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| <b>Citation</b> | 2018 (5) SA 308 (KZD)                                               |
| <b>Case No</b>  | 11830/2016                                                          |
| <b>Court</b>    | KwaZulu-Natal Local Division, Durban                                |
| <b>Judge</b>    | Koen J                                                              |
| <b>Heard</b>    | June 15, 2018                                                       |
| <b>Judgment</b> | June 15, 2018                                                       |
| <b>Counsel</b>  | MA Konigkramer-Sponneck for the applicant.<br>Respondent in person. |

#### Flynote : Sleutelwoorde

**Children** — Parents — Biological father — Sperm donor through natural insemination — Having statutory rights and responsibilities of biological father — Though such capable of post-natal variation by agreement, terms to be proved by party alleging variation — Quaere: Whether so-called 'known **G** sperm donor agreement' waiving rights and responsibilities of biological father valid in South Africa.

#### Headnote : Kopnota

This matter concerned a boy, ES, who born on 12 March 2015 after having been naturally conceived by the applicant (the father) and the respondent (the **H** mother). The couple, never married, had in June 2014 revived an earlier relationship after the applicant agreed to the respondent's request to impregnate her via natural insemination. By July 2014 the respondent was pregnant. But when the applicant told her he wanted to take on parental responsibilities, she demurred. Matters deteriorated when she threatened to **I** forbid him from being present at the birth and to exclude his name from the birth certificate. But in the end he was present and his name included. The relationship remained under strain, and in September 2015 the respondent, having obtained legal advice, sent the applicant an email in which she raised the notion of a 'known sperm donor agreement', pointing out that it was more 'appropriate' than the parenting plan suggested by the applicant. The email included a draft agreement which the applicant did **J** not sign.

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Matters did not improve and in November 2015 the applicant asked the **A** High Court for an order granting him scheduled contact and assigning him the full rights and obligations of unmarried fathers set out in s 21(1)(b) of the Children's Act 38 of 2005. <sup>[\*]</sup> The court granted an interim order and referred the following questions for oral evidence: (i) whether the applicant met the requirements of s 21(1)(b); (ii) whether the parties had concluded a sperm donor agreement; and (iii) whether it was in the best interests of ES **B** for the applicant be assigned rights of contact.

While the applicant stated that the agreement between him and the respondent was that he could choose his level of involvement in ES's life, the respondent argued that the alleged known sperm donor agreement meant that the usual consequences of biological fatherhood in s 21(1)(b) did not **C** apply. She argued that the applicant was a sperm donor with no legal rights in respect of ES save for any concessions made by her. She acknowledged that such agreements were not recognised by the Act and would be novel in South African law, but contended that they were increasingly common and that their recognition would be consistent with mothers' rights to dignity and sexual preference. She conceded, however, that the applicant had, inter alia, accompanied her on visits to obstetricians, **D** attended pre-natal classes with her, and had paid certain expenses in respect of the pregnancy.

#### Held

The known sperm donor agreement contended for by the respondent was an innominate contract, the terms of which she had to establish on a **E** preponderance of probabilities (see [13]). The recognition of such agreements, which were not necessarily invalid, was a novel issue which required the benefit of detailed argument. Any such enquiry would have to consider the best interests of the child and whether recognition might be *contra bonos mores* (see [15]). The present court would, however, assume — without deciding — that a known sperm donor agreement could be validly concluded **F** in South Africa to vary the rights and responsibilities the Act awarded to biological fathers (see [16]).

In the present case the applicant had satisfied the level of commitment required by the Act to confer on him the rights and responsibilities mentioned in s 21 (see [21]). The respondent's conduct was consistent with the applicant's view that he could elect to involve himself in ES's life, and the fact that **G** a parenting plan was even considered also pointed in this direction (see [27] – [29]). Since the respondent failed to prove, on a balance, the agreement alleged by her or to contradict the applicant's more probable version that there had been no variation of the normal consequences of biological fatherhood, the applicant was entitled to an order declaring that he had acquired full parental rights and responsibilities under s 21 (see **H** [30] – [31], [38]).

#### Legislation cited

##### Statutes

The Children's Act 38 of 2005, s 21(1)(b): see *Juta's Statutes of South Africa* 2016/17 vol 7 at 4-99. **I**

#### Case Information

MA Konigkramer-Sponneck for the applicant.

Respondent in person. **J**

## Judgment

### Koen J: B

[1] This matter concerns a boy, ES, who was born on 12 March 2015, having been conceived naturally by the applicant, his biological father, and the respondent, his biological mother. <sup>[1]</sup>

[2] 'Parent' is defined in s 1 of the Children's Act 38 of 2005 (hereinafter **C** referred to as the Act) as follows:

'in relation to a child, includes the adoptive parent of a child, but excludes —

- (a) the biological father of a child conceived through the rape of or incest with the child's mother;
- (b) **D** any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation; and
- (c) a parent whose parental responsibilities and rights in respect of a child have been terminated'.

As the applicant does not fall within any of the exclusions to the definition of 'parent' he qualifies as ES's biological parent to be a 'parent' **E** of ES as defined in the Act.

[3] The applicant and the respondent are, however, not married, and were not married either at the time of ES's conception, or at the time of his birth, or at any time between his conception and birth. The applicant, **F** although the biological father of ES, would accordingly ordinarily, and in terms of s 20 of the Act, 'not have parental responsibilities and rights in respect of the child' as he does not fall into one of the above 'categories' as set out herein.

[4] Section 21(1) of the Act, however, provides that:

'(1) **G** The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child —

- (a) if at the time of the child's birth he is living with the mother in a **H** permanent life-partnership; or

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- (b) if he, regardless of whether he has lived or is living with the **A** mother —
  - (i) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law;
  - (ii) contributes or has attempted in good faith to contribute to the **B** child's upbringing for a reasonable period; and
  - (iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.'

[5] The applicant maintains that he acquired full parental responsibilities **C** and rights in respect of ES by reason of him falling within the provisions of s 21(1)(b) of the Act. On 6 November 2015 he launched an application in which he claims the following relief, as set out in the notice of motion:

#### 'First order prayed **D**

1. That pending the final determination of this application, the applicant is entitled to maintain contact with the minor child, namely ES, a boy, born on 12 March 2015, as follows: every Tuesday and Thursday afternoon, from 12h00 to 17h00; every weekend, alternating on a Saturday and a Sunday, from 08h00 to 13h00; **E**
2. That in order for the applicant to exercise his contact with the minor child as provided for in paragraph 1 hereof, he or his mother, LR, shall collect the minor child from the respondent's home at the commencement of such periods, and either the applicant or his mother shall return the minor child to the respondent's home at the conclusion thereof; **F**
3. That the Office of the Family Advocate, Durban, is hereby requested to conduct an enquiry and compile a report, setting out therein its recommendations regarding the relief sought by the applicant in this application, and in particular whether the applicant should be declared a co-holder of full parental responsibilities **G** and rights, and the extent to which he should be entitled to exercise contact with the minor child, as sought by the applicant in the Second Order Prayed hereinbelow;
4. That the costs be reserved for determination by the Court hearing this application in relation to the relief sought in the Second Order Prayed; **H**
5. That, alternatively to paragraph 4 hereof, and in the event of the respondent opposing the relief sought by the applicant in the First Order Prayed, she be directed to pay the costs associated therewith;
6. That further or alternative relief be granted as this Honourable **I** Court may deem appropriate.

Take notice further that thereafter, once the Office of the Family Advocate has delivered a report, as requested in paragraph 3 of the First Order Prayed, and on a date to be arranged with the Registrar of this Honourable Court, the applicant will make application to this Honourable Court for an Order as prayed in the Second Order Prayed. **J**

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#### Second **A** order prayed

1. That the applicant and the respondent are declared to be co-holders of full parental responsibilities and rights in respect of the minor child, ES, a boy, born on 12 March 2015;
2. That the primary place of residence of the minor child shall be with the respondent;
3. **B** That the applicant is entitled to maintain contact with the minor child as follows:
  - 3.1 from the date of this Order until the minor child turns 3 years of age:
    - 3.1.1 every Tuesday and Thursday afternoon, from 12h00 to 17h00;
    - 3.1.2 **C** every alternate weekend from 08h00 on a Saturday to 16h00 on a Sunday;
    - 3.1.3 on Christmas Day, alternating each year from 08h00 to 13h00, and from 13h00 to 18h00;
    - 3.1.4 on the weekend of Father's Day, from 08h00 on the Saturday to 16h00 on the Sunday, with Mother's Day to be spent with the respondent;
    - 3.1.5 **D** on the minor child's birthday, for a minimum of 4 hours;
    - 3.1.6 on the applicant's birthday, for a minimum of 4 hours, with the respondent's birthday to be spent with her;
    - 3.1.7 any further contact periods by agreement between the **E** parties;
  - 3.2 from when the minor child turns 3 years of age until 1 January in the year in which the minor child commences his Grade 1 schooling:
    - 3.2.1 during school term periods:
      - 3.2.1.1 every Wednesday, from 12h00 (or after crèche if applicable) to 08h00 on Thursday **F** morning (or before crèche if applicable);
      - 3.2.1.2 every alternate weekend from a Friday at 12h00 (or after crèche if applicable) to a Sunday at 16h00;
      - 3.2.1.3 for half of the school holidays, with the long school holidays in June/July and **G** December/January each year to be shared equally between them, on a one week rotational basis;
    - 3.2.2 every alternate public holiday;
    - 3.2.3 on Christmas day alternating each year from 08h00 to **H** 13h00, and from 13h00 to 18h00;
    - 3.2.4 on the weekend of Father's Day, from 08h00 on the Saturday to 16h00 on the Sunday, with Mother's Day to be spent with the respondent;
    - 3.2.5 on the minor child's birthday, for a minimum of four hours;

- 3.2.6 **I** on the applicant's birthday, for a minimum of four hours, with the respondent's birthday to be spent with her;  
3.2.7 any further contact periods by agreement between the parties;  
3.3 from 1 January of the year in which the minor child **J** commences his grade 1 schooling:

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- 3.3.1 during school term periods: **A**  
3.3.1.1 every Wednesday, from after school to 08h00 on Thursday morning before school;  
3.3.1.2 every alternate weekend from after school on a Friday to before school on a Monday;  
3.3.1.3 every alternate public holiday, save in the event of a public holiday falling before or after **B** a weekend and thus creating a long weekend, in which event the party exercising contact with the minor child for that weekend shall include the said public holiday;  
3.3.2 for one half of all of the minor child's long and short school holiday periods, with the school holiday period **C** to commence from after school on the last day of term and end before school on the first day of the next term;  
3.3.3 on Christmas Day alternating each year from 08h00 to 13h00, and from 13h00 to 18h00;  
3.3.4 on the weekend of Father's Day, from 08h00 on the Saturday to 16h00 on the Sunday, with Mother's Day **D** to be spent with the respondent;  
3.3.5 on the minor child's birthday, for a minimum of four hours;  
3.3.6 on the applicant's birthday, for a minimum of four hours, with the respondent's birthday to be spent with her; **E**  
3.3.7 any further contact periods by agreement between the parties;  
4. That there be no Order as to costs;  
5. That alternatively to paragraph 4 hereof, and in the event of the respondent opposing the relief sought herein, she be directed to pay the costs of this application; **F**  
6. That further or alternative relief be granted as this Honourable Court may deem appropriate.'

[6] Interim relief was granted to the applicant by Chetty J on 23 November 2015 in the following terms:

**'It is ordered G**

1. That pending the final determination of this application, the applicant is entitled to main contact with the minor child, namely [ES], a boy, born on 12 March 2015, as follows:
  - 1.1 every Tuesday and Thursday afternoon from 14h00 to 17h00;
  - 1.2 every weekend, alternating on a Saturday and a Sunday from **H** 08h00 to 13h00;
2. That in order for the applicant to exercise his contact with the minor child as provided for in paragraph 1 hereof, he or his mother, [LR], shall collect the minor child from the respondent's home at the commencement of such periods, and either the applicant or his mother shall return the minor child to the respondent's home at the conclusion thereof. **I**
3. That the Office of the Family Advocate, Durban is hereby requested to conduct an enquiry and compile a report, setting out therein its recommendations regarding the relief sought by the applicant in the Application, and in particular whether the applicant should be declared a co-holder of full parental responsibilities **J**

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- and **A** rights, and the extent to which he should be entitled to exercise contact with the minor child, as sought by the applicant in the Second Order Prayer herein below;  
4. That the costs be reserved for determination by the Court hearing this application in relation to the relief sought in the Second Order prayed.  
5. **B** That the respondent be granted to deliver her answering affidavit on or before 7 December 2015, and the applicant to file his reply on or before 21st December 2015.'

[7] After the exchange of affidavits and once the family advocate had filed its report Masipa J on 30 May 2017 granted an order in the **C** following terms:

1. That this application is referred for the hearing of oral evidence on:
  - 1.1 Whether the applicant has met the requirements in s 21(1)(b) of the Children's Act 38 of 2005;
  - 1.2 Whether the parties concluded a sperm donor agreement, **D** and if so, what are its ramifications;
  - 1.3 Whether it is in the minor child's best interests that the applicant be assigned rights of contact with the minor child in terms of s 23 of the Act, in the event of the court determining that the applicant has not met the requirements of s 21 of the Act.
2. **E** That pending the final determination of these proceedings, the applicant shall exercise contact with the minor child as follows:
  - 2.1 Every Tuesday and Thursday from 14h00 to 17h00;
  - 2.2 Every weekend, alternating on a Saturday and a Sunday, from 9h00 to 17h00;
  - 2.3 Sharing of the minor child's birthday;
  - 2.4 **F** On father's day, from 09h00 to 17h00, with mother's day to be spent with the respondent.
3. That terms of para. 2 of the order of this court granted on the 23 November 2015 under case No 11830/2016 shall remain in place pending the final determination of this matter.
4. That the costs of are reserved.
5. **G** The matter is ready to be enrolled for oral evidence and case-flow is not necessary.'

[8] Having heard the oral evidence of the applicant and the respondent on the above issues this judgment now deals with what relief should appropriately be granted.

[9] **H** The following is common cause:

- (a) There is a dispute between the respondent and the applicant as to whether the applicant has acquired full parental responsibilities and rights in respect of ES in terms of s 21(1)(b) of the Act.
- (b) The applicant and the respondent met in 2007 and became **I** romantically involved from January 2011, with the respondent moving into the applicant's flat sometime thereafter. She moved back to her accommodation when they 'broke up' at the end of June 2012.
- (c) They thereafter would spend some time together, although the **J** respondent contends that it was not as 'boyfriend and girlfriend'.

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- (d) Two years after they had broken up and on or about 25 May 2014 **A** the respondent asked the applicant if he would impregnate her through natural insemination. The respondent told the applicant that she wanted her child to know the identity of its biological father because, as she put it, it would be psychologically difficult for a child to not know the identity of its biological father (as would be the case if an anonymous sperm donor was used). **B**
- (e) The respondent said to the applicant that there would be no obligations on his part financially (she also maintains 'or legally', although her affidavit referred to 'or otherwise'). This is disputed by the applicant who states that the respondent said that, should the applicant 'later in life' regret not having a child, he could have a **C** relationship with his biological child. The applicant's version is further that the respondent informed him that if he agreed **D** to have a child for her, he should understand that there would be no obligation on his part to co-parent the child, but if the applicant chose to be involved in the child's life, she would accept that decision. **D**

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- (f) After the respondent fell pregnant the applicant attended certain consultations with her at the rooms of the obstetrician/gynaecologist Dr Berios. The first appointment which the applicant attended was appeared 007-19126 September 2014, during which, in the words of the respondent, she saw him display happiness 'with E regards to the pregnancy'.
- (g) The respondent's medical aid did not cover the costs of all these visits. The applicant contributed towards at least the costs of some of these visits, consultations and also scans.
- (h) The applicant and respondent also attended antenatal classes F together. This was at the suggestion of the applicant.
- (i) During October 2014 the applicant expressly indicated that he would like to take on responsibilities towards the child. The respondent explains that this led to arguments, as there were differences of opinion as to the level of responsibility the applicant needed to take on in order for her to agree to him co-parenting with her. G
- (j) During the pregnancy the respondent asked the applicant if there were any names for the child that he liked so that she could consider them. The applicant sent through some names. These did not, however, meet with her approval.
- (k) When the minor child's birth was registered, the name of the H applicant was reflected thereon as the father of the child.
- (l) On the respondent's discharge from hospital, the applicant stayed with her at her place for at least that day. The applicant maintains that he stayed there for 'a few days', whereas the respondent says she 'cannot recall if he stayed longer than one night'.
- (m) After ES's birth the respondent would allow the applicant to have I contact with him but always on her terms and with specific instructions.
- (n) The respondent concedes that she gave the applicant a set of keys to get into her flat when he visited, given that the buzzer would wake ES if he rang the bell to be admitted to the flat, and further that she J

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- would A not have to stop breastfeeding to go outside the flat to open the gate for the applicant.
- (o) On Friday 22 May and Friday 19 June 2015 the respondent took the minor child to visit the applicant's mother.
- (p) The applicant took ES with him on occasion. The respondent, however, complains that the applicant returned ES later than she had B asked on most visits and that he did not respect her wishes as to ES's diet.
- (q) The applicant accompanied respondent when she took ES to consult with a paediatrician on two occasions.
- (r) The respondent would allow the applicant to visit ES in the evenings C but would insist that he be at her home before 17h45, otherwise he should not come. The applicant's time with ES would, however, be limited, as the respondent would shortly after his arrival require that he take ES immediately for a bath and after his bath she would take him from the applicant and breastfeed him before he would fall D asleep.
- (s) On weekends the respondent would allow the applicant to have contact with ES, but on her terms and when she felt it was appropriate.
- (t) From the sixth-month checkup with the paediatrician, the respondent refused to allow the applicant to attend the consultations and E also failed to give him any feedback.
- (u) The applicant has also offered to pay maintenance in respect of ES, but these payments have been returned. He has deposited these payments into a fund for the benefit of ES.
- (v) Because of the ongoing strife between them, the applicant suggested F that a parenting plan be concluded. On 19 July 2015 the respondent in an email to the applicant recorded:  
'(P)lease go ahead and get the parenting plan in place, seeing as you feel that it is most important right now. When I know how often you are supposed to visit and when and hours appropriate from an G expert, that would be a starting point for us to plan your next visit.'
- (w) On 15 September 2015 the respondent addressed an email to the applicant recording —  
'as mentioned at the family advocate mediation, when I asked you to help me try for a child, it was with the understanding that there were no obligations on your part, and I assumed all responsibility H for the child, and that the nature of your involvement would be by future agreement. From what I have researched, the appropriate agreement in our case was a Known Donor Agreement, rather than a parenting plan. I have attached a Known Donor Agreement for you to sign, which has been changed slightly seeing as it is only being signed after the fact.'
- (x) I The respondent has also posted photographs on Facebook depicting the applicant at a Father's Day event.
- (y) The respondent agrees that by agreement they each paid 50% of the doctors' bills and certain other expenses. The hospital bill for the J birth was paid by her medical aid. The applicant contends that he

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- paid almost R41 000 to the respondent in respect of laying-in A expenses. She disputes the amount and says it was R24 000 that was paid to her, not in respect of laying-in expenses, but R4000 for each month of her maternity leave. She says it was a gift to her.
- (z) The respondent records that notwithstanding the animosity between her and the applicant she still allowed him to take ES out at B least two hours every week unsupervised, her intention being to foster a relationship between ES and the applicant as his biological father, and to act in ES's best interests in the long term.

[10] Based on the aforesaid common-cause facts, the applicant would ex lege and in terms of the Act qualify to be recognised as a parent of ES with C the rights also to reasonable contact with ES.

[11] The respondent, however, contends that these sequelae, which would normally follow by operation of law, should not follow in the case of ES and the applicant because she and the applicant, prior to conception D of ES, concluded a 'known sperm donor agreement'. This agreement would have the result that these legal consequences do not follow, and that the applicant was simply a sperm donor with no rights, save for such concessions regarding contact as she may in her discretion permit from time to time. She contends that, although such an agreement is not expressly recognised in terms of the Act and would be novel in our law, E it is an increasingly common type of agreement internationally, and also in this country. She describes it as consistent with the constitutional rights of a mother to dignity and sexual preference, and to choose single motherhood as a chosen family structure. It would free her from any need to consult with the applicant on matters specified in the Act, on F which parents would normally consult, and the applicant would not acquire rights which might conflict with her exercise of those rights in regard to ES. She argued that the law should develop accordingly.

[12] The respondent also hinted that certain provisions of the Act might be unconstitutional. When her and G's application was filed she was still G represented by attorneys. Rules 10A and 16A should have been complied with in the event of any

constitutional challenge. They were not complied with, nor has the Minister of Justice, who is the Minister responsible for the administration of the Act, been cited as an interested party. Accordingly, it would be improper for me to co-<sup>007-192</sup> constitutional challenge to the provisions of the Act. <sup>H</sup>

[13] The 'known sperm donor agreement' contended for by the respondent would be an innominate form of contract. The terms thereof would have to be established on a preponderance of probabilities.

[14] Mrs *Sponneck*, for the applicant, has submitted that the Act does <sup>I</sup> not recognise such type of agreement. <sup>[2]</sup> She accordingly submitted that a 'known sperm donor agreement' does not have any validity in our law.

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[15] <sup>A</sup> I am not persuaded that this is necessarily so. It certainly appears to be a novel issue whether such an agreement may be recognised in our law. I, however, did not have the benefit of detailed argument as to the lawfulness of such type of agreement, as the invalidity or otherwise of such an agreement, assuming one was proved factually, had not been <sup>B</sup> identified as a separate, discrete legal issue. Any such enquiry, when it occurs, would obviously have to pay regard to the best interests of the minor child and also whether the recognition of such an agreement might possibly be *contra bonos mores*.

[16] In what follows in this judgment I shall assume in favour of the <sup>C</sup> respondent, without deciding the issue, that a 'known sperm donor agreement' can be concluded validly in our law and that it could have the effect that the usual rights and responsibilities, which the Act awards to fathers/biological fathers, may be varied.

[17] As to whether such an agreement has been proved, the period, from <sup>D</sup> when the respondent asked the applicant to impregnate her and while he reflected on that request (which was for some two weeks) before he agreed, is of particular significance.

[18] Respondent contends that her intention was that the applicant would have no financial obligation in respect of the child if she would fall pregnant, and also that the applicant would have no legal rights. She, <sup>E</sup> however, wanted her child to know the identity of his father. She also considered that the child should also 'perhaps have a relationship' with his father 'later in life'. She was not specific about what 'later in life' might mean. Applicant in turn testified that the respondent had said that there was no obligation on his part, that his name need not be reflected <sup>F</sup> on the birth certificate, that he would not be required to contribute financially if he so chose, but that he could have a relationship and see the child if he wanted to. The applicant was specific that the respondent at no stage said that he would relinquish any rights he would enjoy in law to ES. His interpretation of the situation accordingly was that he could choose the level of involvement he would have in his child's life. There <sup>G</sup> was no discussion as to what would happen if he elected to be involved with his child. The applicant understood and assumed that he would have a normal relationship with his son; indeed in agreeing to father the child he had harboured the hope, as a distinct possibility, that he and the respondent might get together again.

[19] <sup>H</sup> The respondent maintains that she had said to the applicant that he would have no financial obligations and no legal rights. The latter is disputed. She is also very critical of what she perceives as a lack of commitment to ES on the part of the applicant during stages of her pregnancy. For example, she drew attention to the applicant's failure to advise his mother of her expected grandchild, a general lack of enthusiasm <sup>I</sup> or jubilation on the part of the applicant at her having a baby, and other conduct on his part which she claims showed a lack of commitment to parenthood.

[20] The respondent, however, conceded that the applicant accompanied her on visits to the obstetricians, to a 4D scan, that she accompanied <sup>J</sup> him at his insistence to antenatal classes, that he paid certain

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expenses in respect of her pregnancy and confinement, that he was <sup>A</sup> present at the birth of ES, and that he took her and ES back to her flat on being discharged, and spent at least one night there.

[21] Insofar as it concerns her criticisms of the applicant's lack of commitment or dedication which one, as she puts it, would not expect from a biological father who wished to be a parent, the respondent <sup>B</sup> clearly has subjective expectations which the applicant, in her view, failed to measure up to. In my view, what the applicant did contribute and commit to, even if only based on the evidence of the respondent alone, clearly satisfies the level of commitment required by the Act to confer rights in respect of ES on the applicant as a single father pursuant to the provisions of s 21. <sup>C</sup>

[22] Prior to ES's birth, the respondent invited the applicant to suggest possible names for the child. After ES's birth, the respondent registered his birth, and on the birth certificate had the name of the applicant reflected as his father (she explained that this was preferable to ES' father <sup>D</sup> being reflected on the birth certificate as 'unknown', although she might have preferred to have left the space for the father's name simply blank).

[23] The respondent also testified that the applicant and his mother visited frequently and had contact with ES.

[24] The dominant impression I was left with from her evidence was that <sup>E</sup> she allowed contact between the applicant and ES if for no reason other than that she recognised this as being in ES's best interest. The respondent, as also the applicant, impressed me as very sincere persons.

[25] Matters would have continued along that trajectory. There was <sup>F</sup> mention made in the emails of concluding a parenting plan, which would have introduced greater certainty in their lives. Never were there any suggestions, whatever contextual insignificance the respondent sought to attach thereto, which met with a blanket refusal or a reminder from the respondent that the applicant had no rights because of the terms of a 'known sperm donor agreement' excluding such rights. The only <sup>G</sup> explanation from the respondent is that she was wanting to see how things developed and whether a point might be reached where the conduct of the applicant would measure up to her expectations and be deserving of the parenthood of ES. But this would be for her to determine.

[26] Although the respondent viewed the applicant simply as a sperm <sup>H</sup> donor (a term she preferred not to use), her first reference to their alleged agreement being a 'known sperm donor agreement', in those terms, was in the e<sup>007-192</sup> above, after she had done some research and reading on the Internet subsequent to the birth of ES. At that stage she also had downloaded a draft written agreement which she amended to <sup>I</sup> take account of the fact that it would not be executed

pre-conception, but post-birth. That draft was, however, never signed.

[27] Although the respondent sought to explain the greater involvement which she allowed to the applicant, as being due to her wanting to act in ES' best interest, and some feelings of pity she had for the applicant and [J]

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his [A] mother, as they did not have a child and grandchild, her conduct is of course also consistent with the version of the applicant that she had offered that he would not have any financial obligation towards her and ES, but that he could elect to involve himself in ES' life.

[28] Matters probably would have continued and improved along that [B] path of voluntarily increasing the involvement of the applicant in ES' life, had it not been that the applicant obtained legal advice as to his position in law, resulting in correspondence being exchanged, which the respondent viewed as formulated with a particular legal outcome in mind. She questions how anyone resorting to legal processes, which she [C] described as intimidatory, could be suitable for parenthood.

[29] Although not a commercial contract, the manner in which the parties conducted themselves after the alleged conclusion of the known-sperm donor agreement is not without significance. On probability, the parties' subsequent conduct is more consistent with the applicant's version than the respondent's version. One may pose the rhetorical [D] question as to why a parenting plan was even to be considered if the applicant would not be a 'parent'. The explanation which the respondent tenders is that she was considering whether the applicant might measure up to a standard where she might consider him suitable for parenthood. That explanation is, however, in itself problematic, because if such a [E] stage was reached it would alter the family structure of a single mother, which is what she had in mind; it would affect the 'critical time' she and her family would have with ES; and it probably would also affect the extent to which she would have to consult the applicant in regard to matters affecting ES.

[30] [F] The legal consequences which would follow ex lege on ES's conception and birth are those provided for in the Act. The onus is on the party, alleging that there was an agreement which would produce different consequences to that provided in the Act, to prove such an agreement and its terms on a balance of probability. The respective versions of the parties in this regard are mutually destructive. At best for [G] the respondent, the probabilities of their respective versions are neutral, although, as indicated above, I consider the applicant's version to be the more probable. Credibility is also, at best for the respondent, evenly balanced, although once again, as I have pointed out above, the description of the alleged agreement as a 'known sperm donor agreement' only occurred after she had conducted further research, post the [H] birth of ES and during a time when the respondent had experienced problems with, and had to abort, an overseas trip. This suggests that her reliance on a 'known sperm donor agreement' might be somewhat of an afterthought.

[31] The respondent has not in my view discharged the onus which is upon her to prove [I] such an agreement, or to contradict the applicant's version that there was no agreement varying the normal legal consequences which would flow from the application of the provisions of the Act. The applicant has accordingly acquired full parental rights and responsibilities in respect of ES in terms of s 21 of the Act.

[32] [J] In reaching the above conclusion I have not had any regard at all and have made no reference to comments in the family advocate's

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report. This was deliberate as the respondent was critical of various [A] findings by the family advocate. I have, however, noted from the investigations by the family counsellor that no adverse comments were made regarding the applicant exercising contact with and having other parental rights to ES.

[33] It is not in dispute that the primary residence of ES should be with [B] the respondent, and an order should follow in those terms.

[34] In defining the extent of contact the applicant may exercise with ES I am guided only by the best interests of ES, which are paramount. [3] I have adopted a cautious approach where necessary.

[35] The applicant and the respondent will have to walk a long way of [C] healing, in the best interest of ES. I can only implore them and their respective extended families to do so in his best interests. Their respective love for ES can make that possible. I was encouraged in my belief in this regard by the applicant abandoning his prayer for costs notwithstanding him having been successful. [D]

[36] ES's interests are absolutely paramount. They will be best served, even with ES having to move between two homes, by an order where he can move between the applicant and the respondent, happily knowing that he is loved unconditionally by both his parents in their respective unique ways. [E]

[37] I hope to contribute to that result by the contact regime set out below which will be phased in over time. It is based on the particular circumstances of this case and how I believe the best interest of ES can be served best. If problems are encountered at any stage which, judged objectively, impact negatively on ES, then I hope the parties will [F] co-operate jointly to address and overcome any possible temporary setbacks. With a positive spirit of co-operation in ES's best interest I believe that ES will only benefit.

[38] The order I grant is as follows:

1. The applicant and the respondent are declared to be co-holders of [G] full parental responsibilities and rights in respect of the minor child, ES, a boy, born on 12 March 2015.
2. The primary place of residence of ES shall be with the respondent.
3. The applicant is entitled to maintain contact with ES as follows:
  - 3.1 from when ES turns 3 years of age until 1 January in the year in which he commences his grade 1 schooling: [H]
    - 3.1.1 During school periods on every Wednesday, from 12h00 (or after crèche if applicable) to 08h00 on Thursday morning (or before crèche if applicable);
    - 3.1.2 during school periods on every alternate weekend from a Friday at 12h00 (or after crèche if applicable)

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- year **A** to be shared equally between them, on a one-week rotational basis;
- 3.1.4 every alternate public holiday;
- 3.1.5 on Christmas Day alternating each year from 08h00 to 13h00, and from 13h00 to 18h00;
- 3.1.6 **B** on the weekend of Father's Day, from 08h00 on the Saturday to 16h00 on the Sunday;
- 3.1.7 with Mother's Day to be spent with the respondent;
- 3.1.8 on the minor child's birthday, for a minimum of four hours;
- 3.1.9 on the applicant's birthday, for a minimum of four **C** hours, with the respondent's birthday to be spent with her;
- 3.1.10 any further contact periods by agreement between the parties.
- 3.2 From 1 January of the year in which ES commences his **D** grade 1 schooling:
- 3.2.1 during school periods, on every Wednesday, from after school to 08h00 on Thursday morning before school;
- 3.2.2 during school periods, on every alternate weekend from after school on a Friday to before school on a **E** Monday;
- 3.2.3 every alternate public holiday, save in the event of a public holiday falling before or after a weekend and thus creating a long weekend, in which event the party exercising contact with the minor child for that **F** weekend shall include the said public holiday;
- 3.2.4 for one-half of all of the minor child's long and short school holiday periods, with the school-holiday period to commence from after school on the last day of term and end before school on the first day of the next term;
- 3.2.5 **G** on Christmas Day, alternating each year from 08h00 to 13h00, and from 13h00 to 18h00;
- 3.2.6 on the weekend of Father's Day, from 08h00 on the Saturday to 16h00 on the Sunday,
- 3.2.7 with Mother's Day to be spent with the respondent;
- 3.2.8 **H** on the minor child's birthday, for a minimum of four hours;
- 3.2.9 on the applicant's birthday, for a minimum of four hours, with the respondent's birthday to be spent with her;
- 3.2.10 any further contact periods by agreement between **I** the parties.
4. No order is made as to costs.

Applicant's Attorneys: *Strauss Daly*, Durban.

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[\*] See [4] of the judgment for the wording of s 21(1).

[1] Specifically, on the common-cause facts, the applicant is not biologically related to ES by reason only of being a gamete donor for purposes of artificial fertilisation. Section 1 of the Act defines 'artificial fertilisation' to mean —

'the introduction, by means other than natural means, of a male gamete into the internal reproductive organs of a female person for the purpose of human reproduction, including—

(a) the bringing together of a male and female gamete outside the human body with a view to placing the product of a union of such gametes in the womb of a female person; or

(b) the placing of the product of a union of male and female gametes which have been brought together outside the human body, in the womb of a female person'.

[2] The Act, for example, recognises surrogacy agreements and defines the rights and obligations arising therefrom — see Ch 19 of the Act.

[3] Section 9 of the Act.

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