REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 47202/2019

27/1/2020

In the matter between:

J[….] J[….] P[….]	**First Applicant**
A[….] P[….]	**Second Applicant**
and	
J[….] V[….]	**Respondent**

JUDGMENT *(extempore)*

PHAHLANE AJ:

[1] This is an application by the First Applicant, who is the biological father of the 3-year-old minor child JJ, to confirm his parental responsibilities and rights, including the right of guardianship. This application extends to the rights of the first applicant to have contact with the minor child.

[2] The first applicant indicated in his affidavit, as also argued by his counsel that the applicant only has contact with the minor child once every alternative weekend for 2 hours with direct supervision.

[3] He is now claiming among other things, unrestricted contact with the minor child in the following manner:

1. Every alternative weekend from Friday 16h00 to Sunday 17h00.

2. Every alternative Wednesday or other possible pre-arranged day in the week from 16h00 to 18h00.
3. Normal or short school holidays to be shared with the respondent, who is the biological mother of the minor child, but excluding contact during September / October holidays.
4. Half of the Easter holidays - which should alternate every year.
5. 3 hours on the minor child's birthday.
6. 3 hours on his own birthday **(ie.** Father's birthday).

[4] At the same time, the first applicant is also claiming that the second applicant be given unsupervised contact as follows:

1. That the second applicant should have supervised contact - every 4th weekend between Friday 10h00 and Sunday 17h00.
2. Every other Wednesday between 14h00 and 17h00.

[5] A perusal of the documents have shown that the first applicant has in his affidavit raised issues, alleging that the respondent stays In a zozo house, together with her parents and other 3 other adults. He also alleges that there are health hazards relating to the fact that everyone in the house is smoking in the presence of the child. Further that the respondent does not want the child to attend pre-school and that this is hampering on the child's development, as he has started to stutter. To this aspect, the 151 applicant alleges that the respondent refuses the child to be treated by the speech therapist. He also indicated that the respondent does not have a motor vehicle and stays far from medical facilities. These issues were however not addressed by both counsels before court.

[6] The respondent opposes this application, especially with regards to the second applicant. It is common cause that the respondent is not opposed to the first applicant being awarded full parental rights, as it appears on paragraph 2.3 of her affidavit which is on page 86 of the court bundle, and as also submitted by her counsel before court. This is an indication that the respondent obviously appreciates the first applicant's automatic contact rights

granted in terms of section 21 of the Children's Act 38 of 2005.

[7] It is also evident from the arguments and submissions made before court, as well on the papers that the second applicant seek entitlement towards the minor child. In considering her application, there are factors which the court must take into consideration in terms of section 23 (2) of the Act, such as:

(a) The best interest of the child;

(b) The relationship between the child and the second applicant;

(c) The degree of commitment which the second applicant has shown towards the minor child;

(d) The extent to which she has contributed towards the expenses relating to the welfare and maintenance of the child; and

(e) Any other fact which should in the opinion of the court be taken into consideration.

[8] Counsel for the applicants argued that the second applicant has satisfied the court in terms of these factors which the court has to take into consideration - in that, - entering into litigation shows that the second applicant has shown commitment of having a relationship with the minor child. Counsel also indicated that from March 2019 to 5 October, the second applicant has had contact with the child.

[9] Relying on the case of ***Townsend-Turner & another v Morrow 120031 JOL 12035 (C)*** counsel on behalf of the respondent argued that the second applicant has no rights to the minor child. The applicants in the ***Townsend*** matter were the grandparents who applied to have limited rights of access to their minor grandson. The court held that the law confers no entitlement on anyone other than the legitimate parents of children to have access to them and it dismissed the application of the applicants.

[10] Both counsels have however submitted that the ***Townsend*** matter is superseded by the Children Act which was promulgated later and takes precedence. Counsel on behalf of the respondent argued that the second applicant has not made out a case or placed evidence before court to support her case. It is apparent that second applicant is the grandmother of the minor child who wants to have a relationship with her grandson. Counsel on behalf of

the second applicant have indicated that this is supported by the fact that on many occasions, the second applicant - as prove that she wanted to have a contact; commitment or a relationship with the child, has a long list of emails where she tried to have contact and such was denied.

[11] With regards to the requirement relating to the extent to which the second applicant has contributed towards the expenses or maintenance of the child, his counsel submitted that this requirement has been met, due to the fact that the second applicant has previously contributed by buying milk and nappies for the minor child.

[12] This court as the upper guardian of all minor children, has the duty to safeguard the best interests of the child, which should prevail over the interest of any other person including adults, irrespective of their views.

[13] The Family Advocate has in the interim report dated 30 September 2019 made some recommendations which are as follows:

1. Visits every alternative weekend - ie. Saturdays from 14h00 to 17h00 and Sunday from 9h00 to 12h00 - (this appears on para 6.1.1 which is on paginated page 260 of the report).
2. Removal rights was recommended on the alternative Fridays from 14h00 to 17h00 (this appears on para 6.2).
3. A telephone contact and a video contact were also recommended.

[14] The Family Advocate stated in paragraph 7 of her report that: contact with both the applicants will be monitored and supervised until the final report is compiled. However, what is more disturbing is what is stated by the Family Advocate on paragraph 5.3 that the child is aggressive towards the first applicant.

[15] The respondent having conceded that she does not dispute the rights which the first respondent has, it is also clear that the first applicant wants to have unrestricted contact, which from the beginning was canvassed with both counsels, and more particularly, with counsel on behalf of the applicants that the unrestricted contact which both the applicants seek, is in contradiction with what is contained on the recommendations which appear on paginated page

260- being the report the Family Advocate.

[16] Having said that, with regards to contact with the second applicant, the respondent submitted at paragraph 17 of the Heads of Argument, as well as submissions made by her counsel in court, that the court should not grant an order while the court is not in possession of the final report which has to be compiled by the Family Advocate. It is apparent that this relates to the question whether it is safe or in the best interests of the child to have contact with the second applicant. Put differently, whether it is safe or in the best interests of the child that the second applicant should have contact rights. As counsel for the respondent puts it, how would the child behave or react when In the presence of the second applicant?

[17] Counsel argued strongly and insists that the second applicant as the grandparent of the minor child, does not have inherent right to the child, though these rights were accommodated in section 23 of the Children's Act, and submitted that the second applicant has not shown good cause, as to whether she is entitled to be granted these rights, as prayed for in the notice of motion, and as argued by her counsel.

[18] It was also argued on behalf of the respondent that the second applicant being the grandmother of the minor child, her rights cannot override the rights of the child's mother, being the respondent in this matter. These relates to the excessive amount of time that is required by the first and second applicant in relation to having contact with the minor child. Counsel argues that the child is not emotionally ready to be removed from the respondent and further that the second applicant can enjoy these rights of contact when the child goes to the father, being the first applicant.

[19] The welfare of the minor child is of paramount importance as he needs stability and emotional security. Both counsels have indicated to the court that the respondent works six days a week, and this translates to the fact that she has limited time to spend with her son. The averments that the second applicant have proven that there's a good case on behalf of the second applicant with regards to her degree of commitment towards the child, and making contributions towards the child, have been disputed by the respondent.

[20] With the respondent's counsel submitting that the second applicant can enjoy

the rights to have contact when the child goes to visit his father, it is my view that giving the unlimited time of contact which is demanded by the second applicant would be unfair or unjust to the respondent. I can find no reason why the respondent should be denied and given limited time, by granting that time to the second applicant.

[21] With regards to the sleepovers as argued by both counsels, I am of the view that the sleepovers should not be granted until the final report is compiled by the Family Advocate. I am inclined to agree with the respondent's counsel that the second applicant has shown no good cause that she is entitled to be awarded or given special rights or unlimited rights to the minor child. It is very unfortunate that till this day, there is no final report or rather no final report has been compiled by the Family Advocate.

[22] Taking all factors into consideration, as well as the arguments and submissions made to court, I am of the view that the second applicant has not made out a case which entitles her to claim all parental responsibilities and rights, as well as extensive contact she wants to have, with the child. It is also my view that it is not in the best interest of the child to grant the second applicant such rights.

[23] The Family Advocate having made recommendations as they appear in her report, there were obviously valid reasons why those recommendations were made, hence it is always important, as also submitted by both counsels, to have the Family Advocate appointed to make an enquiry or conduct an investigation when matters involving children are an issue.

[24] I am informed by both counsels that the contact rights as recommended by the Family Advocate and as it appears from her report on page 259 and 260 and at paragraph 6, these rights will continue or should be awarded as recommended by the family advocate and agreed to by both parties regarding the first applicant.

[25] I have raised my concerns earlier regarding paragraph 5.3 of the Family Advocate's report where she stated that the minor child is aggressive towards his father. An inference might in a way be made that the emotional stability of the child is in question, but however, the first applicant will not be punished

because of what is stated in paragraph 5.3 as there is still an investigation conducted by the family advocate.

[26] Regarding the application itself on behalf of the second applicant, the application is dismissed with costs. With regards to the recommendations made by the family advocate in paragraph 6.1 to 7, those recommendations will stand. Para 4 and 5 are not granted - the reason being that the family advocate is still doing some investigations, and I am therefore of the opinion that it is premature to make a postponement in terms of the relief claimed in section B to be postponed *sine die.* As soon as the final report is available or compiled, the first applicant is entitled to approach this court. No order as to costs is issued against the first applicant because he has to re-enrol the matter again, once the final report by the family advocate is made available.

Under the circumstances, I make the following order:

1. The First Applicant is awarded full joint parental responsibilities and rights with the Respondent in respect of the Minor child, Jacobus Johannes van Helsdingen, born 12 February 2016.

2. Pending the investigation by the Family Advocate the specific parental responsibilities and rights towards care and Primary Residence be awarded to the Respondent, subject thereto that the following rights of unrestricted contact be awarded to the First Applicant:
   2.1 Every alternative Saturday from 14:00 -17:00;
   2.2 Every alternative Sunday from 9:00-12:00;
   2.3 Every alternative Friday other than on the weekends stated in 2.1 and 2.2 from 14:00- 17:00 whereby the second applicant will collect the minor child from the respondent and hand him over to the First Applicant, the First Applicant to return the minor child to the Respondent;
   2.4 Telephonic contact every Tuesday at 19:00; and
   2.5 Video call contact every alternative Sunday between 19:00 and 20:00 on every other weekend other than the contact weekends as stipulated in 2.1 and 2.2.

3. The application by the second applicant is dismissed with costs.

P. D PHAHLANE
Acting Judge of the High Court
Gauteng Division, Pretoria

For the Applicants	: Adv. JC Kotze
For the Respondent	: Adv. M Bouwer
Date of Trial	: 27 January 2020
Date of Judgment	: 27 January 2020