual fact, the second applicant and L….. have been residing with the first applicant and since July 2011 L…….. regards the first applicant as a father figure. They also contend that notwithstanding the interim maintenance order made in terms

of Rule 43, the respondent has neglected to fulfill the obligations stipulated in the interim court order and sometimes fails to contact L……. as arranged.

[7] The respondent opposes this application on the grounds that:

(a) the second applicant did not dispute L……'s paternity in the Rule 43 application;

(b) by virtue of the legal presumption *pater est quem nuptiae demonstrant* L…… is deemed to be his child as she was born during his marriage to the second applicant; and

(c) L…….'s paternity is a matter to be decided in the pending divorce action.

[8] The applicants contend that they did not dispute the respondent's paternity of L…… in the Rule 43 application, as they were not aware at that stage that the first applicant is the biological father of L….. The respondent, however, insists that until the contrary is proved, L……. is deemed to be his child by virtue of being born during the subsistence of the marriage between him and the second applicant. During September 2013, and after the interim order in the Rule 43 application was granted by Tsoka J, the first applicant suspected that because L….. strongly resembled him, he may be her father. The first and second applicants together with L…… submitted to paternity tests at Unistel Medical Laboratories (Pty) Ltd. On 3 October 2013, the results confirmed that "All fifteen (15) markers are compatible with parentage. Paternity of individual 1 (MR B R M R……., ID 7…….) is confirmed with a high degree of certainty)"

[9] Although the respondent does not deny that the results of the paternity test establish that the first applicant is the biological father of L…... he contends in his answering affidavit that:

'The paternity tests were belatedly done during the course of our marriage and it was done without my knowledge or consent. I would not have consented to a paternity test because I do not believe that this would be in the best interests of L……..'

The applicants contend that since there is no longer a dispute of fact in relation to the first applicant's paternity of L…… as he has rebutted the legal presumption relied upon by the respondent by undergoing a paternity test the results of which establish him to be L……'s biological father, it is incumbent upon the court in these proceedings to grant them the relief sought in the notice of motion as it is not in the best interest of L…… that the issue of paternity should stand over for determination by the divorce court in a few months from now.

[10] L…….. was born *stante matrimonio* and there is thus a legal presumption (*pater est quem nuptiae demonstrant*[2]) that the respondent is the father of L…….. Paternity can of course be established on a balance of probabilities[3]. Until then, the child is regarded as 'a child born of married parents' and the husband will, together with the mother, have parental power or parental responsibilities and rights over the child concerned. Therefore, as things currently stand, the respondent is regarded by law as the father of L……. Section 37 of the Children's Act provides that:

'if a party to any legal proceedings in which the paternity of a child has been placed in issue has refused to submit himself or herself, or the child, to the taking of a blood sample in order to carry out scientific tests relating to the paternity of the child, the court must warn such party of the effect which such refusal might have on the credibility of that party.'

In *YM v LB*[4] the SCA held that in cases of disputed paternity, scientific testing such as blood or DNA testing should not be ordered where paternity has been shown on a balance of probabilities. However, the SCA went onto hold that:

"No doubt there are cases where there is genuine uncertainty as to paternity and a DNA test should be ordered for the child in question. It is within the inherent power of a court, as the upper guardian of children, to order scientific tests if it is in the best interests of a child, as Murphy J found [in *LB v YD* 2009 (5) SA 463 (GNP) para 22]. And indeed s 37 of the Children's Act anticipates the use of scientific tests to determine paternity. It provides that, where paternity is in issue in legal proceedings and a party refuses to submit to 'scientific

[2] The common law presumption *pater est quem nuptiae demonstrant* deems a woman's husband to be the father of all children born during their marriage. The presumed fact – paternity – can be rebutted by evidence that shows on a balance of probabilities that the husband is not the father of a child.
[3] In *YM v LB* 2010 (6) SA 338 (SCA).

[4] 2010 (6) SA 338 (SCA) para 13

tests', the court must warn him or her of the 'effect which such refusal might have on the credibility of that party'. But this is not a case in which the inherent power need have been invoked, given that paternity was not disputed.'[5]

[11] The respondent concedes in his answering affidavit that he was invited by the applicants to submit to a paternity test, but declined to do so and is "perfectly content to have the court deal with [his] refusal and maybe also [his] credibility." It bears mention that the respondent has not, at this stage, been warned by a court of the "effect which such refusal might have on his credibility". It is not appropriate, in my view, for this Court in these proceedings to warn the respondent of the effect which his refusal might have on his credibility, as that is the function of the divorce court in the pending divorce action, where the respondent's paternity of L……. is disputed. No credibility finding can, therefore, be made against the respondent in these application proceedings.

[12] The first applicant claims, by virtue of the results of the paternity tests, that he is the biological father of L…. and that he has taken parental responsibility in respect of her. The respondent also asserts that he has parental rights and responsibilities in respect of L…… and has raised her as his own child. The second applicant and the respondent take issue with one another over these issues. Peculiarly, however, despite disputing the respondent's paternity of L…… and his parental rights and responsibilities over her in the divorce proceedings, the second applicant did not dispute these aspects in the Rule 43 application. Thus, pending finalization of the divorce proceedings between the second applicant and the respondent, Tsoka J granted them joint parental rights and responsibilities with regard to the care of L…. as well as joint guardianship. The first applicant is not a party to the divorce proceedings and was not a party to the Rule 43 application. This notwithstanding, the applicants seek a declarator that the first applicant is a co-holder of full parental responsibilities and rights in respect of L…… together with the second applicant as provided for in s 18(2) (a) - (d) of the Children's Act, and that the both of them have sole parental responsibility of maintenance in respect of L……, to the exclusion of the respondent.

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[5] *YM v LB* at para 13.

[13] It is contended on behalf of the respondent that the determination of the issue of the respondent's paternity of L……., and his parental responsibilities and rights over her, is the function of the divorce court in the pending divorce proceedings, as the second applicant and the respondent take issue with one another over these issues in the divorce action. The applicants quite clearly launched the present application well knowing that these issues have been raised and are disputed in the divorce action. The first applicant has, however, not intervened in the divorce proceedings and it is at best questionable whether he can obtain relief in these proceedings where, as indicated, the primary issues for determination are integral to the finalization of the pending divorce action.

[14] The respondent also contends that because the relief sought by the applicants in these proceedings will impact negatively upon his parental rights and responsibilities in respect of L……., he is entitled to present oral evidence to the court in the pending divorce action on his relationship with L……., his contribution to her upbringing and his commitment to her as a parent. Significantly, in this regard, s 20 of the Children's Act provides:

'The biological father of a child has full parental responsibilities and rights in respect of a child –

(a) if he is married to the child's mother; or

(b) if he was married to the child's mother at –

(i) the time of the child's conception;

(ii) the time of the child's birth; or

(iii) any time between the child's conception and birth.'

Although s 20 of the Children's Act refers specifically to 'biological fathers' and may arguably be viewed as 'qualifying or even replacing' the common law presumption *pater est quem nuptiae demonstrant* which applies to all married fathers, I am of the view that this could not have been the intention of the legislature, as not only would this interpretation be inconsistent with the common law presumption referred to above, but it would also imply that married fathers would first have to prove biological

paternity before they could acquire parental responsibilities and rights in terms of the section. The logical corollary of this is that all mothers too, would have to prove biological maternity before they can acquire parental responsibilities and rights in terms of s 19[6] of the Children's Act, as that section also refers specifically to "biological" mothers[7]. Thus on a proper reading, s 20 of the Children's Act must be interpreted as conferring parental responsibilities and rights to married fathers from the moment of the birth of the child. In other words, a married father will automatically have parental responsibilities and rights over a child, born during the marriage, from the moment of his or her birth – and would not have to prove biological paternity first.

[15] In contrast, s 21 of the Children's Act makes provision for a biological father who does not have parental responsibilities and rights in respect of a child, in terms of s 20, to acquire full parental responsibilities and rights in respect of that child[8] if, at the time of the child's birth, he is living with the mother in a permanent life-partnership[9] or if regardless of whether he has lived or is living with the mother –

(i) he consents to be identified or successfully applies in terms of s 26 to be identified as the child's father or pays damages in terms of customary law;

(ii) he contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and

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[6] Section 19 of the Children's Act provides:

(1) The biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child.

(2) If –
(a) the biological mother of a child is an unmarried child who does not have guardianship in respect of the child; and

(b) the biological father of the child does not have guardianship in respect of the child,

the guardian of the child's biological mother is also the guardian of the child.

(3) This section does not apply in respect of a child who is the subject of a surrogacy agreement.'

[7] CJ Davel and A Skelton, Commentary on the Children's Act, at pp 3-9.

[8] s 21(1) of the Children's Act.

[9] s 21(1) (a) of the Children's Act.

(iii) he contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period[10].

Thus, unlike an unmarried father who must show that he contributes or attempted in good faith to contribute to the child's upbringing and expenses in order to attain parental responsibilities and rights in terms of s 21(1) (b) of the Children's Act, a married father is not required to contribute to the upbringing and expenses of his child in order to attain parental rights and responsibilities in terms of s 20 of the Children's Act.[11]

[16] As is apparent from the notice of motion, the applicants seek a declaratory order that the first applicant is the father of L…….; that the first and second applicants be accorded full parental rights and responsibilities in respect of L……; and that the applicants are the sole holders of the parental responsibility of maintenance in respect of L…….. They also seek an order varying the respondent's contact to L……. All of these issues have been put into issue in the pending divorce action and are, therefore, central to its finalization. A court will not grant a decree of divorce until it is satisfied that all issues relating to minor or dependent children, who are born of the marriage, are resolved in their best interests. The best interests of the child standard, as prescribed in s 28(2) of our Constitution, determines the outcome of all legal proceedings concerning a child[12]. In respect to the position of minor or dependent children of a divorcing couple, in particular, it is the primary consideration or standard by which to assess the position of the minor or dependent children on divorce.

[17] Since the *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*[13] our courts have consistently held, on grounds of public policy, that motion proceedings are not permissible in matrimonial causes since it is undesirable for a court to grant a divorce without hearing oral evidence of the parties, first because not only is the

[10] s 21(1) (b) (i), (ii) and (iii) of the Children's Act.
[11] *KLVC v SDI* [2015] 1 All SA 532 (SCA) at para 20.
[12] See also: s 7 of the Children's Act, which sets out the factors that must be taken into account whenever a provision of the Act requires the best interests of the child standard to be applied.
[13] 1949 (3) SA 1155 (T) at 1161.

status of the parties themselves involved, but also those of children, and second because of the interests of the State in the preservation of the binding nature of marriage[14]. The question of paternity of L…..and the rights and responsibilities of the parties in respect of L…….. are raised in the divorce action and are as such integral to the matrimonial cause between the second applicant and the respondent. As affirmed in *Ex Parte Inkley and Inkley*[15]:

'The values and attitudes of the community have not, however, changed in regard to the importance of maintaining healthy marriage relationships. It is still, in my view, characterized by a reluctance to see a marriage dissolved without proper consideration being given to all the relevant facts and circumstances. And for this to be done, the judge must be given the opportunity to consider and evaluate the relevant evidence at a hearing which must be commenced by action.'

[18] A court rarely grants a divorce without having had the opportunity to hear the evidence of at least one of the parties in a divorce action, particularly if there are minor or dependent children involved. It is essential, therefore, that the parties to a contested divorce action be given the opportunity to testify and put evidence before the divorce court on the issues that are raised for determination in the divorce action. Where the paternity and parental rights and responsibilities of a husband are in dispute in divorce proceedings, then it is important that he be given the opportunity to present evidence in the divorce action for consideration and evaluation by the judge presiding therein. In terms of s 6(1) of the Divorce Act, 70 of 1979, a decree of divorce may not be granted until the court: (a) is satisfied that the arrangements made or contemplated for the welfare of any minor or dependent child of the marriage are satisfactory or the best that can be achieved in the circumstances[16], and (b) if the family advocate has instituted an enquiry in terms of s 4(1)(a) or (2)(a) of the Mediation of Certain Divorce Matters Act, 24 of 1987, the court has considered the report and recommendations of the family advocate[17]. In order to enable it to assess the arrangements regarding the children of a divorcing couple, s 6 of the

[14] *Room Hire* at 772 A-D; *Ex Parte Inkley v Inkley* 1995 (3) SA 528; *Williams v Tunstall* 1949 (3) SA 835 (T)
[15] 1995 (3) SA 528 para 536 E-H
[16] s 6(1) (a) of the Divorce Act.
[17] s 6(1) (b) of the Divorce Act.

Divorce Act further empowers the court to cause any investigation it deems necessary to be carried out and to order any person to appear before it[18]. The court may order the parties or any one of them to pay the costs of the investigation and appearance[19]. The court may furthermore appoint a legal practitioner (*curator ad litem*) to represent a child at the divorce proceedings and, here again, may order the parties to pay the costs of this representation.[20][21]

[19] The court, accordingly, has extremely wide powers in determining what is in the best interests of the child in a divorce action. As articulated by this Court in *Terblanche v Terblanche*[22] which concerned an application for interim custody in terms of Rule 43 of the Uniform Rules of Court, when a court sits as upper guardian in a matter:

'[I]t has extremely wide powers in establishing what is in the best interests of minor or dependent children. It is not bound by procedural strictures or by limitations of the evidence presented or contentions advanced by the respective parties. It may in fact have recourse to any source of information, of whatever nature, which may be able to assist it in resolving custody and related disputes.'

Although the dicta referred to above related to a custody matter in terms of Rule 43 of the Uniform Rules, it has direct application to the powers of a court in a divorce action as s 1 of the Divorce Act defines the term "divorce action" to mean:

> 'an action by which a decree of divorce or other relief in connection therewith is applied for, and includes−
>
> (a) an application *pendent lite* for an interdict or for the interim custody of, or access to, a minor child of the marriage concerned or for the payment of maintenance; or
>
> (b) an application for a contribution towards the costs of such action or to institute such action, or make such application, *in forma pauperis*, or for

[18] s 6(2) of the Divorce Act.
[19] s 6(2) of the Divorce Act.
[20] s 6(4) of the Divorce Act.
[21] Boberg's Law of Person's and the Family, 2nd Edition, at pp 514-516.
[22] 1992 (1) SA 502 (W) at 504C-D.

the substituted service of process in, or the edictual citation of a party to, such action or such application.'

[20] The applications which may permissibly be launched pending the finalization of a divorce action are those that fall within the definition of the term "divorce action" in s 1 of the Divorce Act. Thus, even though custody of, or access to, a minor child of a divorcing couple is placed in dispute in the divorce action, one or the other parties to the action may launch an application *pendent lite* for interim custody of, or access to, the minor child. Similarly, where the payment of maintenance is disputed in the divorce action, one or the other parties may launch an application *pendent lite* for interim maintenance. Where a court grants the relief sought in an application for interim custody, access and payment of maintenance to a child born of the marriage, the order remains interim in effect until finalized by a court in the divorce action.

[21] It would follow, therefore, that where, as in the current case, the issue of the respondent's paternity and parental rights and responsibilities in respect of the minor child are placed in issue in the divorce action, it would be inappropriate for the parties to then seek to resolve these issues in application proceedings that fall outside those applications which may permissibly be launched pending finalization of a divorce action. Any attempt to do so in my view, may validly be met with the defense of *lis alibi pendens*. I am, accordingly, of the view that except for those applications which fall within the definition of "divorce action" in s 1 of the Divorce Act, it is not appropriate for a party to attempt to circumvent a pending divorce action by applying to have matters (whether disputed or not), which are raised in the divorce action determined by a court in motion proceedings. Thus, any attempt to pre-empt the findings of a divorce court by the institution of motion proceedings to deal with matters that are in issue in the divorce action and concern the parties to the divorce, will effectively fetter the discretion of the judge, presiding in the divorce matter, to hear oral evidence, and to consider and evaluate such evidence at the divorce trial.

[22] The respondent contends that in so far as the relief sought by the applicants in this proceeding has as its objective the termination of his parental responsibilities and rights over L……., such relief cannot be granted on motion proceedings, as it will deny him the opportunity to present oral evidence to the court on his relationship

with L……, the role that he played in her upbringing, his commitment to her as a parent etc. The applicants argue against this contention on the basis of s 28 of the Children's Act, which provides for the termination, extension, suspension, or restriction of parental rights and responsibilities to be dealt with in application proceedings. Section 28 of the Children's Act provides:

'(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 which a specific person has in respect of a child.

(2) …

(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) …'

[23] Section 29(1) of the Children's Act confers jurisdiction on the High Court, divorce courts in divorce matters[23] and children's courts, within whose area of jurisdiction the child is ordinarily resident, to hear an application in terms of s 28 of the Children's Act to suspend, terminate, extend or circumscribe a person's parental responsibilities and rights. *Locus standi* vests in: (a) every co-holder of parental responsibilities and rights; (b) any person who can demonstrate a sufficient interest in

[23] In terms of s 1 of the Children's Act 'divorce court' means the divorce court established in terms of s 10 of the Administration Amendment Act, 9 of 1929.

the child's 'care, protection, well-being or development', (c) the child with leave of the court; (d) any other person acting in the child's interest with the leave of the court; or (d) a family advocate or the representative of any interested organ of state[24]. When considering the application in terms of s 28 of the Children's Act, the court is required to 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[25].

[24] Section 29(3) of the Children's Act provides that a court hearing an application in terms of s 28 may grant the application conditionally 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. The court is required to also consider the general principles laid out in Chapter 2 of the Children's Act, which encompasses the best interests of the child principle[26]. The child's best interests are clearly the overriding consideration in a s 28 application to suspend, terminate, extend or circumscribe a person's parental rights and responsibilities[27].

[25] In terms of s 29(5) of the Children's Act, the court may for the purposes of a s 28 hearing order that (a) a report and recommendation of a family advocate, 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; (d) the applicant or any party opposing the application may pay the costs of any such investigation or appearance. In terms of s 29(6) (a) and (b) of the Children's Act, the court is afforded discretion to appoint a legal practitioner to represent the child at the court proceedings and 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.

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[24] s 28(3)(a)–(e) of the Children's Act.

[25] s 28(4)(a)-(d) of the Children's Act.

[26] s 29(4) of the Children's Act.

[27] L Schafer, *Child Law in South Africa: Domestic and International Perspectives* (2011) Lexis Nexis at pp 260-261

[26] Section 28 read with s 29 of the Children's Act quite clearly provide for a person's parental rights and responsibilities to be suspended, terminated or circumscribed by way of application proceedings. But as is evident from the provisions of s 29(5) and (6), the powers conferred on a court in a s 28 application broadly correspond to those that a court has in respect of the divorce of a couple with minor or dependent children. There should, therefore, in principle be no objection to divesting a parent of his or her parental responsibilities and rights in application proceedings, because a court which is seized with an application in terms of s 28 of the Children's Act to suspend, terminate or circumscribe a person's parental responsibilities and rights, has exactly the same powers as a divorce court in terms of s 6 of the Divorce Act, which seeks to protect the interests of minor and dependent children in a divorce.

[27] However, as already pointed, where in pending divorce proceedings the issue of parental responsibilities and rights of the husband is disputed on the basis of his paternity, then it would be both inappropriate and simply impermissible, in my view, to launch a separate and contemporaneous application under s 28 of the Children's Act to resolve the issue of paternity and parental rights and responsibilities of the husband. It is precisely for this reason that s 28 read with s 29 of the Children's Act confers jurisdiction on a divorce court in a divorce matter to deal with the question of suspending, terminating, extending or circumscribing the parental responsibilities and rights of a parent. Although use of the term "a divorce court in a divorce matter" in s 28 of the Children's Act relates specifically to a regional divorce court established in terms of s 10 of the Administration Amendment Act, 9 of 1929, the same principle must, to my mind, apply to a High Court in a divorce matter.

[28] Thus, where the issue of paternity and parental rights and responsibilities are raised in a divorce action in the High Court, then those issues should not be contemporaneously raised in application proceedings – particularly in matters concerning the minor or dependent children of a divorcing couple, because the finding of a court in the application proceedings will fetter the discretion of the court in the divorce proceedings to hear, consider and evaluate the relevant evidence concerning the child − and decide the issue in the best interests of the child. As indicated, a court sitting in a divorce action may not grant the divorce decree until he

or she is satisfied that any arrangements or contemplated arrangements relating to the children of the marriage are the best possible in the circumstances, and are in their best interests.

[29] In the current matter, the applicants have attached to their application papers a recommendation by the family advocate, Mrs Kathwaroo, in relation to care and contact of L…., dated 3 September 2014, as well as a report by the Family Counselor, LP Ngwenya, dated 1 September 2014 relating to contact. They also attach a report of Dr PM Duchen, a counseling psychologist, dated 12 May 2014. This report predates the institution of the divorce action as well as the Rule 43 application by the respondent. It is apparent from the report of the counseling psychologist that the respondent did not attend the interview with her and nor did he attend joint sessions with L……. The counseling psychologist notes in the report that:

'No final recommendation can be made in the matter as [the respondent] has not completed the assessment. I am not in a position to comment on important aspects concerning the Best Interest of the Child Standard due to the fact that my investigation is incomplete. This aspect includes:

- The nature of the relationship between [the respondent] and L……;
- [The respondent's] attitude toward parental responsibilities and rights;
- [The respondent's] capacity to provide for the needs of L……, including her emotional and intellectual needs;
- L…….'s views and wishes;
- The nature of the parental relationship between [the applicants] and [the respondent]'

In addition, the counseling psychologist notes that the respondent:

'[D]id not attend joint sessions with L…... L…… was prepared for these sessions and looked forward to it. L……. has experienced disappointment and feels extremely let down and by the fact that [the respondent] cancelled such appointment. [The respondent did not reschedule and L…… has been left in a position of uncertainty. These aspects could not be canvassed with the respondent as he did not complete the assessment.'

[30] As is apparent from the report of the counseling psychologist, even if this court were inclined to determine the issues raised in these proceedings, there is insufficient evidence before me to determine what is in the best interests of L……. This would, therefore, necessitate a referral of the issues for determination to oral evidence. However, in view of the pending divorce action, it would be neither appropriate nor efficacious to do so. For this reason, I consider the divorce court in the pending divorce proceedings to be best placed, having heard the evidence of the parties and any other persons it orders to appear before it, to decide the issues for determination in the best interests of the minor child. It may, in this regard, exercise its power to order the counseling psychologist, referred to above, to interview the minor child as well as both the first applicant and the respondent, and submit a revised report to the court. It may also deem it necessary to order the counseling psychologist to appear in court to give evidence. It may, in addition, also deem it appropriate to order the family advocate to produce a new report. Since L……. is ten years old and, as is apparent from the report of the family counselor, clearly has views of her own in relation to her relationship with both the first applicant and the respondent, the divorce court may deem it necessary to order that she be represented in the divorce action by a *curator ad litem*.

[31] The divorce court in the pending divorce action would be best placed, having heard the relevant evidence to make a fair and accurate assessment of what is in the best interests of L…… by inter alia, understanding:

> (a) what the true nature of the respondent's commitment to L…… is, and what his capacity is to act consistently on a supposed firm commitment to her;
>
> (b) the quality of the respondent's parental capacity and his relationship with L……;
>
> (c) the likely effect on Leago of any change in her circumstances including the likely effect of being separated from the respondent and the respondent's other children;
>
> (d) the factors that impact the second applicant's need to protect L…… from ongoing disappointment and upset; and

(e) Understanding factors that can facilitate co-operation between the adults involved in L……'s life.

[32] The paternity test results identify the first applicant as the biological father of L……. He is now also married to the second applicant and has apparently been taking care of L……. since she was 3 years old. This ought to enable him, in terms of s 21(1) (b) of the Children's Act to acquire full parental rights and responsibilities in respect of L……. Determining whether the first applicant satisfies the requirements of s 21(1)(b) of the Children's Act for purposes of acquiring full parental responsibilities and rights is a factual enquiry, which the divorce court is best placed to undertake in the pending divorce action. The first applicant is, however, not a party to the divorce proceedings. It may, therefore, be necessary for him be joined as a respondent in the divorce action. In the circumstances, I deem it just and appropriate to refer the issues for determination in this application to the divorce court for determination in the pending divorce action. In view of the referral to the divorce court, there is no need to determine the applicant's rule 43(6) application to vary the order of Tsoka J in the Rule 43 application.

[33] In the result, I make the following order:

(1) The issues in this application are referred for determination to the divorce court in the pending divorce action.

(2) I make no order as to costs.

_____

F KATHREE-SETILOANE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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Counsel for Respondent:	Ms K Foulkes-Jones SC
Instructed by:	Raymond Joffe and Associates
Date of Hearing:	9 June 2015
Date of Judgment:	13 August 2015