

**THE POSITION OF UNMARRIED FATHERS IN SOUTH
AFRICA: AN INVESTIGATION WITH REFERENCE TO
A CASE STUDY**

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Yulie Panayiota Paizes

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INVESTIGATION WITH REFERENCE TO A CASE STUDY**

by

YULIE PANAYIOTA PAIZES

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SUMMARY

This dissertation looks at the position of the unmarried father in South Africa with regard to obtaining access to his illegitimate child. The writer has focused on three distinct eras in South African family law: the position of unmarried fathers in terms of: the common law; Natural Fathers of Children Born out of Wedlock Act; and the Children's Act. The writer has further focused on a case study. This is to emphasis the difficulty which unmarried fathers have when attempting to go through the courts to have access to his child.

In terms of South African common law, fathers of illegitimate children did not have any form of parental authority over the child. The mothers of illegitimate children have full parental authority over such children. Access in terms of South African common-law is seen as an incident of parental authority. Unmarried fathers nevertheless had the right to approach the high court to obtain access to their children, if the mother of the child refuses to allow the father to have such access. In the late 1980's and early 1990's, there was an overwhelming amount of applications brought by unmarried fathers in the high courts so as to obtain access to their illegitimate children. The case of *Van Erk v Holmer* 1992 (2) SA 636 (W) sparked victory for unmarried fathers when the learned judge held that all unmarried fathers of children have an inherent right of access to their children. This victory was short-lived. Subsequent case law and in particular the case of *B v S* 1995 (3) SA 571 (A) enforced the common law and held that unmarried fathers do not have an automatic right to their illegitimate children and that such fathers will have to apply to the high court for such access. Due to the increase in litigation in the late 1980's and early 1990's regarding a father's access to his child born out of wedlock the Natural Fathers of Children Born out of Wedlock Act commenced on 4 September 1998. The South African legislature adopted the approach taken in the case of *B v S* 1995 (3) SA 571 (A) and rejected the approach taken in the case of *Van Erk v Holmer* 1992 (2) SA 636 (W) ie the common law continued to remain the approach taken in South Africa.

Legislators recognised that the approach taken in the Natural Fathers of Children Born out of Wedlock Act does not conform to the provisions of the African Charter of the Rights and the Welfare of the Child, the United Nations Convention on the Rights of the Child and equality and dignity provisions of the Constitution of the Republic of South Africa. On 19 June 2006, the Children's Act was effected and will commence once promulgated in the Government Gazette. The writer then determines whether the Children's Act has in practice changed the position of the unmarried father.

KEY TERMS

Parental Authority; Access; Unmarried fathers; Adoption; Children born out of wedlock; Parental care; Parental rights and responsibilities; Children's rights; Best interests of the child; Parental-Child relationship.

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B. PRINCIPAL WORKS CITED AND MODE OF CITATION

BOOKS

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| Boberg <i>Persons and family</i> | Boberg <i>The law of persons and the family with illustrative cases</i> (1977) Juta Cape Town |
| Clark <i>Family law service</i> | Clark B (ed) <i>Family law service</i> (1988 with loose-leaf updates) Butterworths Durban |
| Cronje & Heaton <i>Law of persons</i> | Cronje DSP & Heaton J <i>The South African law of persons</i> 2 ed (2003) Butterworths Durban |
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| De Waal <i>The Bill of Rights handbook</i> | De Waal J, Currie I & Erasmus G <i>The Bill of Rights Handbook</i> 3ed (2000) Juta Kenwyn |
| Erasmus <i>et al Superior court practice</i> | Erasmus HJ, Breitenbach AM & Von Loggerenberg DE <i>Superior court practice</i> (1994 with loose leaf updates) Juta Cape Town |
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| Clark 2000 <i>SALJ</i> | Clark B "The duty of the state to support children in need" 2000 <i>SALJ</i> 343 |
| Clark 1993 <i>THRHR</i> | Clark B "No holy cow – some caveats on family mediation" 1993 <i>THRHR</i> 454 |
| Cohen 1993 <i>DR</i> | Cohen CH "The many faces of arbitration... Why not use it for property disputes in divorce?" 1993 <i>DR</i> 642 |
| Davel 2002 <i>De Jure</i> | Davel CJ "The African Charter on the rights and welfare of the child, family law and children's rights" 2002 <i>De Jure</i> 281 |
| Goldberg 1996 <i>TSAR</i> | Goldberg V "Family mediation is alive and well in the United States of America: A survey of recent trends and developments" 1996 <i>TSAR</i> 358 |
| Goldberg 1998 <i>TSAR</i> | Goldberg V "Practical and ethical concerns in alternative dispute resolution in general and family and divorce mediation in particular" 1998 <i>TSAR</i> 748 |
| Mailula 2005 <i>Codicillus</i> 22 | Mailula D "Taking children's rights seriously: access to, and custody and guardianship of, a child born out of wedlock" 2005 <i>Codicillus</i> 15 |
| Mosikatsana 1998 <i>Michigan Journal of Race and Law</i> | Mosikatsana T "Children's rights and family autonomy in the South African context:" a comment on children's rights under the final Constitution" 1998 <i>Michigan Journal of Race and Law</i> 344. |

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South African Law Commission <i>The review of the Child Care Act 74 of 1983 Discussion Paper 103 Project 110, Chapter 8</i> (http://web.uct.ac.za/depts/ci/plr/pdf/salrc_dis/10-dp103-ch8.pdf down loaded on 29 August 2006)	42

F. LIST OF ABBREVIATIONS

<i>SAJHR</i>	<i>South African Journal on Human Rights</i>
<i>SALJ</i>	<i>South African Law Journal</i>
<i>TSAR</i>	<i>Journal of South African Law / Tydskrif vir die Suid-Afrikaanse Reg</i>
<i>THRHR</i>	<i>Journal of Contemporary Roman-Dutch Law / Tydskrif vir Hedendaagse Romeins-Hollandse Reg</i>
<i>DR</i>	<i>De Rebus</i>

1. INTRODUCTION

This dissertation focuses on the legal position of unmarried fathers and children born out of wedlock. This dissertation centres around such fathers attempting to obtain access to their children when the mother of the child refuses to allow any access. This dissertation is based on a case study which will be referred to as “*K v B*” brought in the Witwatersrand Local Division and the “*Application for the Adoption of BD*” in the Randburg Children’s Court. The case study is used to illustrate, when weighed against the South Africa law during its different stages (ie common law and different changes of legislation), whether a father of a child born out of wedlock would have been successful to bring such access application. It must be noted that throughout the dissertation the word “contact” is used interchangeably with “access” and “care” is used interchangeably with “custody”.

The focus of the case study is to further indicate to the reader the impact of a natural father bringing an application in the high court to access his child which has been born out of wedlock. The emotional turmoil and the costs of bringing such an application are immense. Before 1998, the access application would have been based on common law, currently the application is based on the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 and at a date still to be announced, the application will be based on the Children’s Act 38 of 2005.

2. CASE STUDY

2.1 *Introduction*

This case study is interesting as the respondent and the respondent’s husband (see fig 1) took the firm stance that no access will be granted and all applications brought by the applicant will be vigorously opposed. It becomes clear from the beginning of the application that no settlement would be reached between the respondent and the applicant. The applicant initially took the stance to merely apply for access but due to the respondent’s firm stance and attitude of “no settlement”, the applicant vigorously defended the adoption application of BD which was brought by the respondent’s husband (see fig 2).

Figure 1: High Court Access Application

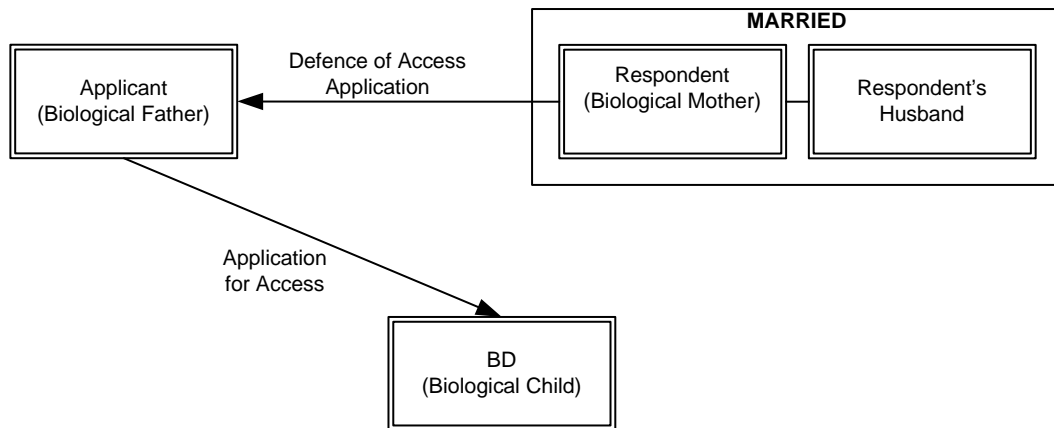
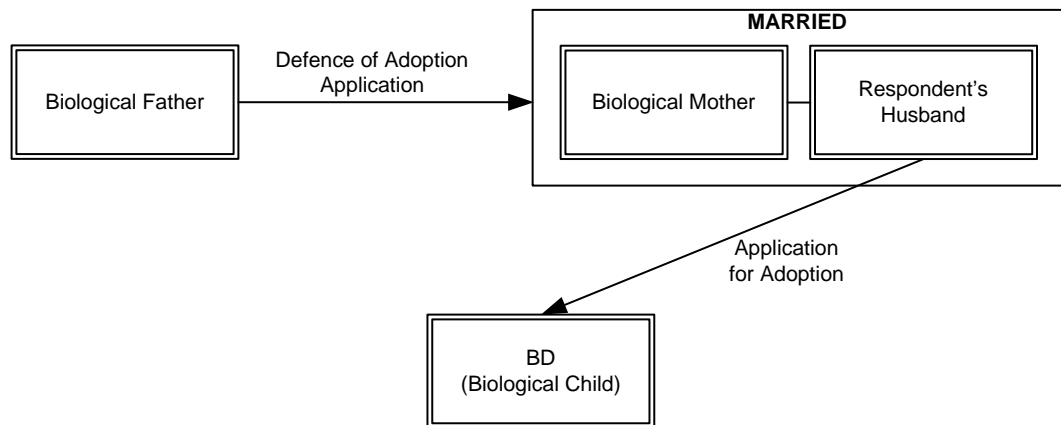


Figure 2: Application for Adoption in the Children's Court



2.2 *The parties to the case study*

In this dissertation the parties are referred to as follows: The natural father of the minor child is referred to as “the applicant”, the natural mother of the minor child is referred to as “the respondent”, the minor child is referred to as “BD”, and the respondent’s husband is merely referred to as “the respondent’s husband” or “her husband”. The case numbers have intentionally not been referred to.

2.3 *Basis of the case study*

The respondent is the natural mother of the minor child, BD (born K, previously B) born on 15 January 1999. The applicant is the natural father of BD. The respondent and applicant were never married and the relationship between the respondent and applicant terminated in 2001. The respondent met her husband in 1998 and married him in terms of South African law in 2004. The respondent has 2 children with her husband, born in 2002 and 2005 respectively.

In August 2004, the respondent’s husband, with the support of the respondent, applied for the adoption of BD in terms of the Child Care Act 74 of 1983 through the Randburg

Children's Court. As required by the Child Care Act, the respondent informed the applicant of the adoption application.¹ The applicant withheld his consent to BD's adoption by the respondent's husband.

In February 2005, the applicant launched an access application under the Natural Fathers of Children Born out of Wedlock Act in the Witwatersrand Local Division for access to BD. This access application was vigorously opposed by the respondent.

The facts of the case appear in the court papers of both the access application and the adoption application and have been set out hereunder in detail.

2.4 *Facts set out in terms of the pleadings presented in the Witwatersrand Local Division and Randburg Children's Court*

The applicant and respondent met in Harare, Zimbabwe in 1992 and commenced a relationship.² The parties remained involved with each other until 1996, when the respondent left for the United Kingdom.³ In 1998, the respondent returned to Harare, Zimbabwe, and the relationship between the applicant and respondent continued.⁴ In April 1998, the respondent fell pregnant with BD.⁵

On or about 13 October 1998, the respondent and applicant were engaged and moved into a common residence together.⁶ In or about October/November 1998, the respondent started working for her husband.⁷ On 15 January 1999, BD was born. The applicant bonded with BD immediately, and on 8 February 1999, the applicant and respondent registered BD under the applicant's surname. The respondent acknowledged the applicant as BD's biological father.⁸

In 2001, the relationship between the respondent and the applicant deteriorated. However, the applicant continued to have a strong relationship with BD. On or about 5 July 2001, the respondent requested the applicant to move out of the common residence.⁹ At this stage, BD was 2-and-a-half years old.

The respondent's husband separated from his wife in June 2001 and commenced divorce proceedings against her in July 2001.¹⁰

In August 2001, the applicant started paying maintenance to the respondent for BD¹¹ in an amount of Zimbabwean \$5,000.00. Even though the applicant was paying maintenance, the maintenance agreement was orally concluded and no formal maintenance agreement was

¹ S 18(4)(d) of the Child Care Act.

² Applicant's founding affidavit par 13 (p 8); respondent's answering affidavit par 24 (p 60).

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Applicant's founding affidavit par 17 (p 9); respondent's answering affidavit par 28 (p 62).

⁸ Applicant's founding affidavit par 13 (p 8).

⁹ Applicant's founding affidavit par 19 (p 9); respondent's answering affidavit par 30.2 (p 63).

¹⁰ Respondent's answering affidavit par 31.5 (p 65).

¹¹ Applicant's founding affidavit par 26.

ever signed between the parties regulating maintenance payments. On or about October 2001, the respondent unilaterally re-issued BD's birth certificate in her maiden surname. The applicant was unaware of the name change.¹²

According to the respondent, she became involved with her husband in September 2001.¹³ However, accordingly to the applicant, the respondent and her husband were seeing each other before the respondent requested the applicant to vacate the common home in July 2001.¹⁴ The applicant believed that the respondent's husband was the cause of the deterioration of his relationship with the respondent and there were a number of altercations between the respondent's husband and the applicant after July 2001.^{15 16}

From July 2001, the respondent allowed the applicant to have sporadic access to BD.¹⁷ Due to the altercations between the applicant and the respondent's husband; and the complete deterioration of any form of civil relationship between the applicant and the respondent, on or about November 2001, the respondent sought professional help of a psychologist, Dr B regarding BD's welfare when BD was in the care of the applicant.¹⁸

A single incidence between the applicant and the respondent occurred on 1 December 2001 in front of BD. The applicant had overnight access to BD from 30 November 2001 to 1 December 2001. The respondent collected BD from the applicant, at the applicant's parent's home. According to the respondent, the applicant smelled of alcohol. The respondent collected BD and placed BD into the car seat in her vehicle. The applicant demanded from the respondent a time when he will see BD again and removed BD from the respondent's vehicle. The respondent was unable to remove BD from the applicant's arms. The respondent was able to call on the applicant's mother for help. The applicant's mother was able to remove BD from the applicant's arms and handed BD to the respondent.¹⁹ Due to this incidence, the applicant was only allowed to have supervised access to BD at the respondent's residence.²⁰

The applicant continued to pay maintenance for BD directly to the respondent. The applicant's maintenance obligations increased from Zimbabwean \$5,000.00 to Zimbabwean

¹² Applicant's founding affidavit par 23 (p 10); applicant's answering affidavit par 26.1 (p 61) & par 36.2 (p 71); respondent's answering affidavit in consequence of applicants amended application par 6 (p 343).

¹³ Respondent's answering affidavit par 29 (p 63).

¹⁴ Applicant's replying affidavit par 3.32 (p 175).

¹⁵ The applicant admitted that he was angry and resentful towards the respondent and that his anger was directed towards the respondent's husband. However, the applicant in terms of the pleadings informed the high court that such anger was never directed towards BD.

¹⁶ In terms of Annexure A attached to the family advocate's report dated 11 May 2005, the report of the family counselor (p 21) states that "the applicant admitted that he had arguments with the respondent's husband on a few occasions. This was because he was angry about the relationship between them and when it was obvious that the respondent was being unfaithful to him."

¹⁷ Applicant's founding affidavit par 22 (p 10).

¹⁸ Respondent's answering affidavit par 49.5 (p 79).

¹⁹ Respondent's answering affidavit par 49.8 (p 80).

²⁰ Respondent's answering affidavit par 32.10 (p 68).

\$10,000.00.²¹ It must be noted that maintenance payments, especially with regard to the duration of maintenance paid, the period in which maintenance was paid, the person to whom maintenance was paid, as well as the amount was strongly disputed between the parties.

In February 2002, the respondent's husband divorced his wife.²² In March 2002, the respondent allowed the applicant to have unsupervised access to BD.²³ In April 2002, the respondent's husband expanded his business into South Africa.²⁴

On 6 April 2002, the respondent and her husband were going on a two-week vacation to South Africa. The respondent allowed the applicant to have access to BD for a two-week period from the evening of 5 April 2002 and BD was to reside with the applicant and his parents at their home. On the evening of 5 April 2002 the applicant discovered that the respondent had fallen pregnant with her husband's child. In the early hours of the morning of 6 April 2002, the respondent and her husband travelled to the Harare International airport by car. The applicant waited for them and trailed them to the airport. The respondent's husband stopped the vehicle when they became aware that the applicant was following them. The respondent's husband got out of the vehicle and approached the applicant to ask him why he was following them. Without warning, the applicant physically assaulted the respondent's husband. Thereafter, the respondent's husband and the respondent approached a police station and reported the incident. The respondent and her husband were escorted by a police reservist to the applicant's parent's home to collect BD. When the applicant's father found out what had happened, a physical fight broke out between the applicant and his father. The applicant was arrested and was charged with "conduct likely to provoke a breach of peace". The applicant paid an admission of guilt fine and was realised. According to the respondent this physical incident between the applicant and his father occurred in front of BD. Accordingly to the applicant and his family, it is denied that the physical incident between the applicant and his father was witnessed by BD.²⁵

The applicant has denied that he has ever physically abused BD or placed BD in danger or harmed BD in any manner.²⁶

²¹ Applicant's founding affidavit par 28 (p 10) and respondent's answering affidavit par 40 (p 73).

²² In terms of the social worker, K&A Adoptions, report dated 29 November 2004, presented to the Randburg Children's Court in the adoption of BD by the respondent's husband, the respondent's husband indicated that the reason for the divorce between himself and his ex-wife was that his ex-wife strongly felt that she did not want to have children (p 7 of the report).

²³ Respondent's answering affidavit par 32.10.

²⁴ Respondent's answering affidavit in consequence of applicant's amended application par 17.14 (p 351).

²⁵ Respondent's answering affidavit par 32.8-32.15 (p 67-69) & par 49.10 (p 81). Also see respondent's supplementary affidavit to the respondent's answering affidavit Annexure BCD17A (p 261); family advocate's report dated 11 May 2005 par 8 (p 21).

²⁶ Family advocate's report dated 11 May 2005 par 7 (p 22) & par 8 (p 23).

Due to the incident above, the respondent refused the applicant access to BD. Due to what the applicant referred to as the “respondent’s obstructive behaviour”, the applicant placed all maintenance payments for BD into a trust account.²⁷

On 19 June 2002, the respondent through her attorneys at the time, informed the applicant that he may have access to BD every Wednesday from 17h00 to 19h00 on condition that the applicant together with the respondent attend psychologist sessions with the respondent’s psychologist, Dr B. The applicant was also to pay for all psychologist consultations that the respondent and the applicant utilise with Dr B.²⁸

In July 2002, the respondent and her husband moved in together.²⁹

On 3 July 2002, at the insistence of the respondent, the applicant consulted with Dr B. Dr B recommended to the respondent that the applicant is not to have access to BD for a period of 3 weeks so that he may assess the applicant.³⁰ On 10 July 2002, the applicant commenced consultations with Dr B.³¹ An amount of Zimbabwean \$3,500.00 was spent per session. The applicant attended four sessions with Dr B in July 2002. On or about 31 July 2002, at the end of the fourth session, Dr B recommended that the applicant has supervised access to BD once a week for two hours from 17h00 to 19h00 at the respondent’s residence in the presence of a third party.³²

On or about 1 August 2002,³³ 7 August 2002,³⁴ and 14 August 2002, on each day the applicant exercised two hours access to BD from 17h00 to 19h00 at the applicant’s parents’ home. The applicant bathed, changed and fed BD. The applicant felt that he had fully bonded with BD and has secured a good father/son relationship with BD.

On 14 August 2002, the respondent informed the applicant that the amount of maintenance paid by the applicant in respect of BD, which amounts to Zimbabwean \$10,000.00 per month, is minimal and requested that maintenance payments by the applicant be increased.³⁵ On 22 August 2002, the respondent informed the applicant through the offices of her attorneys that all of BD’s maintenance payments are to be paid through her attorneys of record.

²⁷ Applicant’s founding affidavit par 29 (p 11) & 30 (p 11).

²⁸ Respondent’s answering affidavit BCD 10 (p 145).

²⁹ K&A Adoptions report p 3 (*supra* n 22); respondent’s answering affidavit in consequence of applicant’s amended application par 21.12 (p 359).

³⁰ Applicant’s founding affidavit par 37 (p 12); respondent’s answering affidavit par 49.11 (p 82).

³¹ Applicant’s replying affidavit Annexure SHK 20 (p 219).

³² Respondent’s answering affidavit par 50.2 (p 82).

³³ Applicant’s founding affidavit par 47.1 (p 15).

³⁴ Applicant’s founding affidavit par 47.2 (p 15).

³⁵ Applicant’s founding affidavit par 47.3 (p 15).

On 24 August 2002, the applicant had a motor vehicle accident in which he hit a pedestrian. The pedestrian died on the scene.³⁶ The pedestrian was intoxicated and had walked across the road in a busy intersection. It seems from the pleadings that the applicant was never prosecuted for such incident.

On 3 October 2002, the applicant increased BD's maintenance payments from Zimbabwean \$10,000.00 to Zimbabwean \$12,500.00.³⁷ The respondent rejected the applicant's maintenance payment, as the respondent stated it was verbally agreed that the applicant's payments would increase to Zimbabwean \$17,500.00.³⁸

On 11 October 2002, the applicant paid an amount of Zimbabwean \$41 935.43 (including interest) which was invested in a trust account to the respondent for BD's maintenance for the months April, May, June and July 2002.³⁹

On 17 October 2002⁴⁰ and 24 October 2002,⁴¹ the Applicant attempted to telephonically contact the respondent as he wanted access to BD. The applicant was unable to contact the respondent. On 27 October 2002, the respondent allowed the applicant to exercise access to BD for a nine-hour period from 9h00 to 18h30.⁴²

On 17 October 2002, the respondent gave birth to her husband's first child.⁴³ On 18 October 2002, the applicant learned from a mutual friend that the respondent had given birth to her husband's first child.⁴⁴

On 31 October 2002, according to the respondent, she informed the applicant that she will be moving with BD to South Africa in January 2003. According to the applicant, the respondent had informed him that she will be going to South Africa with BD on holiday.⁴⁵

The respondent indicated in a subsequent letter to her attorneys of record that she was under the impression that the applicant had no objections to her leaving with BD to join her husband in South Africa.

In November 2002, the crèche where BD attends indicated that BD was behaving aggressively and had a very defiant behaviour.⁴⁶

³⁶ Respondent's supplementary affidavit to the respondent's answering affidavit par 6.4 (p 257). Also see applicant's supplementary affidavit par 16 (p 294) and Annexure SHK 17 (p 264); applicant's supplementary affidavit par 16 (p 294).

³⁷ Applicant's founding affidavit par 31 (p 11).

³⁸ Respondent's answering affidavit par 43.2.

³⁹ Applicant's founding affidavit par 30 (p 11).

⁴⁰ Applicant's founding affidavit par 47.5 (p 15-16).

⁴¹ Applicant's founding affidavit par 47.7 (p 16).

⁴² Applicant's founding affidavit par 47.8 (p 16).

⁴³ K&A Adoptions report p 4 (*supra* n 22).

⁴⁴ Applicant's founding affidavit par 47.6 (p 16).

⁴⁵ Applicant's founding affidavit par 48 (p 17); Annexure SHK 11 attached to the applicant's founding affidavit (p 40); respondent's answering affidavit par 8.8 (p 50); respondent's answering affidavit in consequence of applicant's amended application par 7.2 (p 343).

⁴⁶ Respondent's answering affidavit par 50.4 (p 83).

On 7 November 2002, the respondent allowed the applicant to have access to BD for a 2-hour period from 17h00 to 19h00.⁴⁷ On 10 November 2003, the respondent allowed the applicant to have access to BD for 5-and-a-half hours from 11h00 to 16h30.⁴⁸

On 24 November 2002, the applicant had access to BD and took BD to a birthday party.⁴⁹ On 26 November 2002, the applicant presented the respondent with a letter allowing her to remove BD from Zimbabwe on a holiday visa and requested the South African High Commission to grant the respondent such visa.

On 28 November 2002, BD's great-grandfather had turned 80 years of age and the applicant had arranged with the respondent that he would exercise access to BD so that they could celebrate BD's great-grandfather's birthday. The applicant arrived at the respondent's residence at 17h00 to collect BD. Neither the respondent nor BD was at the respondent's residence. The applicant telephoned the respondent at 17h10 and the respondent advised that she had unilaterally terminated the applicant's access to BD.⁵⁰

On or about the beginning of December 2002, the respondent informed her attorneys that she had unilaterally terminated the applicant's access to BD.⁵¹ The respondent stated that the applicant's own behaviour such as exercising his access to BD at irregular intervals, drinking alcohol excessively, not complying with BD's routine, ignoring BD's eating habits, and his aggressiveness and hostility towards the respondent's husband, has made her decide that it was not in BD's best interests to allow the applicant access to BD.⁵² The allegations made by the respondent were denied by the applicant.

The applicant avers and believes that the reason for the respondent's severe attitude towards the applicant's access to BD, is that BD bonded with the applicant and as a consequence thereof it would have been difficult for BD to deal with the lack of access if the respondent merely stopped such access and left for South Africa. The respondent wanted to stop such access in an environment which was familiar to BD such as the respondent's residence.⁵³

⁴⁷ Applicant's founding affidavit par 47.9.2.

⁴⁸ Applicant's founding affidavit par 47.10. 2.

⁴⁹ Applicant's replying affidavit par 3.60.6 (p 133).

⁵⁰ Applicant's founding affidavit par 47.11. See Annexure SHK 11 attached to the applicant's founding affidavit; respondent's answering affidavit in consequence of applicant's amended application par 7.2 (p 343).

⁵¹ In terms of Annexure A attached to the family advocate's report dated 11 May 2005, the report of the family counselor (p 19) states that "[a]t the end of 2002, the respondent made a decision to move to South Africa without informing the applicant or obtaining his permission. The respondent then made a calculated decision and took the risk of withholding the minor child from the applicant."

⁵² In terms of Annexure A attached to the family advocate's report dated 11 May 2005, the report of the family counselor (p 19) states that "the Respondent alleged that the applicant's state of mind was not good and she knows it not to be true".

⁵³ In terms of Annexure A attached to the family advocate's report dated 11 May 2005, the report of the family counselor (paginated page 21) the applicant further stated he did not want to contact the minor child directly after the respondent's husband and the respondent left Zimbabwe "as he did not want to cause him more trauma than what he was already experiencing at the time".

On 5 December 2002, the applicant received a letter from the respondent, dated 22 November 2002, recording that the respondent and her husband informed the applicant of their immigration to South Africa and that the applicant had “no objection” to removing BD from Zimbabwe. The applicant denies that he agreed to the respondent removing BD from Zimbabwe and had confirmed to his attorneys of record that he did not agree to such removal as this would have hampered his access to BD. The applicant further confirms that he signed a letter in which he had agreed that BD may be removed out of Zimbabwe only on condition that the trip to South Africa was a holiday and that he had provided permission for a holiday visa.^{54 55}

On 6 December 2002, BD’s crèche released a report stating BD has become aggressive, defiant and disobedient.⁵⁶ The respondent blamed the applicant for BD’s behaviour and this justified her decision to unilaterally stop the applicant’s access to BD.

On 13 December 2002, the applicant consulted with Dr B. Dr B recommended that the applicant should have access to BD on a regular basis, on condition that the applicant does not consume alcohol within 48 hours of seeing BD, that the applicant collect and fetch BD at the agreed location and time, and that the applicant is to properly feed BD when the applicant has access to BD. This was the last consultation that the applicant had with Dr B.

On 27 December 2002, the respondent left Zimbabwe and immigrated to South Africa with BD.⁵⁷

On 2 January 2003, the applicant paid maintenance directly to the respondent’s attorneys.⁵⁸

On 2 January 2003, the applicant was informed through a letter received from the respondent’s attorneys that the respondent left Zimbabwe for South Africa on 28/29 December 2002 and that the respondent has instructed that she will not allow any access to BD, as she does not believe that it is in BD’s best interests.⁵⁹

The maintenance cheque paid on 2 January 2003 to the respondent was never cashed and the applicant was advised that all maintenance payments were to be paid to the respondent’s husband’s company in Zimbabwe. The maintenance cheque paid to the respondent’s husband’s company in Zimbabwe was further never cashed.⁶⁰ The applicant continued to pay maintenance, at the agreed rate, into a trust account.

⁵⁴ Applicant’s replying affidavit par 3.61.1 (p 200) & par 3.62 (p 201).

⁵⁵ In terms of Annexure A attached to the family advocate’s report dated 11 May 2005, the report of the family counselor (p 18) states that “in December 2002, the respondent asked the applicant’s permission to take the minor child to South Africa for Christmas shopping. The applicant withheld consent”.

⁵⁶ Respondent’s answering affidavit Annexure BCD 13 (p 152).

⁵⁷ Applicant’s founding affidavit Annexure SHK 11 (p 40).

⁵⁸ Applicant’s founding affidavit par 32.

⁵⁹ Applicant’s replying affidavit par 3.68 (p 202).

⁶⁰ Applicant’s founding affidavit par 33.

On 7 January 2003, the applicant launched an urgent chamber application for access to BD. The pleadings were served on the respondent's attorneys⁶¹ and they indicated that they have been given instructions to vigorously defend the urgent chamber application. On 10 January 2003, an urgent chamber application was heard. The judge was of the view that it was in BD's best interest that the applicant should have access to BD, however the court required full details of the whereabouts of the respondent and BD and if they would ever return to Zimbabwe.⁶²

On 14 January 2003, the respondent's attorneys informed the applicant that the respondent had instructed them that:

- ❑ she had moved with BD to South Africa permanently and will not be returning to Zimbabwe;
- ❑ the respondent's husband had secured permanent employment in South Africa;
- ❑ she had informed the applicant that they would be moving to South Africa and he had no objection thereto
- ❑ access by the applicant to BD was not in the best interests of BD as the applicant consumes alcohol, collects BD with a hangover, is constantly late for the collection and the dropping off of BD, and on all occasions when the applicant has had access to BD, BD has returned home ill.

The respondent indicated that the applicant has no concern for BD and should not be given access to BD.⁶³

In terms of the respondent's letter dated 14 January 2003, she had provided the residential address in South Africa to which she had moved with her husband and BD. It must be further noted that 4 months later, the respondent, her husband and BD moved from this residential address.⁶⁴

On 23 January 2003, the urgent application was postponed *sine die*. A letter was produced from the South African High Commission indicating that in terms of the South African immigration law mothers of natural children born out of wedlock need not apply for consent from the natural father to apply for a residence permit. It was further argued that the respondent's and BD's passports were endorsed with the necessary stamp to indicate that

⁶¹ Respondent's answering affidavit par 70; applicant's replying affidavit Annexure SHK 22 (p 236).

⁶² Applicant's replying affidavit Annexure SHK 23 (p 238).

⁶³ Annexure SHK 11 attached to the applicant's founding affidavit (p 40); applicant's answering affidavit par 10.8, 33.10, 34 & 35.

⁶⁴ In terms of the family advocate's report dated 11 May 2005, the respondent alleges that she informed the applicant that she was moving to South Africa in 2002. The applicant made no effort to see or contact the minor child. There were no Christmas or birthday cards or gifts (par 5 p 19 of the family advocate's report). The applicant concedes that he had the respondent's address but after she moved from the address he had no way of contacting the respondent (par 11 p 27 of the family advocate's report). The family advocate further noted that the respondent returned 4 or 5 times to Zimbabwe but did not see the necessity of contacting the applicant par 11 (p 28) of the family advocate's report.

they had applied for permanent residency. This would indicate that the respondent and BD had immigrated to South Africa.⁶⁵

On 5 February 2003, the respondent's attorneys produced notarised copies of the respondent's and BD's passports in which it was indicated that the respondent and BD had been given temporary residence by the South African government and that they had applied for permanent residence.⁶⁶ Due to the evidence produced by the respondent's attorneys of record, it was clear that the application for access was brought in the wrong jurisdiction. The applicant's attorneys of record served and filed a notice of withdrawal of action.

On or about April 2003, the respondent, her husband and BD had moved from the address which was provided to the applicant on 14 November 2003.⁶⁷

On 29 December 2003, the applicant had a confrontation with S (the respondent's uncle) at a casino in Kariba. The applicant enquired from S whether he has had any contact with the respondent. Accordingly to the respondent, the applicant then bad-mouthed her and sent his friends to intimidate and coerce S and his wife.⁶⁸ The applicant has admitted that he met S and his wife by chance in Kariba and enquired about the respondent's whereabouts, as he wanted to determine BD's residence. However, the applicant denies the remainder of the allegations as set out by the respondent.⁶⁹

On or about 2 April 2004, the respondent and her husband married according to South African law.⁷⁰ On 20 June 2004, the respondent's husband, with the support of the respondent, applied for the adoption of BD.⁷¹ On or about 31 July 2004, the respondent telephonically informed the applicant that the respondent's husband wanted to adopt BD and informed the applicant that she requires his permission for such an adoption.⁷²

On or about 31 July 2004, the applicant's girlfriend, F, and her stepfather laid charges against the applicant for assault with grievous bodily harm and malicious damage to property.⁷³ The allegation was made that the applicant broke F's arm during an incident between herself and the applicant. It seems that this allegation was made, so as to inform the high court that the applicant has a continuous violent streak and his behaviour is not in

⁶⁵ Applicant's replying affidavit SHK 24 (p 239).

⁶⁶ Respondent's answering affidavit par 10.7; Annexure BCD 3 (p 133 & 134).

⁶⁷ Respondent's answering affidavit in consequence of applicant's amended application par 17.16 (p 351).

⁶⁸ Respondent's supplementary affidavit to the respondent's answering affidavit Annexure BCD 18 which is S's affidavit (par 6.1 & 7 (p 267 & 268)); applicant's supplementary affidavit par 24.5 (p 303-304).

⁶⁹ Applicant's supplementary affidavit par 24.5 (p 303-304).

⁷⁰ In terms of Annexure A attached to the family advocate's report dated 11 May 2005, the report of the family counselor (p 20).

⁷¹ K&A Adoption report (*supra* n 22). Notice for an order for the adoption of a child born out of wedlock; respondent's answering affidavit Annexure BCD 4 (p 136-137).

⁷² Respondent's answering affidavit par 10.11 & par 79. As per the requirement in terms of s 18(4) of the Child Care Act.

⁷³ Respondent's supplementary affidavit to the respondent's answering affidavit par 7.1.2, 7.1.3 & 7.1.5 (p 258); Annexure BCD 17 (p 262).

BD's best interests. The respondent and her husband approached private investigators in Harare, Zimbabwe to investigate the applicant.⁷⁴

The applicant admitted to the altercation between himself, F and her stepfather. However, he denies that he hit F or broke her arm.⁷⁵ The applicant stated that he attempted to break off the relationship with F and an argument ensued between him and F. When the argument broke out, the applicant was situated outside the F's premises. According to the applicant, F's stepfather approached the applicant and hit the applicant through the gate. The gate then opened and the applicant hit F's stepfather back. F then started hitting the applicant, as a result of which she broke her little finger.⁷⁶ The applicant further indicates that the parties got back together after this incident.⁷⁷

2.5 *Proceedings brought in the Randburg children's court and Witwatersrand Local Division*

On 3 August 2004, the respondent contacted the applicant again in an attempt to convince him that BD's adoption by the respondent's husband would be in BD's best interests, and to obtain the applicant's consent to her husband's adopting BD.⁷⁸ The applicant indicated telephonically to the respondent that he will give such permission on condition that the respondent will allow him access to BD.^{79 80} The respondent refused to agree to allow such access to BD.

On 5 August 2004, the applicant was served by the sheriff, Harare⁸¹ with the notice of adoption with attached affidavit attested to by the respondent.⁸² The notice informed the applicant that the respondent has given her consent to the respondent's husband's adoption of BD. The notice further allows the applicant a period of 14 days to withhold or give his consent to the respondent's husband for the adoption of BD, to provide reasons to the court why his consent should not be dispensed with, and gives the applicant the opportunity to

⁷⁴ In terms of Annexure A attached to the family advocate's report dated 11 May 2005, the report of the family counselor p 23 states that "[t]he Respondent's husband hired an investigator to investigate applicant's past as the applicant had knocked down a pedestrian and killed him, broke his ex girlfriend's arm, assaulted his ex girlfriend's father and alleged that the dockets and files of the applicant went missing from the police station".

⁷⁵ Family advocate's report dated 11 May 2005 par 8 (p 24).

⁷⁶ Applicant's supplementary affidavit par 19 (p 296-298); family advocate's report dated 11 May 2005 par 11 (p 29).

⁷⁷ Applicant's supplementary affidavit par 19.13 (p 299).

⁷⁸ In terms of s 18(4)(d) of the Child Care Act, consent is required for an adoption from both the mother and the father of a child born out of wedlock. Only a father who has acknowledged himself in writing to be the natural father and has made his whereabouts and identity known will be such a natural father in terms s 18(4)(d).

⁷⁹ Respondent's answering affidavit par 10.11.

⁸⁰ It must be noted that in terms of South African adoption law, an adoption will not be granted based on conditions. Consent must be given without any conditions attached thereto. If conditions have been attached to the consent, it is viewed as the consent has been withheld by the relevant party.

⁸¹ In term of s 19(A)(1) the manner of service has not been prescribed. In terms of regulation 6 of the Regulations made in terms of section 60 of the Child Care Act 74 of 1983 ("Child Care Act Regulations"), if the manner of service has not been prescribed, the notice or the summons can be served by any means.

⁸² Respondent's answering affidavit par 10.11 & Annexure BCD 4 (p 135).

apply for the adoption of BD.⁸³ The adoption application was brought through the jurisdiction of the children's court in Randburg, as BD was living in the Randburg jurisdiction.⁸⁴

The applicant through his South African attorneys of record filed and served a notice of intention to defend. His attorneys of record further informed the respondent's attorneys of record that the adoption will not be defended or consent withheld, if access arrangements can be agreed to. The respondent responded by stating that she will not grant the applicant access to BD and all applications brought in terms of the Natural Fathers of Children Born out of Wedlock Act will be vigorously defended.

On 6 December 2004, the applicant's attorneys of record were served with a notice for the applicant to appear in the Randburg Children's Court on 25 January 2005.⁸⁵ The notice requests the applicant to provide reasons why his consent should not be dispensed with.⁸⁶

Due to the short notice provided by the clerk of the children's court, Randburg, the applicant was unable to obtain a visa to enter into South Africa. On 20 December 2004, the applicant's attorneys of record through correspondence, requested a postponement.⁸⁷

On 25 January 2005, the applicant requested the children's court, Randburg, to postpone the matter so that the applicant is given the opportunity to appear in court as he was unable to obtain a visa to enter South Africa, as well as the opportunity to launch an access application in terms of the Natural Fathers of Children Born out of Wedlock Act. The postponement was vigorously defended by the respondent, stating that this claim was a "spurious claim and a stratagem to delay the due determination of the adoption proceedings".⁸⁸ The commissioner postponed the matter to 1 March 2005 to give the applicant such an opportunity.

On 2 February 2005, the applicant served on the respondent's attorneys of record an urgent access application in terms of the Natural Fathers of Children Born out of Wedlock Act brought in the Witwatersrand Local Division.⁸⁹ On the same date, the respondent's attorneys of record served a notice of opposition.

⁸³ S 19A(1) of the Child Care Act. Such notice was required to be brought by the respondent's husband, as in terms of section 19(A)(2) the applicant had acknowledged himself in writing as being the natural father of BD and had registered himself as being the father of BD on BD's birth certificate (s 19(A)(2) of the Child Care Act).

⁸⁴ As per s 18(1)(a) of the Child Care Act.

⁸⁵ The notice was received by registered post. In terms of regulation 6 of the Child Care Act Regulations, a notice in terms of s 19(A) of the Child Care Act must be sent via registered post.

⁸⁶ Respondent's answering affidavit par 10.16; annexure BCD 5 (p 138-139); K&A Adoption report (*supra* n 22).

⁸⁷ Applicant's replying affidavit Annexure SHK 17 (p 214 - 215).

⁸⁸ Respondent's affidavit attached to the notice of counterclaim.

⁸⁹ In terms of Annexure A attached to the family advocate's report dated 11 May 2005, the report of the family counselor p 21 states that "the Applicant wants a relationship with the minor child and wants him to know who his father is and to see him growing up and play a role in the life of the minor child".

On 3 February 2005, the applicant further served the access application, as well as an Annexure B,⁹⁰ on the family advocate and requested the family advocate through a letter to conduct urgent interviews with the applicant, the respondent, the respondent's husband and BD, as the matter was brought on an urgent basis.

On 4 February 2005, the respondent served on the applicant a notice to provide security in terms of section 47 of the Uniform Rules of Court.⁹¹ The request for security was based on the fact that the applicant was a Zimbabwean citizen and resided in Zimbabwe. The applicant is viewed as a *peregrinus*, as he does not permanently reside in South Africa, nor does he own land in South Africa.⁹² The security requested was in an amount of R 75,000.00. On 10 February 2006, the applicant's attorneys of record served a notice of intention to oppose the *quantum* requested.⁹³

On 11 February 2005,⁹⁴ the respondent served her answering affidavit. On 14 February 2005, a round table meeting commenced between the applicant, the applicant's attorneys of record and the respondent's attorneys of record. The respondent was not present. The respondent's attorneys of record made it clear that the respondent did not believe that access to BD by the applicant is in BD best interests and the respondent had instructed that they will not agree to allow the applicant to have access to BD.⁹⁵ No settlement was reached.⁹⁶ On 15 February 2005, the respondent's attorneys of record requested that the applicant submit himself to full psychological testing by psychologist R.⁹⁷ On 16 February 2005, the family advocate requested that, due to the allegations regarding alcohol abuse by

⁹⁰ In terms of s 3(1) of the Natural Fathers of Children Born out of Wedlock Act "the Family Advocate shall, after an application has been lodged for –

(a) an order granting access rights to or custody or guardianship of a child born out of wedlock under section 2; or

(b) variation, rescission or suspension of such order,

If so requested by any party to such proceedings or the court concerned, institute an enquiry to enable him/her to furnish the court at the hearing of such application with a report and recommendations on any matter concerning the welfare of the child concerned regarding any matter as is referred to him or her by the court".

In the Natural Fathers of Children Born out of Wedlock Act, the family advocate is defined in s 1 as the family advocate appointed under s 2(1) of the Mediation in Certain Divorce Matters Act 24 of 1987 ("Mediation in Certain Divorce Matters Act").

A request as per s 3(1) of the Natural Fathers of Children Born out of Wedlock Act is submitted in terms of the Regulations in terms of section 5 of the Mediation in Certain Divorce Matters Act.

⁹¹ Uniform Rules of Court under the Supreme Court Act 59 of 1959.

⁹² Harms Civil Procedure in the Supreme Court par D7.

⁹³ It is clear from the facts of the matter that the applicant is a *peregrinus* of South African (as he is a Zimbabwean citizen) and liable to provide security as requested in terms of rule 47(1) of the Uniform Rules of Court. However, in terms of s 47(3) of the Uniform Rules of Court, if the party on which the notice of security had been served is liable to pay security but believes that the amount requested is excessive, that party can demand from the party requesting the amount to draw up and tax the drawn bill of costs.

⁹⁴ Filing sheet attached to respondent's answering affidavit (p 44-45).

⁹⁵ In terms of Annexure A attached to the family advocate's report dated 11 May 2005, the report of the family counselor (p 19) states that "the respondent is totally against the minor child having a relationship with the applicant and will do everything in her power to protect the minor child from the applicant".

⁹⁶ Respondent's supplementary affidavit to the respondent's answering affidavit par 10.1 (p 259).

⁹⁷ Applicant's supplementary affidavit to the respondent's answering affidavit SHK 19 (p 269).

the applicant, that the applicant submit himself for CDT alcohol testing. The results of the CDT alcohol testing were in the normal range.⁹⁸

On 16 February 2005, the applicant's attorneys of record informed the respondent's attorneys of record that the applicant no longer disputed the *quantum* as set out in the Rule 47 application and an amount of R75 000.00 had been placed in a section 76(2A) trust account. The respondent's attorneys of record accepted the *quantum*, as well as the way the security was set up.⁹⁹

On 17 February 2005, the applicant, his father, the respondent's husband, the respondent and BD attended personal interviews with the family advocate and family counsellor at the Office of the Family Advocate, Johannesburg.¹⁰⁰

On 18 February 2005, the applicant's attorneys of record informed the respondent's attorneys of record that the applicant would not be seeing the respondent's selected psychologist and have elected to see a psychologist selected by the applicant's attorneys of record.¹⁰¹

On 21 February 2005, the applicant served on the respondent his replying affidavit.¹⁰² The following documentation was further served on the applicant: the respondent's counter-application¹⁰³ and the respondent's supplementary affidavit to the respondent's answering affidavit.¹⁰⁴

On 22 February 2005, an urgent access application was heard in the Witwatersrand Local Division. The court held that the matter was not urgent and struck the matter from the roll for non-urgency. The applicant was ordered to pay for the costs of urgency.¹⁰⁵

On 1 March 2006, the 2nd hearing of the adoption of BD continued in the Randburg Children's Court. The applicant's attorneys of record argued for a 2nd postponement based on the fact that the applicant matter was struck from the urgent roll in the Witwatersrand Local Division and that the applicant will be launching the access application in the normal course. It was further argued that the applicant will be amending his papers to apply not only for access to BD but also for guardianship¹⁰⁶ of BD.¹⁰⁷ The commissioner held that the matter

⁹⁸ Applicant's replying affidavit par 3.59.3 (p 197); family advocate's report dated 11 May 2005 par 11 (p 34); Annexure B to the family advocate's report.

⁹⁹ Applicant's replying affidavit Annexure SHK 18 (p 216).

¹⁰⁰ Family advocate's report dated 11 May 2005 Annexure A p 2. Applicant's replying affidavit par 3.11 (p 168); respondent's supplementary affidavit to the respondent's answering affidavit Annexure BCD 20 (p 272).

¹⁰¹ Applicant's supplementary affidavit Annexure X9 (p 327).

¹⁰² Applicant's replying affidavit (p 154).

¹⁰³ Respondent's counterapplication (p 243–254).

¹⁰⁴ Respondent's supplementary affidavit to the respondent's answering affidavit (p 255–260).

¹⁰⁵ Outside cover of the court file.

¹⁰⁶ As set out by s 1(2) of the Guardianship Act 192 of 1993.

¹⁰⁷ Applicant amended founding affidavit to access application; respondent's answering affidavit par 8.8; applicant's supplementary affidavit par 9.8 (p 286); respondent's answering affidavit in consequence of

is to be postponed to 12 May 2005, so that the applicant be given the opportunity to apply for guardianship of BD through the Witwatersrand Local Division. The Randburg Children's Court held the reason for granting such a postponement is that the high court is the upper guardian of the minor child and the high court must first decide the issue of guardianship before the adoption can continue in the Randburg Children's Court.¹⁰⁸

On 15 April 2005, the applicant's attorneys of record served a notice of intention to apply for leave to amend in terms of rule 28.¹⁰⁹ The amendment sets out changes to the notice of motion whereby the applicant applies to the high court to grant the applicant and the respondent joint guardianship¹¹⁰ of BD. The amendment further sets out how the applicant would exercise his access to BD. It is clear from the papers that the applicant requested that access to BD be implemented gradually, as BD had not seen the applicant in a 3-and-a-half-year period.¹¹¹ The respondent did not object to the rule 28(1) amendment¹¹² and it came into effect on 26 April 2005, when the amended pages were effected on the respondent.¹¹³

The parties exchanged further pleadings¹¹⁴ in which the respondent maintains that the applicant does not have the child's best interests at heart and that the applicant is not suitable guardian for the child. The applicant asserts that the respondent's husband is a New Zealand citizen and gave up his Zimbabwean citizenship in 1999.¹¹⁵ The applicant had fears of the respondent's husband, the respondent and BD immigrating to New Zealand in the near future. If the applicant was successful in his access application it would be an empty victory as the respondent could remove BD from South Africa. If successful, the access application would secure the applicant access to BD and a guardianship order would ensure that the respondent does not remove BD from South Africa without the applicant's permission. Furthermore, the applicant had continued to pay BD's maintenance directly into a trust account in Zimbabwe, which amounted to a substantial amount, if living in Zimbabwe. In support of his guardianship application, the applicant requested the Court to grant him guardianship so that he could handle BD's affairs in Zimbabwe.

applicant's amended application par 6 (p 343); the applicant's postponement application and affidavit in the adoption proceedings.

¹⁰⁸ K&A Adoption report (*supra* n 22).

¹⁰⁹ Rule 28(1) of the Uniform Rules of Court states that "any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment".

¹¹⁰ S 2(1) of the Natural Fathers of Children Born out of Wedlock Act allows the natural father of a child born out of wedlock the right to apply for access, custody and guardianship of the child born out of wedlock.

¹¹¹ Notice of intention to apply for leave to amend in terms of rule 28 (p 17-22 of the index to notices); applicant's supplementary Annexure X1 (p 308-313); respondent's answering affidavit in consequence of applicant's amended application par 10 (p 344).

¹¹² In terms of rule 28(2) of the Uniform Rules of Court, any party who wishes to object to the amendment must do so within 10 days from the date that the amendment was delivered. If no objection is received within the 10-day period, the amendment will be effected.

¹¹³ As set out in rule 28(7) of the Uniform Rules of Court.

¹¹⁴ On 19 April 2005, the applicant served on the respondent the respondent's supplementary affidavit. (p 278-279).

¹¹⁵ Respondent's answering affidavit in consequence of applicant's amended application par 17.12 (p 350).

The respondent denied the allegations made by the applicant that she and her husband will be leaving South Africa to immigrate to New Zealand, stating their home is South Africa. She further indicated that all of their personal and business interests are in South Africa and they have no intention of immigrating to New Zealand.¹¹⁶ The respondent further argued that the amount of monies situated in a trust account in Zimbabwe do not amount to much in South African terms, and this does not warrant the court granting the applicant guardianship of BD.

On 11 May 2005, the family advocate served and filed their report. The family advocate's report was in favour of the applicant obtaining access¹¹⁷ and joint guardianship¹¹⁸ of BD. The family advocate further recommended that the adoption process be deferred.¹¹⁹ The family advocate stated that the applicant seeks to be appointed as joint guardian of BD and without such application the respondent remains sole guardian and custodian of BD.¹²⁰ The family advocate further went on to state that the applicant would have a right to "participate on an equal basis with the respondent on issues incidental to guardianship only".¹²¹

The family advocate further went on to state:

"From the investigation into this matter it was clear that the applicant loves the minor child and has the minor child's interest at heart. His interests have been sustained throughout the investigation".¹²²

On the issues pertaining to the altercations between the applicant, the respondent and the respondent's husband, the family advocate went on to state:

"Misguided on some issues the applicant might be, this is no disqualification. The applicant will in future be a significant and meaningful presence in the minor child's life if access is allowed as recommended".¹²³

The family advocate went on to say regarding joint guardianship:

"I could see no justification to deprive the minor child of the benefit of assistance in litigation and the administration of his property by the applicant, be it then only property acquired from the applicant and his family. Had the parties been married, the minor child would have been entitled to such assistance. I have no doubt that the respondent's husband has a very good relationship with the minor child and also has assisted the respondent immensely in the past, but this should not be to the exclusion of the applicant".¹²⁴

¹¹⁶ Family advocate's report dated 11 May 2005 par 8 (p 23).

¹¹⁷ Family advocate's report dated 11 May 2005 par 10.3 (p 15). The family advocate stipulated that reasonable access is to be phased in, as set out in the applicant's amended notice of motion.

¹¹⁸ Family advocate's report dated 11 May 2005 par 10.2 (p 15).

¹¹⁹ Family advocates report dated 11 May 2005 par 10.1 (p 15).

¹²⁰ Family advocate's report dated 11 May 2005 par 9 (p 13).

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

The family counsellor further indicated in the family advocate's report that the respondent wilfully and intentionally kept BD away from the applicant and by the respondent's own admission she did not want BD to have a relationship with the applicant and she would do "everything she could as a mother to protect the minor child"¹²⁵ from the applicant. However, the respondent informed the family advocate and the family counsellor that, if from the age 10 years BD wanted to know his biological father, they would not stop him.¹²⁶ However, the family advocate and family counsellor are adamant that the respondent would not inform BD of the applicant's existence and that the applicant would become a faded memory.¹²⁷ The family counsellor recommended that access should be granted on the condition that it is monitored and supervised. Access should occur every 6 weeks or less depending on the applicant being able to enter into South Africa.¹²⁸ The family counsellor further recommended that the applicant be appointed as joint guardian of BD.¹²⁹

On 12 May 2006, Randburg Children's Court postponed the adoption of BD to 2 August 2006. The applicant's attorneys of record argued that the issue of guardianship and access must be decided by the high court first before the adoption application can be heard in the Children's Court, Randburg. The respondent's attorneys of record argued that the cases of *T v C*¹³⁰ and *Haskins v Wildgoose*¹³¹ clearly indicate that an adoption does not bar an access application in the high court. It was argued that the guardianship application was a ludicrous application and that the applicant will do everything in his power to ensure that the adoption application does not continue and this was clear indication that the applicant does not have BD best interests at heart. The commissioner indicated that the Children's Court has no jurisdiction regarding guardianship and postponed the matter to 2 August 2005, so that the applicant is given the opportunity to change his pleadings to reflect the application for joint guardianship.

On 2 June 2005, the access and guardianship application was set down on the opposed motion roll for hearing. The applicant argued that the entire matter must be referred to oral evidence, as throughout the pleadings there were many disputes of facts. The respondent conceded that the access application be referred to oral evidence, although she argued that the guardianship application can be dealt with on the papers as there was no dispute of fact. After hearing argument regarding whether the guardianship application should be referred to oral evidence, the court held that the access application, due to a clear dispute of fact, should be referred to oral evidence. However, the guardianship application is to be heard by the court on the given day. Issues relating to the best interest of the child were

¹²⁵ Family advocate's report dated 11 May 2005 par 11 (p 34).

¹²⁶ Family advocate's report dated 11 May 2005 par 11 (p 34).

¹²⁷ *Ibid.*

¹²⁸ Family advocates report dated 11 May 2005 par 12.1 (p 36).

¹²⁹ Family advocate's report dated 11 May 2005 par 12.2 (p 36).

¹³⁰ 2003 (2) SA 298 (W).

¹³¹ [1996] 3 All SA 446 (T).

argued in the context of pertaining to the narrow definition of guardianship, issues surrounding the maintenance monies in the trust account in Zimbabwe, what land is owed in Zimbabwe by the applicant, to what extent BD will benefit from the applicant being a joint guardian of BD, whether the applicant has been part of BD's life, how long BD and the applicant have been apart, whether the applicant has shown any interest in BD's life prior to the launching of the access and guardianship application. The issue of unfair discrimination based on the equality clause was attempted to be argued on behalf of the applicant, but the court rejected issues pertaining to constitutionality. After hearing argument and considering the family advocate's recommendations, the court held that the family advocate's recommendations are merely recommendations and need not be considered by the court. The court further held that the applicant was denied the right to be joint guardian of BD. However, pending the trial of the access application, the respondent and her husband may not remove BD from South Africa.

On 2 August 2005, the adoption application of BD by the respondent's husband continued in the Children's Court, Randburg. The applicant informed the commissioner that he was not granted joint guardianship of BD, but nevertheless attempted to postpone the matter based on the Children's Bill.¹³² It was argued that in terms of section 21 of the new Children's Bill, the applicant would obtain automatic rights of access to BD. If the adoption is granted in favour of the respondent's husband, all rights and obligations between the applicant and BD would be severed. This would mean that the applicant's rights in terms of section 21 of the Children's Bill would no longer be in effect. The applicant would merely be considered as an "interested person" and would have to launch an application for access in terms of section 24 of the Children's Bill. This would mean that the applicant would be in the same position as he finds himself currently. It was argued by the respondent's attorneys of record that the case law indicates that adoption is no bar to an access application and the high court will still remain the upper guardian on minor children. The commissioner dismissed the applicant's request for postponement stating that she is not bound to legislation which may or may not come into being, she is bound by the current law as it stands. The hearing of the adoption of BD commenced. After examination and cross-examination of the social worker that drafted the report, as set out by section 18(1)(b) of the Child Care Act and rule 21 of the Child Care Act Regulations, and the respondent's husband, the adoption hearing of BD was postponed to 20 September 2005.

On 20 September 2005, the respondent was unable to attend the second hearing for the adoption of BD, as she was due to give birth to her third child. The adoption proceedings continued with the cross examination of the applicant and his father. The applicant in cross examination indicated that he had BD's interests at heart and that he wanted BD to know him

¹³² Children's Bill 70D of 2003 found on <http://web.uct.ac.za/depts/ci/plr/pdf/bills/B70D-03.pdf> visited on 21 June 2006.

as his father. He wanted to bond and have a relationship with BD. The applicant further testified that he understands that the respondent's husband has been BD's father since BD was 3 years old and has looked after BD and the respondent. However, he believed that he could be a part of the BD's life. The matter was further postponed to 21 and 23 February 2006, to give the respondent the opportunity to give evidence.

The applicant's attorneys of record applied for a trial date. The trial date was set for 2 August 2006. The respondent's attorneys of record launched an application in terms of rule 47(6) of the Uniform Rules of Court, in terms of which they requested more security in an amount of R100 000.00 in addition to the security already held in trust. This request was made on notice and set down for taxation. The applicant's attorneys of record attended the taxation of the bill of costs and the taxing master ordered that an amount of R100 000.00 in total (including the monies held in trust) is to be paid by the applicant and held in the same manner as previously agreed by the parties.

On 21 February 2006, the legal representatives of the applicant, the respondent and respondent's husband commenced with the examination and cross examination of the respondent. The respondent clearly indicated in her testimony that she will do everything in her power to ensure that BD's world remains as it is, to the exclusion of the applicant. This includes vigorously defending any applications brought by the applicant in any forum. The respondent further indicated that she will inform BD of the applicant's existence but informed the court that this date will not be a date in the future. The respondent indicated that if BD determines through a third party that the applicant is BD's father she will inform him of the applicant's contact details.

It is clear from the respondent's and her husband's testimony that BD is unaware that the applicant is his father and regards the respondent husband as his father.

On 21 February 2006, the applicant's attorneys of record requested the children's court to call the family advocate as a witness of the court and to consider family advocate's report. The applicant's attorneys of record based their request on rule 21(7) of the Child Care Act Regulations which provides that the children's court may consider "the report of any other person who can form an authoritative opinion on any matter relevant to the application". The children's court denied the applicant's request and held that if any party to the proceedings wishes to call the family advocate they may do as their own witness.

On 23 February 2006, the applicant's attorneys of record called the family advocate.

On or about March 2006, the Children's Court, Randburg held that the respondent's husband was successful in the adoption of BD. All rights and obligations which the applicant had with regard to the BD terminated.

In or about July 2006, the applicant formally withdrew his access action against the respondent, as he was unable to pay the costs of the security ordered by the taxing master. The parties agreed that each party was to pay for their own costs.

3. THE LEGAL POSITION OF UNMARRIED FATHERS: THE COMMON LAW

3.1 Introduction

South African common law distinguishes between children born in wedlock¹³³ and children born out of wedlock.¹³⁴ A child born of a valid marriage is a child born to a man and woman who were validly married¹³⁵ at the time of the birth of their child or subsequently got married to each other after the birth of their child.^{136 137} A child born out of wedlock is a child born to a man and woman who were not validly married at the time of the birth of their child or who did not get married to each other thereafter.¹³⁸ The legal consequences attached to differentiating between such children and fathers of such children are notable.

3.2 Standing of a father of child born out of wedlock at common law

The mother of an illegitimate child has full custody¹³⁹ and guardianship¹⁴⁰ (parental authority¹⁴¹) over her illegitimate child.¹⁴² Harms J in *F v L*¹⁴³ simply affirms that “a mother ... acquires her parental authority by reason of birth”. In law, a child can never be considered illegitimate in relation to its mother.¹⁴⁴ This legal position is based on the maxim “een moeder maakt geen bastaard”.¹⁴⁵

On the other hand, the law regards the father of a child born out of wedlock as a stranger to his child.¹⁴⁶ The father of an illegitimate child does not have the inherent right of guardianship or custody over his minor child, even if the mother of the illegitimate child dies.¹⁴⁷ Margo J

¹³³ Also known in South African Law as a legitimate child.

¹³⁴ Also known in South African Law as an illegitimate child.

¹³⁵ A valid marriage between a man and a woman.

¹³⁶ In terms of s 11 of the Births and Deaths Registration Act 51 of 1992, any parent or guardian of a child born out of wedlock whose parents have married each other may apply, after the registration of the child's birth, to the director-general to amend the registration of the child's birth as if his or her parents were married to each other at the time of the child's birth. After the child has become of age, such child may apply himself or herself.

¹³⁷ S 4 of the Children's Status Act 82 of 1987.

¹³⁸ Cronje & Heaton *Law of Persons* 45.

¹³⁹ Clark *Family Law Service* E40.

¹⁴⁰ Clark *Family Law Service* E32.

¹⁴¹ Parental authority “refers to the rights, powers, duties and responsibilities that parents have towards their children and those children's property” Cronje & Heaton *South African Family Law* 265.

¹⁴² If the mother of the illegitimate child is a minor herself, her guardian becomes the guardian of the illegitimate child until the mother of the illegitimate child reaches the age of majority or is emancipated in terms of a court order. The mother of the illegitimate child will still have custody over the child. Van Heerden *et al Boberg's Law of Persons and Family* 394; 405; Boberg *Persons and Family* 333. The high court of South Africa is the upper guardian of minor children and if an application is brought by an interested party regarding the guardianship and custody of the illegitimate child, the court will consider the application and will make an order which is in the best interests of the child.

¹⁴³ 1987 (4) SA 525 (W).

¹⁴⁴ Van Heerden *et al Boberg's Law of Persons and Family* 390.

¹⁴⁵ In *F v L* 1987 (4) SA 525 (W) 527 H–I, Harms J states that a mother “can not make a bastard”.

¹⁴⁶ Clark *Family Law Service* par E24.

¹⁴⁷ Sinclair assisted by Heaton *Marriage Vol 1* 288.

held in *Ex Parte Van Dam*¹⁴⁸ that even though it was held as *obiter* in *Rowan v Faifer*¹⁴⁹ that “the father of an illegitimate child has no right to custody, he has *locus standi* to appear on the question of custody”.¹⁵⁰ Margo J went on to state that “the same reasoning would apply to guardianship”. Only if it is in the interests of the minor illegitimate child, may the courts grant custody and/or guardianship to the natural father”.¹⁵¹ However, the court must firstly determine whether granting such custody and/or guardianship would be in the best interests of the child.¹⁵²

An illegitimate child automatically acquires the surname of the mother.¹⁵³ However, a child which is born out of wedlock can acquire the surname of the father, if the father has acknowledged in writing that he is the father of the child (ie the father acknowledges paternity of the child) and both mother and father jointly apply for the child to be registered under the surname of the father.¹⁵⁴

A father of a child born out of wedlock does not have an inherent right of access to his minor child,¹⁵⁵ and if access is denied by the mother of the minor child, the father's only right of recourse is to apply to the high court for access to the minor child. Only if the court believes and has determined that such access is in the best interests of the child, will the natural father of a child born out of wedlock be granted such access.¹⁵⁶

In terms of common law, a child born out of wedlock automatically acquired its mother's domicile. However, legislation has intervened and in terms of the Domicile Act 3 of 1992, a child acquires the domicile of the place to which he or she is most closely connected. The Domicile Act does not distinguish between a child born in or out of wedlock.

The father of a child born out of wedlock has a duty to support his or her child¹⁵⁷ and such child has the right to be supported by his natural father.¹⁵⁸ In other words, both the mother and father of the child have a duty to support their child¹⁵⁹ according to their means and

¹⁴⁸ 1973 (2) SA 182 (W).

¹⁴⁹ *Rowan v Faifer* 1953 (2) SA 705 (E).

¹⁵⁰ Margo J in *Rowan v Faifer* 1953 (2) SA 705 (E) rejected the decision in *Docrat v Bhayat* 1932 TPD 125 whereby the court held the father of an illegitimate child has no legal claim to the child and has no *locus standi* regarding the custody of the child.

¹⁵¹ *Rowan v Faifer* 1953 (2) SA 705 (E) 184 -185.

¹⁵² *Rowan v Faifer* 1953 (2) SA 705 (E).

¹⁵³ Sinclair assisted by Heaton *Marriage Vol 1* 288. Cronje & Heaton *Law of Persons* 59; Van Heerden *et al Boberg's Law of Persons and Family* 394; Births and Deaths Registration Act s 10(1)(a).

¹⁵⁴ The father of the child enters his particulars in the child's notice of birth (Births and Deaths Registration Act s 10(1)(b)); Cronje & Heaton *Law of Persons* 63-64; Van Heerden *et al Boberg's Law of Persons and Family* 396; Sinclair assisted by Heaton *Marriage Vol 1* 288.

¹⁵⁵ In *Van Erk v Holmer* 1992 (2) SA 636 (W) it was held that a father has an inherent right of access to his child born out of wedlock. However, in subsequent cases and most importantly in the case of *B v S* 1995 (3) SA 571 (A) it was decided that a natural father of a child born out of wedlock has no inherent right of access. These cases are discussed in detail below.

¹⁵⁶ *B v S* 1995 (3) SA 571 (A); *F v L* 1987 (4) SA 525 (W); *Rowan v Faifer* 1953 (2) SA 705 (E).

¹⁵⁷ *Lamb v Sack* 1974 (2) SA 670 (T) 673.

¹⁵⁸ *F v L* 1987 (4) SA 525 (W) 527 A-B.

¹⁵⁹ Cronje & Heaton *South African Family Law* 291.

according to the child's needs.¹⁶⁰ This duty of support extends to the estates of both parents. No distinction is made between a child born in or out of wedlock.

In the case of *Petersen v Maintenance Officer*,¹⁶¹ the natural father's duty of support was extended to paternal grandparents, only if the natural father of a child born out of wedlock does not have the means to support the child. Fourie J in *Petersen v Maintenance Officer*¹⁶² held that the common law, applied in the case of *Motan v Joosub*,¹⁶³ whereby the paternal grandfather of an extra marital child has no duty of support¹⁶⁴ is unconstitutional, based on the violation of the constitutional rights of equality¹⁶⁵ and dignity.¹⁶⁶

It is clear from the above that the parental duty of support is not linked to parental authority over the child. In the case of *F v L*, Harms J held that the "right of access is not a *quid pro quo* for payment of maintenance".¹⁶⁷

3.3 Natural fathers of children born out of wedlock and the issue of access at common law

A father of a child born out of wedlock does not have an inherent right of access to his minor child and if access is denied by the mother of the minor child, the father's only right of recourse is to apply to the high court for access to the minor child. It has been conceded that the father of a child born out of wedlock has the *locus standi* to apply to the high court for such access.¹⁶⁸ Only if the court believes that it is in the best interests of the child,¹⁶⁹ will it allow the natural father of a child born out of wedlock such access.

It must be noted that from the decision of *Fletcher v Fletcher*¹⁷⁰ the best interests of the minor child is the paramount consideration in deciding any dispute between the parents with regard to custody and access. The best interests test allows the court to focus on the rights of the child rather than the rights of the parents.¹⁷¹

¹⁶⁰ Boberg *Persons and Family* 338; *Lamb v Sack* 1974 (2) SA 670 (T) 673.

¹⁶¹ 2004 (1) All SA 117 (C); 2004 (2) BCLR 205 (C). Also reported as *Petersen v Maintenance Officer*, *Simon's Town Maintenance Court* 2004 (2) SA 56 (C).

¹⁶² *Ibid.*

¹⁶³ *Motan v Joosub* 1930 AD 61.

¹⁶⁴ *Ibid.*

¹⁶⁵ Constitution of the Republic of South Africa, 1996 s 9.

¹⁶⁶ Constitution s 10.

¹⁶⁷ *F v L* 1987 (4) SA 525 (W) 527B.

¹⁶⁸ Van Heerden *et al Boberg's Law of Persons and Family* 406; Sinclair assisted by Heaton *Marriage Vol 1* 114; *Douglas v Mayers* 1987 (1) SA 910 (Z); *F v L* 1987 (4) SA 525 (W).

¹⁶⁹ Since the decision in *Fletcher v Fletcher* 1948 (1) 130 (A) the best interest of the minor child has been the paramount consideration in deciding any dispute between the parents with regard to custody and access. In terms of s 28(2) of the Constitution of the Republic of South Africa 1996 (the "Constitution") the best interests of the child are of paramount importance in every matter concerning the child. In terms of the United Nations Convention on the Rights of the Child the best interests of the child is one of paramount considerations, whilst in the African Charter on the Rights and Welfare of the Child the best interest of the child is the paramount consideration.

¹⁷⁰ *B v S* 1995 (3) SA 571 (A); *F v L* 1987 (4) SA 525 (W); *Rowan v Faifer* 1953 (2) SA 705 (E).

¹⁷¹ De Waal *The Bill of Rights Handbook* 416.

The common-law position regarding a natural father's access has been confirmed on appeal in the case of *B v S*.¹⁷² There was considerable dissension regarding the father's access to his child born out of wedlock. In the decision of *Van Erk v Holmer*,¹⁷³ Van Zyl J held that a father of a child born out of wedlock has an inherent right of access to the child. Whilst in other decisions subsequent to¹⁷⁴ and preceding¹⁷⁵ the decision of *Van Erk v Holmer*,¹⁷⁶ case law leaned towards the conclusion that a father of such a child born out of wedlock does not have an inherent right of access.

In the case of *Van Erk v Holmer*,¹⁷⁷ Van Zyl J held that the father of a child born out of wedlock has an inherent right of access to his minor child. He came to this decision by analysing Roman and Roman-Dutch authorities and determined that such authorities were silent on the issue of rights of access by a father of a child born out of wedlock. He went on to determine that "it may safely be assumed that no such right was ever considered"¹⁷⁸ by such authorities. Van Zyl J went on to justify his decision by focusing on public policy. He determined that public policy dictated that there should be no distinction between fathers of children born in or out of wedlock¹⁷⁹ and that many fathers of children born out of wedlock want to be part of their children's lives and form a bond with their children but due to the South African legal position many fathers are denied this right.¹⁸⁰ The learned judge held that such father should have an inherent right of access and that these automatic rights should only be denied if there is a clear indication that it is not in the child's best interests.¹⁸¹ Van Zyl J based his decision on what he believed would be just and reasonable, that it would conform to public policy and that all fathers would be placed on an equal footing before the law.¹⁸²

Van Zyl's J decision was heavily criticised and was not followed by subsequent case law, as will be seen below.

In *S v S*,¹⁸³ Flemming DJP held that he was not bound to the decision made in *Van Erk v Holmer*, as Van Zyl J did not follow the *stare decisis* rule.

Flemming DJP in *S v S*¹⁸⁴ was referring to the full-bench decision in *B v P*,¹⁸⁵ where it was held that the father of a child born out of wedlock does not have an inherent right of access,

¹⁷² *B v S* 1995 (3) SA 571 (A).

¹⁷³ *Van Erk v Holmer* 1992 (2) SA 636 (W).

¹⁷⁴ *S v S* 1993 (2) SA 200 (W); *F v L* 1987 (4) SA 525 (W).

¹⁷⁵ *B v P* 1991 (4) SA 113 (T).

¹⁷⁶ *Van Erk v Holmer* 1992 (2) SA 636 (W).

¹⁷⁷ *Ibid.*

¹⁷⁸ *Van Erk v Holmer* 1992 (2) SA 636 (W) 637 J.

¹⁷⁹ *Van Erk v Holmer* 1992 (2) SA 636 (W) 649 E.

¹⁸⁰ *Van Erk v Holmer* 1992 (2) SA 636 (W) 649 H-I.

¹⁸¹ *Ibid.*

¹⁸² *Van Erk v Holmer* 1992 (2) SA 636 (W) 649 J.

¹⁸³ 1993 (2) SA 200 (W).

¹⁸⁴ *Ibid.*

¹⁸⁵ 1991 (4) SA 113 (T).

that the father of the child born out of wedlock must prove on a balance of probabilities that such access would be in the best interests of the child, and such relief does not unduly interfere with the mother's parental rights.¹⁸⁶ Kirk-Cohen J in *B v P*¹⁸⁷ emphasised that the best interests of the child is of paramount importance and is the most important consideration¹⁸⁸ when determining whether a father of child born out of wedlock should have access to his child. Kirk-Cohen J followed the case of *F v L*¹⁸⁹ where it was held that parental power is vested in the mother of a child born out of wedlock and that the father of such child has no inherent right of access. Kirk-Cohen J further held that the case of *Matthews v Haswari*¹⁹⁰ is not authority for the view that a father has automatic rights of access.¹⁹¹ The court in *B v P* followed the decision in *Douglas v Mayers*,¹⁹² where the court held that it will not unduly interfere with the mother's parental authority.¹⁹³

Flemming DJP in *S v S*¹⁹⁴ held that he could not deviate from the decision in *B v P*¹⁹⁵ and held that the decision delivered by Van Zyl J in *Van Erk v Holmer* was incorrect.¹⁹⁶ He further considered Van Zyl J's interpretation of the Roman and Roman-Dutch Law authorities and held that his interpretation thereof was incorrect. Van Zyl J clearly stated that, if there is no authorities that deal with access by a father to his illegitimate child, there was a strong indication that such right did not exist.¹⁹⁷

The matter regarding the access of a father to his child born out of wedlock was finally settled by the Appellate Division (now known as the Supreme Court of Appeal) in *B v S*.¹⁹⁸ *B v S* was an appeal from the decision of Spoelstra J in the court *a quo* of *B v S* 1993 (2) SA 211 (W). Howie J in *B v S*¹⁹⁹ held that the common law in South Africa must be followed unless the common law has been altered by "judicial exposition".²⁰⁰ Howie J then went on to analyse the common law through case law.²⁰¹ He held that the father of a child born out of wedlock does not have an inherent right of access, and that the best interests of the child are the main criteria to consider before allowing access.

¹⁸⁶ *B v P* 1991 (4) SA 113 (T) 117 F.

¹⁸⁷ *B v P* 1991 (4) SA 113 (T).

¹⁸⁸ *B v P* 1991 (4) SA 113 (T) 177 C.

¹⁸⁹ *F v L* 1987 (4) SA 525 (W).

¹⁹⁰ 1937 WLD 110.

¹⁹¹ *B v P* 1991 (4) SA 113 (T) 114 J.

¹⁹² *Douglas v Mayers* 1987 (1) SA 910 (Z); *F v L* 1987 (4) SA 525 (W).

¹⁹³ *B v P* 1991 (4) SA 113 (T) 115 B – C.

¹⁹⁴ *S v S* 1993 (2) SA 200 (W).

¹⁹⁵ *B v P* 1991 (4) SA 113 (T).

¹⁹⁶ *S v S* 1993 (2) SA 200 (W) 205 B.

¹⁹⁷ *S v S* 1993 (2) SA 200 (W) 205 E.

¹⁹⁸ *B v S* 1995 (3) SA 571 (A).

¹⁹⁹ *Ibid.*

²⁰⁰ *B v S* 1995 (3) SA 571 (A) 576 A.

²⁰¹ Howie J at 576-577 considered the following decisions: *Wilson v Eli* 1914 WR 34; *Matthews v Haswari* 1937 WLD 110; *Docrat v Bhayat* 1932 TPD 125; *Douglas v Mayers* 1987 (1) SA 910 (Z); *F v L* 1987 (4) SA 525 (W); *F v L* 1987 (4) SA 525 (W); and *B v P* 1991 (4) SA 113 (T).

Howie J then progressed to the decision of Van Zyl in the case of *Van Erk v Holmer*.²⁰² Howie J clearly points out that the learned judge in *Van Erk v Holmer* was requested by the parties to provide a judgement, even though the parties had already agreed to settle the matter according to the family advocate's recommendations.²⁰³ The learned judge went on to state that the reasons provided by Van Zyl J were merely an opinion, as there was no longer a *lis* between the parties.²⁰⁴

Howie J differed in opinion from Van Zyl's interpretation of the Roman and Roman- Dutch authorities. He clearly indicated that parental power over a child born out of wedlock vests in the mother of the child, and access is a consequence of or incidental to parental authority. The father of a child born out of wedlock does not have parental authority over such child and therefore has no inherent right of access.²⁰⁵ The learned judge however, went on to state that a father of a child born out of wedlock has the *locus standi*²⁰⁶ to apply for access to the minor child through the high court. The most important consideration that the court will take into account is the best interests of the child and whether such access is in the best interests of the child.²⁰⁷

Howie J then considered whether the father of a child born out of wedlock was discriminated against as he was not given the inherent right of access to his child.²⁰⁸ The court looked at English case law and concluded that only if access is in the best interests of the child will access be granted and stated that "the child's welfare is thus the central, constant factor in every insistence".²⁰⁹ The learned judge went on to state that the right of access is the right of the child and not the right of the parent.²¹⁰ The court was further of the view that the father of a child born out of wedlock is not unfairly discriminated against as the father of a legitimate child will also have to approach the court, if the mother of the child does not allow access. The court did consider the fact that a father of a legitimate child has an inherent right of access whilst the father of a child born out of wedlock does not have such a right.²¹¹

Howie J then considered what the court would take into account when determining what would be in the best interests of the child when determining access by a father to his child born out of wedlock. Howie J stated that the court must consider the following when determining what would be in the best interests of the child when determining access: the

²⁰² *Van Erk v Holmer* 1992 (2) SA 636 (W).

²⁰³ *B v S* 1995 (3) SA 571 (A) 577 D-E.

²⁰⁴ *B v S* 1995 (3) SA 571 (A) 578 H.

²⁰⁵ *B v S* 1995 (3) SA 571 (A) 575 D-E.

²⁰⁶ Van Heerden et al *Boberg's Law of Persons and Family* 409.

²⁰⁷ *B v S* 1995 (3) SA 571 (A) 579 H.

²⁰⁸ *B v S* 1995 (3) SA 571 (A) 580 A.

²⁰⁹ *B v S* 1995 (3) SA 571 (A) 581 J.

²¹⁰ *B v S* 1995 (3) SA 571 (A) 582 A.

²¹¹ *B v S* 1995 (3) SA 571 (A) 582 C-E.

degree of commitment which the father has shown to the child,²¹² the degree of attachment which the father and the child have between them²¹³ (ie the bond between the child and the father), and the reasons why the father has applied for such access.²¹⁴

The learned judge further held that where the access application is being heard for the first time there is no onus in the sense of an evidentiary burden and this type of litigation requires judicial investigation.²¹⁵

3.4 *Natural fathers of children born out of wedlock and the issue of adoption*

Adoption in terms of South African Law is regulated by the Child Care Act. In terms of section 20 of the Child Care Act an adoption terminates all rights and obligations (ie severs all legal ties) that existed between the child and the parents of the child, except in a case where the step-parent marries the natural parent of the child.

The writer interprets this section to mean that parental authority (ie custody and guardianship) which was exercised by the biological parent/s of the child before the adoption of the child would terminate and the adoptive parents from the date of adoption would have parental authority over the adoptive child.

In terms of section 20(2) of the Child Care Act the child is considered as the legitimate child of the adoptive parents, and in terms of section 20(3), the adopted child takes on the surname of the adopted parents.

Before the judgement in the case of *Fraser v Children's Court, Pretoria North*,²¹⁶ only the consent of the mother of the child born out of wedlock was required for the adoption of such child. The Constitutional Court in the case of *Fraser v Children's Court, Pretoria North*²¹⁷ held that section 18(4)(d) of the Child Care Act was unconstitutional, as it discriminated unfairly on the grounds of gender and marital status.

The Constitutional Court held that section 18(4)(d) discriminated against a father of a child born out of wedlock on the basis of gender, as consent of the mother of the child is required but not that of the father. This section further discriminated against the father of a child born out of wedlock on the basis of marital status, as the consent of the father of a legitimate child is required when the child is being adopted but not that of a father of a child born out of

²¹² SALC discussion paper (*infra* n 292) has indicated that factors such as financial support, pursuing contact, keeping with arrangements, being present at the child's birth, being named on the birth certificate will be relevant in this regard.

²¹³ SALC Discussion paper (*infra* n 292) has indicated that a father of a young child may have little opportunity to develop a relationship with.

²¹⁴ *B v S* 1995 (3) SA 571 (A) 583 C. Howie JA quoted this criteria from Balcombe LJ's judgement in *Re H and another (minors)(adoption putative fathers rights)* [1991] 2 All ER 185 (CA).

²¹⁵ Most access applications are referred to oral evidence, such as the matter in the case study. In an access application there will constantly be a dispute of fact.

²¹⁶ *Fraser v Children's Court, Pretoria North* 1997 (2) BCLR 1357 (CC); 1997 (2) SA 261 (CC).

²¹⁷ *Ibid.*

wedlock.²¹⁸ Section 18(4)(d) was amended by the legislature to provide that in the case of an adoption of a child born out of wedlock, consent of both parents is required for the adoption of the child, only if the father of a child born out of wedlock has acknowledged in writing that he is the father of the child and has made his identity and whereabouts known.²¹⁹

In the case of *Haskins v Wildgoose*,²²⁰ the applicant approached the court for access to his minor son born out of wedlock. The access application was initially launched against the respondent, the mother of the child. However, after the launch of the proceedings, without the knowledge of the applicant, or the respondent's attorneys, the respondent's parents adopted the minor son. The applicant subsequently amended his papers and joined the new adoptive parents as respondents to the pleadings.²²¹

In terms of section 20(1) of the Child Care Act, an order for adoption severs all legal ties which the biological parents have with the biological child. Hefer J in *Haskins v Wildgoose*²²² considered whether such severing prevented the court as the upper guardian of the child from granting the biological father access to his biological son who had been adopted.

In short, Hefer J held that the rights and obligations which were severed in terms of section 20(1) of the Child Care Act did not include access between a biological child and the biological father. The high court is the upper guardian of a minor child and has the power to determine whether access by the father to his child was in the child's best interests. If access is in the child's interests, the court is entitled to make the appropriate order. Therefore, the best interests of the child is paramount and if access is in the best interests of the child, then access will be granted.²²³

Hefer J then considered the best interests criteria set out in *B v S*.²²⁴ Regarding the degree of commitment which the father has shown to the child, the court held that the father had always taken an interest in the child and that he would continue to show an interest in the child if he had the chance to do so. Regarding the degree of attachment which the father and the child have between them, the court held that it was clear that there was no degree of attachment, as the mother of the child did everything in her power to ensure that there was no bond. The court further held that the mother's consent to the adoption of the child and the actual adoption of the child by the mother's parents was a "ploy designed to defeat the father's claim to access" and the desire of the mother and the "adoptive parents to stifle his attempts to see the child smacked of self-interest".²²⁵ With regard to the reasons for the

²¹⁸ *Fraser v Children's Court* 1997 (2) BCLR 1357 (CC); 1997 (2) SA 261 (CC) par 43.

²¹⁹ This amendment was enacted by the Adoption Matters Amendment Act 56 of 1998.

²²⁰ *Haskins v Wildgoose* [1996] 3 All SA 446 (T).

²²¹ *Haskins v Wildgoose* [1996] 3 All SA 446 (T) 448, 458–459.

²²² *Haskins v Wildgoose* [1996] 3 All SA 446 (T).

²²³ *Haskins v Wildgoose* [1996] 3 All SA 446 (T) 451.

²²⁴ *B v S* 1995 (3) SA 571 (A) 583C.

²²⁵ *Haskins v Wildgoose* [1996] 3 All SA 446 (T) 460.

father applying for access to the child, the court stated that the father had a genuine interest in his son.²²⁶ The court granted phased in access.

In the case of *V v H*,²²⁷ Liebenberg J did not grant the applicant access to his biological child. The facts of the case are as follows: the applicant was the father of a minor daughter. The respondent was the mother of the minor daughter. The minor child was born out of wedlock. The respondent married the second respondent and two children were born out of this marriage. The second respondent legally adopted the minor daughter. The minor daughter was not aware that she was adopted nor was she aware that the second respondent was not her biological father. The applicant launched proceedings when the minor daughter was 6 years old. The applicant had exercised his last access when the minor daughter was about 8 months old.

Liebenberg J took into account a number of considerations of what would be in the best interests of the minor daughter. Liebenberg J held that the applicant had a strong desire to build a relationship with his minor daughter and that he had a genuine desire to give the child love and affection. However, the court stated that the applicant last had access to the minor child when the child was 8 months old and there was no existing bond between the applicant and the minor daughter. Further, the minor daughter only acknowledged the second respondent as her father. The court further heard evidence that the minor daughter was fragile and very insecure and would be traumatised if she determined at this young age that the applicant was her biological father.²²⁸ The court held that the applicant's access to his minor daughter was not in the best interest of the child.

3.5 *Bringing a common law access application based on the facts of the case study*

In the writer's opinion, the applicant in the case study would have been unsuccessful if an application for access to BD was brought under the common law.

The applicant's guardianship application would have failed outright, as there is no clear indication why the court should grant the applicant guardianship of BD and there is no reasons given on why the court should water down the respondent's guardianship of BD. The courts would not have been persuaded under any circumstance, especially in terms of the facts under the case study.

²²⁶ *Haskins v Wildgoose* [1996] 3 All SA 446 (T) 461. Hefer J stated that "[d]espite their opposition to the application, there is no fact of any substance to be found in their affidavit which suggests that the father is not genuinely interested in pursuing his relationship with the child or that the strengthening of that relationship will not be to the present and future benefit of the child". Hefer J further pointed out that "[t]he family counsellor was persuaded by a number of factors to recommend in favour of the grant of access to the applicant: the right of the child to know his father, his expressed desire to see him, and the father's apparent love for the child. She remarked that the relationship had deteriorated with the deprivation of access and needed to be restored".

²²⁷ [1996] 3 All 579 SE.

²²⁸ *V v H* [1996] 3 All 579 SE 589-590.

Even though in *B v S*²²⁹ Howie J clearly stated that there is no onus of proof in the sense of an evidentiary burden or risk of non-persuasion with regard to a father bringing an access application for the first time, in practice the evidentiary burden is greater on the father to show that it is in the best interests of the child to have access over and above the mother's burden to show that it is not in the best interests of the child that the father have access to his child.

It is clear from the case study that the respondent has a strong relationship with BD. She appreciates, understands and loves BD. She understands BD's psychological make-up and knows whether he will be able to cope with the applicant's access. For the respondent, it is simple and easy to show the court that the applicant's access to BD will not be in BD's best interests. She will produce to the court evidence to show her rocky relationship with the applicant, and that by law the applicant was to pay maintenance but does not, indicating that the applicant doesn't care about BD's financial needs and welfare. The respondent will show how her husband took over the applicant's obligations in terms of BD. She will reveal to the court the applicant's violent behaviour directed towards herself and the respondent's husband. She will further indicate that even though the violent behaviour has never crossed over to BD, there is a strong possibility that it might when the applicant has access to BD. The respondent will show that BD does not know the applicant, nor is she aware of the applicant's existence. She will show that he is a happy child and happy with his surroundings. The respondent will show that the applicant has nothing to offer BD except that the applicant is BD's biological father and that there is no other link. The respondent will show that the applicant consumes alcohol excessively. The respondent will show that the applicant has not seen BD since he was two-and-a-half years old and there is no bond between the applicant and BD. The respondent will attempt to prove that the applicant is not in BD's best interests.

The applicant does not know what BD likes or dislikes nor does he understand the psychological make-up BD. The applicant wants and needs access to BD so that he can form a relationship with BD, so that he can get to know BD, so that he can understand BD's psychological make-up. The applicant wants to love BD and wants BD to know and recognise that he is BD's father. This can be stated in words in an affidavit and presented to the high court. However, it will be very difficult to prove. The applicant admitted to the rocky relationship with the respondent. The applicant admitted to the altercations between himself, the respondent and the respondent's husband. The applicant will explain that such altercations were due to the respondent's rejection of him and his anger directed towards the respondent's husband. The applicant will deny that he is violent and that he will ever act in a violent way towards or in front of BD. The applicant will show that maintenance was paid and

²²⁹ *B v S* 1995 (3) SA 571 (A).

that the respondent rejected maintenance payments and such payments were placed into a trust account. The applicant will show that the reason for BD not bonding with him was the result of the respondent's determination not to allow the applicant access to BD. The applicant will insist and will show as far as possible that such access will be in the BD's best interests.

The applicant and the respondent will inform the high court that the respondent's husband had adopted BD and that such adoption was vigorously opposed by the applicant.

The high court will consider the best interest test set out in *B v S*,²³⁰ being: the degree of commitment which the father has shown to the child, the degree of attachment which the father and the child have between them, and the reasons for the father applying for custody.

With regard to the first query, the court will point out that the applicant is a Zimbabwean citizen and that the applicant has shown a commitment towards BD throughout the high court and adoption proceedings, as he has been present at every single court hearing. However, the court will then consider why the applicant waited a 3-year-period before applying for access to BD. The court will further consider whether the applicant will be able to access BD on a regular basis, as the applicant does not live in South Africa.

With regard to the second query, the court will determine that the applicant and BD did have some degree of attachment and bond but that this bond was terminated when BD was 2-and-a-half years old. BD is 7 years old in 2006. The court will further look at the respondent's sheer determination not to let the applicant have such a bond. At this stage, the court will determine that the applicant has no bond or attachment to the child. The court will then consider BD's psychological make-up and whether BD will be able to handle such access. The court will consider the case of *V v H*²³¹ and *Haskins v Wildgoose*.²³²

With regard to the third query, the court will recognise that the applicant desires to build a relationship with BD. However, the court will consider the history of the matter and will determine whether such access will be in BD's best interests.

It is in the writer's opinion that the applicant will be unsuccessful.

4. THE NATURAL FATHERS OF CHILDREN BORN OUT OF WEDLOCK ACT 86 of 1997

4.1 *An access application brought in terms of the Natural Fathers of Children Born out of Wedlock Act*

²³⁰ *B v S* 1995 (3) SA 571 (A) 583.

²³¹ *V v H* [1996] 3 All 579 SE.

²³² *Haskins v Wildgoose* [1996] 3 All SA 446 (T).

Due to the increase in litigation in the late 1980's and 1990's regarding a father's access to his child born out of wedlock, the South African legislature adopted the approach taken in the case of *B v S*²³³ and rejected the approach taken in the case of *Van Erk v Holmer*.^{234 235} On 4 September 1998, the Natural Fathers of Children Born out of Wedlock Act commenced.

In the absence of an application to the high court, in terms of section 2(1) of the Natural Fathers Born out of Wedlock Act by the father of a child born out of wedlock, the mother of the child remains the sole guardian and custodian of the child.²³⁶ Section 2(1) sets out that the natural father born out of wedlock has the *locus standi* to apply for access, custody, and guardianship of his minor child.²³⁷

In terms of section 2(2) of the Natural Fathers Born out of Wedlock Act, the court will only grant such application if it is in the best interests of the child.²³⁸ This conforms with section 28(2) of the Constitution, which provides that the best interests of the child are of paramount importance in every matter concerning the child.

Further, in terms of section 2(2) of the Natural Fathers of Children Born out of Wedlock Act, an application in terms of section 2(1) will not be granted unless the family advocate has held an inquiry and has produced a report with recommendations. In terms of section 3(1), the family advocate is required to institute such an inquiry if either the court or any party to the proceedings requests it. The family advocate will only institute an inquiry as set out in section 3(1), if a party to the proceedings completes an Annexure B in terms of Regulation 3 of the regulations in terms of section 5 of the Mediation in Certain Divorce Matters Act 24 of 1987 ("Mediation in Certain Divorce Matters Regulations"). However, it must be noted that this is the practice followed by the family advocate's office,²³⁹ and the procedure to be followed is not set out in Mediation in Certain Divorce Matters Regulations or in the Mediation in certain Divorce Matters Act.

In considering the application in terms of section 2(1), the court must take into consideration a list of factors set out in section 2(5), which are:

²³³ The approach in *B v S* 1995 (3) SA 571 (A) is that the father of a child born out of wedlock has no inherent right of access to the child. The mother of a child born out of wedlock has parental authority over the child and if the father of the child wishes to have access to the child, he must approach the court to obtain such access.

²³⁴ The approach in *Van Erk v Holmer* 1992 (2) SA 636 (W) is that the father of a child born out of wedlock has an inherent right of access to the child and the onus is upon the mother of the child to approach the court and prove that the father's access is not in the best interests of the child.

²³⁵ Van Heerden *et al* *Boberg's Law of Persons and Family* 417. Mailula affirms that the Natural Fathers of Children Born out of Wedlock Act does nothing more than to confirm the common-law position (Mailula 2005 *Codicillus* 22).

²³⁶ It must be noted that the Guardianship Act does not affect the common-law position that the mother of the minor child born out of wedlock is the sole guardian and custodian of the minor child (Clark *Family Law Service* E32).

²³⁷ S 2(1) of the Natural Fathers of Children Born out of Wedlock Act: "a court may on application by the natural father of a child born out of wedlock make an order granting the natural father access rights to or custody of the child on conditions determined by the court".

²³⁸ S 2(1)(a) of the Natural Fathers of Children Born out of Wedlock Act.

²³⁹ In terms of the case study as set out under heading 2 above, a request to the Office of the Family Advocate, Johannesburg to launch such a query must be launched in terms of Annexure B.

- ❑ the relationship between the applicant and the natural mother and in particular, whether either party has a history of violence against or abusing each other or the child
- ❑ the relationship of the child with the applicant and the natural mother or either of them or with proposed adoptive parents (if any) or any other person
- ❑ the effect that separating the child from the applicant or the natural mother or proposed adoptive parents or any other person is likely to have on the child
- ❑ the attitude of the child in relation to granting of the application
- ❑ the degree of commitment that the applicant has shown towards the child and in particular the extent to which the applicant contributed to the lying-in expenses incurred by the natural mother in connection with the birth of the child from his or her birth to the date on which an order (if any) in respect of payment of maintenance by the applicant for the child has been made the extent to which the applicant complies with such order
- ❑ whether the child was born of a customary union concluded according to indigenous law or custom or a marriage concluded under the system of any religious law, and
- ❑ any other fact that in the opinion of the court should be taken into account.

In the case *T v M*,²⁴⁰ Scott JA stated:

“While at common law the father of an illegitimate child, unlike the father of a legitimate child, has no right of access, the difference between the respective positions of the two fathers is not one of real substance in practice since in our modern law whether or not access to a minor child is granted to its non-custodian father is dependant not upon the legitimacy or illegitimacy of the child but in each case wholly upon the child’s welfare which is the central and constant consideration. Accordingly, and to the extent that one may choose to speak in terms of an inherent right or entitlement, it is the right or entitlement of the child to have access, or to be spared access, that determines whether contact with the non-custodian parent will be granted”.

In terms of section 2(5)(g) of the Natural Fathers of Children’s Born out of Wedlock Act, the court may take into account any other fact which in the opinion of the court should be taken into account.

The courts have attempted to broaden the factors of the best interests of the child:

In the case of *Mchiza v Lugalo & Others*,²⁴¹ Nhlangulela AJ held, *inter alia*, that the best interests of the children would be served by giving due weight to the children’s expressed preferences. The learned judge went on to say

²⁴⁰ *T v M* 1997 (1) SA 54 (A) 57 H-L.

²⁴¹ *Mchiza v Lugalo* [2003] JOL 11963 (Tk) 17.

"I have no doubt in my mind that these children are sufficiently intelligent to appreciate the nature and consequences of their preferences. To ignore them would surely contradict their interests."²⁴²

The case of *Wicks v Fisher*²⁴³ was decided before the commencement of the Natural Fathers of Children Born out of Wedlock Act. However, Pillay J was mindful of the Natural Fathers of Children Born out of Wedlock Act and placed emphasis on the trend to move away from considering the custodian parent's rights as more important than those of the natural father, and focused on section 28(2) of the Constitution.

Pillay AJ stated that in custody or access applications, the only factor of interest is the best interests of the child. The court considered a number of factors. One such factor was the bond which has been created between father and son. The learned judge went on to state that:

"it is worth mentioning at this stage that apart from other factors, it is also in Calvin's interests to have access to his father unless there are very cogent reasons why this should not be so. Once a material bond has been established, which I believe to be so in the present case, it is in the interests of the child that it be maintained."²⁴⁴

The court considered other factors such the child's environment in South Africa and the child's relationship with different members of the family. The Court also considered that it would be in the best interests of the child that the child be represented by a *curator ad litem*.²⁴⁵ This case²⁴⁶ clearly sets out that the courts are moving away from the rigid approach taken in the case of *B v S*.²⁴⁷

4.2 *Bringing an access application under the Natural Fathers of Children Born out of Wedlock Act, based on the facts of case study*

It is clear from the case study that the adoption application of BD was granted in favour of the respondent's husband. If the applicant was able to raise the security determined by the registrar, the applicant would have continued with the application for access in terms of section 2(1) of the Natural Fathers of the Children Born out of Wedlock Act.

It seems that the high court would have taken a more lenient approach than the approach taken under the common law. This is merely an opinion of the writer and is adduced from the approach taken in recent case law.

²⁴² *Ibid.*

²⁴³ *Wicks v Fisher* [1998] JOL 3126 (N); 1998 (9) BCLR 1199 (N); 1999 (2) SA 504 (N).

²⁴⁴ *Wicks v Fisher* [1998] JOL 3126 (N); 1998 (9) BCLR 1199 (N); 1999 (2) SA 504 (N) 5.

²⁴⁵ *Wicks v Fisher* [1998] JOL 3126 (N); 1998 (9) BCLR 1199 (N); 1999 (2) SA 504 (N) 11-12.

²⁴⁶ *Wicks v Fisher* [1998] JOL 3126 (N); 1998 (9) BCLR 1199 (N); 1999 (2) SA 504 (N).

²⁴⁷ *B v S* 1995 (3) SA 571 (A).

The court would not necessarily take into account the family advocate's report and recommendations, and has a discretion whether or not to consider the family advocate's report.

As the family advocate's report is not in the respondent's favour, the respondent will attempt to discredit the family advocate's report by arguing that an analysis of the respondent, the respondent's husband and BD over a period of two hours on a single day could not have allowed the family advocate to come to the conclusion that it did. They will request the court to call the family advocate and the family counsellor and will argue that the family advocate's report and recommendations should not be taken into account. It must further be noted that only the family advocate and the family counsellor interviewed all the parties to the proceedings and this would be in favour of the applicant.

The high court would have considered in terms of section 2(5) of the Natural Fathers Born out of Wedlock Act the factors of what would be in the best interests of BD.

In terms of section 2(5)(a) of the Natural Fathers of Children Born out of Wedlock Act the court would have considered

“the relationship between the applicant and the natural mother and in particular, whether either party has a history of violence against or abusing each other or the child”.

The stance taken by the respondent in this application was the history of the altercations between the respondent, the respondent's husband and the applicant. The respondent would then focus on the continued history of violence that the applicant has shown towards people around him and the community. This is clearly shown in the respondent's replying affidavit and affidavit in terms of the counter-application. The applicant will admit to the altercations but the applicant will produce evidence that he believed that the respondent's husband was the cause of his relationship breakdown with the respondent and that before the break-up between the applicant and the respondent the relationship was happy. The respondent will argue that this was not the case.

In terms of section 2(5)(b) of the Natural Fathers of Children Born out of Wedlock Act the court would have considered “the relationship of the child with the applicant and the natural mother”. It would be shown by the applicant that before the respondent left for South Africa, he had a close relationship with BD, that they had a close father-and-son relationship. The applicant will concede that the relationship with the respondent was troubled but only after the break-up with the respondent. The applicant would have argued that the applicant's relationship with BD would have flourished if the respondent hadn't remove BD from Zimbabwe and that he would have had a close father-and-son bond to this day. The applicant would have argued that the respondent allowed access before they left for South Africa and that he should be allowed to continue with such access.

The respondent would have argued that the applicant and BD did not have a close relationship and that the applicant did not have BD's interests at heart. The respondent would have produced evidence that the applicant abused alcohol in the presence of BD and generally didn't care about BD's welfare. It is further possible that the respondent would have subpoenaed Dr B to appear in court to give evidence in this regard.

The applicant would have further argued that he has shown an extreme degree of commitment towards BD. The applicant will show that he contributed to the lying-in expenses in connection with the birth of the BD and that he continued to pay maintenance with regard to BD into a trust account.

The respondent will argue that she had to commence working after the birth of BD so as to provide adequately for BD. The respondent will further argue that applicant's maintenance payments were erratic and not the amounts that they agreed to. The respondent would have further argued that the maintenance paid per month into the trust account in Zimbabwe by the applicant is an insignificant amount and that the respondent's husband took over the applicant's financial obligations with regard to BD.

The respondent would have further argued that BD is only 7 years old and is age appropriate. He has not been informed that he is adopted nor is he aware that the respondent's husband is not his father. The respondent would have argued that it would not be in BD's best interests to inform him of the applicant's existence.

Even though the courts have taken a more lenient approach, the writer believes that the applicant's access application would have been unsuccessful, as the high court would have held that the applicant's access to BD would not be in BD's best interests.

5. UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, THE AFRICAN CHARTER AND SECTION 28(1)(b) OF THE CONSTITUTION

5.1 *United Nations Convention on the Rights of the Child*

South Africa undertook to comply with the obligations and directives set out by international treaties and to change its domestic laws to comply with these international treaties. An international treaty of significant importance is the United Nations Convention on the Rights of the Child, 1989 ("the Convention"). The Convention was ratified by the South African government on 16 June 1995.²⁴⁸

In 1989, the Convention changed the way the international community viewed children and the rights of children. Before the advent of Convention, children were not viewed as the bearers of rights. They were viewed as a group that required special protection²⁴⁹ and were

²⁴⁸ Sloth Nielson 1995 *SAJHR* 401 403.

²⁴⁹ Sloth Nielson 1995 *SAJHR* 402.

regarded as “mere property”²⁵⁰ of their parents. The Convention gave children rights and entitlements which children could claim. Children were regarded as the bearers of such rights.²⁵¹ In the international community there was a movement away from the mere moral obligations of each international state to look after and protect children in their own communities and internationally, to international states recognising, acknowledging, pledging that they will fully protect children, respect and uphold the rights and liberties of children.²⁵²

The Convention focuses on the main aspect that the child has the right to have a family life.²⁵³ Article 1 of the Convention clearly stipulates that a child is a person under the age of 18 years.²⁵⁴ This criterion applies to all children within the jurisdiction of the state.²⁵⁵ This means that the Convention applies to all children within the member state’s border’s, regardless of whether the child has citizenship/permanent residence or not.²⁵⁶ The best interests’ criterion is a primary consideration when determining all actions pertaining to children.²⁵⁷

Article 7(1) stipulates that every child has “the right to know and to be cared for by his parents” and in terms of article 7(2), state parties shall ensure that the right in terms of article 7(1) is implemented. Article 9(1) specifies that a child is not to be separated from its parents, unless it is in the child’s best interests.²⁵⁸

In terms of article 4 of the Convention, all parties which have signed and ratified the Convention must draft and implement appropriate domestic legislation which recognises the rights of children set out in the Convention.²⁵⁹ The Convention has established an international monitoring committee in which it ensures that states which have ratified the Convention comply with their obligations.²⁶⁰

South Africa has ratified the Convention and has undertaken to conform to the obligations and responsibilities as set out in the Convention in articles 4 and 7(2). South Africa has undertaken to draft and implement legislation to conform to these new rights and obligations.

5.2 *The African Charter on the Rights and the Welfare of the Child*²⁶¹

The African Charter on the Rights and Welfare of the Child (“the Charter”) came into force on 29 November 1999 and the South Africa government ratified the Charter on 7 January 2000. This Charter has a significant effect on South Africa, as it focuses on children’s rights in

²⁵⁰ Sloth Nielson 1995 *SAJHR* 404.

²⁵¹ Pieterse 2003 *TSAR* 1.

²⁵² Sloth Nielson 1995 *SAJHR* 402.

²⁵³ Sloth Nielson 1995 *SAJHR* 406; a 5 of the Convention.

²⁵⁴ Sloth Nielson 1995 *SAJHR* 411.

²⁵⁵ Sloth Nielson 1995 *SAJHR* 411; a 2 of the Convention.

²⁵⁶ Sloth Nielson 1995 *SAJHR* 411.

²⁵⁷ Sloth Nielson 1995 *SAJHR* 411; s 3 of the Convention.

²⁵⁸ Sloth Nielson 1995 *SAJHR* 411.

²⁵⁹ Sloth Nielson 1995 *SAJHR* 415.

²⁶⁰ Sloth Nielson 1995 *SAJHR* 416.

²⁶¹ Ratified by South Africa on 7 January 2000.

Africa. The Charter's foundation stems from the Convention²⁶² and focuses on the family unit as the centre in which children are raised.²⁶³ Article 18 points out that the "role of the family [is] the basis of society and a natural unit within which children are reared".²⁶⁴ Article 19(1) of the Charter states that:

"every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his parents..... [unless] such separation is in the best interest of the child".

Article 19(2) clearly stipulates that "every child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis". The Charter regards the best interests of the child as the primary criterion when dealing with actions pertaining to the child.²⁶⁵

The Charter further places a responsibility on the South African government to ensure that its domestic legislation conforms to the obligations set out in the Charter.²⁶⁶

5.3 *The Rights of the Child as set out in section 28 of the Constitution of the Republic of South Africa*

The Constitution of the Republic of South Africa, 1996 and enacted new domestic legislation has changed the common-law view. In terms of section 28 of the Constitution, children are now seen as the bearers of rights and the state, as well as the South African public must take the best interests of the child into consideration in every matter dealing with the child.²⁶⁷ It is clear that the Convention and the Charter have had a significant influence on wording of section 28 of the Constitution.

Section 28(1)(b) of the Constitution guarantees that

"every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment".

The Constitution guarantees that every child has the right to be looked after or cared for by the child's parents or family. This echoes the concept in the Convention which clearly stipulates that the child has a right to know and to be cared for by its parents²⁶⁸ and not to be separated from its parents, unless it is in the child's best interests.²⁶⁹ It is clear from section 28(1)(b) of the Constitution that the focus is on the responsibilities which parents have towards their children and not on parental authority. There is a shift in reasoning from

²⁶² Davel 2002 *De Jure* 282.

²⁶³ Davel 2002 *De Jure* 283.

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid.*

²⁶⁶ Article 1 of the Charter.

²⁶⁷ S 28(2) of the Constitution.

²⁶⁸ Sloth Nielson 1995 *SAJHR* 412.

²⁶⁹ *Ibid.*

parental authority to parental rights and responsibilities.²⁷⁰ This right becomes the right of the child.²⁷¹

It has been stated that the right to parental care includes the right to be cared for by both parents.²⁷² In South African common law, the fathers of children who are not married or who are married according to Muslim rights or customary rights are not considered to have a right to care for their children or to have access to them.²⁷³ They only have a duty of support.²⁷⁴ Due to the advent of the Constitution and the ratification of the Convention and the Charter, domestic legislation has intervened and has changed the common law. The Children's Act recognises, in terms of section 21, that biological fathers of illegitimate children will be given automatic family rights and responsibilities if they comply with certain criteria.²⁷⁵ It must be noted, however, that the Children's Act is not yet in force and the Natural Fathers of Children Born out of Wedlock Act, which is in place, attempts to normalise the relationship between the illegitimate child and the biological father.

Even though the Constitution protects the right to parental care in section 28(1)(b) and guarantees that the child's best interests are taken into account when determining a matter concerning the child, the law may still be misinterpreted. This is clearly shown in the interpretation by Van Dijkhorst J in the case of *Jooste v Botha*.²⁷⁶ This case was the first case of its kind in South Africa where the child was using the Constitution to enforce his rights.

The facts of the case are as follows: the plaintiff is an 11-year-old boy born out of wedlock who has sued the defendant, his father, based on an action for damages suffered due to the defendant not rendering him any attention, love and interest. The matter came before the court as the defendant took an exception to the plaintiff's summons stating that the plaintiff failed to disclose a cause of action in his pleadings. The plaintiff based his argument on section 28(1)(b)²⁷⁷ and 28(2)²⁷⁸ of the Constitution. Van Dijkhorst J focused on the relevant constitutional provisions and concluded that neither our common law nor statutes recognise the right of a child to be loved, cherished and attended to by a parent. A bond of love is not a legal bond. The court upheld the exception.

Van Dijkhorst J based his decision on a number of reasons. The reasoning of importance to this dissertation is that the non-custodian parent of a child born in wedlock and the natural

²⁷⁰ Pieterse 2003 *TSAR* 7; Mailula 2005 *Codicillus* 24.

²⁷¹ Mailula 2005 *Codicillus* 25.

²⁷² Mosikatsana 1998 *Michigan Journal of Race and Law* 344 376.

²⁷³ Mailula 2005 *Codicillus* 25.

²⁷⁴ Van Zyl & Bekker 2000 *De Jure* 149.

²⁷⁵ Mailula clearly states that the common-law position and the position set out in the Natural Fathers of Children Born out of Wedlock Act is a clear violation of the Constitution, as fathers of such children should have an inherent right of access (Mailula 2005 *Codicillus* 26).

²⁷⁶ 2000 (2) BCLR 187 (T); 2000 JOL 5943 (T).

²⁷⁷ S 28(1)(b) of the Constitution: "Every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment".

²⁷⁸ S 28(2) of the Constitution: "A child's best interests are of paramount importance in every matter concerning the child".

father of a child born out of wedlock who does not have custody, falls outside the scope of section 28(1)(b).²⁷⁹

A number of authors²⁸⁰ have disagreed with this interpretation. It is acknowledged in terms of our common law that access is an incidence of parental authority. A father of a child born out of wedlock does not have such parental authority but our legislation through the Natural Fathers of Children Born out of Wedlock Act gives recognition that such fathers could apply for custody, guardianship and access to their minor children. The high court is the upper guardian of the child and will decide whether it is in the best interests of the child that the father shall have access or custody or guardianship over child.²⁸¹ Once the court grants the father access to the child, the father becomes responsible for the child during such access and this includes care. The child has the right to be cared for by both parents and to know both parents. This right belongs to the child and not to the parents of the child. This right is enshrined in the Convention, as well as Charter. As indicated above, the Constitution has heavily relied on the wording in both international treaties.

It is true to say, as Van Zyl and Bekker²⁸² have pointed out, that once an inquiry in terms of access or custody or guardianship has been instituted, the family advocate advises the parties from the onset that both parties' rights in terms of access, custody and guardianship to their minor children, whether the child is born in or out of wedlock, is guaranteed. *Jooste v Botha*²⁸³ articulates the clear message that this right is not guaranteed.

However, it must be noted that in the case of *Heystek v Heystek*,²⁸⁴ the learned judge stated that a child's right to parental care in terms of section 28(1)(b) is not confined to the child's natural parents but also includes or extends to other types of parents such as step-parents, adoptive parents and foster parents. Authors such as Cronje & Heaton²⁸⁵ clearly stipulate that this would further include non-custodian parents and this would be in line with the subsequent constitutional court decision of *Government of the Republic of South Africa v Grootboom*.²⁸⁶ Foxcroft J in the case of *Allsop v McCann*²⁸⁷ adopted this view that parental is not restricted to custodian parents and that children have a right to parental care from non custodian parents.

²⁷⁹ Van Dijkhorst J stated in *Jooste v Botha* 2000 (2) BCLR 187 (T); 2000 JOL 5943 (T) 19-20 that "[w]hat section 28(1)(b) envisages, therefore, is a child in care of somebody who has custody over him or her. To that situation every child is entitled. That situation the state is constitutionally obliged to establish, safeguard and foster. The state may not interfere with the integrity of the family. It follows that in the subsection the word 'parental' must necessarily be read as pertaining to a custodian parent. To interpret it otherwise would not make sense. Thus interpreted the non-custodian legitimate parent and the natural father of an illegitimate child (who does not have custody) fall outside the scope of section 28(1)(b)."

²⁸⁰ Van Zyl & Bekker 2000 *De Jure* 149; Robinson in Eekelaar & Nhlapo *The changing family* 485; Mosikatsana 1998 *Michigan Journal of Race and Law* 344; Mailula 2005 *Codicillus*.

²⁸¹ Robinson in Eekelaar & Nhlapo *The changing family* 485.

²⁸² Van Zyl & Bekker 2000 *De Jure* 149.

²⁸³ *Jooste v Botha* 2000 (2) BCLR 187 (T); 2000 JOL 5943 (T).

²⁸⁴ 2002 (2) All SA 401(T); 2002 (2) SA 754 (T).

²⁸⁵ Cronje & Heaton *South African Family Law* 260.

²⁸⁶ 2000 (11) BCLR 1169 CC; 2001 (1) SA 46 (CC).

²⁸⁷ 2001 (2) SA 705 (C).

6. THE CHILDREN'S ACT 38 of 2005

6.1 *Introduction*

The Children's Act was published on 19 June 2006 under Government Gazette No 28944 and will only come into effect on a date fixed by the President of the Republic of South Africa by proclamation in the Government Gazette.²⁸⁸ The Children's Act brings about a new era in South African parent and child law. This Act looks at South African parent and child law from a different perspective; no longer is the focus on parental authority and the rights of the parents over the child but on children's rights. The children are the bearers of these rights. The Children's Act attempts to comply with the directives set out in the Convention and the Charter, as well as the rights enshrined in section 28 of the Constitution.

6.2 *Best interests of the child*

The Children's Act clearly provides that the best interests of the child are of paramount importance and must be applied and taken into account when dealing with all matters concerning the care, protection and the wellbeing of the child.²⁸⁹ Section 7(1) of the Children's Act seems to set out an exhaustive list of what should be taken into account when considering what would be in the best interest of the child. Even though this list is exhaustive, it is extremely comprehensive.²⁹⁰

²⁸⁸ S 315 of the Children's Act.

²⁸⁹ S 9 of the Children's Act.

²⁹⁰ S 7(1) of the Children's Act: Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely –

- the nature of the personal relationship between –
 - the child and the parents, or any specific parent; and
 - the child and any other care giver or person relevant in those circumstances;
- the attitude of the parents, or any other specific parent, towards –
 - the child; and
 - the exercise of parental responsibility and rights in respect of the child;
- the capacity of the parents, or any other specific parent, or of any other caregiver or person, to provide for the needs of the child, including emotional and intellectual needs;
- the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from –
 - both or either of the parents; or
 - any brother or sister or any other child, or any other care giver or person with whom the child has been living;
- the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or specific parent, on a regular basis;
- the need for the child
 - to remain in the care of his or her parent, family and extended family; and
 - to maintain a connection with his or her family, extended family, culture or tradition;
- the child's
 - age, maturity and stage of development;
 - 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 that the child may have;
- any chronic illness from which the child might suffer
- the need for the child to be brought up within a stable family environment and where this is not possible a caring family environment;
- the need to protect the child from any physical or psychological harm that may be caused by –

6.3 Parental rights and responsibilities

The Children's Act has moved away from the concept of parental authority to the concept of parental rights and responsibilities.²⁹¹ Case law already has started recognising the importance of children's rights and interests over that of their parents and has linked this to the duties and responsibilities which parents have towards their children.²⁹² The South African Law Commission²⁹³ indicates that South Africa is a signatory to the Convention and has in terms of article 4 of the Convention undertaken to draft national legislation which will promote the rights of the child, and is obliged to shift away from the concept of parental authority to parental rights and responsibilities.²⁹⁴

Parental responsibility is defined in section 18 of the Children's Act as the responsibility to care for the child,²⁹⁵ to maintain contact with the child,²⁹⁶ to act as guardian of the child,²⁹⁷ and to contribute to the maintenance of the child.²⁹⁸ The Children's Act further sets out that a person may have full or specific parental responsibilities and rights.²⁹⁹ Full parental responsibilities and rights means that a person may be entitled to all the rights set out in section 18 of the Children's Act. Specific parental responsibilities and rights mean that a person may only have a specific right in terms of section 18 of the Children's Act, for example, the right only to act as guardian of the child.

In terms of section 1(2) of the Children's Act the word "access" is replaced with the word "contact" and the word "custody" is replaced with the word "care".

Contact is further defined in the Children's Act in Section 1(1) as:

"in relation to a child, means maintaining a personal relationship with the child; and if the child lives with somebody else: communication on a regular basis with the child in person which includes visiting the child or being visited by the child; or communicating on a regular basis with

subjecting the child to maltreatment, abuse, neglect, exploitation, or degradation or exposing the child to violence or exploitation or other harmful behavior; or;
exposing the child to maltreatment, abuse degradation, ill-treatment, violence harmful behavior towards another person;
any family violence involving the child or a family member of the child; and
which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.

²⁹¹ "Executive Summary: Children's Bill (B70-2003) Re-Introduced"

(<http://www.pmg.org.za/docs/2004/appendices/040805execsummary.htm> visited on 21 June 2006) 1.

²⁹² South African Law Commission The Review of the Child Care Act 74 of 1983 Discussion Paper 103 Project 110, ch 8 (http://web.uct.ac.za/depts/ci/plr/pdf/salrc_dis/10-dp103-ch8.pdf visited on 29 August 2006) 195 ("SALC discussion paper"). The SALC sets out an important quote by Foxcroft J in the case of *V v V* 1998 (4) SA 169 (C) 176D "There is no doubt that over the last couple of years the emphasis in thinking in regard to questions of relationships between parents and their children has shifted from the concept of parental power to one of parental responsibility and children's rights. Children's rights are no longer confined to the common law, but also find expression in s 28 of the Constitution of the Republic of South Africa, 1996, not to mention a wide range of international conventions."

²⁹³ SALC discussion paper (*supra* n 292) ch 8.

²⁹⁴ SALC discussion paper (*supra* n 292) 197.

²⁹⁵ S 18(2)(a) of the Children's Act.

²⁹⁶ S 18(2)(b) of the Children's Act .

²⁹⁷ S 18(2)(c) of the Children's Act.

²⁹⁸ S 18(2)(d) of the Children's Act.

²⁹⁹ S 18(1) of the Children's Act.

the child in any other manner including through the post or by the telephone or any other form of electronic communications”.

A child is defined as any person under the age of 18.

6.4 Section 21: Unmarried fathers

6.4.1 Introduction

In terms of section 19 of the Children’s Act, it is clear that the drafters have continued with the common-law privileges and rights that the biological mother has over their minor child.³⁰⁰ It is further clear that the drafters have further attempted to move away from the harsh wording of the common law and avoided the words “illegitimate child” or “child born out of wedlock”.³⁰¹ The perspective is different and the focus is now on the parents, whether they are married or not.

In terms of section 20 of the Children’s Act, the common-law privileges and rights associated with regard to a married father over his child continues. A married father acquires full parental rights and responsibilities over his child if he was married³⁰² to the mother of the child³⁰³ or was married to the mother of the child at the time of conception³⁰⁴ or birth³⁰⁵ or between conception and birth.³⁰⁶

In terms of section 21, the drafters have taken a bold and exciting step. The SALC discussion paper has shown that even though commonwealth countries have looked at whether or not to grant unmarried fathers automatic parental rights and responsibilities, they have opted not to and have chosen other options for unmarried fathers to acquire rights and responsibilities in respect of their children.³⁰⁷

³⁰⁰ In terms of the Children’s Status Act s 3(1), if a minor is unmarried and gives birth to a child, the guardianship of the minor’s child vests in her guardian. Once she attains the age of majority (which is 21 years of age under the Children’s Status Act) she becomes the child’s guardian (Van Heerden *et al* / *Boberg’s Law of Persons and Family* 394). In terms of the Children’s Act s 19(2)(a) & (b), if the mother who is unmarried is a minor and the father of the child does not have guardianship, guardianship of the child vests in the guardian of the minor mother.

³⁰¹ SALC discussion paper (*supra* n 292) 238.

³⁰² In terms of s 1 of the Children’s Act, marriage is defined as a marriage recognised in terms of South African Law or customary Law, or concluded in accordance with a system of religious law subject to specific procedures. The Children’s Act now specifically recognises Muslim marriages. Fathers of children born from these marriages will be regarded as married fathers in terms of s 20 of the Children’s Act. The Children’s Act has taken away the harsh realities that such fathers face when approaching the high court for access, guardianship and custody of their children. Now they will automatically have such parental rights and responsibilities over the child unless terminated in terms of s 28 of the Children’s Act.

³⁰³ S 20(a) of the Children’s Act.

³⁰⁴ S 20(b)(i) of the Children’s Act.

³⁰⁵ S 20(b)(ii) of the Children’s Act.

³⁰⁶ S 20(b)(iii) of the Children’s Act.

³⁰⁷ In England, the approach taken is that unmarried mothers and fathers can conclude an agreement which is properly registered and made an order. If no agreement is concluded then the unmarried father must approach the court and acquire such parental rights and responsibilities. The SALC discussion paper has further set out that English law has not gone without criticism and there is a proposal to change the current English law so that it allows unmarried fathers automatic parental rights and responsibilities “if the unmarried father signs the application to register the child’s birth and is named as a parent on the birth certificate”.

In England,³⁰⁸ Scotland³⁰⁹ and Kenya,³¹⁰ the approach taken is that unmarried mothers and fathers must conclude an agreement which is properly registered and made an order, for the fathers of such children to acquire specific or full parental rights and responsibilities. If no agreement is concluded, the unmarried father must approach the court and acquire such parental rights and responsibilities

The SALC discussion paper has further set out that English law has not gone without criticism and there is a proposal to change the current English law so that it allows unmarried fathers automatic parental rights and responsibilities only “if the unmarried father signs the application to register the child’s birth and is named as a parent on the birth certificate.”³¹¹

In Australian law, marital status does not affect parental rights and responsibilities which the parties have towards their child. This is similar to a stance taken in a number of African countries such as Ghana.³¹²

The drafters of the Children’s Act have moved away from the stance taken in *B v S*³¹³ and have recognised the plight of many unmarried fathers and their children. Children have a right to know their fathers and have a right to form a relationship with them. As Van Zyl in *Van Erk v Holmer*³¹⁴ stated:

“I believe the time has indeed arrived for the recognition by our Courts of an inherent right of access by a natural father to his illegitimate child.” That such right should be recognized is amply justified by the precepts of justice, equity and reasonableness and by the demands of public policy. It should be removed only if the access should be shown to be contrary to the best interest of the child”.³¹⁵

The Children’s Act has moved one step further. It has recognised not only that unmarried fathers should have inherent right of contact, but also that they should have an inherent right of guardianship and care.

6.4.2 Section 21(1): Inherent right of contact, care and guardianship

An unmarried biological father has automatic parental rights and responsibilities in respect of his child if he complies with certain criteria.

6.4.3 Analysis of section 21(1)(a)

³⁰⁸ With regard to English law see SALC discussion paper (*supra* n 292) 250-251.

³⁰⁹ With regard to Scottish law see SALC discussion paper (*supra* n 292) 259.

³¹⁰ With regard to Kenyan Law see SALC discussion paper (*supra* n 292) 246-247.

³¹¹ SALC discussion paper (*supra* n 292) 254.

³¹² In terms of the Ghanaian family law “parental duty and responsibility applies to all parents regardless of their marital status and of whether or not they are living together” (SALC discussion paper (*supra* n 292) 246).

³¹³ *B v S* 1995 (3) SA 571 (A).

³¹⁴ *Van Erk v Holmer* 1992 (2) SA 636 (W).

³¹⁵ *Van Erk v Holmer* 1992 (2) SA 636 (W) 649 I–J.

If the unmarried father at the time of the birth of the child was living in a life-partnership with the mother of the child, he will have an inherent right of contact, care and guardianship. Life-partnership means that the parties were living in a *de facto* husband and wife relationship and chose not to get married.

6.4.4 Analysis of section 21(1)(b)

If an unmarried father, whether he was living with the mother of the child or not, consents to be identified as the father of the child or applies for an amendment to be effected on the birth certificate that the father is registered as the biological father of the child terms of the Births and Deaths Registration Act or pays damages in terms of customary law, contributes or has attempted to contribute in good faith to the upbringing of the child within a reasonable period, and has paid or attempted to pay maintenance in relation to the upbringing of the child, the father of the child will have automatic parental rights and responsibilities.

6.4.5 Discussion of section 21(2)

Section 21(2) confirms the common-law duty of support that parents of minor children, whether born in or out of wedlock, has towards their minor children. The wording of this section is clear: "this section does not affect the duty of the father to contribute towards the maintenance of the child".

6.4.6 Analysis of section 21(3)(a): The family advocate and mediation

6.4.6.1 Introduction

In terms of section 21(3)(a),³¹⁶ if there is a dispute by the mother of the child regarding the fulfilment of the criteria set out in section 21(1)(a) or (b) by the father of the child, the matter must be referred for mediation. It must be noted from the onset that mediation in family law is not a recognised concept in South African Law. The South African public is slowly moving towards using mediation centres. However, the writer has noted that even though the parties resort to mediation, the matter ends up being adjudicated. In family-law matters, especially surrounding children, there is a lot of acrimony between the parties.

Family law, especially with regard to unmarried fathers attempting to obtain contact, care and guardianship, is complex by nature. The legal process of an unmarried father attempting to move through our courts in litigation is no easy task. The amount of time and money a litigant spends in obtaining guardianship, care and contact is astronomical. The emotional pressure is overwhelming. Due to the adversarial nature of our court procedures, many litigants are unhappy with the outcome of their matters, and often feel that their legal practitioners could

³¹⁶ S 21(3)(a) of the Children's Act states that "if there is a dispute between the biological father referred to in subsection (1) and the biological mother with regard to the fulfilment by that father of the conditions set out in subsection (1)(a) or (b), the matter must be referred for mediation to a family advocate, social worker, social services professional or other suitably qualified person".

have dealt with their matters differently. In all opposed motions, especially with regard to children, there is never a win-win situation.³¹⁷

6.4.6.2 Adjudication

Due to many circumstances and consequences many people have children without getting married. These parties either live together as if they were married³¹⁸ or they will continue with their separate lives, as if there was no child holding them together. Some parties will experience a complete decline in their relationship and with such decline will come the acrimony associated with the termination of the relationship. Unmarried fathers will be declined contact to their children based on a number of circumstances when the mother believes that no contact or care from the unmarried would be in the child's best interests.

Termination of such relationships in South African law requires no formal and rigid approach. There are usually no assets to divide and if they are it is usually based on a cohabitation agreement or lien over the said property.

Matters which become of great concern to mothers of such children are maintenance payments by the father of the child and the father's access to his child. The mother of the child will do anything to protect the child and will entrench a minimum standard of contact that the unmarried father will have to his child. The party that loses in this type of situation is the child.

The father will launch an access application for access to his child. The adjudication will increase the acrimony between the parties.³¹⁹ Once acrimony is present, the parties usually cannot compromise in any way without the intervention of their legal practitioners. The legal practitioners will do what is necessary to attempt to settle the matter. However, the costs associated with settlement and the litigation increase dramatically. The children are used as pawns, the parties fight over custody, over access, over maintenance. It seems never-ending. However, if the matter proceeds to court, the court will decide the fate of the parties. Most parties cannot afford to take their matters to trial.³²⁰ This places most parties at a disadvantage, as they have to settle on an agreement that is not truly beneficial for the children.

It is a reality that the quality of family law adjudication matters in our high courts is shocking, the family Advocate's office is overworked and underpaid. Due to the amount of pressure placed on our courts, the acrimony and costs associated with contested family law adjudication is shocking.

³¹⁷ Pretorius *Dispute resolution* 74.

³¹⁸ As in a cohabitation arrangement.

³¹⁹ Clark 1993 *THRHR* 455.

³²⁰ An estimation of the costs for junior counsel (Sandton Bar) for a day at the high court, South Africa (Witwatersrand Local Division) (without preparation) amounts to an approximate amount of R9000.00 exclusive of VAT; for senior counsel (Sandton Bar) the approximate day fee (without preparation) amounts to R 15000.00 exclusive of VAT.

The Children's Act has attempted to introduce mediation as a starting point.³²¹

In the current adversarial system, legal practitioners generally do their best to settle their client's problems for them³²² and are compassionate.³²³ Most legal practitioners are ethical and warn their clients of the costs involved. They call round table meetings, attend pre-trial conferences, offer settlement and draft settlement agreements. These settlement negotiations are on a "without prejudice" basis and cannot be used in a court. Most legal practitioners try to decrease the acrimony between the parties. They have the legal duty when there are children involved, to consider what is in the best interests of the children. Legal practitioners further protect their clients from legal injustices that the other party might have performed "without further stimulating further family conflict".³²⁴ Parties to a family law matter in the adversarial process will only reach settlement and the acrimony between the parties will only decrease, if the parties themselves agree to resolve their disputes through their legal practitioner. Many authors³²⁵ state that there are concerns relating to family law mediation, whilst others³²⁶ believe it is the solution to problems associated with the adversarial system.³²⁷

If there is a problem associated with maintenance, contact or care surrounding their children, parties will automatically approach their attorney or approach the court directly to determine what would be the best solution for them. Family Law mediation is not extensively practised³²⁸ nor is it promoted in South Africa and many individuals do not even consider approaching one of the mediation centres³²⁹ to settle maintenance, contact or care surrounding their children with their partners.

In terms of section 21(3)(a) of the Children's Act mediation has been introduced as part of our law.³³⁰

Mediation is defined as

³²¹ In terms of s 21(3)(a) of the Children's Act.

³²² Schäfer 1984 *DR* 16 19.

³²³ Van Zyl *Divorce mediation and the best interests of the child* 178.

³²⁴ Schäfer 1984 *DR* 17.

³²⁵ Goldberg 1998 *TSAR* 748 749; Van Zyl *Divorce mediation and the best interests of the child* 178.

³²⁶ Cohen 1993 *DR* 642.

³²⁷ Pretorius *Dispute resolution* 74.

³²⁸ Pretorius *Dispute resolution* 50.

³²⁹ Such as FAAMSA (Family Life) and SAAM (South African Association of Mediators). Also discussed in Goldberg 1998 *TSAR* 748.

³³⁰ The Hoexter report on the structure and function of the courts in South Africa (1983) recommended mediation in the proposed family court. The bill that was drafted setting out the Hoexter recommendations was rejected. There has been no move in our law from an adversarial position to an inquisitorial position. Instead the Mediation in Certain Divorce Matters Act was passed which created the office of the family advocate, which looks after the best interests of the children to divorcing parties. The family advocate is not a mediator and does not mediate between the parties (Clark 1993 *THRHR* 455). Also see Cronje & Heaton *South African Family Law* 184.

“a process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives and reach consensual settlement which will accommodate their needs”.^{331 332}

This means that parties will have to agree to attend the mediation process.³³³ Once the parties have agreed to attend such mediation the parties will have the choice of what they would like to discuss. The mediator is a neutral party and will facilitate, without getting involved in the process, to help the parties reach a settlement (which is a non-binding agreement). Therefore it is clear that the success of mediation is in the willingness of the parties to participate in the mediation and cooperate with one another. However, even though family mediation seems positive, there are many concerns regarding family mediation.

In terms of section 21(3)(a) of the Children’s Act it is clear that if there is a dispute between the biological mother and the biological father with regard to the fulfilment by that father of the criteria set out in section 21(2) of the Children’s Act, the matter “must be referred for mediation”. This means that in terms of this section, mediation is mandatory. This does not conform to the definition of mediation set out above. If the mediation is mandatory, what are the consequences if the parties do not attend such mediation? In terms of the Children’s Act there does not seem to be any consequences.

Further, if for example the biological father refers the matter to mediation and the biological mother fails to attend the mediation, can the matter be taken directly to high court for adjudication or must it be referred back to mediation? The Children’s Act is not clear on what the next step would be. If the next step is to set another date for mediation and one of the parties do not attend the new mediation date, does this then mean that the matter must be sent to the high court or the children’s court for adjudication? Who is entitled to take the matter to high court or the children’s court and in terms of what section? Further, will the court merely frown upon the parties’ non attendance of the mediation process or is this section a loophole? Can the parties bypass the whole mediation process by merely not attending the mediation?

6.4.6.3 Concerns regarding mediation

Mediator’s qualifications

There are no formal requirements as to who may act as a mediator.³³⁴ There is no standardisation of qualifications, nor do the mediators have to belong to a body or

³³¹ Pretorius *Dispute resolution* 75.

³³² Also see definition set out in Goldberg 1998 TSAR 748.

³³³ In other words mediation is not mandatory.

³³⁴ Goldberg 1998 TSAR 748.

association which regulates them.^{335 336} Furthermore, there is no code of ethics or conduct³³⁷ which mediators need to follow.

Social workers/psychologists are themselves not necessarily versed in the law and this can lead to serious consequences when attempting mediation.³³⁸ Lawyers are versed in the law but are not necessarily compassionate towards the parties in mediation. This can also lead to serious consequences when attempting mediation. Parties that attend mediation expect competent mediators who are compassionate to their needs but who also understand the law.³³⁹ It is therefore of great concern that parties attend mediations in which the mediator is unqualified to attend to the mediation and the parties have no way of checking the status or the competence of the mediator.³⁴⁰ Owing to the low standard of mediators, lack of uniform qualifications and a code of conduct, the mediation process in South Africa is brought into disrepute.

It is clear from section 21(3)(a) of the Children's Act that the mediation must be referred to the family advocate, social worker, social service provider or any other suitably qualified person.

In terms of section 1, the family advocate is defined as a family advocate in terms of the Mediation in Certain Divorce Matters Act. The powers and duties of the family advocate are set out in section 4(1) of the Mediation in Certain Divorce Matters Act, which provides that the family advocate shall

“institute an inquiry to enable him to furnish the court at the trial of such action or the hearing of such application with a report and recommendation on any matter concerning the welfare of each minor child or dependant child”.

It has been outlined by Van Zyl that that “mediation” by the family advocate differs from the common understanding of mediation, as mediation is not completely voluntarily submitted to by both parties, the family advocate actively participates in the decision making, the mediation involves the establishment of facts on which the parties agree, the family advocate

³³⁵ Goldberg 1996 *TSAR* 358 360.

³³⁶ Attorneys need a certain standard of qualification. They all belong to a regulatory body that ensure that their members are bound by ethics.

³³⁷ Goldberg 1996 *TSAR* 360.

³³⁸ If parties cannot agree to place themselves in a position which is contra bonos mores, or where children are concerned, the parties cannot agree to something that is against the children's best interests.

³³⁹ Clark 1993 *THRHR* 461.

³⁴⁰ *Visser v Visser* (unopposed divorce in the Witwatersrand Local Division). The parties attended mediation in which the mediator suggested joint physical custody of their two-year-old female child. A parenting plan was drawn up in which it was agreed that the female child would reside with the mother for a 3-day period and then would reside with the father for a 3-day period. The family advocate queried such agreement stating that it was not in the best interests of the child. For the divorce to proceed, the senior advocate suggested to call the mediator as a witness, so that the mediator may testify to her qualifications and reason for the suggestion of joint physical custody. The mediator however, could not be called as the mediator had no qualifications.

involves an evaluation of the parenting abilities and the children participate in the mediation process.³⁴¹

Neither the family advocate nor the family counsellors (ie social workers) has been trained or is equipped to handle actual mediation between parties and to ensure that the parties attempt to reach settlement. For the family advocate to comply with section 21(3)(a) of the Children's Act, the family advocate's office must firstly train their staff so that they will be able to handle and manage mediation between parties; secondly, in practice it is clear that the family advocate's office is understaffed. The workload in the family advocate's office is great, and the family advocate is only handling queries under two acts.³⁴² In terms of the Children's Act, the family advocate's workload will increase tenfold. The involvement of the family advocate in the Children's Act is overwhelmingly too large for the family advocate to handle.³⁴³

From the writer's examination of the Family Advocate's Office in Johannesburg,³⁴⁴ it is clear that resources are not being allocated to the family advocate's office. There are no computers, the offices are dark and dreary. There are 2 photocopy machines. Only one of these machines is working. There is a single fax at reception. There are only 5 family advocates. In general, not including urgent matters, the turn-around time for the family advocate's offices to book a query is 4 to 6 months from the date the Annexure B has been submitted.

As set out above, the mediation in terms of section 21(3) of the Children's Act can also be referred to a social worker, social services professional or any other suitably qualified person. In terms of section 1 of the Children's Act, a social worker is a person who is registered under the Social Services Professions Act 110 of 1978, and a social services professional includes a probation officer, development worker, child and youth care worker, youth worker, social auxiliary worker and social security workers who are registered under the Social Services Act. "Any other suitably qualified person" is not defined. We therefore go back to the initial concern: many of the mediators in South Africa are not qualified. They do not have the necessary qualifications, nor do they have the necessary training to conduct mediations. There is no body that ensures that these mediators conform to a code of conduct

Confidentiality

³⁴¹ Van Zyl Divorce mediation and the best interests of the child 375.

³⁴² Mediation in Certain Divorce Matters Act and Natural Fathers Born out of Wedlock Act.

³⁴³ For example, the family advocate can be involved in the following circumstances:

if there is a dispute between the biological father referred to in s 21(1) and the biological mother of the child with regard to the conditions set out in the subsection, the matter must be referred for mediation (s 21(3))

parental responsibilities and rights agreements must be registered with the family advocate (who must be satisfied that the agreement is in the best interests of the child) (s 21(4)-(6))

the children's court can further request the family advocate to institute a query and provide a report which set out recommendations before it decides a matter (s 50(1)).

³⁴⁴ The writer visited the offices of the Johannesburg Family Advocate in February 2006.

Supporters of mediation state that one of the most highly regarded aspects of mediation is confidentiality.³⁴⁵ Without this link there would be no trust and this would not lead to a positive atmosphere.³⁴⁶ The assurance of utmost confidentiality encourages open and honest discussions.³⁴⁷ The mediator explains, before the mediation proceedings begin, that neither the parties nor the mediator may be compelled to divulge any information which has been obtained during mediation. The mediator usually compels the parties to sign a pre-mediation agreement stating that all negotiations or statements made are “without prejudice” and are privileged and confidential nature.³⁴⁸

In South African law, there is no statutory protection or authoritative privilege for any disclosures made in the course of the mediation process. This means that a mediator may be called to give evidence in court on issues or discussions that were raised during the course of the mediation. The mediator may be compelled to give evidence as the privilege belongs to the parties and either may waive that privilege and may compel the mediator to testify.³⁴⁹

The whole mediation process will fail if the mediator cannot assure the parties that the mediation is absolutely confidential. Parties to the mediation will not be open or honest in their discussions if the mediator can be compelled to appear in court to act as a witness against either of the parties. Settlements will never be reached if the parties are not completely open and honest with each other.³⁵⁰

It is further pointed out that mediators cannot “guarantee absolute confidentiality” as mediators have an obligation to report all criminal acts which have been committed or which are to be committed towards an innocent child.³⁵¹ Pretorius³⁵² sets out clearly that “the defence of privilege would not however avail itself in criminal proceedings where the mediator may be called upon to give evidence in a criminal court”.

In terms of section 21(3)(a) of the Children’s Act, it is clear that the mediation as envisaged in this section is not confidential as the mediation outcome may be reviewed by the court in terms of section 21(3)(b).

Domestic violence

There is continuing debate regarding mediation and abuse. Mediation is not appropriate where there is a history of domestic violence.³⁵³ In mediation, the parties sit in close proximity

³⁴⁵ Goldberg 1998 *TSAR* 751.

³⁴⁶ Van Zyl *Divorce mediation and the best interests of the child* 209.

³⁴⁷ Pretorius *Dispute resolution* 76.

³⁴⁸ Goldberg 1998 *TSAR* 751; Van Zyl *Divorce mediation and the best interests of the child* 209; Pretorius *Dispute resolution* 49. In practice, FAAMSA compels the parties to sign such an agreement.

³⁴⁹ Pretorius *Dispute resolution* 49.

³⁵⁰ Goldberg 1998 *TSAR* 753.

³⁵¹ In terms of the Child Care Act and the Prevention of Family Violence Act (Van Zyl *Divorce mediation and the best interests of the child* 210 –211).

³⁵² Pretorius *Dispute resolution* 49.

³⁵³ Van Zyl *Divorce mediation and the best interests of the child* 203 – 204.

to one other (mainly in a triangle formation). Many of the victims of domestic violence feel completely powerless against the perpetrator. When there is a history of domestic violence there is a power imbalance within the relationship.³⁵⁴ Many victims do not report the abuse to the authorities and the reason for their presence at the mediation is fear that if they refuse to attend the mediation there will be more violence perpetrated³⁵⁵ against them and even against the children. It is mainly women and children who are the victims of abuse. Before the mediation commences these victims are in a disadvantaged position. These victims will agree to whatever the outcome of the mediation will be³⁵⁶

When the parties attend mediation, they do not always inform the mediator of the abuse. Skilled mediators might discern that there is some form of abuse but unskilled mediators are unlikely to uncover the abuse.³⁵⁷ The skills and the qualifications of the mediator are of utmost importance.

Cultural and Ethical concerns

At the Women's Conference held by the Law Society of the Northern Provinces³⁵⁸ one of the major concerns was the lack of black persons in important roles in family law. In terms of section 21 of the Children's Act mediation has been made compulsory. One of the concerns relating to mediation was the lack of black mediators. The reason for the concern was that parties from a certain ethnic and cultural background would be more comfortable with a person from the same ethnic and cultural background who understands the issues affecting the parties. However, it does not seem to be possible owing to the lack of mediators which come from the same cultural background as the mediating parties.

For this reason the mediator needs to be trained in cultural awareness³⁵⁹ and needs to understand how parties solve disputes in their culture.³⁶⁰ If the mediator understands the parties' culture and ethnic background, the mediation will "succeed in the cultural divide and have an outcome favourable to the parties".³⁶¹ For example, a conservative Afrikaans-speaking mediator must be able to mediate between a Venda couple. The mediator would need to understand how the Venda culture and the power imbalances work. The Venda couple would not automatically open up to the mediator because of the cultural and ethnic barrier. However, if the mediator assured the parties of his or her understanding of their culture the parties would find it easier to trust the mediator and be open with him/her.

³⁵⁴ Goldberg 1998 TSAR 366.

³⁵⁵ Van Zyl *Divorce mediation and the best interests of the child* 205.

³⁵⁶ Goldberg 1998 TSAR 366.

³⁵⁷ Van Zyl *Divorce mediation and the best interests of the child* 205.

³⁵⁸ On 22 and 23 July 2005.

³⁵⁹ Goldberg 1998 TSAR 754.

³⁶⁰ Goldberg 1998 TSAR 756.

³⁶¹ Goldberg 1998 TSAR 757.

Does the Office of the Family Advocate have the resources to train their staff to be more compassionate and have an understanding of the different cultures in South Africa? Are any of the parties set out in section 21(3)(a) of the Children's Act, such as the social worker or any other qualified person qualified to deal with the different types of cultures that we have in South Africa? Are they trained and suitably qualified?

Mediator's neutrality

The mediator's main aim is to assist the parties to reach their own settlement. Ideally the mediator does not interfere. He or she guides the parties to a decision but does not control the outcome. The mediator must be impartial and unbiased. Van Zyl³⁶² posed the following question: "Can a mediator be truly neutral?" In my opinion, no person can be truly neutral and unbiased. All persons have their own beliefs and attitudes towards what they believe are right. The mediator will gear and guide the parties towards what he or she considers to be correct and proper.³⁶³ Even though a mediator might be considerate or reluctant to air his opinion to the parties, the parties will discern the mediator's views and give them undue weight. The parties will consider the mediators suggestions and ultimately take them on. Therefore it is not what the party's desire but what the mediator feels which ultimately becomes the "settlement".

The family advocate's role is mainly to evaluate. As set out by Van Zyl, the family advocate mediates quite differently to mediators in the normal mediation process. The family advocate gets involved and voices his or her own opinion on matters.³⁶⁴ This is contrary to the mediation process. This means that the parties will place undue weight on what the family advocate's opinion and suggestions are, instead of coming to a settlement themselves.

6.4.7 Analysis of section 21(3)(b): Review

Section 21(3)(b) states that "any party to the mediation may have the outcome reviewed by the court".

A number of statutes provide for revision of the decisions or the outcomes of statutory tribunals or officials by the high court. This is known as statutory review. It appears from the terminology set out in section 21(3)(b) that this is what the drafters have foreseen. It does not appear from the terminology used in section 21(3)(b) that the word "review" should have its ordinary legal meaning, which is "the process whereby the proceedings of the lower courts, both civil and criminal, are brought before the high court in respect of grave irregularities or illegalities occurring during the course of such proceedings."³⁶⁵

³⁶² Van Zyl *Divorce mediation and the best interests of the child* 182.

³⁶³ Burman & Rudolph 1990 SALJ 251 273.

³⁶⁴ Van Zyl *Divorce mediation and the best interests of the child* 374.

³⁶⁵ Harms *Civil Procedure in the Supreme Court* par R1.

Statutory review is review in its widest sense and means to “examine” or “to take into consideration”. Harms states that when the court considers a matter already dealt with, the court has no restrictions in dealing with the review and it seems that the court’s power’s are unlimited.³⁶⁶ Harms clearly sets out that the court:

“not only possesses the powers of a court of review in the legal sense, but it also has the functions of a court of appeal with the additional capacity of being able to, after setting aside the decision arrived at by the lower tribunal, to deal with the whole matter upon fresh evidence as a court of first instance....Where the determination of a discretionary matter is entrusted by Statute to a public official, the High Court will not inquire into the merits of the official if his discretion has in fact been exercised, save on special grounds such as *mala fides*, improper motive, exceeding of the discretionary power, non compliance with the statutory procedure, and so forth”.³⁶⁷

It is clear from the above quotation that some form of judgment must have been reached by either a public official or a tribunal before it can be referred to review. However, a mediation as provided for in section 21(3)(a) of the Children’s Act, is a in simply a meeting between the mediator, the biological father of the child and biological mother of the child, with the main aim being settlement. A mediator is involved but in my understanding he or she is not envisaged as a public official nor is the mediation process envisaged as a statutory tribunal. The decision reached at mediation is either settlement or no settlement. The decision reached is not a judgment made by the mediator nor does the mediator have the authority to make such a judgment.

It seems illogical to use the wording used by the drafters in this section. Maybe the drafters envisaged “review” as the process whereby the matter is taken either to the children’s court or the high court when the parties are unable to reach settlement and a parental rights and responsibilities agreement is not entered into in terms of section 22. However, the fact remains that section 21(3)(b) is not clear.

6.5 Section 29: court proceedings

It would seem to be a logical conclusion that the drafters erred by not referring the matter to section 29 in cases where the mediation failed or did not take place.³⁶⁸ Section 29 provides that the matter is launched by way of application³⁶⁹ to the high court. The high court will take into consideration what would be in the best interests of the child before making an order.³⁷⁰ If there is an order for guardianship only, there must be reasons why the applicant has not

³⁶⁶ Harms *Civil Procedure in the Supreme Court* par R6.

³⁶⁷ *Ibid.*

³⁶⁸ S 29(1) of the Children’s Act provides that “an application in terms of section 22(4)(b), 23, 24, 26(1)(b) or 28 may be brought before the high court, a divorce court in a divorce matter or a children’s court, as the case may be, within whose jurisdiction the child concerned is ordinarily resident”.

³⁶⁹ S 29(1) of the Children’s Act.

³⁷⁰ S 29(3) of the Children’s Act.

moved for adoption of the child.³⁷¹ When the court considers the application in terms of section 29(1) of the Children's Act, the court must take into consideration the principles set out in chapter 2³⁷² of the Children's Act. The high court may for the purposes of the hearing order that:³⁷³

- ❑ a report and recommendations be provided by the family advocate, social worker or any other suitably qualified person
- ❑ a specific matter be investigated by a person elected by the court
- ❑ a person must appear to give or produce evidence
- ❑ any person is to pay for the costs of the investigation

The high court may further order that the child must be represented in court proceedings and order that either one of the parties pays the costs of such representation.³⁷⁴ In terms of section 29(7) of the Children's Act, if the child is affected by the court proceedings and is in need or care and protection, the court must order that the matter must be referred to a social worker so that the social worker can determine whether the child is in need of care and protection.

6.6 *Section 23: assignment of contact and care to interested persons by order of court*

In terms of section 23 of the Children's Act, if an interested person would like to obtain contact or care of the child, he or she can through an application in terms of section 29, apply for contact or care of child.

Examples of interested persons would be a biological father who does not qualify for automatic access under the factors set out section 21(1) or paternal grandparents or extended family of the child.

When considering such an application the court must take into account a number of factors. These factors are the best interests of the child, the relationship between the applicant and the child and other relevant person, the degree of commitment the applicant has shown towards the child, the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child, and any other factor that should in the court's opinion be taken into account.

³⁷¹ S 29(1)(2) of the Children's Act.

³⁷² The principles set out in ch 2 of the Children's Act include: factors to be applied when considering what is in the child's best interests (s 7), the best interests of the child are paramount (s 9), the views of the child are given due consideration (s 10), certain factors must be taken into account when dealing with children with disability or chronic illness (s 11), dangerous social, cultural and religious practices are prohibited (s 12), every child has a right have access to information on health care (s 13), every child is entitled access to court (s 14), every person has a right to enforce his or her rights or that of a child in terms of the Children's Act (s 15), and every child has a right to have responsibilities appropriate to her or her age (section 16).

³⁷³ S 29(5) of the Children's Act.

³⁷⁴ S 29(6) of the Children's Act.

The factors set out by this section 23(2) of the Children's Act are the factors set out by Howie JA in *B v S*.³⁷⁵ It is clear from this section that the common law is confirmed. The criteria considered throughout our rich case law from the decision in *B v S*, will most certainly be taken into account by the court when dealing with this section.

In terms of section 23(3), if during the proceedings it is brought to the attention of the court that another interested party has brought an application for adoption, the court will request the family advocate or social worker or psychologist to institute a query and to furnish it with a report and recommendations on what would be in the best interests of the child. The court may further suspend the contact or care application until the adoption application has been heard.

Section 23(4) further states that a successful care or contact application will not affect the parental responsibilities and rights of another person.

The whole section 23 is further a replication of the application in terms of the Natural Fathers of Children Born out of Wedlock Act.

6.7 Adoption

The Child Care Act is repealed by the Children's Act and adoption of a child is dealt with in terms of chapter 15. As far as unmarried fathers are concerned, the adoption proceedings in the Children's Act are similar to those in the Child Care Act. In terms of section 231(1)(d) of the Children's Act an unmarried father may adopt his child.³⁷⁶ Section 233(1)(a) of the Children's Act provides that consent of both parents to the adoption is required.³⁷⁷ In terms of section 236(3)(a) of the Children's Act, the consent of the unmarried biological father is not required for the adoption of his child if the unmarried father has not acknowledged that he is the biological father of the child. The unmarried father acknowledges that he is the biological father of the child if he acknowledges in writing he is the father of the child, if he pays maintenance voluntarily or pays damages in terms of customary law, or if he registers his particulars when registering the child's birth. This acknowledgement takes place in terms of section 237(4)³⁷⁸ of the Children's Act. In terms of section 242(1), an adoption order terminates parental rights and responsibilities of any person³⁷⁹ who had such rights in respect of the child immediately before the adoption.

³⁷⁵ *B v S* 1995 (3) SA 571 (A) 583.

³⁷⁶ S 17(d) of the Child Care Act.

³⁷⁷ S 18(d) of the Child Care Act.

³⁷⁸ In terms of s 18(d) of the Natural Fathers of Children Born out of Wedlock Act, the consent of the unmarried biological father is required when he acknowledges himself in writing as the father of the child and he has made his identity and whereabouts known.

³⁷⁹ In terms of s 20 of the Child Care Act an adoption order terminates the rights and obligations between the child and any person who was his or her parent prior to the adoption. S 242(1) of the Children's Act takes it a step further and refers to termination of parental rights and responsibilities of person whilst the Child Care Act only refers to the termination of the parents' rights and obligations.

A positive introduction to adoption proceedings is the post-adoption agreement. The guardian or parent of the child can enter into an agreement with the new adoptive parents before an application is made for the adoption of the child, for contact to the child and to obtain information regarding the child. There are conditions attached to this agreement³⁸⁰ and it will only come into effect if it is made an order of court.³⁸¹

6.8 *The Children's Act and the facts of case study*

The respondent and her husband would have applied for the adoption of BD through section 231(a)(i) of the Children's Act. For the adoption to proceed, the respondent and her husband would of have requested the applicant to give his consent³⁸² in terms of section 133(1)(a) of the Children's Act. The consent of BD would have also had to be obtained if BD was of an age, maturity and at a stage of development to understand the implications of such consent.³⁸³ The applicant would have attempted to enter into a post-adoption agreement with the respondent and the respondent's husband for contact to BD. It is clear from the respondent's non-settlement approach and hard attitude taken, that a post-adoption contact agreement would have never been agreed to.

Due to the position taken by the respondent regarding the post-adoption consent agreement, the applicant would not have given his consent to the adoption of BD and the proceedings for adoption would have proceeded in terms of Section 239 of the Children's Act.

In terms of section 21 of the Children's Act, the applicant would have automatic full parental rights and responsibilities. The applicant believed that he was living with the respondent in a life-partnership. The applicant and the respondent were engaged and living together before, during and after the birth of BD. Further, the applicant acknowledged himself in writing as being BD's father and entered his name on the birth registry as being BD's father. The applicant contends that he contributed to BD's upbringing by looking after, bathing, caring and feeding BD. The applicant would further have stated that he worked long hours so as to provide maintenance for the respondent and BD, as the respondent was not working.

The respondent would have disputed that the applicant has fulfilled the conditions set out in section 21 of the Children's Act. The respondent would have argued that the parties were not living in a life-partnership at the time before, during and after the birth of BD. The respondent would have conceded that the applicant acknowledged that he was the father of the child, as

³⁸⁰ The conditions attached to post-adoption agreements are: s 234(2) of the Children's Act requires that this agreement may not be entered into unless the consent of the child is obtained only if the child is of age and maturity. S 234(3) of the Children's Act requires a social worker to counsel parties regarding the post-adoption agreement and the implications attached thereto. In terms of s 234(4) of the Children's Act, the court must confirm that the post-adoption agreement is in the best interests of the child. The agreement must be in the prescribed format (s 234(5)).

³⁸¹ S 234(6) of the Children's Act.

³⁸² The consent of the unmarried father is required in terms of s 236(3)(a) of the Children's Act, when he has acknowledged paternity of the child.

³⁸³ S 233(1)(c)(ii) of the Children's Act.

there is a birth certificate in which the applicant acknowledged that he is the father of BD. The respondent would further have argued that the applicant did not contribute to BD's upbringing as the applicant spent long hours at work, at race meetings and did not spend any time with BD. The respondent would have disputed that the applicant provided maintenance for BD, as soon after BD's birth, the respondent had to return to work so as to ensure that BD was adequately maintained.

The respondent would have continued to deny the applicant access to BD and the applicant would have no option but to refer the matter for mediation for the parties to discuss what is in dispute and to attempt to reach some form of settlement. The applicant's main aim is obtain contact to BD.

The adoption proceedings would have continued in the children's court and the applicant would have continued to withhold his consent and vigorously defend the adoption of BD by the respondent's husband.

If the adoption is granted, which it most likely will as there is no evidence to indicate that the adoption is not in the best interests of BD, the applicant cannot continue with his application in terms of section 21 or 29 of the Children's Act, as the applicant's parental rights and responsibilities would have been terminated.

The applicant would have requested the respondent and her husband to enter into a parental rights and responsibilities agreement³⁸⁴ only with regard to contact to BD. Due to the stance taken by the respondent and her husband, this request would have been denied.

The applicant would have no choice but to bring an application for contact in terms of section 23 of the Children's Act. The criteria used to determine whether the applicant would be entitled to such contact to BD, is the same criteria used in *B v S*.³⁸⁵ The court will consider factors such as the applicant's financial support of BD, pursuing contact, keeping with arrangements, being present at the child's birth, being named on the birth certificate, developing a relationship with BD, and the reasons for the application in terms of section 23.

The section 23 application for contact will be brought in terms of section 29 and the family advocate, social worker, social services professional or any other qualified person would be called upon to provide a report and to produce recommendations. The applicant would have been placed in the position that he would have been in under the Natural Fathers of Children Born out of Wedlock Act and the common law. The criteria provided in *B v S*³⁸⁶ is considered. However, the best interests criterion, as set out in section 7 of the Children's Act is considered paramount.

³⁸⁴ In terms of s 22 of the Children's Act.

³⁸⁵ *B v S* 1995 (3) SA 571 (A) 582.

³⁸⁶ *B v S* 1995 (3) SA 571 (A) 582.

Due to the criteria set out in section 7 of the Children's Act, it is the writer's belief that the strategy that would have been taken by the respondent would have been to have BD psychologically tested in an attempt to prove to the court that BD's psychological make-up would not have been able to deal with the applicant having contact with BD or the applicant gradually coming part of BD's life. This would be rebutted by the applicant, who would have his own psychologists indicating that BD does not have a delicate psychological make-up. The respondent would also focus on the altercations between the applicant, the respondent and the respondent's husband, to indicate that the applicant is violent, exposed the child to violent behaviour and that his behaviour has continued even after the respondent and BD left Zimbabwe.

Unless the high court will take a more lenient approach, the writer does not believe that the applicant would be successful in his contact application to BD.

7. CONCLUSION

The Children's Act is an exciting piece of legislation, especially for unmarried fathers, as the common law and the Natural Fathers of Children Born out of Wedlock Act did not protect these fathers' rights adequately. When reading section 21 of the Children's Act, it is clear that unmarried fathers, who conform to a certain criteria, automatically have parental rights and responsibilities in respect of their children. However, when scratching the surface of this section, one starts to realise the problems associated with the section. Further, when one starts applying the common law, current law and the Children's Act to case studies, one starts to realise that the law hasn't changed, especially for in cases where the biological mother or adoptive parents have taken the hard-line approach of "no settlement". The legal fraternity representing unmarried fathers expected a complete change in direction of the current law. The application for contact is similar to that of the current law, so is the evidentiary burden. Needless to say, the impact of the Children's Act in the writer's opinion is disappointing.

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