IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 32200/2020

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

17/06/21 pp QN

DATE SIGNATURE

In the matter between:

QG	FIRST APPLICANT
MB	SECOND APPLICANT
and	
CS	FIRST RESPONDENT
AW	SECOND RESPONDENT
and	
PROFESSOR DW THALDAR	*AMICUS CURIAE*

JUDGMENT

KOLLAPEN, J

Introduction

[1] Kahlil Gibran, the Lebanese poet in his seminal work the Prophet, offers the following observation about children: -

'Your children are not your own
They are life's longing for itself
They come through you but not from you
And though they are with you yet they belong not to you '.

[2] This case is about a young child and while the dispute in law relates to contact and further rights to the child, in many respects it raises philosophical questions as to who children are and who, if anyone, they belong to, if not to themselves.

The parties

[3] The first applicant is a self-employed interior decorator. He is currently a partner in a long-term homosexual relationship. The first applicant is also the gamete donor (spermatozoa) (hereinafter also referred to as "the sperm donor" and/or "gamete donor"), in terms of a "Gamete Donor and Recipient Agreement for the Purposes of Artificial Fertilisation" (hereinafter "the donor agreement") which donor agreement was concluded between himself and the respondents on or about 22 May 2015.

[4] The second applicant is self-employed in the interior decorating sphere and manages a nursery on a smallholding owned by the first applicant. The second applicant is also the mother of the first applicant and lives on one of the smallholdings owned by the first applicant.

[5] The first and second respondents are a lesbian couple who have been in a committed relationship for about 19 years - since about 13 June 2002. They became married to each other on the 12 June 2015 and live as a family together with their minor child at Mooiplaats, Pretoria. The first respondent is employed in the hospitality industry whilst the second respondent is a homemaker.

[6] An application was received from Professor Donrich Thaldar who has written and researched the area around the enforceability of sperm donor agreements to be admitted as an *amicus curiae*. He is also the Chair of the Health Law and Ethics Research Group at the School of Law at the University of Kwa-Zulu Natal. Both parties having indicated they had no objection to the application and the Court satisfied that Professor Thaldar could by reason of his research and expertise assist the Court, made an order admitting him as an *amicus curiae*. He submitted written argument and also made an oral presentation during the hearing of the matter.

Factual background

[7] The facts in this matter are complex and raise many disputes about how the parties see and understand their relationship with each other as well as in particular how the applicants characterize their relationship with the minor child who shall be referred to as L in this judgment.

[8] During 2011, the first and second respondents desirous of starting a family began exploring the possibility of procuring a gamete donor (spermatozoa) to fulfil their shared desire of having a child.

[9] Between 30 November 2011 and 29 September 2014, the first respondent was supplied with donor spermatozoa on eight occasions and took part in an artificial insemination process in an attempt to fall pregnant. That process proved unsuccessful, and the respondents embarked on a different strategy in their quest to have a child. During this period the first applicant was not known to the respondents and was unaware of the attempts by the respondents at artificial insemination making use of an anonymous donor.

[10] During February or March 2015, the first respondent placed a post on various social media platforms, including Facebook, wherein she invited potential willing sperm donors to assist her and the second respondent to have a child. The first applicant responded to the first respondent's Facebook post soon after it was posted and expressed his willingness to be such a donor.

[11] A meeting was thereafter arranged between the first applicant and the respondents during which the parties discussed in quite general terms the idea of a sperm donation without tying down any specific arrangement. About one week after this meeting the first respondent contacted the first applicant to inform him that they had chosen him to be their sperm donor.

[12] The respondents say they then approached an attorney to draft a sperm donor agreement and that on the 22 May 2015, after signing the agreement themselves e-mailed the donor agreement to the first applicant. The first applicant was not required to sign the donor agreement immediately, but did so on 25 May 2015, when he visited the respondents at their home. The respondents say that the first applicant signed the donor agreement after they had a discussion about it and all the parties indicated that they were satisfied and understood the contents of the agreement.

[13] The terms of the donor agreement contained the following provisions: -

13.1 The first respondent is described as the biological mother and recipient;

13.2 The second respondent is described as the co-parent and spouse of the recipient;

13.3 The first applicant is described as the gamete donor;

13.4 "Child" is defined as any child born to the first respondent as a result of fertilisation by sperm provided by the first applicant;

13.5 "Parental Rights" are defined as all rights accruing to a parent, whether derived from statute or common law, including but not limited to rights related to the child's health, education, adoption, guardianship, religion and place or country of residence;

13.6 The first respondent has made a decision to conceive and raise a child;

13.7 The first and second respondents and any child born to the first respondent shall constitute a family unit for all purposes;

13.8 The first and second respondent have the financial resources to support and provide for a child;

13.9 The first applicant agrees to donate gametes to the first respondent for the purposes of fertilisation at no cost, the donation is further made to both respondents;

13.10 The first applicant is willing to be the respondents' gamete donor due to his conviction that the respondents shall be good parents. The first applicant does not want to be a parent to any child born to the first respondent, at the time and in the future, although the agreement made provision for remote or personal visitation with the child should the respondents feel, it shall serve the child's best interest.

13.11 The first applicant will produce a sample to the first respondent, which shall be for her sole use, and she is prohibited to sell or transfer same to any person or for any reason. The first respondent shall destroy the gametes not used for fertilisation. The first applicant is aware of the intended use of the gametes and shall have no rights towards the gametes or the child at the time of conception, pregnancy, termination of the pregnancy, birth of during the raising of the child.

13.12 The first respondent shall not be inseminated by any other man's gametes, by any method, during the period of time she receives gametes from the first applicant. The first respondent shall not engage in any activity that might cause

confusion in identifying whose genetic material caused a conception to occur. The first applicant's genetic material shall be what produces the child;

13.13 All parties acknowledge and agree that, through the procedure of artificial fertilisation, it is the first respondent's intention to become pregnant, and thereafter have joint responsibility with the second respondent for the raising of the child. The intention of the parties is that, if conception occurs from such artificial fertilisation, the first applicant shall not be a legal parent of the resulting child and shall not have a role in the raising of the child;

13.14 All parties acknowledge and agree that the first applicant will provide his gametes for the purpose of the said artificial fertilisation and does so with the clear understanding that he shall not demand, request or compel any guardianship, custody, or visitation rights with any child born from the artificial fertilisation procedure. Further, the first applicant acknowledge that he fully understands that he shall have no parental responsibilities and rights whatsoever as set out in section 18(2) of the Children's Act, 38 of 2005 with the child and he shall not have any authority of any kind with respect to the child, or any decisions regarding the child nor will he seek the aforementioned parental responsibilities and rights in future;

13.15 All parties acknowledge and agree that the respondents have relinquished any and all rights that either of them might otherwise have to hold the first applicant legally, financially or emotionally responsible for any child that results from the artificial fertilisation procedure. The respondents further agreed that they will not demand, request or compel the first applicant to provide any financial support.

13.16 All parties relinquished and released any and all rights he or she may have had to bring a suit to establish paternity;

13.17 The first applicant agreed to assist the respondents in any court proceedings to facilitate any matters that could result in a legal requirement for his assistance, including signing a legal document or sworn affidavit regarding the process by

which the child was conceived;

13.18 The first applicant's relatives shall not have any rights or relationship with regard to the child as first applicant renounced his rights in the agreement;

13.19 The first applicant warranted that to the best of his knowledge, he did not suffer from any sexually transmitted diseases and shall take precautions not to be infect by such diseases until the first respondent has conceived a child. The first applicant further warranted that his personal health information provided was true and correct;

13.20 The first applicant shall not impede any local or international travel of the child and he understands that the child may be born in, brought up in and hold the citizenship of any country or countries;

13.21 The respondents shall make all financial, health and personal decisions about the pregnancy;

13.22 The first applicant shall have no parental responsibility, financial or otherwise, during the pregnancy;

13.23 The child's name shall be chosen by the respondents;

13.24 The full name and identity of the first applicant shall not be made known to anyone other than the child without his written approval, or unless the first applicant discloses the information voluntarily, or if required by law or for medical reasons. The first applicant's identity may only be made known to the child, to other legal guardians of the child, to notaries, lawyers, beneficiaries of the first applicant's will or anyone that needs to see a copy of the agreement in the course of a legal context or procedure. The intent of the parties is that the first applicant's identity will only be made known to anyone other than the child, by the respondents, if absolutely necessary;

13.25 The respondents' identities shall only be made know to anyone other than the

first applicant, unless the respondents approve such disclosure in writing, or unless the information is voluntarily disclosed by the respondents, or if required by law. The intent of all the parties is that the respondents' identities will only be made know to anyone other than the first applicant if absolutely necessary;

13.26 The first applicant shall provide the respondents with the requested medical exam results including those requested prior to conception, any exams related to pre-pregnancy or pregnancy and in relation to the child's health in future. The first applicant shall provide the respondents with a detailed family medical history and a description of family traits and particular characteristics that the child may share, if requested and as may be requested from time to time insofar it relates to the child's health, education, well-being or development.

[14] The first applicant says that he was not acquainted with agreements of this nature but does not say however, that he was unaware of what the sperm donor agreement provided for in general terms nor that he had any difficulty with those terms. He says in addition that no investigation or evaluation of a medical, psychological, social or cultural nature was undertaken to assess and determine the suitability of all of the parties to enter into the agreement and to discharge their respective roles envisaged in the agreement.

[15] The first applicant was informed by the respondents that they intended to attempt insemination themselves at their residence and he accordingly made gamete deposits at the place of residence of the respondents. None of these attempts were successful.

[16] During or about June 2015, the respondents requested the first applicant to attend the fertility division of Die Wilgers Hospital with them in order to have artificial insemination process undertaken by a qualified medical professional. The first applicant made the gamete deposits at the direction of the clinic and the first respondent was thereafter successfully inseminated which pregnancy led to the birth of L on 20 April 2016.

[17] The first applicant was not actively involved in the pregnancy but remained in contact with the respondents. Both applicants visited the first and second respondents and L at Die Wilgers Hospital on 22 April 2016, two days after L's birth.

[18] The applicant described that visit, its impact on him and the consequence of that visit in both the short term and the long term in the following words in his founding affidavit: -

> "From the first moment I held L in my arms, I felt a bond with him. I also recognised some of my physical features in him and there was no doubt that biologically speaking, he is my son. At the hospital, where I first saw L, I realised that I was not psychologically prepared for the impact which his birth shall have on me and that I was naïve to think that I can simply make an altruistic donation and not have the need to be in the child's life. "

[19] These moving sentiments in many respects began to lay the foundation for the present dispute as it must be evident from the stance taken by the first applicant and the bond that he says he felt with L and his desire and intention to be in the life of L would set him on a path of conflict with the respondents.

[20] The respondents allowed the applicants to visit L from time to time whilst he was an infant during the course of 2016 and about four visits took place in 2016. There was limited contact between the applicants and L in 2017 and the applicants would have seen L on two occasions in that year, one of which was on L's first birthday on 20 April 2017.

[21] There was no contact between the applicants and L in the year 2018, but towards the end of that year respondents were seeking to secure new accommodation at a rental that was affordable and that would enable them to effect some savings which they hoped would contribute to their coffers as they were planning to immigrate to Australia. They concluded an agreement with the first applicant to lease a smallholding he owned. At the time which was about May 2019 the first applicant and his partner lived on an adjacent smallholding while the second applicant and her fiancé occupied the smallholding opposite to the one occupied by the respondents and L.

The first applicant and his partner moved from the smallholding soon after May 2019.

[22] There is some dispute as to whether the respondents were given a special dispensation on the rental they paid as the first applicant says was the case or whether they in fact paid a market related rental. The relevance of this is that the first applicant relies on his version as part of his attempt to contribute to the well-being of L based on his concern for L and the bond that he says he felt between himself and L.

[23] The respondents rented the first applicant's property for a period of approximately nine months and during this time there was a greater level of interaction between the applicants and L but all of this occurred subject to the concurrence and approval of the respondents. It would be fair to say that L enjoyed fairly regular visits with the second applicant who owned a nursery as well as with the first applicant and his partner even though there is some dispute with regard to the regularity of the time the applicants spent with L and the intensity of the contact during that period.

[24] It was however, also during this time that the relationship between the applicants and the respondents started showing signs of strain and the first applicant makes reference to incidents and issues which he says raised concern on his part with regard to the well-being of L and which it appears may have also contributed to the strained relationship between the parties.

[25] These incidents and issues include: -

a) The schooling of L. The first applicant says he was concerned that the respondents had decided to home school L and his concern was deepened by what he says was the inappropriateness of the second respondent as a home schoolteacher given that she had only passed standard 7. In response the respondents point out that L was too young to start attending school and they were so advised but that he commenced school in April 2021. It must be recalled that L was only 3 years old when the respondents moved with him to the smallholding, and I am not sure if school attendance at that age is necessary as part of the development of a young child.
b) Visits to the local pub. The first applicant complains that the respondents

regularly visit a local pub called 'Die Vlakvark' at all times of the week and spend hours there with L. He says that it is an age-inappropriate place where alcohol is served openly and is frequented by intoxicated guests. The respondents strenuously dispute this and have procured a letter from the owner of the 'Die Vlakvark' taking issue with the first applicant's characterization of the business as a pub and pointing out that it is an upmarket family restaurant with a children's play area appropriate for visits by families with children.

c) The November 2019 incident. L was hurt when he fell injuring his mouth and face. The applicants say that it was caused by the negligence of the respondents who allowed L to exit from a moving vehicle, this according to the second applicant who says she witnessed the incident. The respondents deny this and point out that L was strapped into his car seat inside the vehicle, was assisted out of his car seat when the vehicle stopped and then ran in excitement to play with his dogs and in doing so stumbled across some toys in the driveway, fell and hurt himself. Of interest and worth noting is that the second applicant in describing the incident says she 'could clearly infer that respondents returned from a visit at their favourite pub '. It is not clear at all how she was able to reach this conclusion but her suggestion that alcohol would have played a role in the incident is clear.

d) The first applicant also says that on an occasion L asked about why he did not have a dad and from this question by L, he concludes that the respondents did not explain to L the nature and uniqueness of his family. His suggestion is clearly that L was enquiring about and in need of a father figure. Again, the respondents point out that they have, regard being had to L's age, broached this topic and have used a TV programme called 'Hey Duggie', that depicts families with different structures and that may be regarded as different.

[26] While all of the issues relate to what may be termed the welfare of L and may not have direct relevance to part A of the relief sought, what they collectively do is to raise, on the part of the applicants, doubt about the parenting abilities of the respondents and their commitment to the well-being of L. I will return to this later[1].

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1 See paragraph [61],[63]-[65].

[27] After the November 2019, incident when L fell and hurt himself the relationship between the applicants and the respondents became hostile and deteriorated and during January 2020, the respondents having given the first applicant due notice, vacated the smallholding they had been leasing from the first applicant.

[28] There has been no further contact between the applicants on the one hand and the respondents and L on the other hand, since January 2020. The applicants then instituted these proceedings in July 2020.

Relief

[29] This application is brought in two parts with the relief sought in Part A of the notice of motion currently before this Court. In Part A the applicants, seek relief that includes an investigation by the Family Advocate into the best interest of the minor child, including the issue of contact between the minor child and the applicants. Part B of the application is to be postponed *sine die* pending the findings of the Family Advocate. The relief sought in Part A and Part B is the following:

> "PART A
>
> 1. That the Family Advocate be ordered to conduct an investigation into the best interest of the minor child, L[……] W[……..]-S[……..] born 20 April 2016 (hereinafter 'the Minor Child'), this investigation, including but not limited to the issue of contact with the Applicants, and report back to the Court on its findings;
>
> 2. That pending the finalization of Part B of this application the Applicants shall enjoy the following contact with the Minor Child in terms of Section 23 of the Children's Act, 38 of 2005:
>
> 3.
>
> a. Every alternative Saturday from 09h00 to 17h00;
>
> b. Reasonable electronic and telephonic contact on a Tuesday and Thursday between 17h00 and 17h30;

c. On the Minor Child's birthday for at least 3 (three) hours;

d. On both the Applicants' birthdays for at least 3 (three) hours;

e. Christmas Day for at least 3 (three) hours, alternatively, on New Year's Day for at least 3 (three) hours;

4. That Part B of this application be postponed *sine die*;

5. That anyone of the parties may set Part B of the application down for hearing after receipt of the Family Advocate's report, and both parties may supplement their papers for purposes of determining Part B of the application;

6. No order as to costs, alternatively, and only in the event of opposition by the Respondents, the cost in Part A of the application shall be cost in the application;

7. Further and/or alternative relief;

PART B

1. The Applicants are granted rights of contact and care towards the Minor Child in terms of Section 23 of the Children's Act, 38 of 2005;

2. The First Applicant is granted guardianship over the Minor Child, with the Respondents, in terms of Section 23 of the Children's Act, 38 of 2005;

3. The Applicants shall enjoy the following rights of contact towards the Minor Child:

3.1 Every alternative weekend from 17h00 on the Friday to 17h00 on the Sunday;

3.2 Every alternative public holiday and long weekend from 17h00 on the day before the public holiday or long

weekend until 17h00 on the public holiday or the last day on the long weekend, as the case may be, with the understanding that a public holiday directly abutting a weekend shall be regarded as part and parcel of the long weekend and shall not be singled out as a public holiday.

3.3 Every alternative short school holiday and half of every long school holiday, Christmas and Easter to alternate between the Parties annually;

3.4 On the Minor Child's birthday for at least 3 (three) hours if this day falls in the week and from 09h00 to 13h00 if this day falls on a weekend;

3.5 On the Applicants' respective birthdays for at least 3 (three) hours;

3.6 On Christmas Day for at least 3 (three) hours; alternatively on New Year's Day for 3 (three) hours;

3.7 Reasonable telephonic and electronic contact at all reasonable times.

4. That the Minor Child receive play therapy by a therapist agreed on between the Parties within a period of 10 (ten) days after the granting of the order with the purpose to give effect to clause 4.5 of the Gamete Donor and Recipient Agreement for the Purposes of Artificial Fertilisation dated 22 May 2015;

5. Further and/or alternative relief;

6. Costs, only in the case of opposition."

In limine

[30] Apart from opposing the relief sought on the merits, the respondents have also placed in issue the *locus standi* of the applicants to bring this application in terms of section 23 of the Children's Act[2] ('the Act").

[31] The first respondent submits that the applicants have failed to make out a case that they are persons having an interest in the care, well-being and development of L and that on account of that they lack the necessary *locus standi* to advance the relief they seek. In particular they contend that section 23 of the Act was not intended to give a wide range of persons, substantially not connected with a child, the right to invoke the relief that the section contemplates.

[32] In addition they rely on the provisions of section 40 of the Act as well as the terms of the donor agreement in arguing that no rights of the kind that the applicants seek to assert in these proceedings could have come into existence or are capable of being recognized for the purpose of a section 23 application.

Legislative framework

[33] The first and second applicants bring this application in terms of section 23 of the Act. The applicants disavow reliance on the sperm donor agreement as well as on the biological link between the first applicant and L. The biological link, however, at least factually appears to be a significant feature in this matter and is a matter I will return to[3].

[34] The applicants' counsel placed on record that the relief sought in Part A was confined to contact and did not extend to care of the minor child. This will be relevant with regard to the allegations of the inappropriate treatment and care of L which have been levelled at the respondents.

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2 Act 38 of 2005.

3 See paragraphs [69]-[70] and [86].

[35] Section 23 of the Act determines the basis upon which "any person having an interest in the care, well-being or development of a child may apply to the High Court" for the assignment of rights specified therein and provides as follow:

> "**23. Assignment of contact and care to interested person by order of court**
>
> (1) Any person having an interest in the care, well-being or development of a child may apply to the High Court, a divorce court in divorce matters of the children's court for an order granting to the applicant, on such conditions as the court may deem necessary-
> (a) contact with the child;
> (b) care of the child.
>
> (2) When considering an application contemplated in subsection (1), the court must take into account-
> (a) the best interest 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 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.
>
> (3) . . .
>
> (4) The granting of care or contract to a person in terms of this section does not affect the parental responsibilities and rights that any other person may have in respect of the same child."

[36] Section 26 of the Children's Act provide as follow:

> "**26 Person claiming paternity**
>
> (1) A person who is not married to the mother of a child and who is or claims to be the biological father of the child may-
> (a) apply for an amendment to be effected to the registration of birth of

the child in terms of section 11 (4) of the Births and Deaths Registration Act, 1992 (Act 51 of 1992), identifying him as the father of the child, if the mother consents to such amendment; or

(b) apply to a court for an order confirming his paternity of the child, if the mother-

(i) refuses to consent to such amendment;

(ii) is incompetent to give consent due to mental illness;

(iii) cannot be located; or

(iv) is deceased.

(2) This section does not apply to-

(a) . . .

(b) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation."

[37] Section 40(3) of the Children's Act provides as follow:

"40. Rights of child conceived by artificial fertilization

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

(a) that person is the woman who gave birth to that child; or
that person was the husband of such women at the time of such artificial fertilization."

Analysis

Locus Standi

[38] While our Courts have recognized that in general unmarried fathers and grandparents may well constitute a part of the category of persons who have an interest in the care, well-being and development of a child[4], the question arises as to how wide the door to section 23 should be opened. The suggestion that it be limited to

4 *S v J and another* [2011] 2 All SA 299 (SCA); *LH and another v LBA* [2013] JOL 29947 (ECG).

someone who would constitute a *de facto* parent may well be too restrictive and may ultimately not accord with the best interests of the child principle.

[39] On the other hand what may be required is some tangible and clearly demonstrable interest and connection to the child, regard being had to the facts and the relationship (if any) that may have come into being between the child and the person/s seeking contact rights. While it is difficult to define precisely what interest would be sufficient, it would invariably depend on the facts of each particular case and a fleeting, incidental interest may not be sufficient while on the other hand an interest akin to that of a parent may set the bar too high.

[40] At the same time I do not consider section 40 of the Act to create an insurmountable hurdle to someone seeking to invoke section 23. I understand section 40 to do no more than simply provide that no rights or obligation arise *ex lege* between a child and a sperm donor where such child is born as a result of the sperm donation. In such instances a sperm donor cannot rely on the biological link evidenced by the sperm donation to argue for the recognition of such right on that basis alone. At the same time, it cannot operate as an absolute bar to such a person seeking care and contact as in this case. Section 23 and Section 40 seek to achieve different objectives and are consistent with each other – the former creates the opportunity for an interested person to obtain certain defined rights while the latter simply precludes the vesting of such rights automatically on the basis of a genetic link through artificial insemination.

[41] Both section 40 and section 26(2)(b) of the Children's Act make it clear that a gamete donor (except a spouse) is not legally regarded as the parent of any child born using from their gametes, and therefore does not acquire any parental rights and responsibilities relating to the donor-conceived child because of their genetic link.

[42] In both the above provisions, the legislature clearly and deliberately excludes gamete donors from having any claim to parenthood of the donor-conceived child. The unequivocal purpose of the sections is to make it so that in the eyes of the law a donor-conceived child is the child of the person(s) who intended to act as the child's parent(s); and the gamete donor relinquishes any claim to parenthood, and the

attendant rights and responsibilities that come with it, by virtue of becoming gamete donors.

[43] The legal certainty provided through the two sections is essential for sustaining the artificial reproduction system in South Africa. If this legal certainty is compromised, donors would not be willing to donate, recipients would not be willing to accept donations, and infertility would become an unsolvable burden.

[44] The two provisions entail that a gamete donor does not acquire parental rights and responsibilities towards a donor-conceived child by virtue of their genetic link. A person does not qualify as a 'person having an interest in the care, well-being or development of a child; as contemplated in sections 23(1) and 24(1) of the Children's Act because of a genetic link caused by gamete donation. An interest in the care, well-being or development of a child therefore needs to be based on facts other than genetic relatedness caused by gamete donation.

[45] The existence of the sperm donor agreement and its extensive provisions cannot oust the Court's jurisdiction nor its duty to consider the best interest of the child principle. While the terms of the agreement as well as the intention of the parties when the agreement was concluded may be relevant in dealing with the merits of the dispute the Court is called upon to adjudicate, the agreement cannot stand as an obstacle to the Court discharging its constitutional obligations nor can it, *ipso facto* operate as an immutable bar to the first applicant invoking section 23. While contractual freedom is important in ensuring certainty and predictability in the constitutional order, we live in, that freedom must be exercised consistently with the values and imperatives of the Constitution.

[46] It is for these reasons that it may be inappropriate to dispose of the *locus standi* arguments *in limine* but rather to let the proper adjudication of them stand over to be dealt with concurrently with the merits given how, in this application those two issues are inextricably intertwined.

The claim to contact located in section 23

[47] The thrust of the applicants case is that they have over time and with the concurrence of and the acquiescence of the respondents become involved in the life of L, spent time with him, shared in his interests and his life to such an extent that a bond has developed between them and L and that it would not be in the best interests of L for this bond to be terminated as the respondents have elected to do. They say that beyond the bond that has developed their ongoing presence in the life of L which an order in terms of section 23 would facilitate, would endure for the best interests of L, as they bring love and commitment to L and are also able to contribute materially to his well-being.

[48] The respondents on the other hand deny that a bond exists between the applicants and L saying that at best the applicants may feel a bond towards L but this is considerably different from saying that a mutual bond of affection exists. They point to the limited time in the life of L from his birth to the current time when the applicants had some form or other contact with him. In addition, it is the respondent's case that as a couple they took a conscious decision to start a family and to have a child and to be the parents of the child and in seeking a sperm donor did not expect nor contemplate nor agree that the sperm donor would play a role in the life of the child.

[49] A key feature of this application is the twin questions of whether a bond has formed between the applicants and the child and related to that whether it can be said that the respondents were responsible for allowing such a bond to develop by allowing and supporting the contact between the applicants and L and therefore by implication must accept the consequences of that development.

[50] From the outset and in particular when the sperm donor agreement was reached the parties were clear that the respondents would be the parents of L and no role was envisaged for the first applicant in the life of L. Even leaving aside the terms of the written sperm donor agreement, the parties are not in dispute in what they understood the sperm donation would entail and the consequences of it, namely that the first applicant would have no claim of rights to the child and would not play any role in the life of L.

[51] That the first applicant as well as his mother, the second applicant, were allowed to have some contact with L is not in dispute and it is also not in dispute that this occurred with the consent of the respondents. However, what the respondents say, and this is not unreasonable, is that out of a sense of gratitude they allowed the applicants to have some limited contact with L but that in doing so they did not open the door to the kind of rights the applicants now seek. They also say that they were at all times secure in the knowledge that the agreement they had concluded with the first applicant and what they say was the common intention of the parties gave them a sense of security that the rights they had in L as his parents would not be unduly interfered with by anyone else and that the conduct of the first applicant, is an attempt to insert himself into their lives and that of L which is unacceptable and not in the best interests of L.

[52] It is important in this regard to recognise that the decision by the respondents to have a child and constitute a larger family is one that triggers a number of rights in the Bill of Rights, and they include the right to dignity[5] in being able to make the choices that relate to one's personal and family life and have those choices protected. They also impact on the child's right to family as set out in section 28 as well as the right to association encapsulated in section 18 and the right to privacy[6].

[53] A family has traditionally been accepted to consist of the so-called nuclear family, that is, a unit consisting of a mother, father and their biological children.[7] However, this traditional notion of a nuclear family unit has in recent years imploded as a result of the gradual recognition of other forms of family structures in South Africa. The advent of democracy and the Constitution has in many respects heightened the recognition of other forms of family structures by affording legal recognition to non-traditional ideals of family relationships. The move toward a less traditional and more

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5 Section 10 of the Bill of Rights.

6 Section 14 *Supra.*

7 See, for example, Regulations published in terms of the now repealed Social Assistance Act 59 of 1992. These Regulations defined "family" in section 1 as: "the parent or parents and his or her dependent child or children". "Family" is undefined in the current Regulations: Regulations relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in respect of Eligibility for Social Assistance (GN R898 *Government Gazette* 31356 22 August 2008. The White Paper for Social Welfare defines "family" as "individuals who either by contract or agreement choose to live together intimately and function as a unit in a social and economic system". See GN 1108 *Government Gazette* 18166, 8 August 1997.

liberal definition of what constitutes a 'family unit' in South Africa is evinced by the fact that only 25% of children in South Africa are actually part of a traditional nuclear family unit, with the remaining percentage either being a part of a single parent headed family or a family unit consisting of same sex parents.[8]

[54] In *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs*,[9] the Constitutional Court confirmed a wider understanding of the notion of family and held that:

> "Families come in many shapes and sizes. The definition of family also changes as social practices and traditions change. In recognising the importance of family, we must take care not to entrench particular forms of family at the expense of other forms."

[55] In *Mubake and Others v Minister of Home Affairs and Others*,[10] which was a case concerning the Refugees Act[11] and the Children's Act,[12] the court, per Makgoka J, held–

> "This, in my view, ties in with the definition of a family member in section 1(d) of the Children's Act, which is not restricted to the nuclear family, but also includes "any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship". I therefore agree with the submission by Prof Skelton, for the applicants, that the Children's Act takes a broader, more African view to the concept of family, and that this should dispose this Court towards a more flexible approach to the interpretation of a "dependant" in section 1 of the Act."[13]

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8 2018 Children, Families and the State report published by the Children's Institute at the University of Cape Town.
9 2000 8 BCLR 837 (CC); 2000 3 SA 936 (CC) at para 31. See also Smit in Olivier and Kuhnle (eds) Norms and Institutional Design: Social Security in Norway and South Africa 265.
10 2016 (2) SA 220 (GP).
11 130 of 1998.
12 38 of 2005.
13 Supra n 7 at para 20.

[56] The cases of *Volks NO v Robinson and Others*[14] and *Gory v Kolver NO and Others (Starke and Others Intervening)*[15] not only highlight a stark distinction between the approach of the courts to domestic partnerships depending on sexual orientation, but both cases in turn play an important role in highlighting the fact that the dynamics of relationships have evolved as couples no longer feel the need to be bound by the institution of marriage in order to live together as 'husband and wife' and exercise the same responsibilities and obligations as married couples. As such, the call for greater recognition of domestic partnerships through case law and even through legislation is indicative of the changing norms in society and a greater push for non-nuclear family units in South Africa to be fully embraced.

[57] In *S v M*[16] the process of weighing up the best interest of the child received detailed attention. Sachs J attempted to describe what he called *"an operational thrust for the paramountcy principle".*[17]

> *"The paramountcy principle, read with the right to family care, requires that the interest of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely the interest of children who may be concerned.*

[58] It must be so that family is often about intimate space and special bonds that are nurtured through both easy and difficult times and that bind those in it in more ways than are imaginable. While that space may often be open to scrutiny, in particular when, it involves the best interest of the child principle, it is also a space that requires protection and where appropriate must be insulated from undue outside interference.

[59] There is in this regard nothing about the conduct of the respondents that suggests that they opened their family space to the applicants in the manner

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14 2005 (5) BCLR 446 (CC).
15 2007 (4) SA 97 (CC)\.
16 2008 (3) SA 232 CC at [42].
17 Skelton 'Too much of a good thing? Best interest of the child in South African jurisprudence' 2019 De Jure Law Journal 557-579 at 565.

described. If they were motivated by a sense of gratitude to allow the applicants to see the child on limited occasions, there is nothing wrong with that and it would be incorrect to describe it as having opened the door of their lives to the applicants in a way that now binds them to afford far reaching rights to the applicants.

[60] It is a far stretch to suggest that someone who out of goodwill and gratitude reaches out and is warm and inviting to another must then carry the consequence that such conduct, which is not beyond the ordinary expectation of decent human beings, may trigger a rights claim on the part of the other. This is not tenable and if it were allowed it would be chilling in its effect on ordinary human relations. On this aspect it is important to also recognize that this application is not a contest between the parties, but its starting point must be the recognition that the respondents are the parents of L and they have by all accounts done a good job thus far.

[61] At this juncture, and even though this application is about contact and not care, I briefly reflect on the allegations advanced by the applicants, that suggest that the respondents may not always act in the best interest of L. I have described the various incidents and events the applicants have made reference to and it is an unfortunate attempt to cast doubt on the parenting abilities of the respondents. That the second respondent has a Standard 7 formal education has absolutely no bearing on her ability to support the educational development of her son. There are millions of others with little formal education who play a vital role in the educational development of their children. Similarly, the suggestion that the respondents visit a pub almost daily with L is mischievous when it appears to be a respectable family restaurant. In addition, the incident when L was hurt is a part of the growing up of a young child.

[62] In regard to the incident that occurred on 27 November 2019 in which the minor child was injured the following simple but profound observation was noted in *Wilford v Little*[18] a decision of the California Court of Appeals that "an infant is afraid of nothing and in danger of everything when left to his own devices".

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18 Civ. No. 21469. Second Dist., Div. One. Sept. 17, 1956.

[63] In addition the unwarranted suggestion that alcohol played a part in the incident together with the other issues I have referred to appear collectively to seek to advance the suggestion that somehow the best interest of L is imperiled by the conduct of the respondents – there is no justification for this.

[64] Finally, there is the reference to L enquiring about a father figure and the suggestion that the respondents have not explained this to him. Apart from the explanation the respondents have offered and the reference to the *"Hey Duggie"* kids TV program, it must also be recalled that in *Van der Linde v Van der Linde*[19], the Court held that the concept of mothering is determined by the quality and function thereof and is no longer determined by the gender of the parent and the proposed role that they are classified as in society. A father can be as a good a "mother" as the biological mother of the child, whilst a mother can be as a good a "father" of as the biological father of the child. It is inconceivable how in a society that is committed to the eradication of discrimination on the basis of sexual orientation, concepts such as a father figure can be sued to cast doubt on the appropriateness of a lesbian couple to be parents of a child. Ultimately it must be about the environment of love and caring that is created for a growing child and not the sexual orientation of its parents.

[65] Accordingly on this aspect I must conclude that the choice of the respondents to have a family that would include L, the manner in which they have demonstrated their commitment as parents to L and the privacy and dignity that they are entitled to are important considerations in ensuring that their life choices and the identity and the construction of their family are protected. Certainly, on that score there is nothing to suggest that the conduct of the respondents in their role as parents have somehow imperiled the best interests of L.

[66] That however, is not the end of the enquiry and it may well be, notwithstanding that the respondents are not blameworthy, that the best interest of L may be advanced by having contact with the applicants, I examine the nature of the relationship between the applicants and L and also the genesis of that relationship and how the applicants see that relationship in the fullness of time and the rights to L they seek in the long

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19 [1996] 1 All SA 43 (0) - quoting from Editor's Summary.

term and as set out in Part B of this application.

[67] In examining the extent of the contact between the applicants and L then the following is largely not in dispute: -

2016	First applicant saw L on six occasions – this would have been when L was an infant
2017	Two visits took place
2018	No visits
2019	Visits over a nine-month period, with the last visit being end November 2019
2020	No visits
2021	No visits

[68] If regard was had to just the number of visits, then it was hardly significant and in the five years of the life of young L, he has had no continuous contact with the applicants for about three of those years while the contact that was had in the first year of his life was as an infant. Under these circumstances of quite limited contact, one must question whether it can be said a mutual bond exists between the applicants and L.

[69] From the description given by the applicants of their feelings towards L, I must accept that they feel a closeness to him and subjectively from their side they hold the view that a bond exists. This is not unreasonable and in this regard the feelings and affection they hold for L are indeed sincere. Certainly, on the part of the first applicant those feelings and the bond he describes can be traced back to the birth of L and the description of the first applicant when he held L for the first time. The immediate bond he felt, the similarity in the physical features of L he identified and his own conclusion that L was his biological son, all contributed to his realization that he was naïve to think that he could simply make an altruistic donation and let the matter end there. At that point in his own words, he felt the need to be a part of L's life.

[70] This candid and moving account of what occurred when the first applicant saw and held L for the first time is telling in understanding the actions and the conduct of

the first applicant since then. Clearly and whatever the respondents may have done in 'opening the door' as he describes, his own trajectory and the mould for that in his relationship with L had been set when he held L for the first time – he wanted to be a part of L's life.

[71] I have considerable understanding for what may have been the anguish and the dilemma the first applicant found himself in. In making the donation it was clear that he did not harbor any thoughts of contact with or, a relationship with the child, still to be born. However, all of that changed as I have described, and the seeds of the current dispute were probably sown after L's birth when the applicants visited L.

[72] The first applicant at no stage during this time shared with any of the respondents the deep emotion and bond that he felt when he first saw L and his feeling at the time that he wanted to be a part of L's life. I am not sure how this would have affected the relationship between the parties if he had done so, but I cannot imagine the polite and cordial relationship they enjoyed for some time would have endured or that the respondents would have allowed even the limited contact between the applicants and L as they did.

[73] The first applicant also did not seek any professional assistance in dealing with the dilemma he had found himself. Whatever the status of the sperm donor agreement may have been, he would have known that the respondents and himself saw the donation as altruistic, with him playing no role in L's life thereafter, while on the other hand his own view of the matter had changed quite dramatically from the time of L's birth.

[74] Therefore and even accepting that the there is still a strong feeling of affection on the part of the applicants and that they both feel a deep bond towards L, the reality is that that situation arose largely through no fault of the respondents but rather as a result of the probably unexpected and deep reaction the birth of L evoked in the first applicant.

[75] The consequences of that are probably the most difficult and complex feature of this dispute. How does a Court deal with the claim of contact of someone who

sincerely holds strong feelings towards L and always wanted to be a part of his life but did not express any of this to L's parents who on their part are capable parents and may rightly feel that there is no place in L's life for the applicants and that allowing them contact rights would undermine their own self determination as a family, their integrity as a family and the proper respect for their dignity.

[76] Under these circumstances and whatever the applicants may feel towards L, I am not sure if L's best interests would be advanced by allowing the contact that the applicants seek.

[77] While the applicants have denied that they see themselves as parents of L or that they seek to insert themselves into the life of L, the first applicants conduct from the time of L's birth to the bringing of this application was about asserting and giving effect to the bond he says he felt for L from the time of his birth.

[78] In addition, if one has regard to the nature of the relief the applicants seek in Part B of this application which includes rights of guardianship to L, it certainly envisages a significant role in the life of L and includes care and contact, access which includes weekend sleepovers and school holidays as well as guardianship. There can be little doubt that what the applicants seek will in effect mean them playing a role in the life of L, similar to that which the respondents currently play; that they will take major decisions in the life of L and that they seek to become a permanent, integral and substantive part of L's life. What is envisaged is that L will have two sets of parents, two homes and three people who will exercise guardianship over him.

[79] While as matter of principle this may not be objectionable, in the context of this application and on the facts before me, I have serious reservations whether it is warranted but more importantly whether it will serve L's best interests. Mindful that Part B is not before me, the relief that the applicants seek in Part A, is a precursor to the relief they seek in Part B.

[80] Section 23 (2) requires the Court, in adjudicating an application of this nature, to have regard to the following factors: -

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

(a) the best interest 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 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.

[81] I have already considered the facts as well as the analysis and the evaluation of those facts against the applicable legal principles found in section 23 as well as the values and the imperatives of our Constitution. They all point strongly in the direction of refusing the relief sought. For the sake of completeness however, I list the considerations set out in section 23 (2) and my conclusions in respect of each of them, mindful that what is required ultimately is what would advance the best interests of L.

a) The best interest of the child

[82] By all accounts L is well cared for and lives in a family that is both sensitive and responsive to his needs. There is no evidence that has emerged that contact with the applicants will redound to his best interests. If anything, it may well cause confusion, create new, alternate and possibly conflicting centers of focus in his young life. All of this may well open up a path of great uncertainty for L and given my conclusion that L's best interests are already adequately catered for by the respondents, granting contact rights to the applicants will not be in L's best interests.

b) The relationship between the parties and the child

[83] I have already dealt with the relationship between the respondents and L as well as that between the applicants and L and while I have concluded that the applicants feel deeply and strongly for L, it simply cannot follow that the existence of that level of affection and concern should trigger an entitlement to have contact. In this

regard it must be recalled that the applicants have not had contact or interaction with L for a major part of his life and certainly no contact for the past 18 months or so. This has not had any disruptive effect in the life of L and while I would characterize the relationship between the applicants and L as being warm and affectionate while it existed, it was a relationship of limited duration and limited interaction and while it brought great joy to the applicants, it was in all respects a tangential and subsidiary relationship to the one that L enjoys with his parents which is a close and loving one.

c) The degree of commitment that the applicants has shown towards the child

[84] While the applicants are committed to L and want the best for him, that commitment (without undermining it) occurred in the context of a limited relationship and in any event cannot be dispositive of the matter.

d) Contribution to towards expenses

[85] The applicants have provided gifts to L from time to time but all of L's essential needs have been taken care of by the respondents. In this regard I note the applicants offer to contribute in more substantial ways to L's upbringing including paying for his education, the reality though is that the respondents have within their available resources provided well for L. There is the issue of the rental premises the respondents occupied and leased from the first applicant and even if I accept that this was the first applicant's way of contributing to L's well-being, there was at no stage any request by the respondents for assistance. The significance of this is to recognize their dignity in wanting to be able to provide for their son and is not about the respective ability of the parties and what they can do for L. This is about the best interest of L and not a competition about who has the best resources.

e) Any other factor

[86] The first applicant has said that this application is not premised on his biological link with L but on the development of the bond that has developed between him and

the second applicant, on the one side and L on the other[20]. Despite this, all of the evidence points in a different direction – that in his mind the biological bond, the physical likeness and him reneging on his altruistic donation to the respondents, suggest that he sees himself as the father of L intent on playing such a role and in the future being the guardian of L.

[87] He seeks all of this, mindful of the relationship between the respondents, their desire nurtured over time to have a child of their own and their great joy in having L and having him as part of their family to love and to cherish. They are surely entitled to that little special place they have created for themselves and while keeping the applicants out of that space may appear to be harsh, it is ultimately what is needed to respect and protect the intention and the choice of the respondents in constituting their family and being able to live as a family in the best manner they see fit.

[88] Simply and unequivocally put, that means bringing up L without the involvement of the applicants which is the relief the applicants seek.

Comparative Law

[89] *In Re Patrick*[21], Guest J of the Family Court of Australia dealt with the issue of whether a gay sperm donor, known to the lesbian mother of the child, had a right under Australian law to regular contact with the child. Guest J held that the sperm donor was allowed contact with the child to the extent that this was in the child's best interests. Guest J did, however, find that due to the way in which particular provisions of Australia's Family Law Act 1975 (Cth) are drafted, a sperm donor cannot be regarded as the 'parent' of the child, and accordingly called for legislative reform to recognise the rights of known sperm donors wanting involvement with the child.

[90] In *Mason v Parsons*[22], decided by Australia's apex court, the High Court. In *Mason*, the applicant, a known sperm donor, was entered on her birth certificate as the child's father; he was actively involved in the child's life; and he had an ongoing

20 Founding Affidavit page 001-37 at 4.43.
21 [2002] FamCA 193.
22 [2019] HCA 21 (19 June 2019).

role in the child's financial support, education, health and general welfare since birth. Based on the applicant's ongoing involvement and relationship with the child – *not* the genetic link – the High Court held that the applicant was indeed the child's parent for legal purposes. The High Court further held *obiter* that it was unnecessary to decide whether being a sperm donor *per se* is relevant to being a parent for legal purposes.

[91] It does seem and with respect correctly so, that the approach of the Court as that the involvement and the nature of the relationship between the applicant and the child and not the genetic link would be the dominant consideration in a claim for contact rights.

[92] In *TJ v CV & Ors*[23], application was made by the biological parent (who was the known sperm donor) seeking contact and parental responsibility for his son who was now part of the applicant's sister's same sex family. No parental responsibility order was made and a limited contact order was granted. The applicant's sister, S, was in a stable civil partnership with CV. They had various unsuccessful attempts at creating a family before turning to the applicant as a possible sibling sperm donor. This was agreed and CV successfully gave birth. There was however a dispute as to whether the child's conception was through natural means or through artificial insemination.

[93] The applicant's case was that the three of them had agreed he would have regular contact and a role in major decision-making whereas S and CV maintained that he was merely to have an avuncular role. The disagreement had caused the parties to become estranged. In this judgment Hedley J observes that the depth of feeling caused by such arrangements often comes as a shock to those involved. However, he had to consider the issues from the viewpoint of the child's welfare. He concluded that giving the applicant parental responsibility would not be wise as he would be likely to use it to force greater involvement in the future. He also rejected any form of restricted parental responsibility but was reluctant to dismiss the application as the essential conditions for parental responsibility had been met: he therefore made no order. The Judge did make an order for contact as the child needed to know from an early stage that the applicant was more than just an uncle as that fact would

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23 [2007] EWHC 1952 (Fam).

inevitably be revealed at some stage. However, the contact was restricted to four occasions a year as it was not intended that such contact should develop a relationship that might be considered parental.

[94] What the cases appear to highlight is that the genetic link is hardly an overwhelming or substantial consideration in adjudication claims of this nature. In the South African context, the irrelevance of such a link is highlighted by section 40 of the Act and from this it must therefore follow that a claim in terms of section 23 for contact and /or care must be predicated on the factors that are outlined in the section and which I have dealt with. To somehow infuse the genetic link into the process, as the first applicant in fact does but at the same time disavows reliance on such a link, does an injustice to the regime that section 40 contemplates which is to provide legal certainty in the artificial reproduction system in South Africa.

Conclusion

[95] For these reasons the relief sought in Part A of this application must fail and it fails primarily not on account of the fact that the applicants are ill suited in their commitment to L but rather in recognition that the family that the respondents have made for themselves in their relationship with their child L, are intimate and special and are both worthy and deserving of constitutional protection from outside interference, even if the latter is well meaning. In any event and for the reasons already given, the granting of the contact rights sought will not ultimately be in the best interests of L.

Costs

[96] There is no reason why costs should not follow the result. The respondents have had to expand financial resources in opposing this part of the application which they have done successfully and they should be entitled to their costs.

Order

[97] I make the following order: -

Part A of the application is dismissed with costs.

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N KOLLAPEN
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
PRETORIA

Appearances

For the applicants:	Adv LC Haupt (SC)
	Adv B Bergenthuin
Instructed by:	Adam & Adams Attorneys
For the respondents:	Adv CD Alton
	Adv L Pearce
Instructed by:	Cilliers & Gildenhuys Attorneys
Date of hearing:	14 April 2021
Date of judgment:	17 June 2021