

SOUTH AFRICA / JUDGMENT

DR v NM and Another (3358/2024) [2024] ZAWCHC 69 (5 March 2024)

[2024] ZAWCHC 69**COURT**

Western Cape High Court, Cape Town

BEFORE

Lekhukeni

CASE / FILE NUMBER

3358/2024

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July 2024

FLYNOTES:

FAMILY – Children – Contact –
Same-sex couples – Children
born via surrogate – Irretrievable breakdown of marriage –
Applicant does not
have any existing parental rights and
responsibilities – Children’s best interest paramount
– Maintaining
contact with applicant is in best interest of
child – Demonstrated an immeasurable degree of commitment
and contributed
towards maintaining child – Child should be
included in investigation to determine child's best interest –
Overnight
contact granted.
In
the High Court of South Africa
(Western Cape
Division, Cape Town)
Case
No: 3358/2024
In

the matter between: DR
Applicant
and
N
M
First
Respondent
R
L
Second
Respondent

Heard: 23 February 2024
Delivered
(electronically): 05 March 2024

JUDGMENT

LEKHULENI J

1.

Introduction

[1] This is an urgent application in which the applicant seeks primary care of two minor children in terms of section 23(1)(b) of the Children's Act 38 of 2005 (“the Children’s Act”). The application is divided into two parts, Part A and Part B. In Part A, the applicant seeks an order that, pending the final

determination

of the relief sought in Part B, he shall be awarded the primary care of two minor children, namely, WML, a girl born on 09 October 2018, and LM a boy born on 12 April 2022 in terms of section 23(1)(b) of the Children's Act. The two minor children are currently in the care of the first respondent. In addition, the applicant sought an order that the minor children be returned to the applicant forthwith and that the first respondent is to have contact with the minor children on Wednesdays and Fridays from after school until 17h30 and on Sundays from 09h00 to 17h30.

[2] The applicant also sought an order that the contact referred to hereinabove, shall be supervised contact and that the supervision should be conducted by a registered social worker in the employ of Child Assist; the cost associated therewith is to be shared by the applicant and the first respondent. The applicant also implored this court to direct that Leigh Pettigrew be appointed to urgently conduct a care and contact assessment and compile a report setting out her

findings and recommendations regarding future care and contact arrangements between the parties and the minor children that would be in the best interest of the children.

- [3] In the alternative to the above, the applicant sought an order that he be awarded reasonable contact to the two minor children as envisaged in section 23(1)(a) of the Children's Act every Tuesday from after school until 08h00 on Wednesday and every alternate weekend from after school on Friday until 08h00 on Monday.
- [4] In Part B, the applicant seeks an order that will implement Ms Pettigrew's recommendations, pursuant to her assessment. This court is only enjoined to consider Part A of the applicant's application.
- [5] The first and the second respondent opposed the applicant's application and filed the necessary answering affidavit opposing the relief sought by the applicant. At the hearing of this application, the court was informed that the applicant was no longer seeking the care of the minor children but instead, access to the minor children as prayed for in the alternative. The applicant's Counsel, Mr Pincus SC, informed the court that the applicant seeks an order that the application be postponed sine die and that pending the final determination of the relief sought in Part B of this application, the applicant shall exercise contact to the minor child LM as stated in paragraph 3 above and on every alternative weekend from after school on Friday until 08h00 on Monday. Regarding the girl, WML, the applicant requested to contact her on such terms as the first and the second respondent may agree.

2. The factual Matrix

- [6] The applicant and the first respondent are same-sex couples. They were married to each other on 29 April 2023 in terms of the Civil Union Act 17 of 2006. However, they are currently separated. No children were born during their marriage. The applicant has two biological children who were born via surrogate motherhood agreement as envisaged in section 292 of the Children's Act prior to his relationship with the first respondent. The said children are MT, a boy born in 2012 who is 11 years old and MC, a boy born in 2016 who is now 7 years old. The two minor children are currently in the care of the applicant.
- [7] Prior to the marriage between the applicant and the first respondent, the first respondent was married to the second respondent in terms of the Civil Union Act. The first respondent and the second respondent were same-sex couples, and their marriage was dissolved in terms of an order of court on 13 November 2020. During the marriage between the first and the second respondent, a minor child was born, namely, WML (a girl), via a surrogate motherhood agreement. The first respondent is the biological father of WML. In terms of the parenting plan concluded between them, the first respondent is WML's primary caregiver. The second respondent exercises contact with WML on Wednesday from after school until 17h30 and every Sunday from 09h00 until 14h00.

- [8] The first respondent's second child, LM, was also born via a surrogate motherhood agreement on 12 April 2022. LM was born after the first and the second respondent divorced and before the first respondent could marry the applicant. When LM was born, the first respondent and the applicant were in a romantic relationship for approximately six months before concluding their marriage agreement. The applicant was not involved in the legal process for LM's surrogacy agreement. Thus, the applicant does not appear on LM's birth certificate. Notwithstanding, the applicant has been involved in LM's life since birth and has cared for and provided for him financially as he provided for his two biological children.

2.1 The Applicant's Case

- [9] The Applicant stated that he met the first respondent at the beginning of August 2020 when the applicant moved to Ilkley Crescent, an apartment complex where the first respondent was already residing in Seapoint. The first respondent at the time lived on the ground floor with WML and a nanny. The applicant moved into the upstairs of the same apartment with his two minor children. At that time, the first respondent was in the process of divorcing the second respondent. On 31 August 2020, the first respondent and the applicant commenced a romantic relationship and went on holiday in Kruger National Park with their children. It was during this trip that the first respondent disclosed to the applicant that he suffers from bipolar disorder.
- [10] In February 2021, before they could conclude their marriage contract, the first respondent expressed a desire to have another child. This happened only six months into their relationship. However, the applicant informed the first respondent that he would fully support him during the surrogacy process. Still, he wanted to avoid being involved in the legal side of the process. The applicant stated that he undertook that if their relationship progressed to marriage, he would not hesitate to adopt such a child as his own. According to the applicant, the first respondent and the applicant jointly selected a surrogate, and she became pregnant in August 2021. And the baby boy (LM) was due to arrive in April 2022.
- [11] The child was born on 14 April 2022. On 15 April 2022, the first respondent, the applicant and the four children visited Hermanus for a weekend. The applicant avers that the first respondent's nerves appeared on edge following LM's birth, and the first respondent could not cope with LM. According to the applicant, he then took over all the responsibility of LM's care, including feeding, bathing, putting him to bed, and waking him up during the night to soothe him. The applicant took full responsibility not only for LM but also for WML. The contrast in approach to the care of their children resulted in an argument between the first respondent and the applicant, as the applicant did not want the nanny to be the primary caregiver of the first respondent's children.
- [12] At home, the first respondent was unable to take the night shift with LM as he was taking sleeping tablets, Seroquel, an antipsychotic medication. The applicant stated that the first respondent would take his medication at 20h30, which would take effect within 20 minutes. By the time the applicant had finished putting their children to bed at 21h00, the first

respondent would already be asleep. The medication affected the first respondent to such an extent that not even a screaming baby would awaken him. The applicant averred that he cared for all four children without any assistance from the first respondent.

- [13] The applicant asserted that despite a change in medication, the first respondent's depression persisted, and his overall mental health declined between 2022 and December 2022. He isolated himself, disengaged from their family unit entirely and was incapable of functioning on even the most basic level. The applicant averred that the first respondent was still not participating in bathing the children, feeding them, or putting them to bed at night, nor was he involved in the morning routine. In addition, there was no conversation, as the first respondent did not speak to the applicant, the children or the nanny looking after them.
- [14] While the first respondent was incapacitated by his depression, the applicant asseverated that he was working and running his company full time, managing their household, and single-handedly parenting their four children (including those of the applicant). Although a nanny assisted him, their working hours were such that the applicant was solely responsible for getting their children ready for school, making breakfast, and packing school lunches in the morning, preparing dinners, and putting the children to bed in the evenings. His primary focus was to ensure that despite all the turmoil in their home, the children had a loving and stable environment where they could thrive.
- [15] Notwithstanding, the parties married each other on 29 April 2023. During his marriage with the first respondent, their family comprised the applicant, the first respondent, and the four minor children, namely two of the applicants and two of the first respondent. They lived together as a family unit from August 2020 to 09 February 2024. In October 2023, the applicant accompanied the first respondent to consult Dr. Torline. During the consultation, the doctor suggested that the first respondent's sleeping tablets may be interfering with the effectiveness of his other medications, potentially leading to his depression. The doctor recommended that the first respondent stop taking the sleeping tablets as they were unnecessary suppressants.
- [16] The first respondent's reaction was that it was not the medication that was causing the depression but rather his co-dependence on the applicant and his feeling of abandonment when the applicant travels for work. According to the applicant, this narrative was supported by the first respondent's psychologist and the first respondent's mother, who also dismissed the possibility that the first respondent's illness could be related to the medication and that it was linked to certain environmental factors. The first respondent's family began to blame the applicant for the first respondent's depression, claiming that the first respondent had never been ill prior to meeting the applicant.

- [17] The applicant asserted that the first respondent's condition continued to deteriorate, and the first respondent was subsequently admitted to the psychiatric ward at Vincent Pallotti Hospital, where he remained for three weeks. When the first respondent was in the clinic, the applicant stated that he continued to be the children's primary caregiver and ensured that all their needs were met.
- [18] From 15 December to 22 December 2023, the four children and the applicant stayed at their holiday home in Paternoster. Applicant avers that he had a wonderful time with the four children and spent most of the days on the beach with the children and that the first respondent only joined them on one occasion for lunch on the last night of the holiday. The applicant asserted that he took responsibility for all four children due to the depression the first respondent was suffering from.
- [19] On 1 February 2024, the first respondent was admitted at Anker Huis for treatment. Later, the first respondent insisted that he could complete his treatment at home. The applicant informed the first respondent that this would not be possible and reminded him they had already tried that approach without success. The first respondent telephoned his mother, who fetched him from the treatment centre. On 9 February 2024, the first respondent arrived at their shared home, picked up some of his and the children's belongings, and moved to stay with his mother. The first respondent took his children WML and LM and now resides with his mother.
- [20] The applicant states that their marriage relationship has broken down irretrievably and cannot be restored. After several requests to spend time with WML and LM and initially refusing contact, the first respondent agreed to contact on Thursday, 15 February 2024, until 17h00 hours. The first respondents also agreed that the applicant could take the children to Paternoster with them from Friday, 16 February to Sunday, 18 February 2024. The applicant requested overnight contact with the children on Tuesday, 20 February 2024, and Thursday, 22 February 2024, which the first respondent refused, stating that he has no legal responsibility to agree to further contact. The applicant asserted that it was evident that unless a contact arrangement is put in place, any further contact will be at the whim of the first respondent.

2.2 The First Respondent's case

- [21] The first respondent opposed the applicant's application and stated that the applicant is seeking a drastic and far-reaching relief that primary care of his two minor children be assigned to him in terms of section 23 of the Children's Act for an indefinite time until the relief sought in prayer B is finally determined. According to the first respondent, there is no merit in the applicant's claim for primary care and the severe restrictions on the first respondent's parenting rights and responsibilities. The first respondent stated that the applicant is aware and knows that the first respondent is capable, involved, and a caring parent. According to him, there is overwhelming evidence from mental health practitioners, the children's teachers, and several family members that the first respondent takes good

care of the children and is a loving and committed father. The first respondent stated this application is a bullying technique in response to their marriage break up and his decision to stop with an inpatient treatment program after he realised that the clinic was not suitable for him.

- [22] The first respondent has also raised concerns about the urgency with which this application was filed. According to the first respondent, the applicant knew that the care and contact of WLM between him and the second respondent was reached pursuant to a mediation. The first respondent asserted that there is no valid reason why the applicant has not attempted to mediate this matter. The first respondent also stated that the applicant has no parental rights or responsibilities in terms of the Children's Act in respect of his two minor children, WML and LM.
- [23] The second respondent stated further that he is the biological father of LM, who was born on 12 April 2022 in accordance with a surrogate motherhood agreement. In terms of the surrogate motherhood order granted by this court on 16 July 2021, he was awarded full parental rights and responsibility with respect to LM. He is also the biological father of WLM, who was born on 9 October 2018, pursuant to a surrogate motherhood agreement he concluded with her surrogate mother.
- [24] When the first respondent was divorced from the second respondent, the two concluded a parenting plan governing their respective parental rights and responsibilities regarding WML. The first and second respondents have co-parented WML during their marriage and post-divorce in terms of their parenting plan. The second respondent currently sees WML on Tuesday between 14h00 hours and 18h30 and every Saturday from approximately 09h00 to 15h30. WML has two parents with full parental responsibilities and rights and an engaged extended family with whom she has regular contact.
- [25] The second respondent further stated that he was diagnosed with bipolar mood disorder when he was 18 years old. However, his condition has always been managed by medication as prescribed by his treating psychiatrists. He does not abuse drugs, as alleged by the applicant. The first respondent asserted that he is treatment compliant. His treating psychiatrist, Dr Torline, has confirmed in a report dated 26 January 2024 that the first respondent's voluntary admission and referral to Anker Huis Clinic was not related to drug rehabilitation or any risk to the first respondent or others but rather as part of first respondent's ongoing therapeutic journey. Dr Torline also reported an improvement in the first respondent's mental state.
- [26] The first respondent also attached a report from WML's teacher confirming that the first respondent brought WML to school almost every day this year and that WML appeared very comfortable with the first respondent. The first respondent further incorporated various reports and affidavits of his family members echoing the same sentiments. The first respondent states that these statements from his mother, sister and other collaterals refute the applicant's trumped-up allegations that he is an incapacitated parent.

- [27] Regarding their relationship, the applicant stated that it was generally good but started to take a strain as it became apparent to him that the applicant led a far more social and frenetic life than the first respondent was prepared to lead with WML and LM in his care. When LM was only a few days old, the applicant insisted that they go to Hermanus with friends on a trip, which caused the first respondent much anxiety as he had a newborn baby to care for. Between LM's birth in April 2022 and approximately August 2023, their relationship broke down over time. It became apparent to the first respondent that they were simply not a good match, and because of the strain of their relationship, the first respondent gradually became depressed. The applicant's OCD progressively became more and more intensified, which led to friction as the applicant attempted to control the first respondent, the first respondent's children, and their home environment.
- [28] During the latter part of 2023, he felt depressed and hit a low in October 2023 and one day had thought of even ending his life. He did not act on those thoughts and sought the intervention of his psychologist, who referred him to Vincent Pallotti Hospital, where he stayed as an inpatient for three weeks. His stay at Vincent Pallotti Hospital was good for him. When he was ready to leave the institution, he was able to recognise that his relationship with the applicant was undermining and problematical in that it was causing him harm emotionally and psychologically. He felt overwhelmed by the applicant's forceful and bossy personality.
- [29] The first respondents vacated the applicant's home for the first time on 16 December 2023. His two minor children, WML and LM, remained with him until 20 December 2023, after which they went to Paternoster with the applicant for three days. The applicant had planned that weekend out some time before.
- [30] On 24 December 2023, the applicant left with WML for a trip to France, including Disneyland, Switzerland. He did not accompany the applicant and WML on the trip abroad as LM was too young to go abroad. Given the breakdown of their relationship, he did not believe it was in WML's best interest for him and the applicant to go on a trip together. Notwithstanding, he agreed that WLM should still go as he had been very excited about her trip to Disneyland.
- [31] On 01 February 2024, the applicant admitted himself to Anker Huis at the insistence of the applicant. The first respondent soon realised that the focus of the centre was on drug and alcohol rehabilitation and that the customised mental health program he was promised was a farce. This was not at all what he had been led to believe would be the purpose of his treatment. According to him, he did not admit himself to Anker Huis for a drug problem. He was ready to leave the clinic and face the underlying cause of his depression, his failed relationship with the applicant, and to make fundamental changes, which he had since implemented by moving to live with his mother.

- [32] The applicant was upset not only because the first respondent was leaving Anker Huis, but because he was moving in to live with his mother. The first respondent fetched his minor children, WML and LM, from the applicant's home the day after he was discharged, and they have primarily stayed with him since then. The first respondent asserted that he is feeling energised and more positive and has been able to focus on WML and LM, particularly on their emotional support and their progress at school.
- [33] According to the first respondent, despite the impression the applicant attempts to create in his application, he has never cared primarily for WML. The first respondent asserts that he has always been primarily responsible for WML's care, assisted by a nanny he employed and paid for. According to the first respondent, the applicant was not involved in any decision about WML's education and her medical care. The first respondent stated that he has always started the WML's day by waking her up, getting her dressed, and ensuring her bags are packed for extramural activities. He also ensured that WML had her breakfast. Whilst he had the benefit of assistance from staff (nanny) in preparing lunch boxes, he had always remained responsible for these tasks.
- [34] He currently resides with his mother at her home in Bantry Bay with his minor children, WML and LM. This has been the case since he vacated the applicant's home. He is currently unemployed and available to devote his time to the children. His mother and his sisters support him regarding the care of the children. His minor children love their grandmother, and the grandmother adores them. To this end, he filed a supporting affidavit of the mother and her sisters confirming his assertions.
- [35] Pending the psychologist's assessment, he has tendered the applicant with interim contact arrangement regarding LM. He has no problem with the applicant having access to LM, but he does not want LM to sleep over at the applicant's house. According to him, it is not in LM's best interest to stay with the applicant overnight as it is too disruptive to LM's routine, as he is still very young. As regards WML, the second respondent stated that he has agreed with the second respondent to extend the contact to the applicant; however, the two respondents are of the view that it is not in the best interest of WML for a formal contact arrangement to put in place in respect of the applicant's contact.

2.3 The Second Respondent's Case

- [36] The second respondent opposed the applicant's application and even launched a conditional counterapplication. In the counterapplication, the second respondent asserted that if this court determines that the minor child WML born in the marriage between the first and the second respondent should not remain in the primary care of the first respondent pending the outcome of such assessment, only in that event, second respondent seeks an order directing that WML be placed in his primary care subject to such contact between the first respondent and WML as may be agreed between the first and the second respondent.

- [37] The second respondent opposed the applicant's application on the basis that the applicant, in this matter, being the estranged husband of the first respondent, sought to have certain parental rights conferred on him in respect of WML born of a marriage between the second respondent and the first respondent. The second respondent asserted that applicant sought such an order in circumstances where no regard has been heard to the fact that the second respondent is the father and the holder of parental rights and responsibilities in respect of WML and where no case has been made out as to why when WML has two loving and dedicated fathers, it would serve her best interest for rights in respect of her to be conferred on the applicant.
- [38] The second respondent stated that the applicant seeks an order placing WML in his primary care rather than in the second respondent, without any explanation for discounting the second respondent's role as WML's father. Furthermore, according to the second respondent, the applicant should have conferred with either the first respondent or the second respondent regarding care arrangements for WML if the first respondent is unable to care for him. To this end, the second respondent contended that the applicant's approach demonstrates his lack of respect for either the first or second respondent as WML parents.
- [39] According to the second respondent, the applicant did not have the courtesy of approaching the second respondent before this application was launched regarding the second respondent's views about WML sustaining a relationship with him and his two sons on his separation from the first respondent or on how contact should take place. The second respondent further asserted that he and the first respondent can exercise their parental rights and responsibilities with respect to WML without interference from any third party.
- [40] The second respondent stated that he is willing to cooperate as a collateral source of information for assessment regarding the first respondent's parental capacity. However, the second respondent asserted that his parental capacity is not in question and does not require assessment. The second respondent further stated that he objects to any expert deciding in this matter regarding his rights of care and contact about WML and objects to WML being assessed to allocate rights and make determinations regarding care and contact in respect of her. Any care and contact assessment regarding LM should be restricted to the applicant and first respondent.
- [41] The second respondent disputed the applicant's assertion that upon the dissolution of their marriage, it was agreed that he would not contribute to WML's maintenance. According to him, in terms of their settlement agreement, it was decided that the first respondent would provide for WML's medical and educational expenses and that the parties would each provide for WML's expenses in their respective homes. The second respondent also asserted that the first respondent is a hands-on father to WML. He is involved in her schooling and other activities. The second respondent applied that the relief the applicant seeks be dismissed with a punitive costs order on an attorney and client scale.

3. Principal Submissions by the Parties

- [42] At the hearing of this application, Mr Pincus, the applicant's Counsel, submitted that when the application was instituted, the applicant sought interim primary care and, in the alternative, interim contact. Mr Pincus further submitted that the applicant is no longer pursuing an order for primary care, but his alternative prayer for interim contact plus the appointment of an expert to conduct an assessment and compile a report setting out her findings and recommendations regarding future contact arrangements between the parties and the two minor children.
- [43] In a nutshell, Mr Pincus submitted that the applicant only seeks access to the two minor children, WML and LM. Regarding contact with LM, Mr Pincus submitted that pending the final determination of the relief sought in Part B of this application, the applicant seeks an order allowing him to exercise access to LM on Tuesdays from after school until 08h00 on Wednesday (in other words, sleepover access). Counsel submitted that the applicant also wants access to LM every alternate weekend after school on Friday until 08h00 Monday.
- [44] Concerning WML, Mr Pincus submitted that the applicant wants access to the child and such contact as the first and second respondent may agree. Regarding the appointment of the expert, the applicant sought an order that the assessment be conducted with respect to both two minor children (LM and WML). At the same time, the respondents refuted this request and argued that the assessment should only be in respect of LM. Mr Pincus also submitted that the applicant seeks an order that the second respondent's conditional counterclaim be refused, as this was sought after the applicant indicated a day before the hearing of the application that it will no longer be seeking primary care for the children.
- [45] Ms Gassner SC, on behalf of the first respondent, submitted that the first respondent is highly involved in the life of LM, who is two years old. Counsel submitted that the first respondent is the primary carer and that with babies, one must be quite careful to separate them from their primary carer for a long time. Counsel further submitted that purely with babies, one would not want to have them separated from their primary caregiver for an extended period without an expert saying it is fine to do so. Counsel submitted that the court should step in cautiously because, with little children, we don't know how this will impact them.
- [46] Ms Gassner argued that there is no indication that the applicant cannot spend quality time with LM during the day. The court should focus on the child and what is in the child's best interest as opposed to the applicant's right. Importantly, Ms Gassner submitted that the applicant does not have legal rights at this stage. He may have those rights in the future. Until he got them, caution and conservatism may be the prudent course.
- [47] Ms Gassner argued that the parties had not lived together for four years, as suggested by the applicant. They were married in April
2023. This is a very short-lived marriage. They lived together since August 2021. LM was born before the marriage in 2022. From 16 December 2023, the first respondent lived at his mother's house. Counsel submitted that they have agreed to an assessment in respect of

the little boy LM because he has known the applicant as a baby. However, the situation is different with respect to MWL. The little girl, it was submitted, has two fathers with full parental rights and responsibilities, which was court-ordered. The first and second respondents have full rights in respect of WML. Accordingly, visitation to WML can only take place on an informal and ad hoc basis and with the express consent of her co-parents.

- [48] The little boy, LM, has one parent with sole parental responsibility. During the hearing, the Counsel argued that the applicant did not provide enough evidence to justify the basis for the assessment to be conducted to establish his rights of contact with WML. As far as WML is concerned, Ms Gassner submitted that she has two parents who have split up and have full parental rights and responsibility to her. Counsel submitted that the situation of MWL is different in that the respondents did not sever the applicant's rights to see WML. Counsel implored the court to exclude WML from the assessment.
- [49] Ms McCurdie SC, representing the second respondent, pointed out that the applicant's claim of not seeking any relief against the second respondent was inaccurate. Counsel argued that the care arrangement the applicant seeks affects the second respondent's rights. This is so because, in the notice of motion, the applicant wanted primary care of WML. The second respondent has the right to care for WML. Counsel submitted that the applicant was seeking rights of care in terms of section 23(1)(b) of the Children's Act. That certainly impacted the second respondent's parental rights and responsibility.
- [50] Furthermore, Counsel argued that in paragraph 3 of the Notice of Motion, the applicant wanted rights of contact conferred on him in terms of section 23(1)(a) of the Children's Act. The applicant wants to have contact with WML, and that long and short school holidays shall be shared between the parties on such terms to be agreed upon between the parties. Counsel argued that this would clearly impact the second respondent's rights of access to the child as it is likely to impact the portion of his time to see the WML.
- [51] Ms McCurdie submitted that the applicant brought this matter on an urgent basis on three-and-half-day notice in circumstances where these two children spent the previous weekend with the applicant with the consent of the first and second respondents. Despite the separation between the applicant and the first respondent, the first and the second respondent facilitated contact between the applicant and WML. They did not need a court order to direct them to do that. According to Ms McCurdie, the applicant did not make a case as to why he suggests he requires a court order.
- [52] Ms McCurdie also impugned paragraph 6 of the Notice of Motion in which the applicant sought an order for an expert to compile a report with findings and recommendations regarding future care and contact arrangements relating to the minor children. In tandem with Ms Gassner's submissions, Ms McCurdie submitted that the first and second respondent did not sever the applicant's right towards the minor child WML. Counsel aligned herself with the proposed draft order sought by Ms Gassner that WML should not be part of the assessment proposed by the applicant in his notice of motion.

4. Issues to be decided

[53] From the discussion above, there are two questions that this court is enjoined to consider. First, this court must consider whether the applicant should have overnight access to LM. Put differently, whether pending the final determination of the relief sought in Part B of this application, the applicant should be allowed to exercise overnight contact with LM on Tuesdays after school until 08h00 on Wednesdays and over the school holidays as agreed by the parties. Secondly, this court is enjoined to determine whether WML should be included in the assessment by the expert to determine care and contact arrangements.

5. Applicable legal principles and discussion

[54] For completeness, I will deal with the questions raised above sequentially.

5.1 Should the applicant enjoy overnight access to LM?

[55] The dispute between the parties centres around the two minor children, WML and LM. The children are currently in the care of the first respondent. It is common cause that the applicant does not have any existing parental rights and responsibilities to these children in terms of the Children's Act. The applicant has approached this court in terms of section 23 of the said Act for him to be granted contact with LM, and to have reasonable access to WML with prior arrangement between the first and second respondent. For the sake of completeness, section 23(1) of the Children's Act provides as follows:

“Any person having an interest in the care, well-being or development of a child may apply to the High Court, a divorce court in divorce matters or the children's court for an order granting to the applicant, on such conditions as the court may deem necessary –

- (a) contact with the child; or
- (b) care of the child.”

[56] Section 23(2) lays down the factors the court must take into account when considering the application for assignment of contact or care. Section 23(2) provided as follows:

“(2) When considering an application contemplated in subsection (1), the court must take into account –

- (a) the best interests of the child;
- (b) the relationship between the applicant and the child, and any other relevant person and the child;
- (c) the degree of commitment that the applicant has shown towards the child;
- (d) the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child; and
- (e) any other fact that should, in the opinion of the court, be taken into account.”

[57] Section 23(2) sets out guiding principles that must be considered when an order in terms of section 23(1) is sought. Significantly, section 23(2) incorporates a child's best interest as envisaged in section 28(2) of the Constitution. It is trite that constitutional protection is given to children in all matters concerning them in terms of section 28(2) of the Constitution and in terms of numerous treaties to which South Africa is a party. (see Article 3(1) of the United Nations Convention on the Rights of the Child 1989). The best

interest or the paramountcy principle creates a right that is independent and extended beyond the recognition of other children's

rights in the Constitution. Crucially, the best interest principle encapsulates the idea that the child is a developing being capable of change and needs appropriate nurturing to develop its moral compass. (See *J v National Director of Public Prosecutions (Childline South Africa and Others as amici curiae)* 2014 (7) BCLR 764 (CC).

[58] The applicant in this matter has approached this court in terms of section 23(1) of the Children's Act. This section empowers anyone who has an interest in the child's care, well-being, or development to approach the High Court, a Regional Court dealing with a divorce matter, or the Children's Court for an order awarding contact or care of the child to him or her. Such an applicant must satisfy the requirements set out in section 23(2) of the Act.

[59] In my view, consistent with the tenets of statutory interpretation, section 23(1) of the Children's Act must be given its grammatical meaning unless doing so would result in an absurdity. This should be done consistent with the three interrelated riders to this general principle, namely: that statutory provisions should always be interpreted purposively; the relevant statutory provisions must be properly contextualised; and that all statutes must be construed consistent with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. (*Cool Ideas* 1186 CC v *Hubbard and Another* 2014 (4) SA 474 (CC) para 28).

[60] The applicant qualifies under the definition outlined in the section and has expressed interest in the two minor children. He has been living with them for over two years or so. The applicant has been caring for the minor children when the applicant and the first respondent lived together. The first respondent admitted in his answering affidavit that the applicant fed, bathed, and put LM to bed even when they visited Hermanus when LM was still an infant. The first respondent also admitted in his answering affidavit that the applicant cared for the children when he came home at night. It cannot be disputed that the applicant has a strong bond with LM. Although he was not involved legally in the surrogate motherhood agreement, he played a critical role in LM's life.

[61] In his answering affidavit, the first respondent alluded to the fact that he does not oppose the psychologist experts assessing whether it is in the best interest of LM that the applicant should have contact with him. However, the applicant tendered day contact only. Ms Gassner argued that the court should not award a sleep-over contact, as this would interrupt the routine of LM. I do not agree with this submission. The applicant, as an interested party,

has consistently cared for LM. He spent nights taking care of LM when the first respondent was ill and admitted to various institutions. He cared for LM when he went on holidays with him in the absence of the first respondent. To this end, it is incontestable that on 20 December

2023, the minor children (LM and WML) went with the applicant to Paternoster for three days in the absence of the first respondent.

The first respondent drove to Paternoster on the last day of their holiday to collect the children.

- [62] It is also not in dispute that from 7 January 2024 until 15 January 2024, LM went with the applicant to Plettenberg Bay for holiday purposes. Recently, after the parties had separated, the first respondent agreed that the applicant could take LM and WML to Paternoster from Friday, 16 February, to Sunday, 18 February 2024.
- [63] While I accept that stability must be maintained and that the child must not be disrupted from his routine, I am of the view that maintaining contact with the applicant is in the best interest of LM. As envisaged in section 23(2) of the Children's Act, the applicant has demonstrated a bonded relationship with LM. It is also indisputable that LM has a closely knitted relationship with the applicant's two children. The applicant has also demonstrated an immeasurable degree of commitment towards LM; hence, he brought this application to maintain contact with him. It is also not in dispute that the applicant has contributed towards maintaining LM.
- [64] Nothing on record suggests that the applicant is a danger to LM. To the contrary, the applicant has proven to be caring, looking after him and having his best interest at heart. It is also irrefutable that the applicant and his children have a close bond with LM and WML.
- [65] I repeat, WML and LM have a closely knitted relationship with the applicant's children. The four children have been raised together as 'siblings' for a period of two to three years or so. Ostensibly, the separation of the applicant and the first respondent has been traumatic to the applicant's children, and to LM and WML. It has been held that siblings experiencing the trauma of divorce tend to form a bond with each other. A bond that, to a greater extent, gives them a feeling of security against an onslaught from outside. *Van der Linde v Van der Linde* 1996 (3) SA 509; *C v C and Another* (32126/2015) [2016] ZAGPPHC 273 (29 April 2016) at para 13.
- [66] While I accept that WML and LM have their own parents, I am of the view that there is an acute need for the children to maintain that bond. Upon considering all the evidence, I firmly believe that the applicant must be allowed to enjoy overnight access to the minor child LM. I am further of the view that the applicant should be allowed access to LM during school holidays on mutually agreed days between the applicant and the second respondent. In turn, LM must also be allowed to enjoy the company of his 'siblings' the applicant's children. This will enable the children from both families to find support from each other during the period of separation or eventual divorce between the applicant and the first

respondent.

5.2 Should WML be included in the investigation by the expert?

- [67] The applicant has applied that Leigh Pettigrew be appointed as the applicant's expert to urgently conduct an assessment and compile a report setting out her findings and recommendations regarding future contact arrangements between the parties and the minor children that would be in the children's best interest. It has been argued on behalf of the two respondents that the question of contact between the applicant and WML stands on a different footing to that of LM. It was further submitted that WML has two fathers who have concluded a parenting plan that regulates their parental rights and responsibilities.
- [68] If an investigation is done and a recommendation is made, so the argument goes, those recommendations will impact the parental rights and responsibilities of the respondents. I do not agree with these assertions. It must be stressed that the intended investigation per se does not take away the parental rights and responsibilities of the first and second respondents. In addition, the investigation does not confer any right to the applicant. The investigation is only intended to determine whether rights are to be accorded to the applicant or not. In my view, the argument raised by both Counsels for the two respondents would have been relevant if this court was considering Part B of the applicant's application and the expert had recommended that the applicant must have access to the minor child WML.
- [69] In my opinion, in that event, the court will have to determine whether making such an order won't impact the first and second respondent's rights negatively. In the instant matter, the applicant is currently seeking an investigation to determine what is in the minor child's best interest. He has been staying with WML. He has looked after her. He travelled with her to various parts of the world. In my view, it will be inconsistent with the constitutional imperatives for this court to close the door for an investigation to determine what is in the best interest of the child. I am aware that there is no interim report to support my findings. However, I am of the view that a conspectus of all the evidence in this matter undoubtedly satisfies this court's judgment that an investigation inclusive of WML is the right course.
- [70] Furthermore, an investigation by the office of the family advocate, which I also intend to order herein in terms of the Mediation in Certain Divorce Matters Act 24 of 1987, aims to provide for mediation in certain divorce proceedings and in certain applications arising from such proceedings, in which minor or dependent children of the marriage are involved, to safeguard the interests of such children.
- [71] It is perhaps apposite to remind ourselves of the general principles set out in section 6 of the Children's Act. In line with child legislation in many other jurisdictions, section 6 provides the central principles underpinning how decisions should be made regarding children in domestic legislation and guides the implementation, proceedings, actions, and decisions in relation to children. (PD v MD 2013 (1) SA 366 (ECP) para 11). Notable, section 6(4) of the Children's Act provides that in any matter concerning a child, an approach which is

conducive to conciliation and problem-solving should be followed, and a confrontational approach should be avoided. In my opinion, the investigation by an expert and by the office of the family advocate is a process that is conciliatory and conducive to problem solving envisaged in section

6(4) of the Act.

[72] As previously stated, the investigation is not conferring rights or taking rights away from the respondents. It only makes recommendations to the court and is only intended to determine what is in the best interest of the child. As adumbrated above, the child's best interest must always prevail in matters concerning a child. In these circumstances, I believe it is incumbent upon this court to err on the side of caution and direct an investigation to determine what is in the child's best interest. This finding, in my view, is fortified by section 6(2)(a) of the Children's Act, which requires that all proceedings, actions, or decisions in a matter concerning a child must respect, protect, promote, and fulfil the child's rights and best interests as set out in the Bill of Rights, subject to any lawful limitations.

[73] The fact that WML has two parents with parental rights and responsibilities should not prevent an interested person from having contact with her if the interest of justice demands it. This is what is envisaged in section 23 of the Children's Act. As discussed above, the applicant has been very hands-on with both children. He has demonstrated love and care for the two minor children. He has travelled with them far and wide. I believe an investigation should be conducted, which includes the two minor children, to determine what is in their best interest. If it is found during the investigation by the family advocate and the relevant experts that it is not in the best interest of WML for the applicant see her, the experts will make such findings and recommendations in their reports. However, to shut the door and stop the investigation which includes WML, in my view, will be inconsistent with section 28(2) of the Constitution.

[74] I conclude, therefore, that the applicant should have overnight access to the minor child LM and over the school holidays as agreed between the parties and that WML should be included in the investigation to determine the child's best interest. As far as costs are concerned, I am of the view that it should stand over for later

determination.

6. Order

[75] Given all these considerations, the following order is granted:

75.1 The applicant's failure to comply with the Rules of court with regard to time periods and service of process is condoned and Part A of the application is heard as a matter of urgency in accordance with the provisions of Rule 6(12)(a).

75.2 The matter is postponed sine die.

75.3 Pending the final determination of the relief sought in Part B of this application, the applicant shall exercise contact to the minor children as follows:

75.3.1 in respect of LM

75.3.1.1 Tuesday from after school until 08h00 on Wednesday;

75.3.1.2 every alternate weekend from after school on Friday until 08h00 on Monday;

75.3.1.3 the long and short school holidays shall be shared between the Applicant and the First Respondent, on such terms as agreed between the parties.

75.3.2 in respect of WML, such contact as the First and Second Respondents may agree.

75.4 Leigh Pettigrew is appointed as the applicant's expert to urgently conduct an assessment and compile a report setting out her findings and recommendations regarding future contact arrangements between the parties and the minor children that would be in the best interests of the children;

75.5 Terry Dowdall is appointed as the first respondent's expert to urgently conduct an assessment and compile a report setting out his findings and recommendations regarding future contact arrangements between the parties and the minor children that would be in the best interests of the children;

75.6 Leigh Pettigrew and Terry Dowdall are authorised to take the following steps to carry out the assessments and compile their reports:

75.6.1 conduct interviews, psychological assessments and clinical observations of the minor children on reasonable notice and for reasonable periods;

75.6.2 conduct interviews with the applicant and the first respondent (and the second respondent if he so wishes) for reasonable periods and on reasonable notice;

75.6.3 observe the minor children interacting with the applicant and the first respondent (and the second respondent if he so wishes) in their home environments;

75.6.4 conduct interviews with all the relevant collateral sources and medical professionals, on reasonable notice and for reasonable periods; and

75.6.5 the applicant is directed not to post pictures of the minor children in question on social media platforms.

75.7 The applicant and first respondent (and the second respondent if he so wishes) are directed to co-operate and participate in the interviews, observations and assessments by Ms Pettigrew and Mr Dowdall and any other professionals they may appoint, for reasonable periods and on reasonable notice.

75.8 The parties are authorised to supplement their papers (and if they so wish, within 14 days of receipt of the last of the experts' report) for the purposes of the relief sought in Part B.

75.9 The costs of Part A of this application shall stand over for later

determination.

75.10 The office of the Family Advocate is also directed to conduct a care and contact assessment in respect of the minor children to determine their best interests.

LEKHULENI JD

JUDGE OF THE HIGH COURT

Appearances

For the Applicant: Mr Pincus SC

Ms McCarthy

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Ms Bezuidenhout

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