

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Reportable: Yes

Interest to other Judges: Yes

26 June 2024

Vally J

CASE NO: 40522/19

In the matter between:

AV**First Applicant****NZ****Second Applicant**

and

DC**First Respondent****Minister of Home Affairs****Second Respondent****Director General of Home Affairs****Third Respondent****Minister of Social Development****Fourth Respondent****Donrich Willem Thaldar****First Amicus Curiae****Centre for Child Law****Second Amicus Curiae**

JUDGMENT

Vally JA word of gratitude

[1] Tradition requires that an acknowledgement of the role played by legal representatives in assisting a court in analysing the dispute before it and in

dispensing justice is left to the end of the judgment. Here, on the other hand, it is necessary to declare up-front that the role played by all the legal representatives was indispensable in the determination of what is clearly a matter of great import to the parties involved in this matter. It has been difficult for the parties. It has been financially and emotionally straining on them. Their legal representatives have presented their case with great care and skill and without rancour. The *amici* – Professor Thaldar and Ms du Toit of the Centre for Child Law, who undoubtedly are very knowledgeable in this area of the law, presented their arguments carefully, concisely and without advocating for either party's case. Without the involvement of all the legal representatives (the attorneys included), the adjudication of this matter would have been a very difficult task. I thank them for their invaluable assistance.

Introduction

[2] The applicants (AV and NZ) and the first respondent (DC) were initially and for different reasons of the view that the Children's Act 38 of 2005 (Act) is constitutionally deficient.

[3] They each applied for a declaration of constitutional invalidity of the particular section that they each believed was constitutionally deficient. AV and NZ identified the problematic section to be s 40 of the Children's Act, whereas DC identified ss 1, 25, 26 and 40 of the same Act as the problematic ones. The complaint of AV and NZ, subsequent to the launch of their application, was dealt with by the Constitutional Court (CC) in *VJV*¹ and hence they no longer persist

¹ *VJV and Another v Minister of Social Development and Another* 2023 (6) SA 87 (CC)

with these challenges to the Act. DC, too, no longer persists with his constitutional challenge.

History of the matter

[4] AV and NZ are a lesbian couple. They commenced with a romantic relationship in 2017. They were living apart at that time. AV informed NZ that she intended to give birth to a child, which she would raise. NZ agreed to raise the child with her. Following this, AV created a virtual profile on various digital platforms in search of a sperm (male gamete) donor in order for her to be fertilised. She shared her logging-in with NZ so that NZ, too, could be part of the search. They decided to find a 'known donor' rather than an 'anonymous donor', as they were concerned that the child born of the fertilisation would be 'negatively affected' if 'he/she was uncertain of his/her heritage and origin'. At the same time, they were specific about the ethnic status of the sperm donor. DC is a gay man who also satisfied the specific ethnic requirements of AV and NZ.

[5] AV succeeded in finding DC on a social networking platform designated 'co-parentmatch.com'. The platform connects persons who wish to become co-parents or who wish to find or become a sperm donor. AV says she joined the platform in order to find a sperm donor. DC says he joined to have a child by supplying his sperm to a woman who would also be willing to co-parent the child with him. DC's profile on the platform indicated as follows: 'I am looking to have a baby I can co-parent. I am 42 without any children. I am open minded in finding

someone we can raise a baby as co-parents. I would like to engage with someone that is ready to have a baby.'

[6] Having made contact and upon reaching out to each other, AV sent the following message to DC: '...Would you consider to donate without becoming actively involved in raising the child?' DC responded by saying that he was open to discussing a 'donation with you.' The two of them exchanged a number of messages for about a month, after which they met in person. AV and NZ were together and DC was by himself.

[7] DC says that the fact that the platform is designated 'co-parentmatch', as well as his profile on the platform, is evidence that he was always only interested in providing his sperm for purposes of becoming a co-parent. AV says that she and NZ made it clear to DC from the outset that they were not interested in sharing parenthood with whoever assisted them in their endeavours to become parents by donating his sperm to AV. They claimed that this was made clear to DC at the first in-person meeting they had on 20 July 2017 where they said that they had no intention to co-parent the child with the donor, and that DC accepted this term. DC denies this.

[8] DC claims that before October 2017 an agreement was reached with AV that he would co-parent the child born of the artificial insemination. NZ, according to him, was aware of and consented to the agreement. AV and NZ vehemently deny this. While they concede that an agreement with him was

concluded, they deny it accorded him co-parenting rights. The issue is dealt with in greater detail below.

[9] On 18 February 2018 AV and NZ began sharing a home.

[10] Between October 2017 and June 2018 AV, NZ and DC attempted to artificially fertilise AV. The fertilisation process was conducted at the home of AV. It was conducted without the intervention of an independent health care professional in contravention of Regulation 7. In June 2018, after three attempts, they succeeded. In July 2018 AV and NZ learnt that AV had fallen pregnant. On 23 August 2018 AV and NZ invited DC to their home and informed him that the artificial insemination was successful.

[11] DC attended some of AV's check-up visits to the gynaecologist. He was introduced to the gynaecologist as the father of the unborn child. In September 2018 they discussed a name for the child. AV chose the first name. DC suggested (according to AV and NZ), or was given the right (according to DC) to choose, the second name. His suggestion/choice was accepted. The surname of the child, they jointly agreed, would be a double-barrelled one made up of a combination of AV's and DC's surnames. It was also agreed that the child would be informed (in time) that he was the donor (according to them) or father (according to him); that the child would be introduced to his family, and that he would make a financial contribution towards the child's school fees.

[12] During the weekend of 1-3 February 2019 AV and NZ, at the expense of DC, visited DC's extended family in KwaZulu-Natal where AV was introduced as the mother of their (AV's and DC's) unborn child.

[13] After about seven to eight months of the pregnancy (i.e. in or around January or February 2019) DC was invited to join AV and NZ in purchasing a cot for the baby, which he accepted. DC delivered the cot to the home of AV and NZ. During the process of purchasing the cot AV and NZ discussed the need to purchase a stroller and a car-seat. DC overheard the conversation and offered to purchase the two items, which they accepted. He immediately purchased them as well as some diapers.

[14] The child Z – of female gender - was born on 24 March 2019. NZ was present in the theatre with AV when Z was born. DC was at the hospital but was not allowed to be in the theatre. He waited outside with AV's mother. They were there for eight hours.

[15] AV is a citizen of country B. AV, NZ and DC decided to have DC registered as the father of Z on Z's birth certificate. DC accompanied AV to the offices of Home Affairs in order to apply for a passport for Z. One of the consequences of this decision is that DC's consent is required when applying for a passport for Z, in both this country and country B. DC has granted his consent, as a result of which Z has two passports. But this consent would be required again when the passports are to be renewed. Another consequence is that AV is not able to travel, temporarily or permanently, to country B with Z

without an affidavit or consent letter from DC agreeing to the travel. This particular requirement has proven to be onerous and problematic. It has been the cause of much agony for AV. It is dealt with in greater detail later.

[16] After the birth, while AV and Z were still recuperating in the hospital, DC visited her every day. On 27 March 2019, AV and Z were discharged from the hospital. DC transported them from the hospital to the home of AV. On that day DC registered Z on his medical aid as a dependent. AV consented to this.

[17] On 28, 29 and 30 March and 3 April 2019, DC continued visiting them at home. Each time he visited he brought clothes and diapers for Z.

[18] On 28 April 2019 the issue of the respective wills of AV and DC arose in a discussion they had. He informed her that he would be amending his will for the benefit of Z. AV indicated that she did not have a will as it is not common practice in country B to have one.

[19] On invitation from AV and NZ, DC attended a Mothers' Day concert sometime in May 2019.

[20] In June 2019, on Fathers' Day, AV and NZ took Z to DC's residence. DC informed them that as soon as AV stopped breastfeeding, his 'parenting journey could begin'.

[21] Z was enrolled in a nursery school on 8 July 2019. DC was present during the enrolment. He signed the enrolment form as father to Z. While she was enrolled at that school DC paid half her school fees.

[22] During June and July 2019, AV and NZ realised that DC wanted to play a greater role in Z's life. They also discovered that he had placed pictures of Z on his Facebook portal. He had created a false version of his relationship with AV on the same portal: that Z was a product of that relationship; that the three of them formed a nuclear family, and that he had purchased a cot and a diaper bin for his home. They were surprised and disturbed by the discovery of these facts. He also informed them that Z 'was very popular on Facebook'. They were particularly disturbed that DC had placed pictures of Z on his profile on the Facebook portal as they believe it compromised Z's safety and privacy.

[23] On 18 July 2019 DC collected Z from AV and NZ's residence and took her with him. He had Z in his sole care for four hours.

[24] During a long-weekend in August 2019 AV, NZ and Z travelled to KwaZulu-Natal, where Z was introduced to DC's maternal and paternal extended families. DC paid for their travels as well as for their accommodation in Kwa-Zulu Natal.

[25] On 23 August 2019 DC delivered the parental consent affidavit required of him to allow AV to travel to country B with Z. A short discussion between AV and NZ and DC took place. AV informed him that she and NZ had always

intended to be the parents of Z, and that as 'a known donor' he was to have limited contact with Z. He, in turn, informed them that he wanted to be the father², meaning that he wanted full parental rights and responsibilities as contemplated in s 18 of the Act. The conversation was not pleasant for any of them. It ended without conclusion.

[26] On 27 August 2019 AV received an email from DC informing her that he had engaged a private social worker who would be contacting her 'to mediate' a 'parenting plan' agreement between the two of them.

[27] On 30 August 2019 AV travelled to country B – where her parents are domiciled - with Z. They returned in mid-September 2019.

[28] On 30 September 2019 AV met on her own with the social worker who, at the instance of DC, was tasked to mediate a parenting plan between AV, NZ and DC. A second meeting with NZ present was planned. On 1 October AV reported to DC that the meeting went well. She agreed to allow DC to visit Z for two hours on 6 October 2019. She asked him to provide her with the necessary consent documents to allow her to travel to country B later in the year. He indicated that he would do so only after the parenting plan was finalised. In fact, he sent AV a message stating: 'I am not going to get the affidavit done without resolving the parenting plan.'

² There is a dispute as to what he exactly said: they say he said he wants to be a '100% father', he denies using those words. The exact words used is not material for our purposes.

[29] The second meeting with the social worker took place on 14 October 2019. DC was present. NZ, per the decision of the social worker, was excluded from the meeting. At the meeting DC indicated that he wanted to enjoy the full rights accorded to a father. AV agreed that he could have a two-hour contact period each week, to be exercised on a Tuesday from 17h30 at her home. According to AV the meeting did not go well, but an agreement between her and DC granting DC the contact rights above was orally concluded. Nevertheless, she was particularly disturbed at the exclusion of NZ from the meeting, and was alarmed by what she says were certain false statements made to the social worker by DC. These related to his interactions with Z and AV's role in granting him access to Z. Almost immediately thereafter AV appointed an attorney to deal with DC. Upon being contacted by her attorney, DC appointed his own attorney.

[30] The next day, 15 October 2019, was a Tuesday, and DC was allowed to have a two-hour contact period with Z. This was the last time he was able to visit Z.

[31] On 29 October 2019 DC informed AV that he no longer consented to her travelling to country B with Z. He said that he would only grant his consent if she were to conclude a parenting agreement with him. He remained steadfast on the issue.

[32] On 18 November 2019 AV launched an urgent application in this Court asking for an order compelling DC to complete and sign the Parental Consent

Affidavit allowing her to travel to country B with Z on 9 December 2019. The matter was resolved by agreement, which was made an order of Court on 28 November 2019. In terms of the order the Family Advocate was required to investigate the facts and circumstances surrounding Z's upbringing, and to recommend to the Court a course of action that would be in the best interests of Z. AV, NZ and DC were jointly interviewed by the Family Advocate on 13 January 2020. Z was brought there by AV and NZ. That was the last time DC saw Z.

[33] In total, from 24 March 2019 to 13 January 2020, DC had contact with Z on 15 occasions. On two occasions she was left in his sole care at his home – once for four hours and once for two hours.

[34] The Family Advocate filed his report on 4 February 2020. It is dealt with in greater detail below.

[35] DC met with AV at the consulate of country B on 24 July 2020. The meeting took place at the instance of an official from the consulate. The meeting was called because DC refused to consent to AV travelling to country B with Z unless she signed a parenting agreement with himself. He eventually signed an affidavit granting consent for her to travel to country B with Z.

The manner by which the artificial insemination was undertaken

[36] The Minister of Health has made regulations concerning the artificial fertilisation of a person (regulations).³ The regulations envisage a firmly regulated scheme for artificial fertilisation. The fertilisation that took place here was supposed to have been undertaken in compliance with the precepts set out in the regulations. But it was not.

[37] The regulations prescribe that only a

‘medical practitioner specialising in gynaecology with training in reproductive medicine [or] a medical scientist, medical technologist, clinical technologist, with training in reproductive biology and related laboratory procedures may remove or withdraw a gamete or cause a gamete to be removed or withdrawn, from the body of a gamete donor for purpose of artificial fertilisation.’⁴

[38] The regulations prescribe a detailed set of pre-requisites for the removal of a gamete. Of particular importance is Regulation 7, which reads:

‘7. Prerequisites for removal or withdrawal of gametes.—

A competent person who intends to remove or withdraw a gamete, or cause a gamete to be removed or withdrawn from the body of a gamete donor, shall, before such removal or withdrawal—

(a) ensure that if a gamete donor file has not previously been opened in respect of that gamete donor, open such a file, to which a unique identification number shall be allocated in respect of the gamete donor;

(b) ensure that the information obtained in paragraph (a) is submitted to the central data bank;

(c) in the case of a known donor, ascertain from the central data bank that not more than six children have been conceived through the artificial fertilisation of a person with the gametes of that gamete donor;

(d) obtain a signed statement from the gamete donor stating whether the gamete donor has previously made a donation of

³ Regulations: Artificial fertilisation of persons GNR, 175 of March 2012. The regulations were made in terms of the National Health Act, 61 of 2003.

⁴ Id. Sub-regulation 3 (1) read with definition of ‘competent person’ in Regulation 1.

gametes and, if so, where and when that donation of gametes took place;

- (e) obtain informed consent from the gamete donor relating to—
 - (i) physical examination and questioning by a competent person;
 - (ii) the removal or withdrawal of a gamete for testing, analysing or other processing as the competent person may deem necessary;
 - (iii) particulars contemplated in regulation 8(1)(a)(ii), (iii) and (iv), (b), (c) and (f) being made available to the recipient and the competent person who is to perform the artificial fertilisation;
 - (iv) particulars contemplated in regulation 8 (2) (c) being made available to the Director-General; and
 - (v) particulars contemplated in regulation 8 (2) (c) being submitted to the central data bank;
- (f) ascertain the age of the gamete donor;
- (g) ascertain that the gamete donor has on two occasions, not more than three months apart and one month prior to that donation of gametes, undergone—
 - (i) medical tests for sexually transmissible diseases; and
 - (ii) a semen analysis, in the case of a male gamete donor;
- (h) ascertain that in the case of a female gamete donor, the donor has undergone a gynaecological examination prior to stimulation for the withdrawal of gametes;
- (i) question such gamete donor concerning her or his family history, especially with regard to any possible genetic condition or carrier status and mental illness in respect of any child, brother, sister, parent or grandparent of such gamete donor; and
- (j) shall, in the event of a request in respect of which the donor and recipient are known to each other, ensure that there is—
 - (i) written confirmation by both parties that they known [sic] each other;
 - (ii) psychological evaluation of both parties.’

[39] The parties here chose to go the self-help route. The fertilisation was conducted at AV’s home (at the time she was living alone). It was undertaken by NZ who, though a qualified nurse, is not competent to artificially fertilise

another person. And more importantly, none of the prescripts set out in Regulation 7 were followed. They acted with total disregard for the law. Had they acted more prudently, perhaps the problems they encountered later, which resulted in this litigation, could have been foreseen and prevented.

The Family Advocate's Report

[40] The report though dated was very helpful. It presented an invaluable insight into the facts and circumstances the parties found themselves in at the time. Although the Family Advocate was given a very short period to complete his report, he presented a report that accurately captured the sentiments of the parties on the thorny issue of parental rights and responsibilities to be enjoyed by AV, NZ and DC.

[41] Recognising that DC had no rights and responsibilities in terms of s 40 of the Act, the Family Advocate concluded that DC:

'has a legitimate interest in the care, well-being and development of [Z]. This would have not been the case had he been only a sperm donor as envisaged in s 40(3) of the Act. But [DC's] commitment to [Z] and the actions of [AV] and [NZ] suggest that [DC's] interest is far more pronounced than that of a mere sperm donor. In fact, if the provisions of section 21 of the Act were relevant to the present matter, [DC] would have complied with them a long time ago as he was, for all intents and purposes, not only acting like a reasonable unmarried father but also allowed to do so.'

[42] On that conclusion the Family Advocate recommended that AV, NZ and DC retain full parental rights and responsibilities as contemplated in terms of s 18 of the Act; that the primary residence of Z be with AV and NZ; that DC be allowed two hours contact on either a Saturday or Sunday under the supervision

of either AV or NZ at a neutral venue until the detailed parenting plan is agreed upon or imposed by the court, and that AV be allowed to travel with Z outside this country in any one year period for no longer than 30 days without first securing DC's consent.

Permanent life partnership agreement of AV and NZ

[43] On 21 February 2020, about two weeks after the Family Advocate issued his report, AV and NZ signed and notarially executed a life partnership agreement. It consists of six short paragraphs, each made up of a single sentence, which reads:

1. The parties presently reside at [XXX].
 2. Neither party is a spouse in an existing marriage or permanent with any other party.
 3. There shall be no community of property and no community of profit and loss between the parties.
 4. Neither party shall be liable for any debt or obligation incurred by the other party before or during the subsistence of their relationship.
 5. Notwithstanding the aforesaid or anything to the contrary contained herein, the necessary monthly household and/or living expenses of the parties shall be born equally by the parties.
 6. The parties agree to act with the utmost of good faith and fair dealing toward the other in all aspects of this agreement.'
- (Quotation is verbatim.)

[44] DC is critical of the life partnership agreement, labelling it a sham. It was orchestrated, he says, to frustrate the co-parenting agreement AV concluded with him (with NZ's knowledge and consent). His cynicism of the life partnership agreement may be borne out by the fact that it was concluded shortly after the Family Advocate issued his report, after he (DC) insisted on holding them to the co-parenting agreement and by the fact that it is minimal in its terms. But as its

validity has not been challenged, the legal consequences that flow therefrom have to be respected.

The relief sought by AV and NZ and the counter relief sought by DC

[45] Initially AV and NZ sought the following relief:

- a. a declarator to the effect that DC is a sperm donor as envisaged in s 40 of the Act;
- b. an order removing DC's surname as the surname of Z on her birth certificate;
- c. an order granting DC:
 - i. contact rights on the first Tuesday of every month from 17h30 to 19h00;
 - ii. contact rights on the third Saturday of each month for a period of two hours;
 - iii. the right to attend Z's pre-school related sport gatherings, functions and concerts;
 - iv. contact rights for four hours on the second weekend of every month once Z reaches 5 years of age, while at the same time removing the contact rights referred to in sub-paragraphs i and ii. above;
- d. an order declaring that the contact rights referred to in sub paragraph c. above shall be forfeited when Z is on vacation;
- e. a declarator to the effect that DC has no duty, responsibility or obligation to contribute towards Z's maintenance requirements;

- f. a declarator to the effect that DC has no decision-making powers regarding matters concerning Z;
- g. an order granting NZ full parental rights as set out in s 18 of the Act.

The relief is consistent with what AV says is the agreement she reached with DC after the second mediation meeting with the social worker on 14 October 2019. Subsequently, however, they had second thoughts about the said relief and consequently amended their notice of motion seeking different relief. The new relief they seek does not grant DC any of the contact rights referred to in sub-paragraph c. above. They persist with the relief sought in sub-paragraphs a., b., e. and f. They sought other relief which has fallen away by dint of the decision in *VJV*⁵.

[46] What they seek is an implementation of sub-section 40(3) of the Act, the relevant part of which reads:

‘ ... no right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial fertilisation and any person whose gamete has or gametes have been used for such artificial fertilisation or the blood relations of that person, ... ’

[47] Should they be granted the relief, DC would have no further dealings with Z. Aggrieved by this he seeks counter-relief. Initially he asked that various sections of the Act be declared to be constitutionally invalid. He no longer persists with that. He now seeks parental rights and responsibilities as set out in s 18 of the Act, as he says this is what AV, with the knowledge and consent of NZ, agreed to.

⁵ See n 1

The decision of the CC in VJV⁶

[48] At the commencement of this judgment it was mentioned that the concerns of AV and NZ were dealt with by the CC in VJV. The CC there declared s 40 of the Act constitutionally invalid for unfairly and unjustifiably discriminating on the basis of marital status and sexual orientation by excluding the words 'permanent life partner' after the words 'spouse' and 'husband' wherever they appear in the said section. It suspended the declaration of invalidity for a period of 24 months and declared further that in the meantime s 40 shall read as follows (only the relevant parts are quoted):

'(1) (a) Whenever the gamete or gametes of any person other than a married person or his or her spouse or permanent life partner have been used with the consent of both such spouses or permanent life partners for the artificial fertilisation of one spouse or one permanent life partner, any child born of that spouse or permanent life partner as a result of such artificial fertilisation must for all purposes be regarded to be the child of those spouses or permanent life partners as if the gamete or gametes of those spouses or permanent life partners had been used for such artificial fertilisation.

...

(3) Subject to section 296, no right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial fertilisation and any person whose gamete has or gametes have been used for such artificial fertilisation or the blood relations of that person, except when—

...

(b) that person was the husband or permanent life partner of such woman at the time of such artificial fertilisation.

...

(5). In respect of the period 1 July 2007 until the date of this order, the following shall be the position:

(a) The reading-in provided for in paragraph 4 above will not apply to persons who were permanent life partners at the time

⁶ Id.

of the artificial fertilisation unless they invoke the benefit of this order by a written declaration signed by both of them. In such event the provisions of section 40(1)(a) as read-in will apply.' (The underlined words are those read into the sub-sections by the CC)

[49] The consequence is that AV and NZ would legally qualify to be the co-parents of Z, if they elect to invoke the benefits of the declaration by the CC. I was informed that they have elected to invoke the benefits. And as such, the law now recognises them both as parents of Z. They enjoy all the rights and responsibilities of parents as set out in s 18 of the Act.

The agreement between AV and NZ and DC

[50] Initially AV and NZ said that the only agreement with DC is that he would donate his sperm, that he would be known to the child born as a result thereof and that he would have occasional contact with Z, but only they would raise Z. Their version changed later. They say that in addition to those terms they agreed that Z would be introduced to his family, that they would visit his extended family in KwaZulu-Natal, and that he would contribute to Z's school fees. They vehemently deny that AV agreed to co-parent Z with him. The agreement was amended after the mediation meeting with the social worker. It now granted DC contact rights. In essence the terms were, *inter alia*: (i) he would be allowed to see Z on the first Tuesday of every month from 17h30 to 19h00; and the third Saturday of each month for a period of two hours; (ii) he would be allowed to attend Z's pre-school related sport gatherings, functions and concerts; and, (iii) he would see Z for four hours on the second weekend of every month once Z reaches 5 years of age. These terms were included in their original notice of motion.

[51] They say that he has repudiated the agreement, which they have accepted, and have accordingly cancelled it. Hence their amended notice of motion. They now wish to exclude him altogether from Z's life: he is no longer required to make any contribution towards the maintenance of Z, and he is to be denied any contact with Z. The repudiation they say took the form of his withdrawing his consent to AV travelling to country B with Z, and by insisting that he wanted to be a full parent and not just a known donor with occasional contact.

[52] Their version of the agreement fails to explain a number of facts that took place with their knowledge, consent, co-operation and even encouragement during the pregnancy and during the childbirth. These in the main are that: he accompanied AV to the gynaecologist on each of her visits, save for two of them; he was present - and introduced as the father - at the baby shower organised by AV's friends and colleagues; he bought a stroller and a baby car seat; he was at the hospital during the childbirth; he transported AV and Z when they were discharged from the hospital; he chose the second name of Z; he accompanied AV to the offices of the Department of Home Affairs to apply for a passport for Z; Z was left in his sole care on two occasions; he was fully involved in securing Z's enrolment in the first pre-school, and in many of the texts and WhatsApp messages sent to him by AV during the pregnancy and after the birth until their relationship took a turn for the worse, AV refers to him as a father. None of these facts sit comfortably with their version of the terms of the agreement.

[53] DC maintains that there was a partially oral, partially tacit agreement with AV, the terms of which were: (i) he would supply⁷ his sperm (he specifically rejects the notion that he 'donated' his sperm) for it to be artificially inseminated;(ii) that he would have contact with the child once he or she was born; (iii) AV would visit his family in KwaZulu-Natal during the pregnancy to be introduced as the mother of his unborn child, and that she would visit again after Z was born to introduce her to his family;(iv) Z would primarily reside with AV; (v) Z would learn the cultures of both AV and himself; (vi) he would be liable for half of the education costs of Z; and, (vii) that Z would be registered as a dependent on his medical aid and he would pay towards her medical expenses.

[54] Those, he says, are the basic elements of the co-parenting agreement already concluded. Further elements such as the days and time-periods he would have contact with Z, and the financial contribution he would make towards the maintenance of Z, were to be finalised in time. In other words, the agreement was understood by AV and himself to be fluid.

[55] Common to both versions are the following terms: (i) that AV and NZ would visit DC's extended family in KwaZulu-Natal while AV was pregnant; (ii) that they would visit again with Z after her birth; (iii) that DC would have some contact with Z; (iv) that he would pay half of Z's school fees; and (v) that Z would be registered on DC's medical aid as a dependent. AV and NZ accepted from

⁷ It is his view that he 'contributed' his sperm. By 'contributing' his sperm as opposed to 'donating' his sperm he becomes a parent himself. A person who does the latter, does so for the benefit of another and not for the purpose of becoming a parent himself.

inception that he was never going to be a mere known sperm donor. They envisaged a role for him which included him having limited contact with Z.

[56] These terms, and the fact that some of them have already been implemented, show that DC was not merely a sperm donor. The agreement reached between them went well beyond the agreement that would be reached with someone who is simply a sperm donor. At the same time, his claim that a co-parenting agreement was concluded with AV is problematic. To the extent that it failed to deal with issues that are fundamental to a parenting plan, such as decision-making regarding Z's material and emotional⁸ upbringing, guardianship and the financial contribution of DC towards Z's maintenance, (which is not restricted to the Z's school fees and her medical aid costs)⁹, it falls significantly short of what can be considered a co-parenting agreement. Differently put, the agreement lacks the key element of a co-parenting agreement, i.e. that of guardianship. It is also very loose in its terms. He was granted contact visits, but no definitive arrangements as to when these would take place and for how long they would last.

[57] A co-parenting agreement involves the life of a child. Bringing up a child is a privilege that carries with it a heavy responsibility. It is not to be treated lightly. A co-parenting agreement is therefore to be very carefully considered and comprehensively crafted so that the best interests of the child are catered for. Here all we have is an agreement granting him certain rights to have contact

⁸ The emotional upbringing would include her religious upbringing as referenced in s 33(3)(d) of the Act.

⁹ Section 18 of the Act.

with Z, the details of which were not fully established, and requiring him to pay half of Z's school fees as well as her medical aid costs.

[58] Accordingly, I find that no co-parenting agreement was concluded between them.

[59] In sum, DC was not just a 'sperm-donor' as AV and NZ contend, and neither was a co-parenting agreement concluded between them. What each of them envisaged or anticipated when they initially embarked on this journey of conception, and what they subsequently experienced, are radically different. Despite what each of them say of their intentions when interacting with each other, neither of them paid full attention to what the other was saying. During much of their interactions, they each heard what they wanted to hear.

[60] The first *amicus*, Professor Thalgar, provided the Court with valuable scholarly articles drawing on the learnings derived from sociology, which demonstrate the benefits of co-parenting agreements for children, especially pre-birth ones. The learned authors advocate for courts to recognise these agreements as they are in the best interests of the children by, amongst others, 'allowing parents to better balance relationships, family and professional life.' Save for the fact that the agreement has to be in the best interests of the child, the sentiment is really uncontroversial. There is no doubt that society has developed considerably from the time when family life was almost exclusively characterised by a nuclear family consisting of a mother (female) a father (male) and children. Two-parents in a heterosexual relationship, while still the

prevalent form of family life, is certainly not the exclusive form of family life in a modern society such as ours. Social relations have advanced a long way since then; the on-going maturation of social relations has resulted in the establishment of new forms of family life. Law, no doubt, is required to adjust accordingly, and for the most part ours has done remarkably well.

[61] It was submitted by Professor Thaldar that the consensus reached between AV and DC was akin to one reached by life partners and thus the agreement between them constituted a life partnership. I am not persuaded. AV and DC did not agree to share their lives: their lives remained completely separate from each other's. They simply agreed to make a child by the process of artificial insemination; attend to the issue of the child knowing DC and his family, and his making a small financial contribution (paying half of her school fees and her medical aid costs) towards the upbringing of the child. A life partnership at the very least would include sharing of living space, sharing of living expenses, taking care of each other, attending to each other's growth, development and happiness and acting in absolute good faith towards each other. AV and DC made no agreement to this effect.

Section 21 of the Act

[62] DC submitted that s 21 of the Act provides for him to acquire full parental rights and responsibilities in respect of Z, and by the facts in this case he has already acquired them. Section 21 allows for a 'biological father', who does not have parental rights and responsibilities because he is not married to the mother and was not married to the mother at the time of the child's birth, to acquire full

parental rights and responsibilities if he consents to be identified as the child's father and 'if he contributes or has attempted in good faith to contribute to the child's upbringing by a reasonable period; and contributes to or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.'¹⁰

[63] AV and NZ take issue with the claim. Sub-section 40(3), they submit, excludes him from being a parent. The definition of 'parent' in s 1 of the Act specifically excludes a person who is 'biologically related to a child by reason of only being a gamete donor for purposes of artificial fertilisation.' The reference to 'father' in s 21 cannot therefore include a person who is only a father by virtue of being a 'gamete donor'.

[64] DC is clearly the 'biological father' as contemplated in s 21 of the Act. But he is not a parent in terms of s 1 of the Act. And, to allow him to claim rights of a parent in terms of s 21 would effectively negate his non-qualification as a parent in terms of s 1. It would be re-writing the definition of 'parent' in s 1 and it would remove the disqualification imposed upon him by s 40(3) of the Act; being only a gamete donor constitutes a legal disqualification from acquiring parental rights and responsibilities in terms of the Act. His genetic link to Z is rendered irrelevant in terms of s 40 read with the definition of parent in s 1 of the Act.¹¹ In other words, he may be a biological father but he is not a parent. He simply cannot become a parent in terms of the Act. If he wishes to overcome

¹⁰ Sub-section 21 (1) of the Act. The quoted parts are from ss 21(1)(b)(ii) and (iii).

¹¹ See: *QG and Another v GS and Another* [2021] ZAGPPHC 366 (17 June 2021) at [94].

the disqualification by virtue of an order from the court, he has to found his cause of action outside of the Act.

[65] One route open to him, without having to declare the disqualifying sections unconstitutional and invalid, is to acquire the right to have contact with and be allowed to take care of Z, by concluding an agreement with AV and NZ. An agreement was concluded. I have already found that no co-parenting agreement was concluded. On the common cause facts though, an agreement regarding contact and care was concluded. These are its terms: he would have limited contact with Z, would pay half of her school fees and he would register her as a dependent on his medical aid. The question that follows is, is the agreement in the best interests of Z. It is considered in detail below.

[66] The other route is for him to apply to this Court, a divorce court or the children's court for assignment of contact and care rights in terms of ss 23(1) of the Act. Section 23 provides that any person who has an interest in the care, well-being or development of a child can apply for an order granting them contact with the child and care of the child. Section 23(2) provides that:

- (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.'

[67] DC had commenced with developing a relationship with Z. It was cut short by the actions of AV and NZ. He has shown a commitment towards her. The commitment commenced pre-birth and continued for a few months after birth. The commitment shown was undoubtedly genuine. He has contributed financially towards her expenses and to this day still does. He certainly qualifies in terms of s 23(1) and (2) to be granted contact with Z, and to hold the privilege of caring for Z in these circumstances. Nevertheless, the decision on whether he should be granted these contact and care rights would depend on whether it is in the best interests of Z to do so.

The best interests of the child

[68] Section 28(2) of the Constitution of the Republic of South Africa, Act 108 of 1996 (Constitution) provides that in all matters involving a child the best interests of the child shall prevail.¹² The best interests of the child is the immutable principle that has to be adhered to at all times.

[69] The Canadian Supreme Court reminds us that:

'[8] Determining the best interests of the child is a heavy responsibility, with profound impacts on children, families and society. In many cases, the answer is difficult — the court must choose between competing and often compelling visions of how to best advance the needs and interests of the child.'¹³

[70] The task is made all the more difficult when parents caught-up in a conflict marred by vitriol conflate their individual interests and pursuits with

¹² The sub-section reads:

'A child's best interests are of paramount importance in every matter concerning the child.'

¹³ *Barendregt v Grebliunas* 2022 SCC 22 at [8].

those of the best interest of the child. It is nevertheless necessary for a court not to lose focus from the primary principle.

[71] In considering what serves the best interests of a child a court is required to look into what would best protect the child's physical, psychological and emotional safety, security and well-being. Considerations of these factors would be foremost.

[72] The interests are enduring and fluid. Yet the court as the upper guardian is required to:

‘... craft a disposition at a fixed point in time that is both sensitive to that child's present circumstances and can [at the same time] withstand the test of time and adversity.’¹⁴

[73] Difficult as the task maybe, it has to be undertaken. The outcome would thus have to be bespoke to the particular child. The court would have to consider the means of each of the parents, the conditions under which each of them lives, the financial and emotional needs, including the physical and mental health of the child, and any other relevant factors that affect or impact upon the interests of the child. The analysis would have to be as comprehensive as is possible in the circumstances.

[74] Z is now five years of age. DC has had no contact with her since 15 October 2019. AV and NZ say that introducing her now to DC would be disruptive, and would not be in her best interests. DC's lack of contact with Z is

¹⁴ Id.

not the result of his conduct. Nor is it a result of a lack of trying on his part. He was removed altogether from Z's life by AV and NZ. This was after they had already agreed that it would be in the best interest of Z to grant DC the pleasure of contributing financially towards Z's well-being and of having contact with her. They have now experienced a change of heart. This was prompted by his behaviour, particularly his withdrawal of consent allowing Z to travel to country B. His withdrawal of consent was conditional upon AV agreeing to a parenting plan. It was incorrect, inappropriate and completely unacceptable for him to tie the two issues together. By so doing, he used his power to withhold consent over AV's and Z's international travel plans as a bargaining chip. By so doing, he acted contrary to the best interests of Z. He was obstinate in his refusal to consent unless he got his way. This forced AV to engage in costly litigation. That this was unacceptable is not to be doubted. However, it does not in itself justify removing him altogether from the life of Z. That would be detrimental to the interests of Z. She would, as AV and NZ initially recognised, benefit from having contact with him as he can, and is willing to, make a positive contribution to her health, welfare and happiness. The complaint raised against him relates to bad judgments on his part when he felt that they were harming his and Z's interests. It would be wrong to hold, based on those bad judgments alone, that he must be punished for life. Such punishment would rebound on Z. They have effectively deprived Z of the love and care she could have received from him. To remove him altogether from her life would be to effectively endorse their conduct of alienating him from Z. The alienation was and is not in the best interests of Z. It should not, I hold, be endorsed by the Court. Contact between

him and Z should be restored and he should be awarded the privilege of contributing towards the care of Z.

[75] The original notice of motion of AV and NZ provides valuable guidance as to the nature of the contact that should take place between DC and Z. The contact should be gradual in order to minimise the disruption to Z's life.

Medical Aid

[76] Since the litigation commenced, the inclusion of Z on DC's medical aid has become a thorny issue between the parties. AV and NZ asked him to de-register her so that she can be registered on AV's medical aid, which has a superior cover to his. He has refused to do so. His refusal, he says, was because he feared that if he agreed to do so, Z may well be left without medical cover. He says that had AV demonstrated to him that she had a medical cover which would accommodate Z he would have agreed to their request and removed Z as a dependent on his medical aid. As he has no difficulty in so doing, the relief sought by AV and NZ in this regard should be granted. The alternative would be to order him to upgrade the medical aid cover provided for Z in his medical aid plan. As no submissions in this regard were received it should be left for the parties to amicably resolve. The order below is crafted in the alternative to allow for the parties to self-resolve this issue.

Maintenance payments for Z

[77] There is a paucity of evidence about the physical and mental health of Z, about her living conditions, about the financial circumstances of AV, NZ and

DC. It is therefore difficult to make a comprehensive order that would meaningfully address all the present and future interests of Z. It is for this reason that I propose to fashion an order that would allow for a re-evaluation of the best interests of Z within the next six months to a year. It is hoped though that the parties would avoid lengthy and protracted further litigation, for this would not only place a strain on their financial resources and tax their emotional strengths to the limit, it would be detrimental to the interests of Z. It is important that Z's future is determined with the necessary swiftness so that any harm that arises from a delay is minimised. Already this matter has taken four years to finalise. And that, in my view, is a tragedy. But nothing can be done about it now. It is hoped that any future arrangements regarding the financial maintenance of Z are finalised without any rancour from AV, NZ and DC, and that they make every effort to co-operate with each other.

The name of DC on Z's birth certificate

[78] AV and NZ ask for an order allowing for DC's name to be removed from the birth certificate of Z and to replace it with the name of NZ. The rationale for this is that it releases AV from the burden of having to obtain the consent of DC each time she wishes to travel internationally with Z and each time she is required to apply for the renewal of Z's passports. This can be attended to by issuing an order declaring that AV does not require his consent to temporarily travel internationally with Z. Such an order would, in my view, be apposite. And, if for any reason this fails to achieve the objective of preventing him from vetoing AV's international travel arrangements with Z, he should be interdicted from refusing to grant his consent where it is required. Consequently, it is not

necessary to remove his name from the birth certificate of Z. There is no evidence that, save for the travel issue, having his name on the birth certificate is not in the best interest of Z. His name, which is captured in the double-barrelled surname of Z reflects her identity. There is then no justification for interfering with that identity. In fact, the contrary holds true. Her identity is crucial to who she is. It should not be tampered with except for very good reason. The relief AV and NZ seek in this regard will have to be refused.

Guardianship of Z

[79] AV and NZ have acquired full parental rights and responsibilities in respect of Z. In terms of s 18(2) of the Act these include the right to act as a guardian to Z. By seeking full parental rights and responsibilities in respect of Z DC is asking that he be granted rights of guardianship over her. There is nothing to show that granting him such a right would be in the best interest of Z. On the contrary, given the animosity that presently prevails between him on the one hand and AV and NZ on the other, it would be perilous to grant him such a right. There is no warrant to risk the interests of Z with such an order. It is important to remember that he is not being accorded co-parental rights and responsibilities as envisaged in s 18 of the Act by the order below. It simply assigns the rights of contact and care as envisaged in s 23 of the Act to him.

Costs

[80] The parties sought costs against each other in their respective applications. This is not a matter between unrelated parties. All the parties acted

for what they believed to be the best interests of Z. Mulcting any of them with a cost order would not serve the interests of justice.

Order

[81] The following order is made:

1. It is declared that Z born on 24 March 2019, with ID number XXX, shall for all purposes be regarded to be the child of the first and second applicants in terms of the provisions of section 40 of the Children's Act, Act 38 of 2005 (Act).
2. It is declared that:
 - 2.1. the applicants have full parental rights and responsibilities in respect of Z.
 - 2.2. the first respondent is, in respect of Z, a gamete donor as is intended in section 40 of the Act.
 - 2.3. the first applicant does not require the consent of the first respondent to travel temporarily overseas with Z. Should the first applicant not be able to satisfy the authorities of any country that she does not require the consent of the first respondent to travel temporarily with Z, then the first respondent is ordered to grant his consent timeously once it is requested.
 - 2.4. The first respondent is ordered to grant his consent timeously for any application for a renewal of Z's passport.
3. The first respondent shall have contact with Z as follows:
 - 3.1. Until Z reaches the age of 6 years:

3.1.1. The first Tuesday of every month from 17h00 to 19h00 at the first and second applicants' residence.

3.1.2. The contact will be forfeited during the period when Z is on vacation whether in South Africa or abroad. The applicants shall inform the first respondent two weeks in advance of any travel within the country and one month in advance of any travel abroad.

3.2. Once Z turns 6 years old:

3.2.1. The Tuesday contact period shall terminate.

3.2.2. On the second weekend of each month, on a Saturday for a period of four (4) hours, at a venue as agreed to between the parties. The parties shall agree the specific times and venue at least a week prior to the Saturday contact.

3.2.3. The contact will be forfeited during the period when Z is on vacation whether in South Africa or abroad. The applicants shall inform the first respondent two weeks in advance of any travel within the country and one month in advance of any travel abroad.

3.3. Every Father's Day for four hours to be arranged with the first and second applicants.

4. The matter is referred to the Maintenance Court to determine the amount of maintenance the first respondent is to pay towards Z's living and travel expenses.
5. The first respondent is ordered to:

5.1. either upgrade the cover for Z on his medical insurance to one that is equivalent to that of the medical insurance of the first applicant; or

5.2. take all such steps necessary to remove Z from his medical insurance and the first applicant is ordered to enrol Z as a dependant on her medical insurance.

6. There is no order as to costs.



Vally J

Gauteng High Court, Johannesburg

Date of hearing:	9 - 10 May 2024
Date of judgment:	26 June 2024
For AV and NZ:	C Woodrow SC with S Martin
Instructed by:	Beute-Keegan Attorneys
For DC:	C J Mouton
Instructed by:	Michael Krawitz & Co
For the first amicus curiae:	Prof. D W Thaldar
For the second amicus curiae:	C du Toit
Instructed by:	K Ozah