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

Case No 2901/10

In the matter between:

M A M Applicant

and

A V **(born N)** Respondent

Court: **CLOETE, AJ**

Heard: 18 and 22 November 2010

Delivered: 23 November 2010

ADV. **FOR APPLICANT:** Adv S van Embden et Adv J I, McCurdie

INSTRUCTED BY: Craig Schneider & Associates

ADV. RESPONDENT: Adv DAJ Uijs, SC et Adv R Maass

INSTRUCTED BY: Michael Ward Attorneys

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JUDGMENT ON POINTS IN LIMINE
DELIVERED ON 23 NOVEMBER 2010

CLOETE, AJ

[1] This is an application wherein the applicant seeks an order directing that he and the respondent are recognised as co-holders of parental responsibilities and rights in respect of M, a male minor child born on 23 May 2000. The relief sought by the applicant includes rights of co-guardianship as provided for in ss 18(2)(c), 18(3), 18(4) and 18(5) of the Children's Act, 38 of 2005 ("the Act"), as also rights of care and contact as referred to in s 18(2)(a) and (b) of the Act, but subject to the residence, decisionmaking and contact provisions set out in the notice of motion.

[2] With regard to M's residence, the applicant initially sought an order that M would reside with such party as may be recommended by Mr Bernard Altman, clinical psychologist, and that the party with whom M does not primarily reside shall have contact with him in the terms set forth in the notice of motion. During the course of argument, the applicant conceded, for purposes of this application, that M shall reside primarily with the respondent, and that accordingly the contact claimed during school terms as set out in paragraph 2.1.4 of the notice of motion,

should apply to the applicant.

[3] The parties agreed that the following issues would be argued (and thus determined) in limine, on the basis of the legal objection of an exception:

[3.1.] Whether the respondent is entitled to rely on the exclusionary provision in regard to the definition of a 'parent' in section 1 of the Act.

[3.2.] in the event that this court declares that the applicant is a 'parent' with full parental rights and responsibilities, whether the respondent can be compelled to enter into a parenting plan with the applicant in respect of M.

J

[3.3.] In the event that the court rules that the respondent is entitled to rely on the exclusionary provision as referred to in [3.1] above, which party bears the onus to prove or disprove the respondent's allegation that she was raped by the applicant.

[4] The parties further agreed that the question of the onus referred to in [3.3] above only arises once this court has determined the issues as set out in [3.1] and [3.2].

[5] It should be noted that the applicant, in agreeing to the determination in limine of the above issues, has not in any way conceded that he indeed raped the respondent.

[6] Before turning to the in limine issues, it is necessary to deal with certain contentions raised by the respondent relating to the procedural aspects of this application. In essence, the respondent argues that the applicant adopted the incorrect procedure in bringing this matter

before court urgently and/or by way of application.

[7] On the issue of urgency, and after this court expressed the strong view that all matters concerning children are, by their very nature, urgent, respondent did not persist with this contention, as is apparent from the respondent's heads of argument which were delivered after argument on the first day.

[8] The respondent also argues that the three issues in limine must be determined *'as if the respondent has excepted to the applicant's claim, as pleaded, and the applicant had excepted to the respondent's plea, as pleaded'.* However, as became apparent during the course of argument, the first two points in limine really amount to an exception taken by the respondent to the applicant's claim.

[9] In terms of a previous order of this court dated 17 May 2010, and by agreement between the parties it was ordered, *inter alia,* that:

[9.1.] The application was postponed to 18 November 2010 for the hearing of oral evidence;

[9.2.] The affidavits filed by the parties shall stand as pleadings in this matter, subject to the right of either party to supplement and/or augment the pleadings in accordance with the rules of court; *{my emphasis)*

[9.3.] Respondent reiterated her recordais as contained in a previous order dated 26 February 2010, namely, that she does not concede that the matter warrants an urgent hearing and reserves the right to argue the question of urgency, the procedure by which applicant approached this court, and any question of separation of issues.

[10] Respondent submitted that is *'an obvious and accordingly implied term of the agreement* [i.e. that contained in the Order of 17 May 2010] ... *that the only portions of the affidavits which may be taken into account by anyone before evidence is led are those parts which would have formed part of the pleadings, had the matter come before this ... court by way of an action duly instituted by the applicant'.*

[11] In support of this submission, respondent relies on the legal principle that evidence should not be pleaded. Respondent's counsel referred the court to the matters of *Ahlers N.O. v Snoeck* 1946 TPD 590 at 594 where this principle was set out, as also *Du Toit v Du Toit* 1958 (2) SA 354 (D and CL) at 356C-D.

[12] In *Du Toit* supra, in a declaration claiming a judicial separation on the ground that cohabitation had become intolerable, the plaintiff had made averments relating to a prior action which she had instituted against the defendant on the ground of adultery but which she had withdrawn when the parties had become reconciled. The defendant excepted to these paragraphs in the declaration as being bad in law and insufficient to sustain the action in whole or in part. Firstly, the exception related to a declaration, which is a pleading and secondly, the court found that the paragraphs objected to did not amount to the pleading of evidence. The *Du Toit* matter is thus entirely distinguishable from the instant matter.

[13] Here, the respondent chose to agree that the affidavits filed by the parties would stand as pleadings. The respondent's recordals as contained in the previous order of 26 February 2010 do not in any way translate into the stance now adopted, namely, that the only portions of the affidavits which may be taken into account before evidence is led are those parts which would have formed part of the pleadings had the matter come before this court by way of action. In my view, the respondent's contention has no merit and her submission in this regard must fail. Accordingly, I am satisfied that the entire contents of the affidavits (and by parity of reasoning the annexures thereto) shall stand as the pleadings in this matter.

WHETHER THE RESPONDENT IS ENTITLED TO RELY ON THE EXCLUSIONARY PROVISION IN REGARD TO THE DEFINITION OF A 'PARENT' IN SECTION 1 OF THE CHILDREN'S ACT

[14] For the reasons which follow hereunder, I have concluded that it is not necessary for me to make a 'blanket' finding as to whether the exclusionary provision of a 'parent' in section 1 of the Children's Act only has application where it is expressly stated in the Act (as contended by the applicant), or whether wherever the words 'parent' or 'parental' appear in the Act, a biological father of a child conceived through the rape of the child's mother is expressly excluded (as contended by the respondent).

[15] It is common cause between the parties that, but for the question of the alleged rape, the applicant would have acquired parental responsibilities and rights in terms of s 21 of the Act. which provides as follows:

> ***'21.Parental responsibilities and rights of unmarried fathers***
>
> (1) *The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20* (i.e. a married father), *requires full parental responsibilities and rights in respect of the child -... (b) 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*
>
> *(ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and*
>
> *(iii) contributes or has attempted in good faith to contribute to expenses in connection with the maintenance of the child for a reasonable period ..."*

[16] A reading of the affidavits in this matter has enabled this court to set out some of the ways in which the respondent recognised the applicant as M's father from the date of his birth:

[16.1.] By consent between the parties the applicant is registered as M's father on his birth certificate;

[16.2.] The applicant has always contributed to M's maintenance requirements since his birth;.

[16.3.] There has been a history of agreed contact between the applicant and M since his birth;

[16.4.] The applicant was involved in various major decisions with regard to M's upbringing since his birth and until approximately 2008 when the relationship between the parties started breaking down;

[16.5.] The applicant was involved as M's father in consulting certain professionals in regard to Ms developmental needs.

[17] In an interlocutory application (under case no 12660/10) the respondent stated the following:

> *"It is not disputed that the Applicant has done the things that he is required to do to qualify in terms of section 21 of the Act to acquire parental responsibilities and rights in terms of that section."*

[18] Accordingly, the irresistible conclusion is that for almost 10 years the respondent treated and regarded the applicant as M's father in every sense, and chose to recognise his rights and obligations in terms of s 21. It was only in February 2010 that respondent, for the first time, challenged the applicant's rights and responsibilities on the ground of an alleged rape at the time of M's conception.

[19] It is also highly significant that for the duration of his young life, M has treated and regarded the applicant as his father in every conceivable way.

[20] The respondent relies on the definition of the exclusion of a 'parent' in section 1 of the Act

which reads as follows:

> *"'Parent' in relation to a child, includes the adoptive parent of a child, but excludes -*
>
> *(a) the biological father of a child conceived through the rape of or incest with the child's mother;"*

[21] Accordingly, says the Respondent, as M was conceived as a consequence of rape by the applicant, the latter cannot exercise *"parental rights and responsibilities"* as enivisaged in s 21 of the Act as he is not and never will be able to be a "parent" as

defined. This is the respondent's case, notwithstanding that it is common cause that applicant otherwise qualifies in terms of s 21 of the Act

[22] Our Courts are now required to interpret all legislation in the context of the provisions of the Constitution of the Republic of South Africa, and with due regard to the constitutional context in which such legislation is set.

> *"The Constitution is now the supreme law in our country (section 2 of the Constitution). It is therefore the starting point in interpreting any legislation. Indeed, every Court must promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation."*

[See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at 521, para 72]

[23] This court must thus first have regard to the relevant provisions of the Constitution which, in this matter, are the following:

[23.1.] Section 28(1).which provides that: *'Every child has the right ... to ... parental care';*

[23.2.] Section 28(2),which provides that: *'A child's best interests are of paramount importance in every matter concerning the child)*

[23.3.] Section 10, which provides that: *Everyone has inherent dignity and the right to have their dignity respected and protected';*

[23.4.] Section 36, which provides that:

> *'36(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom*
>
> *(2) Except as provided in sub-section (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights,'*

[24] Accordingly, what is required in the instant matter is to attempt to give effect to the

competing rights of M, on the one hand, and the respondent on the other, in this regard, s 6(2) of the Constitution is instructive. It requires a court, in all proceedings concerning a child, to, *inter alia, 'respect, protect, promote and fulfil the child's hghts as set out in the Bill of Rights, the best interests of the child standard ... and the rights and principles set out in this Act, subject to any lawful limitation'.*

[25] In _2008(6) SA 30 (CPD) at 37D-38A, a full bench of this division was of the following view:

> *'As the upper guardian of minors, this court is empowered and under a duty to consider and evaluate all relevant facts placed before it with a view to deciding the issue which is of paramount importance: the best interests of the child ...* (with reference to the matter of Terblanche v Terblanche 1992 (1) SA 501 (W) at 504C) *When a court sits as upper guardian in a custody matter it has extremely wide powers in establishing what is in the best interests of minor or dependent children ... In AD & DD v DW & Others (Centre for Child Law as Amicus Curiae;*
>
> *Department for Social Development as Intervening party)* 2008 (3) SA 183 (CC) ... *the Constitutional Court endorsed the view ... that the interests of minors should not be "held to ransom for the sake of legal niceties" and held that in the case before it the best interests of the child "should not be mechanically sacrificed on the alter of jurisdictional formalism".'*

[26] Respondent's counsel referred the court to the matter of S *v M* (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC) at 254C and 255B, where the court stated that:

> *'In practical terms, then, the difficulty is how appropriately and on a case-by-case basis to balance the three interests as required by Zinn* (i.e. the well-known triadic sentencing formula of what has to be weighed up, namely the crime, the offender and the interests of society) ... *without disregarding the peremptory provisions of section 28 .. the paramountcy principle read with the right to family care, requires that the interests of*

children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely, the interests of children who may be concerned.'

[27] Respondent's counsel accordingly advocated what he referred to as 'nuanced approach' in which, so he stated, *'all of the hghts of all of the parties should be considered'.* That having been said however, the thrust of respondent's argument on this point is that it is really a matter of balancing the rights of the minor child M against the rights of the respondent.

[28] To my mind, and to the extent that it might be argued that the court in *J v J* supra did not go far enough, the answer to the *'balancing of rights'* argument advanced by respondent's counsel is to be found in the very authority to which he referred this court, namely, *S v M* (Centre for Child Law as Amicus Curiae) supra at 244E-246C. For sake of brevity, I will quote the summary of what is set forth in this passage and which was conveniently paraphrased in the headnote at 233H-234A:

'The ambit of section 28 of the Constitution was undoubtedly wide. The comprehensive and emphatic language used in this section indicated that, just as law enforcement must always be gender-sensitive, so it must always be child-sensitive; statutes must be interpreted and the common law developed in a manner that favoured protecting and advancing the interests of children; and courts must function in a way that showed due respect for children's rights. Section 28 was also to be seen as an expansive response to South Africa's international obligations as a State party to the UN convention on the Rights of the Child. The four great principles of this convention which, as international currency, guided all policy in South Africa in relation to children, were survival, development, protection and participation. What united these principles, and what lay at the heart of section 28 was the right of a child to be a child and to enjoy special care.

Every child had his or her own dignity; each child was to be constitutionally imagined as an individual with a distinctive personality, and not treated as a mere extension of his or her parents. The unusually comprehensive and emancipatory character of section 28 presupposed that the sins and traumas of fathers and mothers should not be visited on their children.' (my emphasis)

[29] I agree wholeheartedly with the approach adopted by the Constitutional Court in the aforementioned case. It is my duty as upper guardian of M to consider the facts which are common cause in the instant matter in deciding whether it is in M's best interests for the applicant to be recognised as a co-holder of parental responsibilities and rights as envisaged in terms of s 21 of the Act.

[30] Accordingly, and in the particular circumstances of this matter where:

[30.1.] for almost ten years the respondent has asserted and accepted the applicant as M's parent in every sense;

[30.2.] the applicant has, as a matter of fact, exercised full parental responsibilities and rights; and

[30.3.] most importantly, where M himself recognises the applicant as his father in every sense of the word;

it cannot be in M's best interests (which are of paramount importance) to exclude the applicant from the provisions of s 21 of the Act. It may well be that another court, faced with different facts, may come to a different conclusion: however, on the common cause facts before me, I am convinced that this is the right result for M,

THE SECOND POINT IN LIMINE: CAN THE RESPONDENT BE COMPELLED TO ENTER

INTO A PARENTING PLAN WITH THE APPLICANT IN RESPECT OF M

[31] The respondent contends that she (as the unmarried mother of M) cannot be *"compelled"* to enter into a parenting plan with the Applicant (as the unmarried father of M) even if he has full parental responsibilities and rights. She thus contends that she cannot be required to co-parent M with the applicant, and that co-parenting is discretionary on her part. The Respondent relies on section 22 of the Act wherein it is stated that:

> *"(1) ... The mother of* a *child or other person who has parental responsibilities and rights in respect of a child may enter into an agreement providing for the acquisition of such parental responsibilities and rights in respect of the child as are set out in the agreement, with -*
> *(a) the biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of either section 20 or 21 or by court order."*

[32] I have difficulty in understanding the respondent's contention. To my mind, the wording of s 22 is clear, namely that, with regard to the biological father of a child, it only applies to a father who does not have parental responsibilities and rights in respect of the child in terms of either s 20 or 21 or by court order. Accordingly, s 22 can never apply to the applicant.

[33] The section of the Act which does apply is s 33 which provides, *inter alia,* that:

> *'(1) The co-holders of parental responsibilities and rights in respect of a child may agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child.*
>
> *(2) If the co-holders of parental responsibilities and rights in respect of a child are experiencing difficulties in exercising their responsibilities and rights, those persons, before seeking the intervention of a court, must first seek to agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the*

child.' (my emphasis)

[34] The fact that s 33 of the Act was only implemented on 1 April 2010 (as was s 22), does not mean that s 33 has no application. Section 33 must be read in conjunction with s 21(4) which provides that *'This section applies regardless of whether the child was born before or after the commencement of this Act'.* It could never have been the intention of the legislature that s 21 applies regardless of whether the child was born before or after the commencement of the Act, but s 33 only applies with effect from the date of commencement thereof. This would defeat the very purpose of giving substantive effect to the provisions of s 21.

[35] Further, the reference in s 33(2) to *'those persons'* must surely be read to mean that either co-holder of parental responsibilities and rights may approach this court in its capacity as upper guardian of all minor children in circumstances in which attempts to agree on a parenting plan with the other co-holder have failed. In *Pavel & Skelton: Commentary on the Children's Act, Juta 2005 at 3-32* the authors state as follows:

> *'Looking purely at section 33(2), it seems that even if one or more of the co-holders refuse to engage in discussions about a parenting plan, the court can be approached, for then an attempt at agreeing on a parenting plan was made, even though the attempt was doomed from the start.'*

[36] Section 33(5) provides that, in preparing a parenting plan as contemplated in s 33(2), the parties must seek the assistance of a family advocate, social worker or psychologist, or seek mediation through a social worker or other suitably qualified person.

[37] It is common cause that the parties have sought the assistance of a social worker (Carol Phillips) and two psychologists (Leigh Pettigrew and Bernard Altman) in an attempt to address how at least certain of their parental responsibilities and rights should be exercised:

[37.1.] At paragraph 24.3 of the applicant's founding affidavit (p31 of the record), he states: *'As a result of such e-mail, I approached my attorney of record who drafted a parenting agreement, sent it to respondent and invited her to attend mediation)*

[37.2.] At paragraph 54.3 (p156 of the record) the respondent deals with this allegation as follows: *'By now I had realised that I simply could not enter into a co-parenting agreement with the applicant. I simply did not trust him and, to tell the truth, was starting to dislike him more and more. I believe that, far from regulating* (M's) *life and making it more structured, entering into such an agreement would simply create more chaos'.*

[38] To my mind, it is clear that the applicant does not seek to impose an agreed parenting plan on the respondent: rather, the applicant approaches this court for the very purpose referred to in s 33(2), namely, the intervention of this court to determine the exercise of the parties' respective responsibilities and rights in respect of M.

[39] It is accordingly my view that, in light of s 33(2) of the Act, and using the wording adopted by the parties in formulating the second point in limine, the respondent can indeed be compelled to enter into a parenting plan with the applicant in respect of M.

[40] It thus follows that the first two points raised by respondent in limine on the basis of the legal objection of exception must fail. As agreed between the parties, it is accordingly not necessary for me to deal with the third point in limine.

ORDER

[41] In light of my findings as set out above, I make the following order:

[41.1.] The respondent is not entitled to rely on the exclusionary provision in regard to the definition of a 'parent' in section 1 of the Act;

[41.2.] The respondent can be compelled by this court to enter into a parenting plan with the applicant in respect of M;

[41.3.] The costs incurred in the determination of the points in limine shall stand over for later determination.

J I CLOETE