REPUBLIC OF SOUTH AFRICA

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

CASE NO: 1065/2019

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED YES

6 June 2022
Date **Signature**

In the matter between:

YEKISO MARIMA Applicant

and

KARABO JACQUELINE LESELE Respondent

Heard: 23 February 2022
Judgment: 6 June 2022

JUDGMENT

MOVSHOVICH AJ:

1. This is an application by an unmarried father of a child for the declaratory relief that he holds full parental rights and responsibilities in terms of sections 18(2) and (3) of the Children's Act, 2005 ("**the Act**"). He does so because he states that the child is

due to receive pecuniary benefits from his grandmother's estate, but those benefits may only be accessed if the declaratory order sought is granted.

2. The respondent is the mother of the child and she opposes the relief sought on both procedural and substantive grounds. She avers that the applicant was not in a permanent life-partnership with the respondent at the time of the child's birth as envisaged in section 21(1)(a) of the Act, and does not fulfil the requirements of section 21(1)(b) of the Act. She contends, in any event, that before any dispute concerning those sections may be referred to court, the parties are obliged to pursue mediation in terms of section 21(3)(a) of the Act, and that the applicant failed to pursue that route. The applicant states that section 21(3)(a) is not engaged and that there was no intimation prior to the answering papers in this matter that his compliance with sections 21(1)(a) and (b) was disputed.

Key legal principles

3. The Act was, *inter alia*, intended to give effect to the constitutional rights of children, including that they would have family and parental care, and that their best interests would be of paramount importance in the consideration of any matter concerning those children;[1] and to "*promote the protection, development and well-being of children*".[2]

4. The Act enjoins all proceedings concerning a child to respect, protect, promote and fulfil the child's constitutional rights, to treat the child fairly and equitably, and to ensure that the standard of the best interests of the child is observed.[3] It also states that in

[1] Section 2(b) of the Act.

[2] Section 2(i) of the Act.

[3] Sections 6(2) and 9 of the Act.

matters concerning children, an approach "*conducive to conciliation and problem solving should be followed and a confrontational approach should be avoided*".[4] The Act also impels that delays are avoided as far as possible.[5]

5. It seems to me that any court or other decision concerning the child must be taken with due regard to and in fulfilment of the objectives and principles set forth above. This may, in appropriate cases, require the adaptation or modification of the common law and other legal principles which would otherwise be generally applicable outside the context of children. Moreover, the provisions of the Act must be interpreted with those principles and objectives firmly in mind.

6. Section 20 of the Act assigns full parental rights and responsibilities to the biological father of a child who was at any stage from the child's conception to his/her birth married to the child's mother or who is at present so married.

7. The position of *unmarried* fathers is dealt with in section 21 of the Act. Section 21(1)(a) states that an unmarried father who was at the time of the child's birth living with the mother in a permanent life-partnership acquires full parental rights and responsibilities. In cases other than permanent life partnerships, the unmarried father acquires these rights and responsibilities if he:

> "*regardless of whether he has lived or is living with the mother –*
>
> *(i) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law;*

[4] Section 6(4)(a) of the Act.

[5] Section 6(4)(b) of the Act.

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

(iii) contributed or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period."[6]

8. Whether the requirements of section 21(1)(a) or (b) are met is a question of fact.[7] The Supreme Court of Appeal left open the question whether the requirements in section 21(1)(b)(i) to (iii) are cumulative or disjunctive.[8] A judgment in the Western Cape High Court held them to be cumulative;[9] whereas a decision of this Court in *I v C* appeared to assume otherwise.[10]

9. Finally, section 21(3) of the Act states as follows:

"*(a) If there is a dispute between the biological father referred to in subsection (1) and the biological moth of a child with regard to the fulfillment by that father of the conditions set out in subsection (1)(a) or (b) , the matter must be referred for mediation to a family advocate, social worker, social service professional or other suitably qualified person.*

(b) Any party to the mediation may have the outcome of the mediation reviewed by a court."

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[6] Section 21(1)(b) of the Act.

[7] *KLVC v SDI* [2014] 1 All SA 532 (SCA), para [14].

[8] *Loc cit*.

[9] *RRS v DAL* [2010] ZAWCHC 618 (10 December 2010).

[10] 2015 (3) SA 62 (GJ).

Discussion

10. Certain facts are common cause between the parties. The child is 11 years of age; the applicant is his father; the respondent his mother. The child's birth was a result of a relationship which has long come to an end. The applicant has in the court papers confirmed his consent to be identified as the child's father, although the respondent disputes the applicant's *de facto* commitment to being a father to the child. It is also accepted on the papers that the applicant has made some payments towards the care of the child.

11. The matter came before me on the opposed motion roll. The parties filed affidavits dealing with the facts concerning the upbringing of the child and the applicant's contributions in respect of the child. There are factual averments which are material to a determination of the matter under section 21(1)(a) and (b), but which are either vaguely pleaded or placed in dispute. Ordinarily, in motion proceedings for final relief, the court is obliged to accept the respondent's version, together with such averments in the applicant's version as the respondent does not dispute, unless any dispute on the part of a respondent is not *bona fide*, is bald and unsubstantiated or is so far-fetched or clearly untenable that it may rejected on paper.[11]

12. In cases involving determination of issues concerning children under the Act, including the bearers of parental rights and responsibilities, it seems to me that the rigid approach which is usually adopted in motion proceedings is undesirable and may have unfortunate consequences which would not properly vindicate the overriding objectives and principles set forth in the Act which I have sketched above. The Court should, as far as possible, in matters involving children, seek out all relevant and

[11] *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA), para [13] and *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

accurate information within a reasonable time to place it in a position to do justice to its role as the upper guardian of minors and to vindicate and give effect to the best interests of children. It must also take care to ensure that the proceedings do not simply proceed in the usual adversarial fashion, but rather, if appropriate, incorporate opportunities for parties to conciliate, professional mediation assistance, professional reports by family advocates, family counsellors and others, and structured orders to ensure that the parties disclose all relevant information to court and report on their progress in following extra-curial resolution.

13. In this context, section 21(3) of the Act assumes significance. It seems to me that the use of the word "*must*" in the section renders a referral to mediation, ordinarily, mandatory. This also accords with the conciliatory and other principles in the Act, as I set forth above. This is irrespective of whether the dispute arose prior to or in the course of litigation. Of course, the above does not exclude the possibility that, in an appropriate case, the Court may, in the exercise of its overriding constitutionally-sourced powers and discretion, dispense with the need to pursue a mediation as contemplated in that section. This may, for instance, be apposite if mediation would be pointless given the circumstances or the positions adopted by the parties. The present is not such a case.

14. The parties to the mediation process under section 21(3) must use all reasonable endeavours to participate in the mediation with a view to reaching amicable resolution, or at the very least narrowing down the scope of their disputes concerning the application of section 21(1) of the Act as far as possible. The process should be professionally mediated to maximise efficiency and effectiveness. Should any areas of disagreement still subsist by the end of the mediation, those should be clearly identified by the parties, with the assistance of the professional, and then presented

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

15. In the circumstances and in the exercise of the Court's powers and discretion under the Act, I intend to refer this matter for mediation to the Family Advocate's office, with a concrete timetable and reporting obligations. The interests of justice dictate that this matter should be pended until those processes have run their course and must be re-enrolled on the motion court roll, with a preferential hearing date insofar as possible, so that the matter may be finally determined should the mediation process not yield a final agreement on all relevant issues.

16. It seems necessary, however, for the purposes of focusing the mediation enquiry, and for the benefit of the parties and the Family Advocate to make a ruling on the import of the section 21(1)(b) requirements and specifically the issue left open by the Supreme Court of Appeal in *KLVC v SDI*: whether the requirements are cumulative or disjunctive.

17. In my view, the Act is clear that the requirements are cumulative. It is trite that legislation must be interpreted with due regard to text, context and purpose.[12] It is of especial importance in statutory interpretation that courts should try to arrive at an

[12] *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC), para [28].

objective meaning which would be understood by any person reading the legislation in its published terms and without having to divine hidden meanings or motives. In this light, text assumes a particular significance, albeit not to the exclusion of other factors.[13]

18. The requirements set forth in sections 21(1)(b)(i), (ii) and (iii) are separated by the conjunction "*and*". In ordinary parlance, that denotes cumulative or conjunctive criteria, and is to be juxtaposed with the disjunctive "*or*". It is also noteworthy that Parliament used "*or*" in the immediately preceding section 21(1)(a), to emphasise that sections 21(1)(a) and 21(1)(b) were alternatives. The lawgiver was thus, in my view, well aware of the distinction between those conjunctions and purposely chose to use "*and*" in section 21(1)(b). That choice should ordinarily, and in the absence of absurdity, unreasonableness, inconsistency or injustice, be given effect and it is not open to the Court simply to substitute "*and*" with "*or*".[14]

19. No such absurdity, unreasonableness, inconsistency, injustice or other incongruity results in this case. Subsections (i) to (iii) of section 21(1)(b) can operate without any difficulty in tandem; the factors they delineate are certainly not mutually exclusive. This is reinforced by the fact that the cumulative effect of those factors is akin to the legal effect of a relationship such as marriage and permanent life-partnership, being the alternative qualifying criteria for parental rights and responsibilities set out in sections 20 and 21(1)(a) of the Act. It would be a natural consequence of those relationships that the parents in such relationships would have to contribute to a child's

[13] *Choisy – Le-Roi Owners (Pty) Ltd v The Municipality of Stellenbosch* [2022] ZAWCHC 71 (11 May 2022), paras [35] - [39].

[14] *Ngcobo v Salimba CC* [1999] 2 All SA 491 (SCA), para [11].

upbringing, care and expenses at least for the duration of the relationship but would often have duties of support after the relationship terminates.

20. The parties and the Family Advocate should also draw inspiration and guidance in the mediation process from the analysis of section 21(1)(b) factors in the case law, and particularly *KLVC v SDI*, with a view to reaching a resolution which treats the child's best interests as paramount and de-emphasises the importance of the parties' conflicts and contentious relationship.

21. At this stage, it would be just and fair to reserve all issues of costs, not least as a final resolution of this matter must await future events.

Order

22. I thus make the following order:

22.1 the dispute between the applicant and respondent concerning the fulfillment by the applicant of the conditions in sections 21(1)(a) and (b) of the Children's Act, 2005 ("**the Act**") is referred to the Family Advocate's office for mediation as contemplated in section 21(3) of the Act, and the applicant and respondent are directed forthwith jointly to approach the Family Advocate's office in this regard;

22.2 the aforesaid mediation shall take place without delay and the mediation process shall be completed by no later than 29 July 2022;

22.3 the parties shall use all reasonable endeavours to reach agreement to resolve the aforesaid dispute or narrow down and crystallise the areas of disagreement;

22.4 by no later than 10 days after the finalisation of the mediation or 15 August 2022, whichever is the earlier, the parties shall deliver to this Court the following:

22.4.1 a joint chronology (or if there is a dispute as to the content of a joint chronology, two separate chronologies) setting forth the dates and duration of the engagements between the parties and the Family Advocate in the mediation;

22.4.2 a detailed statement either:

22.4.2.1 setting forth agreement between the parties that the applicant does or does not fulfil the statutory conditions in sections 21(1)(a) and (b) of the Act to be the bearer of parental rights and responsibilities in respect of the child, Lehlogonolo Lethinjabulo Marima (date of birth 27 June 2011), summarising the factual basis why the parties agree that there has or has not been fulfilment of the aforesaid conditions; or

22.4.2.2 setting forth the reasons why there is no consensus on the fulfilment or non-fulfilment of the conditions, which shall include:

22.4.2.2.1 a list of common cause facts relevant to the fulfilment of the conditions;

22.4.2.2.2 a list of facts in dispute relevant to the fulfilment of the conditions;

22.4.2.2.3 the parties' respective contentions and documentary and witness evidence supporting their position on the facts in dispute. The documentary and witness evidence must be delivered by each party in a sworn affidavit form;

22.5 the applicant and the respondent are granted leave to deliver to this Court responses, if any, to the contentions and evidence of the other party delivered in

terms of 22.4.2.2.3 above within 10 days of the date of the delivery of such contentions and evidence. Any evidence delivered as part of these responses shall be in a sworn affidavit form;

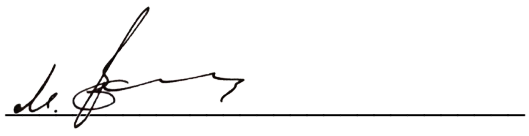
22.6 the application shall be enrolled on the earliest available motion court date after the processes in 22.1 to 22.5 are completed. Insofar as this is possible, the set down and hearing of the application should be expedited;

22.7 the application is postponed pending the finalisation of the processes set forth in the orders above;

22.8 all costs associated with this application are reserved for later determination.

Hand-down and date of judgment

23. This judgment is handed down electronically by circulation to the parties or their legal representatives by email and by uploading the judgment onto Caselines. The date and time for hand down of the judgment are deemed to be 9:00 on 6 June 2022.



VM MOVSHOVICH

ACTING JUDGE OF THE HIGH COURT

Applicant's Counsel:	A Vosloo-De Witt
Applicant's Attorneys:	Burnett Attorneys
Respondent's Counsel:	NM Sithole
Respondent's Attorneys:	Sithole NM Attorneys

Date of Hearing:	23 February 2022
Date of Judgment:	6 June 2022