

The best interests of the child and the right of interested third parties to parental responsibilities and rights: *RC v HSC 2023 4 SA 231 (GJ)*

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SUMMARY

The South African post-constitutional era gave rise to the reframing of what was previously referred to as parental authority to parental responsibilities and rights. Throughout these developments, the best interests of the child remained a constant consideration, resulting in a move away from a parent-centred approach to a child-centred approach. In line with this child-centred approach, modern South African law recognises that children have the right to family or parental care. Recognition is also given to the subsequent fundamental principle that parents and the family perform a central role in a child's care and protection. However, analogous to global trends South African family structures have transformed and are no longer typically nuclear, but are characterised by a diversity of parental, family and community-based forms of caregiving. Children accordingly find themselves being cared for by persons who are not their biological parents. In this regard the position of the "interested third party" or so-called "co-holder of parental responsibilities and rights" is gaining increasing relevance. Although the role of interested third parties is recognised in domestic law, in the Children's Act, some uncertainty about the right of these parties to obtain parental responsibilities and rights over a child prevails. One such aspect is the right of a former life-partner to obtain parental responsibilities and rights over a non-biological child upon the dissolution of a life-partner relationship. A recent High Court case, *RC v SC 2022 4 SA 308 (GJ)* and its appeal namely, *RC v HSC 2023 4 SA 231 (GJ)* to a full bench of the High Court provides valuable insight into this regard and specifically on the approach taken by the courts about an application for parental rights and responsibilities to a non-biological child by an interested third party in terms of the Children's Act.

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1 Introduction

Historically parental authority in South Africa centred around married fathers. The 20th century saw a development in law with the recognition of the rights of mothers, though married fathers retained the sole guardianship of their children. The South African post-constitutional era gave rise to the recognition of the rights of unmarried fathers coupled with the reframing of what was previously referred to as parental authority to parental responsibilities and rights (Heaton “Parental Responsibilities and Rights” in Boezaart (ed) *Child Law in South Africa* (2017) 77). Throughout these developments the best interests of the child remained a constant consideration or “golden thread”, gaining more significance with time and eventually resulting in a move away from a parent-centred approach to a child-centred approach (Skelton “Parental Responsibilities and Rights” in Boezaart (ed) *Child Law in South Africa* (2009) 63). In line with this child-centred approach, modern South African law recognises that children have the right to family or parental care (Art 18 of the United Nations Convention on the Rights of the Child (CRC), s 28(1)(b) of the Constitution of the Republic of South Africa, 1996 and chapter 3 of the Children’s Act 38 of 2005). Recognition is also given to the subsequent fundamental principle that parents and the family perform a central role in a child’s care and protection, with both parents bearing an equal responsibility towards a child’s well-being (Skelton (2009) 63; see also *Centre for Child Law v Minister of Home Affairs* 2005 6 SA 50 (T) para 10: “The primary responsibility for the protection and promotion of the interests of the child vests in the parents”).

Conversely, although parents play an invaluable role in their children’s lives, analogous to global trends South African family structures have transformed and are no longer typically nuclear, but have instead taken on complex forms (*Satchell v President of the Republic of South Africa* 2002 2 SA 1 (CC) para 13; *Wilsenach v M* 2021 1 ALL SA 600 (GP) and *RC v SC* 2022 4 SA 308 (GJ) para 58). Parenting and caregiving arrangements are characterised by a diversity of parental, family and community-based forms of caregiving (Louw “Children and Grandparents: An overrated attachment?” 2013 *Stell LR* 618). This may be attributed to historical, political, socio-economic, and other contemporary pressures, such as migration and HIV/AIDS. Urbanisation and modernisation have intensified this phenomenon even further (National Child Care and Protection Policy, GN472 in GG44636 of 28 May 2021 para 4.2). As a result, many South African children live in a multitude of caregiving arrangements where marriage or biological parentage is no longer dominant. These children find themselves being cared for by persons who are not their biological parents. This may either be by agreement with the parent or in terms of a court order (ss 22(1), 23 and 24 of the Children’s Act). In this regard, the position of the “interested third party” or so-called “co-holder of parental responsibilities and rights” is gaining increasing relevance.

Interested third parties or “any other person” (see s 22(1) of the Children’s Act) are broadly described in the Children’s Act as those individuals who have an interest in the child’s well-being and development. This category of “any other person” is extremely broad. Among other aspects, it covers members of the child’s present and/or former extended family (for example grandparents, aunt, uncle, siblings and a present or former stepparent) and a present and/or former permanent life partner of the child’s biological parent. It may even include persons who have no family or legal ties to the child such as an adult friend, a child’s social worker or a teacher (Heaton “Parental Responsibilities and Rights” in Davel and Skelton (ed) *Commentary on the Children’s Act* (RS 9 2018) 3-19)). These interested third parties may perform the role of caretaker in the life of the child or have an involvement with the child (Heaton *Commentary on the Children’s Act* (2018) 3-19).

Although the role of interested third parties is recognised in domestic law (ss 22, 23 and 24 of the Children’s Act), some uncertainty about the right of these parties to obtain parental responsibilities and rights over a child prevails. One such aspect is the right of a former life-partner to obtain parental responsibilities and rights over a non-biological child upon the dissolution of a life-partner relationship (*RC v SC 2022 4 SA 308* (GJ); *RC v HSC 2023 4 SA 231* (GJ)). This raises questions such as what legal rights may be afforded to another person (third party); where a mother (parent) adequately cares for a child as the primary caregiver and in what instance a second guardian may be appointed, where a child already has a suitable guardian. The diverse caregiving arrangements thus raise the need for greater certainty regarding the nature of family and care arrangements that are recognised in law. Clarity on these arrangements is needed to ensure that they comply with international law and constitutional principles, are in the best interests of the child and that they safeguard the care and protection of children. The recent High Court dispute of *RC v SC 2022 4 SA 308* (GJ) (*RC v SC*) and its appeal *RC v HSC 2023 4 SA 231* (GJ) (*RC v HSC*) provides valuable insight into these questions and specifically on the approach taken by the courts concerning an application for parental rights and responsibilities to a non-biological child by an interested third party, such as a life-partner, in terms of sections 23 and 24 of the Children’s Act. It also forms the topic of this discussion. To have a well-founded understanding of the factors considered by the court a quo and the full court, it is of value to first reflect on the concept and content of parental responsibility and rights as embodied in the Children’s Act.

2 Parental responsibilities and rights

The concept of parental responsibilities and rights is set out in Chapter 3 of the Children’s Act. This concept replaces what used to be referred to as parental authority (Heaton in Boezaart (ed) *Child Law in South Africa* (2017) 77). The common law concept of parental authority comprised of

guardianship, custody, and access. Guardianship was later statutorily governed by the introduction of the Guardianship Act 192 of 1993, which conferred equal and joint guardianship on parents of children born within a marriage. The Children's Act repealed the Guardianship Act and now provides for all parental responsibilities and rights (see s 18 of the Children's Act. This section of the Act came into operation on 1 July 2007. See Proclamation 13 in GG30030 of 29 June 2007).

While the previous common-law dispensation emphasised the rights of parents, the new statutory conceptualisation recognises the importance of both the responsibilities and rights of parents (see also *GM v KI* 2015 3 SA 62 (GJ) para 9 where Fisher J highlighted that these rights and obligations "exist concomitantly" in the Act and that parents have both the right and obligation to carry out their overall function as parents). Notably, the Act places responsibilities before rights. Parental responsibilities and rights comprise four components, namely the care of the child, maintaining contact with the child, acting as a guardian of a child, and contributing to the maintenance of a child (s 18(2) of the Children's Act). The concept of "care and contact" roughly matches what was previously known as "custody and access". However, although care encompasses many of the elements that custody entails in common law, it is defined in broader terms than the term custody and accordingly extends beyond the common law concept of custody. (*Wheeler v Wheeler* 2011 2 SA 459 KZP; *CM v NG* 2012 4 SA 452 (WCC) para 34; Heaton (2017) 78). Note that the Children's Act does not replace the terms "custody" and "access" nor abolishes the common law terms. Section 1(2) provides that the terms must be construed to also mean "care" and "contact" as defined in this Act. For simplification and in line with modern case law the terms "care" and "contact" are used in this contribution). Notable the terms care and contact are also not mutually exclusive but are both concepts of parental rights and responsibilities (s18(2) of the Children's Act).

Care as defined in the Children's Act includes a variety of facets of caring for a child, such as financial support, promoting the well-being of the child, promoting the child's rights, and guiding, assisting and directing the child (s 1 of the Children's Act). Cognisance should be taken of the fact that some of the care responsibilities do not fall only on the parent with whom the child lives. The whole idea of parental responsibilities and rights is that they are shared. For example, both parents should maintain a healthy relationship with a child irrespective of with whom the child may live (Skelton (2009) 67). Contact may be compared to its common law counterpart "access". In terms of section 1 of the Children's Act "contact" means maintaining a relationship with the child. If the child lives with another party contact entails that communication between such party and the child occurs through regular visits to the child or by being visited by the child. Alternatively, contact may take place through other regular communication means namely, via the post or telephone or other electronic communication (s 1 of the Children's Act). It is important to observe that the concept of care is child-

centred as it is the child's right to have contact with his or her parent. This is a shift from the concept of a parent's right of access to a child (Skelton (2009) 67; *T v M* 1997 1 SA 54 (A) 54 and *Wicks v Fisher* 1999 2 SA 504 (N) 508-509).

The Children's Act now provides for guardianship in section 18. In terms of the Children's Act guardianship is regarded as an element of parental responsibilities and rights. Marriage is no longer a key determinant of guardianship as unmarried fathers can also acquire parental responsibilities and rights which may include guardianship rights. This includes the acquisition of parental responsibilities and rights of children born out of wedlock. (See *Centre for Child Law v Director General: Department of Home Affairs* 2022 2 SA 131 (CC) where the Constitutional Court declared s 10 of the Births and Deaths Registration Act 51 of 1992, relating to the registration of a child's birth, unconstitutional because it prevents unmarried fathers from registering their child's birth under their surname in the absence of the mother or without her consent. The court (para 89) found s 10 to be invalid as it unlawfully discriminates against both unmarried fathers and children born out of wedlock). The guardianship of a child entails the safeguarding of the child's property and property interests as well as assisting or representing the child in administrative, contractual, or legal matters. In addition, a guardian must give or refuse consent in respect of certain specified issues, such as consent to the child's marriage, adoption of the child or the departure or permanent removal of the child from the Republic (ss 18(3)(c)(i)-(v) of the Children's Act). Maintenance, which was previously seen as part of the duty of support and regarded as separate from parental authority, now also forms part of the parental responsibilities and rights concept (ss 21(1)(b)(iii) and 23(2)(d) of the Children's Act). It, however, maintains its common law meaning and includes aspects such as food, clothing, accommodation, medical care, and suitable education (Heaton (2018) 3-5).

The acquisition of parental responsibilities and rights can occur in one of two ways, namely either automatically or by assignments. Full parental responsibilities and rights are automatically acquired in terms of sections 19, 20 and 21 of the Children's Act. In this regard, section 19 provides that the biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child. Section 20 affords the biological father of the child full parental responsibilities and rights provided the father is married to the child's mother or was married to the child's mother at the time of the child's conception, birth or any time between the child's conception and birth. Section 21 affords unmarried fathers certain parental responsibilities and rights provided certain requirements are met; for example, that the father lived with the child's mother in a permanent life partnership at the time of the child's birth.

Parental responsibilities and rights can be acquired through assignment, by means of a parental responsibilities and rights agreement

or by means of a court order. Section 22(1) lists two categories of persons who can acquire parental responsibilities and rights by agreement. The first category is the biological father who has not acquired parental rights and responsibilities in any other way. The second category is any other person having an interest in the care, well-being, and development of the child (s 22(1)(b) of the Children's Act). Importantly, a person who acquires parental responsibilities and rights in terms of an agreement only acquires such responsibilities and rights as set out in the agreement, while the agreement cannot confer more parental responsibilities and rights than what the person who confers those rights has (s 22(2) of the Children's Act).

Parental responsibilities and rights can, as indicated above, also be acquired by means of a court order. The High Court, as upper guardian of all minors, may confer any or all the parental rights and responsibilities on a person (see, e.g., *FS v JJ* 2011 3 SA 125 (SCA) where the court used its power as upper guardian to award contact to maternal grandparents). Parental responsibilities and rights can, moreover, be acquired through a court order in terms of a section 23 or section 24 application of the Children's Act (*RC v HSC* 2023 4 SA (GJ) para 26). A section 23 application relates to the assignment of care and/or contact (see *CM v NG* 2012 4 SA 452 (WCC) para (43) where it was held that either contact or care, or both contact and care, can be awarded to an applicant in terms of s 23(1)). Such an application can be made by anyone who has an interest in the child's care, well-being or development and may be made to the High Court, Regional Court or Children's Court (see *LH v LA* 2012 6 SA 41 (ECG) where the courts awarded contact to a grandparent in terms of s 23 of the Children's Act; see also *RC v HSC* 2023 4 SA (GJ) para 32 where the court held that it is settled law that the absence of a biological link with a child is not a bar to an application in terms of s 23 of the Children's Act). In considering a section 23 application the court must take the following aspects into account (s 23(2) of the Children's Act) before deciding as to the granting of such an application:

- a the best interests of the child;
- b the relationship between the applicant and the child, and any other relevant person and the child;
- c the degree of commitment that the applicant has shown towards the child;
- d the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child; and
- e any other factor that should, in the opinion of the court, be taken into account.

When assigning contact or care to a person, the court may impose any conditions it deems necessary (s 23(1) of the Children's Act).

A section 24 application is for the assignment of guardianship. Such an application can be made to the High Court (see s 24(1) of the Children's Act; *Ex Parte Sibisi* 2011 1 SA 192 (KZP)). In considering a

section 24 application the High Court must take the following aspects into account (s 24(2) of the Children's Act):

- a the best interests of the child;
- b the relationship between the applicant and the child, and any other relevant person and the child;
- c any other factor that should, in the opinion of the court, be taken into account.

It is no coincidence that the requirement of the best interests of the child is one of the factors that must be considered by a court when exercising its discretion in terms of sections 23 and 24 of the Children's Act. The principle that the decision of a court concerning a child has to be in the best interests of the child has been for some time part of South African common law and *inter alia* played an important role in family law disputes (see, e.g., *Fletcher v Fletcher* 1948 1 SA 130 (A); *Kaiser v Chambers* 1969 4 SA 224 (C); *Lovell v Lovell* 1980 4 SA 90 (T); *Ex Parte Kedar* 1993 1 SA 242 (W)). This principle later received Constitutional recognition in section 28(2) of the Bill of Rights. The concept of "the best interests of the child" has, however, been widely criticised for its vagueness, indeterminacy, and complexity (Clark "A 'golden thread'? Some aspects of the application of the standard of the best interest of the child in South African family law" 2000 *Stell LR* 15; Bekink and Bekink "Defining the standard of the best interest of the child: Modern South African perspectives" 2004 *De Jure* 22; Heaton "Some general remarks on the concept 'best interest of the child'" 1990 *THRHR* 95; Boezaart "General Principles" in Davel and Skelton *Commentary on the Children's Act* (RS 9 2018) 2-7; see also Couzens "The best interests of the child and the Constitutional Court" 2019 *Constitutional Court Review* 363-386: the author highlights the complexity of the concept and calls for more judicial clarity). Before the Children's Act was enacted, South African legislation did not provide a list of factors to be considered by courts when determining the best interest principle, and the courts had to rely on common law. In this regard, the most comprehensive list of factors was proposed in *McCall v McCall* 1994 3 SA 201 (C) (205B-G), in which thirteen factors were identified in an open-ended list specifically designed for resolving custody disputes.

The inclusion of section 7(1) in the Children's Act, namely the best interests of the child standard, is of significant value as it partly addresses this criticism by listing fourteen factors that must be taken into consideration whenever the best interests of the child are determined (this section came into operation on 1 July 2007, see GG30030 of 29 June 2007). These include the nature of the personal relationship between the child and the child's parents; the attitude of the parents towards the child; the capacity of the parents to provide for the (emotional and intellectual) needs of the child; the likely effect of any change in the child's circumstances; the practical difficulty and expense of a child having contact with the parents; the need for the child to remain in the care of and to maintain a connection with his or her family, extended family,

culture or tradition; the child's age, maturity, developmental stage, gender, background and any other relevant characteristics of the child; the child's physical and emotional security and his or her intellectual, emotional, social and cultural development; any disability or any chronic illness from which a child may suffer; the need for a child to be brought up within a stable (or nearly stable) family environment; the need to protect the child from any physical or psychological harm; and the taking of actions or decisions that would minimise the exposure of a child to legal or administrative proceedings.

Note that the list provided in the Children's Act is not an open-ended one, as was the case in *McCall v McCall*, where a court could consider any other factors which it considered to be relevant. However, both sections 23 and 24 of the Children's Act state that "any other factor that should, in the opinion of the court, be taken into account" should be considered, making it an open-ended enquiry. In reaching a decision in terms of sections 23 and 24 of the Children's Act, a court must accordingly consider all of the section 7 factors in totality, as well as any other relevant factor, attaching such weight to each of the factors as it deems fit and ultimately reach a conclusion on a value judgement regarding what is in the best interests in the particular child's circumstance (*P v P* 2007 5 SA 94 (SCA) para 14; *K v M* 2007 4 ALL SA 833 (E); *Baloyi v Baloyi* (6208/2014) 2015 ZAGPPHC 728 para 17; *AB v Minister of Social Development Centre for Child Law as Amicus Curiae* 2017 3 SA 570 (CC) para 195; see also Fokala "The impact of the best interests and the respect for the views of the child principle in custody cases" 2019 *Nordic Journal of International Law* 614-635: the author discusses the fact that the best interests of the child and the views of the child act as key principles that assist courts in deciding custody cases).

Valuable insight with regard to the courts' approach and interpretation of sections 23 and 24 when assigning parental responsibilities and rights in this way was recently provided in the case of *RC v SC* and its subsequent appeal to the full court in *RC v HSC*.

3 Facts

The facts of the case are reflected in both *RC v SC* and *RC v HSC*. In this regard, it is important to highlight that in some instances it is necessary to have regard to the facts as respectively depicted in the dictum of the two cases. This is due to the fact that some discrepancies and omissions of facts have been set out in *RC v HSC*. These discrepancies and omissions are indicated where relevant.

The case of *RC v SC* concerns an application by an interested third party and former life partner for relief based on sections 23 and 24 of the Children's Act. The applicant in the matter is a chartered accountant approximately fifty-two-year-old who has no biological children (para 17) His previous marriage to a woman and mother of two primary school

children resulted in divorce. The applicant's ex-wife and her children have since relocated to Dubai (para 17). According to the court a quo, difficulty in the parenting relationship between the applicant and one of his ex-wife's children who was diagnosed with attention deficit hyperactivity disorder (ADHD) formed part of the reasons for the breakdown of the marriage (para 17). The court of appeal later indicated that this biographical information, though accepted as fact by the court a quo, proved to be inaccurate (*RC v HSC* para 46).

The applicant, approximately 31 years of age, and the respondent met after his divorce in 2017 on an online dating platform. At the time of their first interaction, the respondent was pregnant with B, while her other son D was six years of age. B and D have different fathers. B's biological father has shown no interest in him, has not had any contact with him nor made any contribution towards maintenance (para 61). No certainty exists as to whether he has acquired parental rights or not (para 61). D's father (C) was a protagonist in the proceedings. Prior to the proceedings, he played no role in D's life (para 19). He was also not a party to the proceedings.

When B was one year old the applicant moved in with the respondent and they lived together for a period of two and a half years. During their time together the applicant served in a "fatherly role" to the respondent's four-year-old child B, forming a strong bond with him and B calling him "Dada" (para 24). However, according to the respondent with time, this relationship became unstable in that the applicant became obsessed with fatherhood (para 25). This she held had an added negative effect on the relationship between the parties as well as on the respondent's own relationship with her son B. The applicant's relationship with B also negatively affected the respondent's other child (D) who felt that he could not compete for the applicant's affection resulting in him feeling unwanted to the extent that he expressed suicidal ideation (para 28). According to the dictum of the court of appeal this description of a toxic relationship between the appellant and D, and accepted as fact by the court a quo, may prove to be without merit (*RC v HSC* para 46).

In late 2019, the respondent attempted to terminate the relationship. The applicant at the time made no effort towards any reconciliation but furnished the respondent with a parenting plan in terms of which he demanded to be afforded parental responsibilities and rights over both the children, B and D (para 30). This led to a reconciliation and the parties moved in together again in November 2020. The respondent stated that she had misgivings to do so, but conceded because of financial worries, being a nursery schoolteacher. During this time D's father (C), was brought into the picture by the applicant. The relationship between the respondent and C had ended years ago in a violent manner. At the time of the breakup, the respondent obtained an interim restraining order against C. After the breakup, C expressed no interest in a relationship with D and did not contribute to any maintenance (para 33). The respondent surmised that C was contacted by and brought into the

picture by the applicant in a bid to take some of the pressure off the applicant in relation to D's need for a father figure (para 38). This led to some contact between C and D. This, the respondent claimed though, complicated matters further, fuelling D's feelings of rejection and inadequacy as C did not have the same means as the applicant to compete with the experiences offered to B by the applicant (para 40).

The parties separated on 2 June 201 and the respondent, and the boys moved out of the communal home (para 41). The respondent initially agreed on an informal contact agreement, allowing contact between the applicant and B (para 50). This contact agreement lasted for nine months until the respondent revoked contact abruptly two weeks before the hearing of the application in the court a quo (*RC v HSC* para 8). According to the respondent, B lost interest in the applicant with time and in having contact with him (paras 51-52). The respondent contended that she thus decided to terminate any contact as the atmosphere in the respondent's home improved and became more relaxed and less fraught with the exclusion of the applicant. Most importantly, she felt that the relationship between the siblings started to mend (para 53).

The applicant was distraught at his loss of contact with B (para 54). He accordingly brought an application to the court a quo in two parts. In part A, the appellant requested an assessment report of a clinical psychologist as to whether it is in the best interests of the child, B, that care, contact, and guardianship be awarded to the applicant. This included an interim contact order pending the determination of care, guardianship, and contact (paras 1-2). In part B, the appellant indicated that he would apply for an order granting him contact and guardianship of B together with the respondent, B's mother, once the nominated expert's recommendations had been delivered (para 2).

Both parts of the application were opposed by the respondent on the basis that the applicant lacked *locus standi* and that the relief sought would not be in the best interests of not only B but both the respondent's children (para 3). The respondent, moreover, brought a counter application requiring that the assessment and recommendations by a nominated expert to determine if it would be in B's interest that the appellant be granted the right of contact and care, should include an assessment of her other son's D interests and that C should consent to the assessment (*RC v HSC* para 46). C consented hereto (*RC v HSC* para 46). Shortly before the trial in the court a quo the respondent refused to cooperate with the assessment but delivered two supplementary affidavits for the court's consideration. In the affidavits, the respondent alleged that the appellant had overridden her parental rights by taking B on unsafe activities (motorbiking and speed boat ridding) without her consent and by allowing C access to D when D stayed overnight with the appellant without her consent (*RC v HSC* paras 11-12). The court considered the affidavits but did not formally admit them into evidence, nor afforded the applicant an opportunity to respond to them (*RC v HSC* para 10).

3.1 The court a quo's approach

In considering the case before it the court a quo submitted on behalf of the applicant that the court's task was limited to determine whether an assessment should be done (to decide care, contact, and guardianship) and whether interim contact should be allowed pending the receipt of the assessment and subsequent application for final relief (para 10). Fisher J pointed out that the real question before the court was not just one of whether the assessment requested was one that would be in the best interests of the child, but that the correct judicial task before the court was an overarching one on whether allowing the applicant to embark with the litigation in the first place would serve the best interests of the child (para 12). To embark on this judicial task the issue of *locus standi* and the interests of the child (B) in the context of the application, as a whole, would be considered (para 14). In fulfilling this task, the court first considered the issue of the applicant's *locus standi* (para 14).

This consideration was undertaken by the court in line with the factors laid down in sections 23 and 24 of the Children's Act, such as the relationship between the applicant and the child and the degree of commitment that the applicant had shown towards the child (see, e.g., paras 22, 24 and 28). Regarding the application for care and contact, the court held that the applicant had not established the necessary interests to seek the relief, but according to the court had a deep misunderstanding of his entitlement under the Children's Act (paras 63-64). The court, in contrast with the applicant's stance, emphasised the quintessence of the parent-child relationship as embodied in the Children's Act, indicating that just because an interested third party has a loving relationship with a child which has "parental hallmarks", it does not follow that such a person automatically has the necessary interests contemplated in sections 23 and 24 of the Children's Act. The rights obtained in sections 23 and 24 are not universally enjoyed, easily obtained, or randomly acquired. They are to the contrary seriously obtained and exercised under the law (para 62). The court held that the child already had a competent, loving, and able mother and implicit in the sections of the Children's Act is the fact that a child would not necessarily benefit from more than one person having parental rights (paras 61-62). In the view of the court, no compelling motivation was given as to why the applicant had to be accorded legal rights to the child (para 70).

The court took an even stronger stance with regard to the application for guardianship. This the court held is in line with the fact that even more stringent requirements are set for guardianship as the rights relate to important aspects of a child's life, such as a change in status or the child's movement beyond the court's jurisdiction (para 65). Consistent with the stringent approach section 24(3) prescribes that if a child already has a guardian, a person who applies for guardianship must submit reasons as to why the child's existing guardian is not suitable to have guardianship. The court, with reference to section 24(2)(b) states

that the “relationship between the applicant and the child and any other relevant person” should be considered, proceeded from the acceptance that there may be competing guardianship rights (paras 66-67). The question as to whether the child already had a suitable guardian, the court stated accordingly, goes directly to the question of *locus standi* (para 67). In following a purposive interpretation of section 24(3) the court held that the non-suitability of the existing guardian is a jurisdictional prerequisite for a court to entertain an application. If a child has a capable guardian no need exists to appoint another (para 68). The court found that in the present case, the child already had a guardian who could not be shown by the applicant to be unsatisfactory (para 70). The application accordingly could not succeed (para 70).

After concluding that the applicant did not have *locus standi*, the court nevertheless proceeded to evaluate the merits of the case. In this regard, the court reviewed aspects that ensure a finding that the applicant should be accorded rights versus aspects militating against such a finding (paras 74-75). In line with the factors laid down in sections 23 and 24, the court evaluated the relationship between the applicant and the child, as well as that of any other relevant person and the child. In this regard, the court, also, evaluated the relationship between the child and his mother and sibling. The court additionally looked at the degree of commitment expressed towards the child as well as the extent to which the applicant contributed towards the child’s expenses. This was all done to determine what was in the best interests of the child (paras 74-75).

In evaluating the merits of the case, the court held that although the applicant wanted to fulfil a fatherly role towards B and had contributed towards B’s expenses, his involvement in B’s life was not in his best interests. The applicant’s interactions with B, were according to the court, inappropriate for B’s age and overly emotional. The applicant, moreover, *inter alia* had put his own needs above those of the respondent and the child, disregarded the respondent’s autonomy and sought to impose his own will on the respondent and her children. This led to conflict between the parties, which in turn negatively affected the whole family. The mere presence of the applicant in their lives affected them negatively. The applicant’s belief that his wealth would give him an advantage over the respondent was further misplaced (paras 74-75). According to the court, the granting of the application would, on a balancing of all the facts, unquestioningly not be in the interests of B and the “last thing B ... needs is a father in the guise of the applicant with power over his life and family” (paras 76 and 77). The application was therefore dismissed (para 81). The court concluded that no further contact between the applicant and the child should prevail (para 80).

3.3 Court of Appeal’s approach and some evaluative comments

Notable the Court of Appeal indicated that a variety of aspects were either erroneously addressed or not addressed at all. The first of these is

that the court a quo did not refer to any authorities nor applied any test to reach its conclusion. In this regard, the full court indicated that as the relief sought was interim, a test such as the *Wester v Mitchell* (1948 1 SA 1186 (WLD) 1189) test should have been applied (*RC v HSC* paras 14 and 16). This test requires the court to consider the facts averred by the appellant together with such facts set out by the respondent that were not or could not be disputed. In this regard, the appellant's version should have been considered and should have been sufficient to succeed unless the respondent was able to cast serious doubt upon it (*RC v HSC* para 16). The court a quo was moreover, criticised by the full court for determining the facts by way of the usual opposed motion approach which is adversarial in nature, i.e., the *Plascon-Evans* test (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 3 SA 623 (A); *RC v HSC* paras 37-39). The full court held that where the welfare of children and their best interest are at stake, the court should follow an inquisitorial approach in which the court may even call evidence *mero motu* to form its own impression (*RC v HSC* para 38). Such an enquiry must furthermore be a child-centred one where the focus is on the interest of the child, B and not on the weighing up of the pros and cons of the rights of the adults (*RC v HSC* para 40).

The second issue revolved around the incorrect allowance of the submission of certain evidence and considering evidence incorrectly. In this regard, the court a quo should not have considered the supplementary affidavits of the respondent without allowing the appellant an opportunity to respond thereto (*RC v HSC* para 17). The respondent repeatedly and under oath indicated that she was not opposed to the appellant having limited contact with B and even accepted the existence of a close bond between them (*RC v HSC* paras 24 and 25). Nothing to this effect is reported in *RC v SC*. The court of appeal also highlighted the consideration of incorrect biographical information on the appellant and the unclaimed substance of a "toxic" relationship between the appellant and D by the court a quo (*RC v HSC* paras 45 and 46).

The third issue concerns the court a quo's finding on *locus standi*. The court a quo found that the appellant had no *locus standi* in respect of his application for co-guardianship in that he had failed to show the non-suitability of the existing guardian (*RC v HSC* para 26). In so far as the interpretation of section 24(3) was concerned, the court a quo followed a narrow or purposive approach holding that the non-suitability of the existing guardian is a jurisdictional prerequisite for a court to entertain an application (para 68). In terms of this approach, it is believed that the provision suggests that if a court assigns guardianship to an applicant the existing guardian loses his or her guardianship. This impression is strengthened by the fact that section 24, unlike that of section 23(4), does not contain a proviso that the assignment of the relevant rights does not affect the parental rights and responsibilities that any other person has in respect of the child. Further support is lent to the argument through section 29(2) of the Children's Act which provides that an application for

an order in terms of section 24 must contain reasons as to why the applicant is not applying for the child's adoption (Heaton (2018) 3-25). Substantial difference exists between the effects of adoption and guardianship. Adoption ends all legal relationships that existed before the adoption, for example, a child cannot inherit from her, or his birth parents once adopted. Guardianship, however, may be acquired by a grandparent who acts as a caregiver of a child, whose parents are still alive and who continues to exercise guardianship while not wishing to make their children available for adoption. The rationale for the provision is questionable (Skelton (2009) 84). Schäfer (*Child Law in South Africa: Domestic and International Perspective* (2011) 250) submits that it appears that the underlying policy of section 24(3) is to discourage the possibility of multiple guardians for the child in favour of adoption.

A different interpretation of section 24(3) is that it assigns equal, concurrent guardianship to the applicant. An applicant therefore only has to show that the existing guardian is unsuitable to such a degree that the court should assign an additional guardian to the child. Heaton prefers this interpretation as it is more logical, given that the Children's Act permits more than one person to have guardianship in respect of the child (Heaton (2018) 3-25). An unmarried father who does not qualify for automatic responsibilities and rights in terms of section 21 of the Children's Act, for example, may apply for the guardianship of his or her child under section 24. Such an application, if successful would not affect the mother's guardianship status, but would merely result in them exercising their rights independently of one another henceforth, except for those issues in section 18(3)(c) requiring both guardians' consent. Skelton highlights that section 24(3) only makes sense if the applicant is seeking sole guardianship. However, in such an event the application in terms of section 24 would have to be combined with an application for the termination of the existing guardian's rights. Skelton submits that the only plausible explanation for the anomaly is to attribute the requirements of the section to a drafting error (Skelton (2009) 84). This latter interpretation was favoured by the court in *CM v NG* 2012 4 SA 452 (WCC), which held that an interpretation of section 24(3) that would terminate an existing guardian's guardianship would be absurd (para 53). This would not be in keeping with the objects of the Children's Act, namely, to promote the preservation and strengthening of families and to give effect to children's constitutional rights (para 53). The court accordingly held that the section only applies if sole guardianship is sought (para 58). The court in *RC v SC* did not follow the court's stance in *CM v NG* but instead chose an exclusionary interpretational approach (paras 67 and 68). The court of appeal held that the court a quo's view was at worst incorrect in law and at best uncertain in law. With reference to *CM v NG* and *Ex Parte Kedar* 1993 1 SA 242 (W), the court favoured the view that it is wrong in law, holding that the High Court as upper guardian of all children, can when finding it is in the best interest of a child, grant joint guardianship without finding that the existing guardian is unsuitable (*RC v HSC* para 26). The position of the full court is supported. It is,

nonetheless, submitted that to ensure judicial consistency and to avoid a position such as that transpired in *RC v SC* the legislature should amend the provision to provide for one interpretational approach.

Corresponding to section 24(3) is the question as to under which circumstances would an existing guardian be deemed to not be a suitable guardian. The section itself provides no guidance. Neither the court a quo nor the full court addressed this matter. It is submitted that a court would accordingly have to apply the general principles set out in Chapter 2 of the Children's Act, including the factors set out in section 7(1) of the Act to make a determination (Heaton (2018) 3-26).

The fourth matter for consideration relates to the court's evaluation of the best interest of the child. It is submitted that the court a quo approached its evaluation from a parent-child relationship's viewpoint by placing much emphasis on the importance of the parent-child relationship. The court held that legal rights should not willy-nilly be afforded to non-parents (para 59) but, to the contrary, stressed that "to needlessly invite dissent by increasing the number of people who have legally enforceable rights in relation to a child should be avoided in the interest of the child" (para 69). Compelling reasons need to exist as to why another person, such as a previous life partner, should be accorded legal rights (para 70). The court of appeal on the other hand held with reference to *QG v CS (Professor DW Thalder Amicus Curiae)* 2021 JDR 1212 (GP) that to limit the category of persons who have an interest in the care, wellbeing and development of a child and who could constitute a *de facto* parent may well be too restrictive and may not accord with the best interest of the child (*RC v HSC* para 33). Some "tangible and clearly demonstrable interest and connection to the child" should however be evident (*RC v HSC* para 33). It is submitted that it must unmistakably, be in the best interests of the child for a court to award such other person legal rights. In *McCall v McCall* (203F) the court highlighted that it is tasked with determining what is in the best interests of the child, and not with adjudicating a dispute between antagonists with conflicting interests to resolve their discord. Its concern is for, and focus should be on the child. The granting of relief to enlist the help of an expert on the issue of the child/children's best interest may ensure a much more child-centred approach.

As a matter of interest, it should be noted that section 23(3) of the Children's Act deals with situations where different applicants apply for the assignment of contact and care and an adoption order specifically prescribes that a report and recommendations on what is in the child's best interest must be obtained by the court. In such an instance a court is compelled to request a report from a family advocate, social worker or psychologist with recommendations as to what is in the child's best interests. The reason for this requirement may be found in the fact that such an application entails more than just a request for an order for care and contact, but also includes an adoption order. Such an application has a greater degree of seriousness as it bears an enhanced impact on the life

of the child in question. Section 23(2) of the Children's Act, the section under consideration in the application of *RC v SC*, does not contain a similar provision. A court is therefore currently not under a statutory obligation to request a report. A High Court as the upper guardian of children may, however, request such a report should it deem it in the best interests of the child. In the case under discussion, the court a quo did not feel itself compelled to obtain such a report but stated that "it is the court's province and function to determine the interests of the child and not that of the expert" (para 79). It is submitted that even though the use of an expert is not prescribed in the Children's Act, courts should seriously consider making use of such experts; not to usurp its functions but to assist in its evaluation of what is in the child's best interests.

The court of appeals finding, namely the upholding of the appeal, setting aside of the order of the court a quo and the appointment of a suitable expert to provide the court with a recommendation as to what is in the child/ children/s best interest is according applauded (para 2).

4 Conclusion

The quintessence of the parent-child relationship as embodied in the Children's Act and recognised in the Constitution is unquestionable. However, this does not mean that a child cannot form a loving bond with an interested third party. The removal of such a central interested third party from a child's life may have an adverse impact on the child and should not be occasioned flippantly. The case of *RC v HSC* reaffirms that such an interested party may acquire parental responsibilities and rights in terms of 23 and 24 of the Children's Act. This may even include an order for joint guardianship. Conversely, as these rights are seriously obtained a party will have to establish the necessary interests as contemplated in sections 23 and 24 of the Children's Act before a court will grant such an application. In establishing such interests, the courts should follow an inquisitorial approach which must furthermore be child-centred. This approach includes an evaluation of what is in the child's best interests. The final question should be what is in the best interests of the child. The answer to this question should never be sought from an antagonist approach of the adults involved, but always from a child-centred approach. The full court can be applauded for its devotedness thereto.