**IN THE HIGH COURT OF SOUTH AFRICA**

**KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case No: 11137/2013

In the matter between:

S[…] D[…] I[…] Applicant

and

K[…] L[…] V[…] C[…] First Respondent

OFFICE OF THE FAMILY ADVOCATE Second Respondent

**Reportable**

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JUDGMENT

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## A. Introduction

1. This matter involves the interpretation of section 21 of the Children's Act 38 of 2005. This section deals with parental responsibilities and rights of unmarried fathers.

2. The need for the interpretation of this section arises from a request from the High Court of Justice Family Division in the United Kingdom (UK High Court) in terms of the Hague Convention on International Child Abduction ("Hague Convention"). That Court requested this Court to determine the following question:

> "In November 2012, was it lawful under South African law, having regard to the circumstances of this case, for the respondent to change the place of residence of the child from a place in South Africa to a place in England and Wales without the prior permission or consent of the applicant or other appropriate South African Court?"

3. This question arose in the UK High Court because of proceedings instituted in that Court by the applicant seeking the return of a child born to him and the first respondent ("respondent"), at a time when they were not married. The respondent left to the UK with the child S[…] when the child was four months old. She did so without informing the applicant. That gave rise to the Hague Convention proceedings brought by the applicant in the UK seeking the return of S[...] under the Hague Convention.

4. The determination of this question depends on whether the applicant was a co-holder of parental rights and responsibilities as contemplated by section

18(1)(a) to (c) of the Children's Act which in terms of section 18(3)(c)(iii) requires the consent of a parent or guardian for a child's departure or removal from the Republic.

5. Ms Annandale SC appeared for the applicant. Mr Gordon SC appeared for the respondent, with the heads of argument having been prepared by Ms Julyan SC. I am grateful to all of them for the written and oral argument.

## B. Jurisdictional Objections

6. Mr Gordon SC argued that this Court has no jurisdiction to hear this matter because the matter had not been referred to mediation first, as required by section 21(3)(a) of the Children's Act. This requires disputes regarding paternity rights of unmarried fathers to be referred to mediation. He argued that in the determination of this matter, this Court has only a "reviewing power" as contemplated by section 21(3)(b). However, this is belied by the respondent's acceptance on the papers that she believed that mediation was not appropriate in this matter. Ms Annandale argued that it is not practical to mediate this matter given that both parties are in different countries – the applicant is in the Republic and the respondent is in the UK. I agree that this is so.

7. Ms Annandale argued that this is not a dispute about the paternity rights of the unmarried biological father emanating in this country and that section 21(3)(b) finds no application. I agree. This case concerns the resolution of a question posed by the UK High Court which is dealing with proceedings initiated there in terms of the Hague Convention. In those proceedings, the UK High Court will

determine whether the applicant had rights of custody when S[...] was removed, as contemplated in Article 3 of the Hague Convention. A resolution of, *inter alia*, that matter will determine whether that Court will order the return of S[...] to the Republic. I am not required to answer any of those matters in this application.

8. Mr Gordon SC also argued that I have no jurisdiction to hear this matter because the UK High Court has to make a decision, in terms of Article 15 of the Hague Convention, whether the respondent's removal of S[…] was wrongful.

9. Article 15 of the Hague Convention provides:

> "The Judicial or Administrative Authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the Applicant obtain from the Authorities of the State of the habitual residence of the child a decision of other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. ..."

10. Mr Gordon SC argued that the question presented by the UK High Court was not whether the removal was "wrongful" but whether the removal was "lawful". He argued that I have no jurisdiction to hear this matter because that Court has no jurisdiction to ask such a question.

11. I find this argument difficult to understand. In its order of 21 August 2013, Mr Justice Keehan of the UK High Court said the following as a preface:

> "**AND UPON IT BEING RECORDED THAT** this court is unclear whether the Respondent was lawfully entitled in November 2012 to change the place of the residence of the child from a place in South Africa to a place in England and Wales without the prior permission or consent of the Applicant or appropriate South African court, and accordingly this court is unclear as to whether or not the Applicant has Rights of Custody within the meaning of article 3 of the Hague Convention on the Civil Aspects of International Child Abduction 1980."

12. As stated, the UK High Court will make a determination on the questions before it, *inter alia*, whether the applicant had rights of custody over S[…] and whether the respondent's removal of S[...] was wrongful – I am not required to do so.

13. I therefore agree with Ms Annandale that the UK High Court has simply requested the assistance of this Court on the determination of the legal question presented. The question involves a consideration of our Children's Act, including sections 21 read with section 18(3)(c)(iii) and (iv) of the Children's Act.

14. The Republic is in any event a contracting party to the Hague Convention and has a duty to assist other contracting states in this regard. Principles of

comity would dictate so.[1] South Africa is a signatory to the Hague Convention and adopted it as law by the enactment of The Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 which was repealed by the Children's Act. Section 275 of the Children's Act now provides that the Hague Convention is law in the Republic subject to the provisions of the Act.

15. I conclude therefore that I have jurisdiction to hear this matter. The respondent has in any event accepted this position and the jurisdiction of this Court. The respondent asserts on the papers:

> "The application before this Honourable Court is in effect an application in terms of Article 15 of the Hague Convention...".

16. The matter is thus properly before me.

## C. The Interpretation of Section 21 of the Children's Act

17. The applicant and respondent were not married or living together in a permanent life-partnership. Accordingly, the applicable provisions are those in section 21(1)(b) of the Children's Act:

> "**21 Parental responsibilities and rights of unmarried fathers**

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[1] *Cf*. *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* 2004 (3) SA 1117 SCA at paragraph [48] where it is pointed out that the Hague Convention is underpinned by principles of international comity.

(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, acquires full parental responsibilities and rights in respect of that child –

(a) ...

(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 or pays damages in terms of customary law;

(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."

18. How am I to be guided in the interpretation of the section? Since the decision of the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 202(4) SA 593 (SCA), paragraph 18, we know that an interpretation of the section requires a consideration of the language, read in context and having regard to the purpose of the provision and the background to its emergence and incorporation in law.

19. Under common law unmarried fathers had no rights over their biological children, apart from a duty to provide maintenance[2]. Then came a gradual change in our statutory landscape, hastened by the emergence of our constitutional order in 1994. This culminated in the Natural Fathers of Children Born out of Wedlock Act 86 of 1997, which permitted an unmarried father to approach the High Court for rights of access, custody or guardianship. That legislation was enacted as a result of the decision of the Constitutional Court in *Fraser v Children's Court, Pretoria* 1997(2) SA 261 (CC).

20. As a result of certain recommendations of the South African Law Commission, a new avenue for the automatic acquisition of parental rights by unmarried fathers emerged.[3] This is what we see in section 21 of the Children's Act. For example, if an unmarried father is living with the mother in a permanent life-partnership at the time of the child's birth, he will automatically acquire full parental responsibilities and rights in respect of the child in accordance with section 21(1)(a) of the Children's Act.[4]

21. That then is the purpose of the provision and the background to its emergence. What of the section's language? Does an unmarried father have to meet all three requirements in 21(1)(b) before he acquires parental rights? The section

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2 *F v L and Another* 1987 (4) SA 525 at 526E.

3 See in this regard, the report of the South African Law Commission in its review of the Child Care Act 74 of 1983, Project 110, December 2002, at paragraph 7.4 web link Http://www.justice.gov.za/salrc/reports/r_pr110_01_2002dec.pdf

4 *See FS v JJ* 2011 (3) SA 126 (SCA) at [25].

separates the requirements with “and”. What happens to those with no financial means but who are nevertheless doting and caring fathers who assist with regular care and the upbringing of the child?

22. Ms Annandale argued, on the strength of *Klerck v Klerck* 1991 (1) SA 265 (W) that the use of the word “and” in section 21 denotes no more than a signal by the legislature that a Court must have regard to all three categories and that a negative conclusion regarding one did not preclude the granting of relief on the strength of the others.

23. In *Klerck,* Kriegler J, as he then was, considered the correct interpretation of section 9(1) of the Divorce Act 70 of 1979 dealing with the forfeiture of marital benefits upon divorce. The Learned Judge concluded that the three factors in section 9, which were linked with “and,” were categories to be considered, being the only linguistic method to list all the factors which had to be considered in that enquiry. In other words, it was not necessary for each of the factors to be present in the conjunctive sense.

24. Ms Annandale argued on this basis that no special significance could be attached to the word “and” in section 21. Further, that the use of the word “or” would have caused the factors to be regarded as alternatives, which was not the legislative intent.

25. It is correct that the use of the word “or” would have had the effect that an unmarried father who consented to be identified as the father and who did

nothing more in respect of his biological child would automatically acquire parental rights. But what of "and"? Is the plain meaning not clear in the context in which it has been used?

26. Mr Gordon SC argued that the section means what it says. "And" means that all three requirements have to be met. In this regard he relied on the unreported decision of the Western Cape High Court in *Steadman v Landman* under case no. 229994/2010. Such an approach is also consistent with the principles enunciated in *Guardrisk Insurance Company Limited v Registrar of Medical Schemes and Another* 2008 (4) SA 620 at [9] and [12], where the Supreme Court of Appeal stressed that there must be compelling reasons for not using the ordinary meaning of words chosen by the legislature.

27. The respondent argued, in the heads of argument, that *Klerck* was distinguishable on the basis that section 9 of the Divorce Act conferred a discretion on the Court ("the court may make an order"). To the contrary, section 21 conferred no discretion on a Court; either all the requirements were satisfied or they were not.

28. Ms Annandale countered this argument by saying that 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. The Court would have to consider a wide range of circumstances because the language in those subsections was deliberately broad, and then make a determination. I believe these arguments to be correct. "Contribute", "attempt in good faith to contribute," "expenses in

connection with maintenance" and "a reasonable period" are all broad concepts permitting of a range of considerations on which minds may differ and the exercise of a value judgment may determine a different outcome. However, does such an exercise equate to a judicial discretion? I am not persuaded that this is so. An unmarried father either acquires parental rights or responsibilities or he does not. How he sets about establishing this is a different matter.

29. All of this is interesting. In my view, there is much force in the argument advanced by Ms. Annandale. Such an approach is certainly consistent with the legislative background and its emergence. It is also consistent with our constitutional commitment to equality and non-discrimination, dignity and the right to family life. However, the argument is not consistent with the plain meaning of the word "and".

30. There may well be compelling reasons to adopt the approach advanced by Ms Annandale as set out in *Klerck*, that the use of "and" denotes more than a mere assertion that all three subsections must be met to automatically acquire parental rights and responsibilities. Such an approach would not exclude the penniless unmarried father who nevertheless cares for his child's upbringing and contributes or makes good faith attempts to contribute to the child's upbringing. It would also not vest automatic parental rights and responsibilities in a father who consented to being identified as the child's father and does no more in respect of the child's upbringing or expenses in connection with maintenance.

31. Nevertheless the law must develop incrementally and not in abstract. It is impossible now to predict the various factual circumstances that may arise in the future or the evolution of societal values on such matters. *See Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC):

> "[82] Sound judicial policy requires us to decide only that which is demanded by the facts of the case and is necessary for its proper disposal. This is particularly so in constitutional matters, where jurisprudence must be allowed to develop incrementally. At times it may be tempting, as in the present case, to go beyond that which is strictly necessary for a proper disposition of the case. Judicial wisdom requires us to resist the temptation and to wait for an occasion when both the facts and the proper disposition of the case require an issue to be confronted. This is not the occasion to do so."

32. I accordingly make no finding on these arguments because I believe this case can be decided on the facts and on the plain words of the section whether the sub-items are viewed conjunctively or whether they are viewed as categories for consideration as argued by Ms Annandale. This is not to say that a case with different facts may well turn on these jurisprudential arguments.

## D. The Facts

33. I have read the extensive papers in this matter. The respondent has dealt with the founding affidavit (20 pages without annexures) in an answering affidavit of 139 pages without annexures. Much of the material dealt with by the

respondent is irrelevant to the limited legal issues presented. These include allegations of drug abuse, sexual abuse, brandishing a firearm, being violent and aggressive and the applicant's hedonistic lifestyle. Such matters may be relevant in the proceedings in the UK but are irrelevant in this application. This is particularly as the respondent does not say that these matters in any way threatened S[…] or were the reasons for her approach to the applicant and his relationship with S[…]. I deal with only the salient facts and facts relevant to the legal question presented as, in my view, these are the facts which are dispositive of the matter. Despite the volume of paper, the facts are straightforward, even on the respondent's version.

D1. Section 21(1)(b)(i)

34. It is common cause that the applicant consented to be identified as the father of S[…].

D2. Section 21(1)(b)(ii)

35. This section speaks to contributions or good faith contributions to S[…]'s upbringing for a reasonable period. These 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.

36. There is a distinction between section 21(1)(b)(ii) and (iii). The former speaks to a child's upbringing and the latter speaks to expenses in connection with maintenance of the child. Clearly the latter relates to finances necessary for the maintenance of the child.

37. In my view section 21(1)(b)(ii) and (iii) must be read with section 18(2) which sets out parental rights and responsibilities in part. Section 18(2)(d) finds expression in section 21(1)(b)(iii) - "to contribute to the maintenance of the child".

38. The responsibility to care for and maintain contact with the child in sections 18(2)(a) and (b), in my view, find expression in section 21(1)(b)(ii) which deals with a child's upbringing.

39. The Court in *Steadman* with reference to the dictionary held that "upbringing" referred to "treatment and instruction received from one's parents through childhood". I am of the view that the concept of "upbringing" denotes more. At its minimum contributing toward a child's upbringing encompasses personal effort towards interacting, caring for and being in contact with the child. But the concept could entail more such as a father procuring suitable care or educational aids or other material yet useful comforts for a child to ensure a comfortable and good upbringing.

40. The respondent left the Republic when S[…] was four months old. It is common cause that she did not tell the applicant that she was leaving and left

at a time when he was out of the country, after having told the applicant's mother that she was going to another city in the Republic. The respondent on her version knew that the applicant did not want her to take S[…] oversees.

41. The respondent calculates that the respondent spent a total of 24 to 32 hours in total with S[…] in those four months. The applicant says that he arranged with the respondent to see S[…] twice a week for 40 minute visits. The respondent's version is that the applicant's visits were no more than 20-30 minutes in duration, and that the applicant would become angry and leave if S[…] was sleeping when he arrived to visit and had accused her of feeding S[…] just before he arrived to ensure that S[…] was sleeping by the time he got there.

42. It goes without saying that children of the age of S[…] spend a great deal of time feeding and sleeping. Caring for and maintaining contact in those circumstances could be difficult. It becomes worse when efforts at contact are frustrated.

43. What is common cause is that the respondent saw the applicant's visits to S[…] as a "favour" that she was granting him, constituting graciousness on her part. A lengthy text from the respondent to that effect is not denied. The limited periods of contact must thus be viewed in that perspective.

44. What is clear, particularly from the letter the respondent had hand delivered to the applicant after she had left the Republic, is that the respondent felt deeply

hurt by the applicant for not having married her and for not loving her. The relationship between the parties was obviously strained. The visits to S[…] could thus not have been in a happy or conducive environment.

45. Based on these facts, emanating largely from the respondent, the applicant can hardly be said to be similar to the unmarried father in *Steadman* who saw his child sporadically over a six month period.

46. The applicant's involvement in the life of S[…] began before his birth and continued up to the respondent's departure. The respondent suggests no ill motive or bad faith behind these contributions.

47. It is clear to me, from the foregoing, that the applicant met the requirements of section 21(1)(b)(ii) in that he made actual contributions or attempted in good faith to contribute to the upbringing of S[…] for a reasonable period over the four month period prior to the respondent's departure.

D3. Section 21(1)(b)(iii)

48. This section speaks to "expenses in connection with the maintenance of a child". This is a different formulation from section 21(2) which speaks to "maintenance of the child". What the difference is is not entirely clear. Baby sitting so as to prevent the costs of a baby-sitter or the costs of a nanny may be an example of an impecunious, unmarried father's contribution towards the expenses in connection with the maintenance of the child.

49. It is common cause that the applicant attended some of the prenatal visits to the doctor and offered to pay for the costs of the pregnancy. The respondent contends that these concerned the well being of the mother and had nothing to do with S[…]. I disagree. Both clearly related also to the health and well being and thus were contributions to the maintenance of S[…].

50. The respondent admits that the applicant built a changing table for S[…]. On this score, the applicant says that he did so because he wanted S[…] to have something personal and memorable from him which he had built with his own hands. The respondent says that the changing table was not as convenient as the ones which could be purchased in a shop. It would nevertheless have contributed towards the maintenance of S[…].

51. It is common cause that the applicant purchased certain items for S[…] from Baby City.

52. It is common cause that the applicant purchased a pram and car seat for S[…] worth just over R10,000. The respondent says that this was paid for by money given to the applicant by his parents. The applicant nevertheless purchased these items and whether the money that was used was his or not he nevertheless paid for them and bought them for S[…].

53. The respondent says that the applicant's mother purchased gifts for S[…] from the baby registry for her baby shower worth approximately R1,000. It is difficult

to imagine how baby shower items listed on a baby registry could have been worthless to the maintenance of a new born child. The respondent does not say that these gifts were useless to S[…] or to the maintenance of S[…].

54. It is undisputed that the applicant contributes to a monthly endowment policy and an education policy set up for S[…].

55. In his founding affidavit the applicant has produced certain invoices which he says demonstrate the items that he paid for towards the maintenance of S[…]. The respondent disputes that the applicant is being honest about all of these invoices.

56. It is however common cause that the applicant purchased a limited number of nappies, wet wipes and baby grows. It is also common cause that no monthly maintenance was paid to the respondent.

57. It is common cause that the applicant offered to put S[…] on his medical aid. The respondent preferred for S[…] to be on her medical aid.

58. It is common cause that the applicant offered to pay a contribution towards S[…]'s maintenance costs. The respondent says that nothing came of this but admits that he had asked for her banking details. The respondent did not give the applicant her banking details and contended that he could nevertheless have obtained it from other sources or that he could have followed up with her but did not do so. The applicant nevertheless offered and the respondent did

not provide her banking details, which ought to have been a simple matter to do.

59. The respondent has presented a schedule of expenses associated with the birth of S[….]. On her version, the applicant paid approximately 11.5% of these expenses. This can hardly be said to be an insubstantial contribution over a period of four months bearing in mind that the applicant had offered to pay the costs during the pregnancy and had asked for the respondent's banking details to pay maintenance.

60. The applicant made actual contributions towards the expenses in connection with the maintenance of S[…] and made good faith attempts to do so. The applicant's tenders to pay began before the birth of S[…] and payments and attempts at payments continued until after the birth during that relatively short four month period.

61. Once more, no ill motive or bad faith is suggested by the respondent for these attempts at contributions and I must conclude that these were good faith attempts. I am of the view that the contributions and attempts at contributions were towards the expenses associated with the maintenance of S[…].

62. Based on the foregoing, I am of the view that the applicant met the requirements of section 21(1)(b)(iii) in the four month period prior to the departure of the respondent.

## E. Conclusion

63. I have come to the conclusion that the applicant met each of the categories in section 21(1)(b) of the Child Care Act.

64. This means that he would have automatically acquired full parental rights and responsibilities in respect of S[…].

65. Accordingly, it was necessary for the respondent to obtain the permission of the applicant prior to removing S[...] from the Republic and prior to applying for a passport for S[...]. This is required by the rights conferred on the applicant in section 18 of the Children's Act and in particular, sections 18(3)(c)(iii) and (iv) (read with 18(5)). The respondent did not do so and thus deprived the applicant of these rights in respect of S[...]. Neither did the respondent approach the Court for permission to leave the Republic with S[...] without the consent of the applicant.

66. It is as well to remember the words of Mahomed DP in the first case in the Constitutional Court on the rights of unmarried fathers in *Fraser*:

> "[29] … by having regard to the fact that the interest of the child is not a separate interest which can realistically be separated from the parental right to develop and enjoy close relationships with a child and by the societal interest in recognising and seeking to accommodate both."

67. I conclude by answering the question posed by the UK High Court of Justice Family Division in the negative.

**68.** As to the question of costs. Both parties sought costs from the other. It is true that the applicant has been put to expense arising directly as a result of the respondent's actions. I accordingly believe that costs ought to follow the result. I direct the respondent to pay the applicant's costs in this application, such costs to include two counsel where employed.

**ORDER**

Accordingly, the Order I make is as follows.

(a) In November 2012 it was not lawful under South African law, having regard to the circumstances of this case, for the respondent to change the place of residence of the child [S[...]] from a place in South Africa to a place in England and Wales without the prior permission or consent of the applicant or other appropriate South African Court.

(b) The respondent is directed to pay the applicant's costs, such costs to include the costs of two counsel where employed.

Gabriel A J

04 April 2014

Date of Hearing: 24 February 2014

Appearances for Applicant: Advocate AM Annandale SC

Instructed by:

Ness-Harvey Attorneys

Appearances for Respondent: D Gordon SC

Heads of argument prepared by J Julyan SC

Instructed by:

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