IN THE NORTH WEST HIGH COURT

MAFIKENG

CASE NO.:115/13

In the matter between:

STOLS RUDI **Applicant**

and

BRUWER SONJA **Respondent**

KGOELE J

DATE OF HEARING : 31 OCTOBER 2013
DATE OF JUDGMENT : 9 JANUARY 2014

FOR THE APPLICANT : Adv. J G Van Niekerk (SC)
FOR THE RESPONDENT : Adv. S Liebenberg

REASONS FOR JUDGMENT

KGOELE J:

[1] On the 29 November 2011 the applicant launched proceedings in this Court for *inter-alia* the following relief:-

1.1 that both he and the respondent are awarded parental responsibilities and right in respect of the child J D Bruwer (**JD**) in terms of the provisions of section 18(2) and (3) of the Children's Act 38 of 2005 as amended (**the Act**), with primary residence vesting with the respondent;

1.2 that the applicant is awarded rights of contact with the child, which includes removing the child on or during alternative weekends and school holidays, together with reasonable telephone contact rights which is to be phased in with the help and mediation of Dr Franco P Visser.

[2] On or about the 4 May 2012, the applicant delivered a further application (which he terms "interlocutory"), seeking an order compelling the respondent to submit JD for a psychological evaluation and assessment by Franco Pierre Visser, a forensic and clinical psychologist for the purposes of:-

2.1 assessing and evaluating JD;

2.2 assisting the parties in drafting a parenting plan;

2.3 phasing the applicant's contact rights in with the child.

[3] The respondent opposed both the main and the interlocutory application which were set down for determination on the 31 October 2013. On this date, by consent between the parties, this Court proceeded to separately make a determination only in as far as the issue of whether or not applicant has acquired parental responsibilities and rights in respect of JD in terms of the provisions of sections 18(2)

and (3) of the Act, and the remainder of the issues were postponed *sine die*.

[4] In respect of the issue that were argued before this Court the following order was granted:-

4.1 that the applicant qualifies and has acquired responsibilities and rights in respect of JD Bruwer, a boy born on 28 March 2002, in terms of the provisions of sections 18(2) and (3) of the Act;

4.2 Costs are reserved and will be costs in the main cause.

[5] The reasons for the above order follow here-under.

[6] The parties are the biological parents of JD. They previously had an on and off intimate relationship which according to respondent lasted for eighteen 18 months. The respondent discovered her pregnancy when she had finally terminated the relationship with applicant. After JD was born, respondent sought a maintenance contribution from the applicant. This prompted a paternity test which confirmed applicant as JD's biological father being done when JD was ten (10) months old. The parties were never married and never lived together in a permanent life partnership. It is common cause between them that the applicant had contributed towards JD's maintenance requirements since he was identified as the biological father.

[7] The applicant's case is to the effect that he in *good faith* contributed to the up-bringing of the child JD and therefore has to succeed in the relief he seeks. According to him it took him some time to accept that he has a child after the paternity test as he did not plan for that. As a

result he started exercising contact with JD in 2005. He could from that time play cricket and rugby with him. During his 4th birthday he bought him a four-wheeled bicycle and during his 7th birthday, a two wheeled one. Later during the same year the respondent relocated to Johannesburg. He continued visiting JD at his maternal grandparents where he was staying. He usually visited them on Sunday afternoon and spent some time with JD. It was only in 2008 when the respondent returned back from Johannesburg to come and stay in Vryburg when he started experiencing problems in getting contact with JD. He could no longer take the child away for weekends and/or visiting purposes. The applicant contends that he could only see the child during Sundays only and according to respondent's conditions. Things were still better that time as they could still communicate well although the contact with the child was limited. According to the applicant it was during the December holidays in 2011 that things took a turn for the worst when applicant wanted to come and give JD his Christmas present, and respondent indicated to him that JD did not want to see him at all. Since then respondent refused any contact between him and JD, hence this application.

[8] The respondent admitted that it was only from 2005 that the applicant visited JD but say it was irregular and sporadically so at her parental home. The said visits were only 15 in number in +- 7 and half years. She describes them as follows:-

"three times during 2005; four times during 2006; on JD's birthday in March 2007 (when he gave him a four wheeled cycle); four other times in 2007; on JD's 6th birthday (when he gave him a two wheeled cycle); two other times in 2008; attended one JD's karate competitions in 2008; in 2010 attended three cricket matches / competition."

According to her the whole of 2009 applicant made no contact with JD. One Sunday afternoon, towards the end of 2010, applicant arrived unannounced at his grandmother's place and JD refused to see him. During 2010 Christmas it was the first time applicant attempted to contact JD over the festive seasons and JD refused to speak to him. In 2011 applicant made no attempts to attend to JD's sporting activities after she told applicant when applicant wanted to speak to JD over the telephone that he (JD) was not interested to speak to him.

[9] On behalf of the applicant Advocate J G Van Niekerk SC submitted that this Court is only asked to determine whether the second requirement as provided for in section 21(1) (b) (ii) has been satisfied by the applicant as it is common cause between the parties that requirements 21(1) (b) (i) and (iii) had been met by the applicant. He contends that the applicant has also met this requirement which is in issue. He based his submission on the fact that the subsection does not require the applicant to prove that he had contributed at all material times to the child's upbringing, but at the least, to prove that he has attempted in *good faith* to contribute to the upbringing of the child for a reasonable period. According to him, the fact that he had visited his child 15 times as the respondent alleges in her papers, does not detract from the fact that the applicant did not attempt in *good faith* to contribute to the upbringing of JD. The fact that he insisted on getting contact and interaction with JD can only mean that he did that for the upbringing of him. According to him there is no basis for one to say that this was done for some other sinister or *mala fide* reasons.

[10] He furthermore submitted that, the word "upbringing" has not been defined in the Act, it must therefore be given its ordinary meaning.

And that, in interpreting this section, the overall objects of the Act which are set out in **Article 2** thereof must be taken into consideration which are:-

(a) to promote the preservation and strengthening of families;

(b) to give effect to the following constitutional rights of the children namely:-

(i) Family care or parental care ……..

[11] In support of all the above submissions, he referred this Court to paragraph **4.2.3.2** of a **Thesis** written by **Anna Sophia Louw** as supervised by **Prof Dr L N Van Schalkwyk** of the **University of Pretoria** dated **May 2009** under **sub paragraph (c)** with the heading "**Commitment to a child**" were she remarked as follows:-

> "An interpretation along these lines, allowing compliance with the requirements in the alternative, could be supported on the basis that the Act generally, if read as a whole, endeavours to improve the legal status of fathers. As such, the aim would be to restrict the automatic acquisition of parental responsibilities and rights by the biological father as little as possible and hence to give as wide as possible interpretation of this section".

[12] Advocate Liebenberg on behalf of the respondent on the other hand submitted that there can be no suggestion that applicant in fact contributed to the up-bringing of JD because:-

12.1 some 15 visits over 8 and half years period which visits did not even last for an hour cannot be termed as *bona fide* contributions to the upbringing for a reasonable time;

12.2 dating in and out of a child's life, wherein more than 12 months was allowed to pass between visits, cannot amount to attempts in *good faith* to contribute towards a child's upbringing;

12.3 the applicant does not suggest that he has made any further contributions one would expect a father to make to the upbringing of his child;

12.4 the applicant is a stranger to JD, as a result JD does not want to see him because he failed to contribute to his upbringing.

[13] She lastly added that it is readily apparent from the definition of the word "upbringing", that it relates to the care, instruction and education of a child by its parents. The applicant did not at all show that he had any hand in raising JD, in providing for JD's care, instruction and education. He had not participated in teaching JD to eat or walk or talk. He only attended two karate competitions and two cricket matches, which is a proof that he has failed dismally in being present at and supporting JD in his participation in sport and cultural activities. In fact, according to respondent's counsel, applicant has done nothing to assist in preparing JD for life's challenges. In consequences, she submitted that the applicant cannot and does not qualify for the acquisition of parental responsibilities in respect of JD in terms of the provisions of sec 21 of the Act.

[14] **Section 21(1)** of the Act provides as follows:-

"The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of Section 20, acquire full parental responsibilities and rights in respect of the child-

(b) if he, regardless of whether he has lived or is living with the mother-

(i) Consents to be identified ….. as the child's father ……;

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

(iii) Contributes on has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period".

[15] It is not in dispute that the applicant only started to have contact with JD after he was declared to be his biological father. The respondent however indicates that the number of times the applicant had contact with the child are not sufficient enough to enable this court to conclude that he had contributed or attempted in *good faith* to contribute to the child's upbringing for a reasonable period. If regard is had to the actions of the applicant, to wit:-

- visiting the child at his grandparents home;
- attending the child cricket or karate competitions;
- bought presents for him and even visited him during his birthdays,

I do not hesitate to fully agree with the applicant's counsel that all of these actions are an indication of a *bona fide* attempt to contribute to the upbringing of the child. For what reason can a parent try to get interaction & contact with the child if it is not for the upbringing of that particular child? Unfortunately the actions of the applicant do not in any way suggest that the applicant did this for some other sinister or *mala fide* reasons. The respondent also in her papers did not suggest any.

[16] In **Jooste v Botha 2000 (2) SA 199 (T) Van Dijkhorst J** remarked as follows:-

> "the parent-child relationship has two aspects: The economic aspect of providing for the child's physical needs and the intangible aspect of providing for the child's psychological, emotional development needs"

The remarks quoted above are apposite to the sentiments as expressed by **Anna Sophia Louw** in her Thesis that applicant's Counsel had already referred to above which I fully agree with, that although "**upbringing**" is not defined in the Act, it should in the context of section 21 probably be interpreted as pertaining to the intangible aspects of raising the child's such as the training, education, rearing or nurture of the child.

[17] Respondent referred this Court to the following remarks by **Mothle** J in the matter of **M v Minister of Police of the Government of the Republic of South Africa 2013 JDR 1480 (GNP) at [22] at 14**

> "……the content of the right of parental care goes further than just the need for financial support. From the time of the birth of a child there are numerous duties which parents have to perform and where money is not a factor. These would include teaching a child to eat, to put on clothes, to tie shoes, to use ablution facilities, to walk, to talk, to respect, to express appreciation, to do homework and perform home chores, to be present and supportive of the child during his/her participation in sport and art activities. The list is endless and no attempt is made here to create a *numerous clauses*. These parental care duties are performed to assist the child to prepare for life challenges. They could be referred to as parental guide, advice, assistance, responsibility or simply parenting or child nurturing.

It is clear from these remarks that the list here provided was not made to create a numerous clauses. The list is endless. To interpret failure by the applicant to put on clothes, to tie shoes, to teach him to eat, to talk, to do homework, as amounting to failure to attempt to contribute to the upbringing of the child is in my view a narrow interpretation of the meaning of the word "upbringing" and will lead to absurd result especially taking into consideration the circumstances of this matter. As indicated by applicant's counsel, the purpose of the Act had to be taken into consideration when dealing with acquisition of full parental responsibilities and rights of biological fathers in respect of the child, therefore a wider interpretation is paramount. The parties at the time the pregnancy was discovered were no longer in a love relationship. The parties as indicated above never lived together as partners. The fact that their relationship was sometimes turbulent and as a result negatively affected the contact between JD and applicant cannot be simply brushed away. Regard has to be also taken of the fact that from the papers before this Court it is quite clear that the number of occasions the applicant managed to have contact with JD was at his grandparents place, most probably during the times when the respondent was not there. In my view, the actions by the applicant are characteristics of a father that not only was willing to acknowledge his paternity and to contribute financially to the child's maintenance, but also and very importantly, willing to shoulder responsibility of the parental role. The argument as advanced by the respondent's legal counsel that the applicant did not at all show that he had any hand in raising JD and not participated in teaching JD to eat, walk, talk *etc* cannot detract from the fact that the applicant had attempted to contribute in such difficult circumstances that prevailed at the time to the upbringing of the child.

[18] The Act does not require that the father must only prove that he contributes to the child's upbringing, but that he can also prove that he has attempted in *good faith* to contribute to the child's upbringing. I am satisfied that the applicant has managed to prove that he has attempted to contribute to the child's upbringing, and what remains for this Court to consider is whether the said attempt was for a reasonable period.

[19] Once again the Act does not define what a reasonable period is. It therefore goes without saying that the phrase "reasonable period" is problematic to deal with. The only solution is to rely on the circumstances of a particular matter to determine what is reasonable. The problem that I find with the submission of the respondent is that she based the sufficiency of contact of JD and applicant to numerics. According to her Legal counsel 15 times in 8 and half years is not sufficient. The question that remains unanswered is, when will the contact and/or visit with the child be numerically enough to be regarded as "reasonable"?

[20] It has been proved in this matter that the applicant beside paying maintenance, visited the child and had contact with him at the least, 15 times as alleged by the respondent. On other numerous occasions he attempted to come and visit or have contact with JD but the contact was refused apparently by JD himself. The fact remains he had attempted to have an interaction with the child and stopped when he was ordered to when the proceeding in this matter started. In my view, this is one of the cases wherein I find that the applicant did not have a free flow access to interact with the child JD. This assessment

had also been demonstrated to some extent by the fact that the applicant had to approach this Court to seek for a relief of this sort. A relief which could have been amicably solved by mediation which the two parties were referred to by an order that emanated from this Court previously which proved fruitless. Unfortunately the failed mediation is furthermore an indication that both parties cannot on their own, like normal parents do, agree to the upbringing of their child. As indicated above, this legitimate expectation from them has been affected and hampered by the animosity kind of relationship the parties endued before pregnancy, during pregnancy and after the birth of JD. It is quite clear as indicated above that the condition / circumstances were not always conducive for the applicant to have contact with his child. Therefore, the circumstances that prevailed must in my view be taken into consideration in evaluating whether 15 times contacts which the applicant had with JD is sufficient to constitute "reasonable period". In my view, they do.

[21] For all of the afore-going considerations and reasons thereof, I came to the conclusion that the number of contacts and the interaction as depicted by the respondent suffices to be regarded as "attempts" in "*good faith"* to contribute to the child's "upbringing" for "a reasonable period" as contemplated by sec 21(1) (b) (ii) of the Act.

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A M KGOELE
JUDGE OF THE HIGH COURT

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