THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 20334/2014
Reportable

In the matter between:

K L V C **Appellant**

and

S D I **First Respondent**

OFFICE OF THE FAMILY ADVOCATE **Second Respondent**

Neutral citation: *KLVC v SDI* (20334/2014) [2014] ZASCA 222 (12 December 2014)

Coram: Maya, Leach, Theron, Mbha JJA & Schoeman AJA

Heard: 28 November 2014

Delivered: 12 December 2014

Summary: Section 21(1)(*b*) of the Children's Act 38 of 2005 – requirements that must be satisfied before an unmarried father can acquire full parental rights and responsibilities, as envisaged by s 18 of the said Act, in respect of his minor child met.

ORDER

On appeal from: the KwaZulu-Natal Local Division, Durban (Gabriel AJ sitting as a court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Mbha JA: (Maya, Leach, Theron JJA and Schoeman AJA concurring):

[1] The appellant and the first respondent are the biological parents of a minor child S, a boy born in Durban, South Africa on 30 July 2012. The parties were never married to each other, nor did they cohabit or live together in a permanent life partnership. The first respondent has however at all material times consented to being identified as the child's father. On 28 November 2012, and whilst the first respondent was on a brief visit to the United States of America, the appellant removed the child from Durban and relocated to England without either informing or seeking permission from the first respondent to do so. At the time the child was four months old.

[2] On 16 May 2013, the first respondent applied to the High Court of Justice, Family Division of the United Kingdom (the English court), in terms of the Hague Convention on the Civil Aspects of International Child Abduction, 1980 (the Hague Convention), for an order directing the appellant to return S to his habitual place of residence in Durban, South Africa. The basis of the application was that the appellant had removed S from South Africa to England in breach of the first respondent's co-parental rights and responsibilities by not seeking the first respondent's approval before doing so.

[3] The appellant opposed the application on the grounds that, firstly, the first respondent was not exercising 'rights of custody' as defined in Articles 3 and 5 of the Hague Convention, and secondly that, in terms of Article 13(b) there was a grave risk that should the child be returned to South Africa, he would be exposed to physical or psychological harm or otherwise be placed in an intolerable situation.

[4] The fundamental question for resolution before the English court was whether the appellant's removal of the child from South Africa without the first respondent's approval was wrongful. This, of necessity, entailed determining two aspects stipulated in Article 3[1] of the Hague Convention namely, firstly, in terms of Article 3(a), whether the removal of the child was wrongful because it was in breach of the rights of custody of the first respondent under the law of South Africa immediately before the removal of the child, and secondly, in terms of Article 3(b), whether the relevant rights of custody were actually being exercised at the time of the child's removal.

[5] The English court was unable to decide the question whether the appellant was lawfully entitled in November 2012 to change the place of residence of the child from South Africa to England without the prior permission or consent of the first respondent or an appropriate South African court. Consequently, on 21 August 2013 the English court made an order referring the following question to a South African court for determination:

'In November 2012, was it lawful under South African law, having regard to the circumstances of this case, for the Respondent [appellant] to change the place of residence of the child from a place in South Africa to a place in England and Wales

[1] Article 3 of the Hague Convention reads as follows:
'The removal or the retention of a child is to be considered wrongful where –
(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.'
Article 3 must be read together with Article 5 which defines 'rights of custody' as including rights relating to the care of the child and in particular, the right to determine the child's place of residence.

without the prior permission or consent of the Applicant [first respondent] or other appropriate South African court?'

[6] On 8 October 2013 the first respondent, as applicant, issued application proceedings in the KwaZulu-Natal Local Division, Durban (the court a quo) for consideration of the question referred to it by the English court. The court a quo ruled in the first respondent's favour and found that in November 2012 the first respondent had met all the requirements prescribed in s 21(1)(*b*)(i)-(iii) of the Children's Act 38 of 2005 (the Act). Furthermore the court a quo held that he had acquired full parental rights and responsibilities in respect of the child as envisaged in s 18 of the Act. Accordingly, it was necessary for the appellant to have obtained the first respondent's consent or permission, alternatively, a consent by an appropriate court, prior to applying for a passport for S's removal from South Africa. This appeal, with leave of the court a quo, is against the judgment and order granted.

[7] Before dealing with the merits of the appeal, it is necessary first to dispose of two preliminary issues raised by the appellant. The appellant sought to expand her grounds of appeal by the addition of a further ground, namely that her right to a fair public hearing in the court a quo, in terms of s 34 of the Constitution, had been violated. The basis of her complaint is that counsel who had prepared the heads of argument upon which the matter was argued on 24 February 2014 was not available for the hearing and as a result she had been represented by different counsel. This application was however abandoned, correctly in my view, as there was no specific complaint about the competency or otherwise of the counsel who represented the appellant in the court a quo, or about any prejudice allegedly suffered by her. In any event, the same papers are before this court and the appellant was represented on appeal by her initial counsel of choice, and to start afresh in the high court would be an exercise in futility.

[8] The appellant also sought to lead on appeal further evidence about matters concerning the first respondent's conduct and events regarding the child which arose after she had deposed to her answering affidavit on 20

January 2014, in the court a quo. This application was similarly misconceived. The question which the English court has referred to a South African court relates to a specific point in time, namely November 2012. It follows that the lawfulness or otherwise of the appellant's conduct when she removed the child from South Africa must be determined with reference to this date. Accordingly, any evidence of events subsequent to November 2012 is irrelevant to the question referred to the court a quo and is therefore inadmissible. In the result, the application to adduce this further evidence must fail.

[9] As the parties were not married or living together in a permanent life partnership, the real issue in this appeal is whether, in terms of s 21(1)(*b*) of the Act, the first respondent had acquired full parental rights and responsibilities in respect of the child as envisaged in s 18(2)(*c*),[2] prior to his removal from the Republic in November 2012. If the answer to this question is in the affirmative, it follows that the first respondent had rights of guardianship in respect of the child, and that either the first respondent's consent or permission or that of a competent court was required before the child could be removed from the Republic.

[10] Section 21(1)(*b*) provides for the acquisition of full parental responsibilities and rights of an unmarried father regardless of whether he has lived or is living with the mother of the child if he—

'(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;

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[2] Section 18 of the Act in relevant parts, reads as follows:
'18(2) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right –
. . .
(*c*) to act as guardian of the child;
. . .
(3) . . . a parent . . . who acts as guardian of a child must –
. . .
(*c*) give or refuse any consent required by law in respect of the child, including –
. . .
(iii) consent to the child's departure or removal from the Republic;
(iv) consent to the child's application for a passport;
. . .
(5) Unless a competent court orders otherwise, the consent of all the persons that have guardianship of a child is necessary in respect of matters set out in subsection (3)(*c*).'

(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 towards expenses in connection with the maintenance of the child for a reasonable period.'

[11] The decision of the court a quo was attacked on various grounds which can be summarized as follows: section 21(1)(*b*) of the Act explicitly sets out three requirements which must all be satisfied before an unmarried father in the position of the first respondent could acquire full parental rights and responsibilities; because the first respondent met one requirement only, namely that he consented to be identified as the child's father, he never acquired any parental rights; the first respondent never contributed either adequately or at all or attempted in good faith to contribute to the child's upbringing and expenses in connection with the maintenance of the child; and, even if he did have any parental rights in respect of the child, he was not exercising them at the time of the child's removal as he was abroad at that time.

[12] The appellant submitted that because the word 'and' is used to conjoin the subsections in s 21(1)(*b*), this means that the matters set out therein are conjunctive requirements all of which the first respondent had to meet before he could acquire parental responsibilities and rights in respect of the minor child. The appellant sought to rely on the judgment in *RRS v DAL*,[3] where the court held that '[t]he applicant must meet all these requirements to qualify for automatic parental responsibilities in a minor'. On the contrary, the first respondent contended that the requirements in the subsections were simply categories of matters which a court had to consider before coming to a conclusion.

[13] The court a quo found it unnecessary to make a determination on the correct interpretation to be placed on the section because it found ultimately that even if the matters referred to in s 21(1)(*b*)(i)-(iii) were self- standing and distinct requirements, the first respondent had met them all. In coming to this

[3] *RRS v DAL* (22994/2010) [2010] ZAWCHC 618 (10 December 2010) at page 13 lines 2-4.

conclusion, the court a quo reasoned as follows: a consideration of sections 21(1)(*b*)(ii) and (iii) required that a court consider the facts, exercise a value judgment and come to a conclusion; in doing so a court would have to consider a wide range of circumstances because the language used in those subsections was deliberately broad permitting of a range of considerations on which minds may differ and the exercise of a value judgment may determine a different outcome and, such as an exercise does not equate to a judicial discretion.

[14] I am unable to fault the reasoning of the court a quo. Determining whether or not an unmarried father has met the requirements in s 21(1)(*b*) is, in my view, an entirely factual enquiry. It is a type of matter which can only be disposed of on a consideration of all the relevant factual circumstances of the case. An unmarried father either acquires parental rights or responsibilities or he does not. Clearly, judicial discretion has no role in such an enquiry. For all these reasons, I also deem it unnecessary to rule on whether the requirements set out in s 21(1)(*b*) ought to be determined conjunctively or whether these are simply categories of facts which a court must consider before concluding whether an unmarried father has acquired full parental responsibilities and rights in respect of a minor child or not.

[15] I now turn to consider whether, on the facts and peculiar circumstances of this matter, the first respondent has satisfied the requirements in s 21(1)(*b*).

[16] It is not in dispute that the first respondent consented to be identified as S's father. Accordingly, the requirement in s 21(1)(*b*)(i) has been met. In contradistinction, a great deal of the debate before us related to whether the first respondent had contributed adequately or at all, or had attempted in good faith to contribute over a reasonable period, towards the upbringing or expenses in connection with the maintenance of S as contemplated in ss 21(1)(*b*)(ii) and (iii).

[17] Consequently, it behoves of this court to consider the meaning that was intended by the legislature in including phrases or words such as

'contribute(s)' and 'for a reasonable period' in the section. In simple terms, what needs to be determined is the nature and extent of the contribution required for the child's upbringing and for expenses in respect of the child in order for an unmarried father to acquire full parental responsibilities and rights.

[18] A good starting point is a consideration of the purpose of the legislation. It will be recalled that at common law unmarried fathers had no rights in respect of their children if they were born out of wedlock. As a consequence of the judgment in *Fraser v Children's Court, Pretoria North*,[4] The Natural Fathers of Children Born out of Wedlock Act 86 of 1997 was promulgated which enabled unmarried fathers to obtain parental rights in respect of their children by way of an application to court.

[19] Section 21 the Act was specifically intended to provide for the automatic acquisition of parental right by an unmarried father if he was able to meet certain requirements. Clearly, the intention was to accord an unmarried father similar rights and responsibilities in relation to his child to those of the father who was married to the child's mother. To my mind, this was intended to promote both the equality guarantee in s 9 and, more importantly, the right of a child to parental care as envisaged by s 28 of the Constitution.

[20] It bears mention that s 20 of the Act, which accords automatic full parental responsibilities and rights to married fathers, makes no stipulation whatsoever that such fathers should contribute towards the upbringing or expenses of their children. On the other hand, s 21(1)(*b)* requires an unmarried father to contribute or make an attempt in good faith to contribute towards the upbringing and the expenses in connection with the maintenance of the child for a reasonable period. It is clear that the legislature draws a distinction between married and unmarried fathers. However, it is important in my view for the court whilst interpreting this section, not to unfairly discriminate against the unmarried father by demanding what the appellant

[4] *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC).

refers to as 'significant or reasonable contributions'. There is a real danger of finding that an unmarried father has not automatically acquired rights and responsibilities in respect of a child due to factors entirely unrelated to his ability and commitment as a father.

[21] It is significant that the word 'contribute(s)' in ss 21(1)(*b*)(ii) and (iii) is not qualified in any way. Clearly, the legislature deliberately omitted to prescribe that the contributions must, for example, be reasonable, significant or material. It is also clear that the word 'contribute(s)' in the section is in the present continuous tense which conveys, in my view, that whatever the unmarried father contributes must be of an on-going nature. As the section stipulates that the contributions or attempts must endure for a reasonable period, what constitutes a reasonable period in the circumstances must be determined with reference to inter alia the age of the child and the circumstances of the parties at the time the determination is made.

[22] In the light of what I have stated above, I align myself completely with the observation by the court a quo that the concept of a contribution or an attempt in good faith to contribute to the child's upbringing for a reasonable period are 'elastic concepts and permit a range of considerations culminating in a value judgment as to whether what was done could be said to be a contribution or a good faith attempt at contributing to the child's upbringing over a period which, in the circumstances, is reasonable'.[5]

[23] In support of the contention that the first respondent never met the requirement in s 21(1)(*b*)(ii), the appellant contends inter alia, that: the first respondent was not present at the birth of S; he was not a willing father from the day he heard of the appellant's pregnancy; S only visited first respondent's parents' home twice and that his parents only visited the appellant's home on two occasions; although it was agreed that the first respondent would visit S for 40 minutes per visit twice a week, the first respondent's visits to S were never more than 20 to 30 minutes in duration;

[5] Para 35 of the judgment a quo.

and that the first respondent abuses drugs and alcohol, is violent, aggressive and follows a hedonistic lifestyle and on one occasion came to visit S whilst in possession of a firearm.

[24] In my view most of these assertions by the appellant, in particular those allegedly relating to the first respondent's conduct, are irrelevant to the requirement in ss 21(1)(*b*)(ii). The first respondent has demonstrated that at all material times he was willing to be involved in S's wellbeing and upbringing, and that all his efforts at fatherhood were actively frustrated by the appellant who had received legal advice during pregnancy that, firstly, she should not make it easy for the first respondent to have an influence over her and S's life, and secondly, should depart for England within three months of the birth so that she could be 'free' and the first respondent could have no control over or legal claim to her and S's lives. It is also clear that the appellant was deeply upset by the termination of her relationship with the first respondent. This was exacerbated by the fact that he had a new girlfriend.

[25] It is not disputed that the first respondent accompanied the appellant to an early medical scan after learning of her pregnancy. However, after the first three months of the pregnancy, the appellant refused to allow the first respondent to attend any further scans and prevented him from attending her doctor's visits. Significantly, the appellant refused to allow the first respondent to be present at S's birth and insisted instead on having her sister present as her birthing partner.

[26] Once the appellant and S were home, the appellant and the first respondent agreed that he would visit on a Tuesday and a Thursday for 40 minutes per visit. He thereafter visited the infant on a regular basis and the appellant allowed him to have contact with the child. From the evidence it is clear however that the first respondent wanted more contact with S than the appellant was prepared to allow. This is borne out, for example, in a sms message which the first respondent sent to the appellant shortly before his departure to the United States of America in November 2012, in which he stated he was even prepared to sit in the garden with S if the appellant was

prepared to allow this, and that he wished to come visit him on the following Saturday at 10h00. The situation was also exacerbated by the fact that the appellant was of the view that she was doing the first respondent a favour by allowing him to visit his son.

[27] The fact that the first respondent visited and interacted with S regularly, introduced him to his extended family and took out an endowment policy to cater for S's future upbringing are in my view contributions which first respondent made towards S's upbringing prior the child's removal to England in November 2012.

[28] I accordingly hold that the court a quo was correct in finding that the first respondent had indeed met what is required by section 21(1)(*b*)(ii).

[29] With regard to the requirement in s 21(1)(*b*)(iii) concerning the contribution towards expenses related to the maintenance of the child for a reasonable period, this must be considered against the backdrop of two important factors, namely that s 21(2) of the Act makes it plain that this requirement does not affect the duty of a father to contribute towards the maintenance of the child; and secondly that the extent and nature of the contribution is again unqualified in the legislation. Thus the submission by the appellant that the contribution by the first respondent was insignificant and that it had to be viewed in the context of maintenance as envisaged in the Maintenance Act 99 of 1998 is clearly misconceived.

[30] It is not in dispute that the first respondent purchased certain items for S including a heater, a pram, a car seat, clothing as well as nappies and other necessities. He also built a changing table for S with his own hands as he wanted him to have something special and personal from his father. The appellant's response to all of this was either that the money used for the purchase was from the first respondent's parents or that the handmade changing table was a mere cost-saving measure by the first respondent, and that the table was not as convenient as the one that could be purchased in a shop.

[31] It is noteworthy that the first respondent offered to put the child on his medical aid, which offer was declined by the appellant. Similarly, the appellant failed to provide her banking account details to the first respondent when he asked for them so that he could deposit money into her account.

[32] In any event, the appellant's version is that the first respondent contributed approximately 11.5 per cent of S's expenses which translated to approximately R14 000 up to the time he was removed from the Republic. As the court a quo found, correctly in my view, this can hardly be described as an insubstantial contribution to expenses in relation to the maintenance of S over a period of four months.

[33] I am satisfied that the offers or attempts made by the first respondent to contribute towards the expenses of S were all made in good faith. As the appellant declined to accept these offers, she cannot now say that the first respondent made an insufficient contribution to try to bring himself within the ambit of section 21(1)(*b*)(iii).

[34] Accordingly, I find that the court a quo was correct in concluding that the first respondent contributed to expenses in connection with the maintenance of the child, as envisaged in s 21(1)(*b*)(iii).

[35] The contention by the appellant that the first respondent never exercised his rights of custody, if any, at the time of the child's removal as the first respondent was abroad at the time, is so legally untenable that it must be rejected outright. The undisputed evidence is that the first respondent left the country temporarily. Furthermore, the appellant well knew that it was always his intention to return to the country. It does not, in my view, assist the appellant's case that the first respondent only came back a few days after the scheduled return date.

[36] The first respondent demonstrated sufficiently that he had acquired full parental responsibilities in respect of S by November 2012. As co-guardian of

S, the first respondent's consent was therefore required prior to the removal of S from the Republic by the appellant.

[37] As it is common cause that the appellant had neither the first respondent's consent nor the consent of a competent court to remove S from the Republic when she did, it follows ineluctably that the appellant acted in breach of the first respondent's parental rights and responsibilities when she did so.

[38] I am accordingly satisfied that the court a quo was correct in answering the question posed by the English court in the negative.

[39] I now turn to the issue of costs. It is so that generally in cases involving children, for example those concerning rights of access, courts frequently make an order that parties must pay their own costs because they are considered to be acting in the best interests of the children as envisaged by s 28 of the Constitution. I have however taken into consideration the fact that in the present proceedings the application in the court a quo was brought at the behest of the English court and that the first respondent was put to the expense of bringing the proceedings in order to assist the English court in resolving a difficult issue relating to custody rights pertaining to the child. Essentially this case revolved around the best interests of S to have access to her biological father. The appellant adopted a deliberately difficult and obstructive approach throughout this litigation. In addition, she introduced scurrilous and vitriolic matters about the first respondent which were completely irrelevant to the issue for determination. Undeterred by the finding of the court a quo, she has persisted in the present appeal with her frivolous claims with the sole purpose of denying the appellant his parental rights to S. Undoubtedly her conduct deserves serious censure from this court as it borders on abuse of the court process. In the circumstances, it is appropriate that the appellant should pay the costs of appeal.

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

The appeal is dismissed with costs.

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B H MBHA
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	J Julyan SC (with her S Clarence) Susan Abro Attorney c/o Webbers, Bloemfontein
For First Respondent:	A M Annandale SC Ness Harvey Attorneys c/o Honey Attorneys, Bloemfontein