



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

**CASE NUMBER: 2020/26471**

- (1) REPORTABLE: YES  
(2) OF INTEREST TO OTHER JUDGES: YES  
(3) REVISED.

DATE: 2 FEBRUARY 2022

In the matter between: -

**ST**

Applicant

and

**BN**

First respondent

**MINISTER OF JUSTICE AND CONSTITUTIONAL  
DEVELOPMENT**

Second respondent

and

**CENTRE FOR CHILD LAW**

*Amicus curiae*

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**J U D G M E N T**

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**DELIVERED:** This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 10h00 on 2 February 2022.

F. BEZUIDENHOUT AJ:

## **INTRODUCTION**

*"Your children are not your children.  
They are the sons and daughters of Life's longing for itself.  
They come through you but not from you,  
And though they are with you yet they belong not to you.  
You may give them your love but not your thoughts,  
For they have their own thoughts.*

...

*You may strive to be like them,  
but seek not to make them like you."*<sup>1</sup>

[1] Once upon a time, a little boy, now 12, was born in the kingdom of love. His younger sister joined him two years later. They had heard about this thing called marriage, but it had no meaning to them as it did not happen to their parents. All that mattered to the two children was that their mother and father adored them beyond words and raised them with dignity and an unquenchable awareness that they were unrepeatable miracles.<sup>2</sup> But alas, what the children did not expect, was that their mother and father would not be together forever, and that their father would meet another princess in another kingdom and their mother another prince. One day, the mother dreamt of moving with her prince to a kingdom far, far away. She wanted

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<sup>1</sup> Gibran; Kahlil: The Prophet

<sup>2</sup> Popova Maria: The Marginalian – On poignant parenting advice from Kahlil Gibran

the children to go with her, but the father was upset and forbid her to take them. He wanted them to stay with him. The mother and father's quarreling saddened the children. The mother and father did not know what to do. They simply could not agree.

- [2] The story of this family is an all too familiar one. No doubt, the applicant (the mother) and the first respondent (the father), had hopes of a love story that would never end. Marriage was not a prerequisite to these dreams and hopes and this love. Married or not, what matters is that they fell in love, had children and later fell out of love - like some married couples do. That is the harsh reality. Now the applicant wishes to relocate with the children to Canberra, Australia, with her husband whilst the first respondent is opposed to the idea and retaliated with a claim for primary care of the children with him and his wife.
- [3] This court is thus called upon to determine Part A of the applicant's application ("*the main application*") which entails an order for a referral to the office of the Family Advocate.
- [4] The even harsher reality about stories of this kind is that parents have the choice to move on, but children do not. They remain inextricably linked to both parents, but find themselves torn between two separate households. This happens to children whether or not their parents were ever married or once married, but divorced. Which begs the question - if there are so many commonalities in the lives of these children, why then does the law require children of non-married parents to embark on a process, different to the one followed by children of married or divorced parents, to have their best

interests investigated by the office of the Family Advocate? Is it a differentiation and if it is, is it justifiable considering the long and arduous battles fought in this country for the right to equality, dignity and protection against arbitrary discrimination? These are the issues that the court raised *mero motu*, in terms of section 172(1)(a) of the Constitution of the Republic of South Africa, 1996 ("*the Constitution*") and which enjoins me with a duty to uphold the spirit, purport and objects of the Bill of Rights and to declare invalid any law or conduct that I find to be inconsistent with the Constitution.<sup>3</sup>

## **THE CONSTITUTIONAL CHALLENGE**

[5] After having heard argument on behalf of the applicant and the first respondent on 24 August 2021 and I adjourned the hearing, I issued the following directive on the 21<sup>st</sup> of September 2021: -

"...

2. *The Court has identified the following issues which require further argument and consideration:*

2.1 *It is trite that in almost all litigated matters involving children the Court will require a report from the Family Advocate in order to rule finally in the matter.*

2.2 *Parties, as is the case in this instance, who have never been civilly married have a different path to follow entirely as they are informed that the Family Advocate office will not become involved without a court order directing it to do so. This means that one or both*

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<sup>3</sup> *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) paragraph [12].

*parties must first approach the Court for such an order.*

2.3 *In stark contrast, if a party to any litigation who is married and in the process of divorcing or who was previously divorced and who wishes to litigate further, she can easily complete and sign an annexure "B" form to the Mediation in Certain Divorce Matters Act ("the Act"), and serve it on the opposition as well as on the office of the Family Advocate and an investigation will be conducted on the strength thereof.*

2.4 *It would therefore appear that an arbitrary distinction is made between the children of married, or formerly married and divorced parents, and parents of children whose parents have never been civilly married.*

2.5 *The category of unmarried parents naturally would include a large number of persons who elected not to be married for many and varied reasons, often economic, cultural, religious or social or simply subscribing to a different belief system.*

2.6 *The arbitrary distinction occasioned by policy and/or the Act appears to be inconsistent with the various provisions of the Constitution of the Republic of South Africa, 1996 and with the Children's Act, 38 of 2005, including but not limited to the following:*

2.6.1 **The Children's Act**

(i) Section 6(2)(c) and 6(2)(d) - all proceedings, actions or decisions in a matter concerning a child must -

...

(c) *treat the child fairly and equitably;*

(d) *protect the child from unfair*

*discrimination on any ground, including*

*...*

*(ii) Section 6(4)(b) - in any matter concerning a child - a delay in any action or decision to be taken must be avoided as far as possible.*

*(iii) Section 7(1)(n) which states, paraphrased, that in considering the best interests of the child standard in the application of any provision of the Act that factors to be taken into account include...*

*which action or decision would avoid or minimize further legal or administrative proceedings in relation to the child."*

#### **2.6.2 The Constitution**

*Section 9(3) bill of rights - 'The State may not unfairly discriminate directly or indirectly against any one on one or more grounds, including, ... marital status...*

*2.7 In terms of section 172(1) of the Constitution of the Republic of South Africa, 1996, when deciding a constitutional matter within its power, a Court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency and may make any order that is just and equitable, including:*

*(i) An order limiting the retrospective effect of the declaration of invalidity; and*

*(ii) An order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.*

3. *The parties are therefore directed to submit further written submissions on the specific issues referred to above, which should include but not necessarily be limited to whether the Act and/or policy adopted is unconstitutional and should be declared as such.*
4. *The Court requests the following amicus curiae to assist and make submissions:*
  - 4.1 *The Centre for Child Law;*
  - 4.2 *The office of the Family Advocate (Johannesburg and Pretoria);*
  - 4.3 *The Gauteng Family Law Forum;*
  - 4.4. *The Legal Resources Centre.*
5. *The parties are requested and directed to:*
  - 5.1 *comply with the provisions of rule 16A(1) of the Uniform Rules of Court..."*

[6] Subsequent to the issuing of the directive, the Centre for Child Law, the Minister of Justice and Constitutional Development ("the Minister") (who also appeared on behalf of the office of the Family Advocate), responded and were joined to the proceedings. Three case management conferences were convened to facilitate the filing of written submissions and the scheduling of a hearing date as well as to ensure compliance with the provisions of Rule 16A of the Uniform Rules of Court.

## THE CONSTITUTIONAL CHALLENGE

### A summary of the salient submissions

[7] At the outset I wish to express my sincere gratitude to counsel for their most valuable input and their enthusiastic participation in what I consider a very important issue.

### The applicant's submissions

[8] The applicant identified the offending provision of the Act as section 4, which provides as follows: -

"4. *Powers and duties of Family Advocates -*

(1) *The Family Advocate shall -*

(a) *after the institution of a **divorce** action; or*

(b) *after an application has been lodged for the variation, rescission, or suspension of an order with regard to the custody or guardianship of, or access to, a child made in terms of the **Divorce Act, 70 of 1979,***

*if so requested by any party to such proceedings, or the court concerned, 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 recommendations on any matter concerning the welfare of each minor or dependent child of the marriage concerned or regarding such matter as is referred to him by the court.*



- (2) A Family Advocate may -
- (a) after the institution of a **divorce** action; or
  - (b) after an application has been lodged for the variation, rescission, or suspension of an order with regards to the custody or guardianship of, or access to, a child, made in terms of the **Divorce Act, 1979**,
- if he deems it in the interests of any minor or dependent **child of a marriage concerned**, apply to the court concerned for an order authorizing him to institute an inquiry contemplated in subsection (1).*
- (3) A Family Advocate may, if he deems it in the interests of any minor or dependent child of **the marriage concerned**, and shall, if so requested by a court, appear at the trial of any divorce action or hearing of any application referred to in subsection (1)(b) and (2)(b) and may adduce available evidence relevant to the action or application and cross-examine witnesses giving evidence thereat." (emphasis added)

[9] The applicant submitted that it is common cause that the office of the Family Advocate has interpreted the wording of the Act such that it will not conduct investigations and/or compile reports in matters involving minor children, if the parents of these children have never been married, unless specifically ordered to do so in terms of an order of court, which order could only be obtained on application by one of the parties.

[10] The effect of the provisions of the Act, so the applicant argued, is to place an obstacle in the way of litigants who were never married and the children

who form the subject of such litigation. Instead of assuring their access to the services that the office of the Family Advocate offer through the simple act of filling a standard form (Form B) issued in terms of the regulations of the Act and which is conveniently accessible on the internet, a never-married litigant is put through the process of first approaching a court for an order authorising the office of the Family Advocate to assist the parties. This process necessarily involves an additional legal step which has the inevitable consequence of delay and additional cost, even if a referral is unopposed. When opposed, the delay and incurrence of legal costs increase exponentially and the waiting period for a hearing date is longer. All the while these never-married litigants and their children are deprived of access to the office of the Family Advocate which has been established by the legislature to safeguard children's interests.

[11] The applicant submitted further that the definition of marriage and divorce would relate to marriages that are legally recognized as valid civil marriages in terms of our law. This would currently exclude Hindu and Muslim marriages. In this instance the parties would be regarded as unmarried and it would follow that the children born of such relationships would be regarded as children of unmarried parents. This is not even to mention parties who have never been married who fall into categories of vulnerable groups of single parents or teenage parents who are often less resourced than their married counterparts, but are put to the additional cost and legal obstacle.

[12] The Act, in singling out concepts of marriage and divorce, has also excluded another large group of parties who approach these courts regularly in the

best interest of minor children, which include concerned grandparents or other relatives of children who apply to the court in terms of sections 23 and 24 of the Children's Act. These parties would presumably also be required to first obtain a court order before an investigation by the office of the Family Advocate can commence.

[13] Ms Ossin on behalf of the applicant argued that there appears no rational reason why litigants who approach the court for relief involving a minor child should be treated differently on the basis of their marital status and that such a distinction could only serve to categorize the unmarried parents or caregivers as somehow lesser or less worthy of the attention and services of the courts, the justice system and the office of the Family Advocate.

[14] Ms Ossin argued that the distinction made by the Act infringes on *inter alia* the following constitutional rights of litigants: -

[a] The right of parent litigants not to be unfairly discriminated against on the grounds of marital status in terms of section 9(3) of the Constitution;

[b] Minor children's rights to have their best interests held to be paramount in all matters which concern minor children in terms of section 28(2) of the Constitution;

[c] The right of unmarried litigants and their children to dignity in terms of section 10 of the Constitution and their right to have their dignity respected and protected.

[15] Ultimately, the applicant argued that no government purpose has been advanced for the differentiation. The distinction was simply a function of the wording of the Act and references to words such as "*divorce*" and "*marriage*" have never been considered. Accordingly the Act, as it is currently worded, amounts to discrimination with no rational connection to a legitimate government purpose and should be declared invalid.

[16] The applicant submitted that the declaration of invalidity should be suspended for a period of 24 months in order for the legislature to cure the defect. The defect could be cured through the process of "*severance*" of certain words or the "*offending portion*" from the statute,<sup>4</sup> and the authority of the office of the Family Advocate could be extended in the amended wording of the statute to include children in matters where the litigant is a non-parent, such as grandparents, in which event additional wording may have to be inserted.

### **The first respondent's submissions**

[17] Mr Bezuidenhout, on behalf of the first respondent, argued that the differentiation by the Act has nothing to do with the superior treatment of the one parent above the other, but that it has everything to do with the legal consequences of choices made by parties to marry or not. Mr Bezuidenhout found support for his argument in *Volks*.<sup>5</sup>

[18] Notably, Mr Bezuidenhout argued that the provisions of the Children's Act

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<sup>4</sup> *Van der Merwe v Road Accident Fund and Another* 2006 (4) SA 230 (CC).

<sup>5</sup> *Volks N.O. v Robinson and Others* 2005 (5) BCLR 466 (CC).

do not require any additional steps to be taken by never married parents as is the case with married or divorced parents where section 4 of the Act requires the institution of an action or application before an investigation by the office of the Family Advocate can be requested.

[19] Moreover, Mr Bezuidenhout submitted that unmarried parents have recourse in the Children's Act to engage the Family Advocate. It was argued that unmarried parents can enter into a parenting plan in terms of section 33 of the Children's Act to formalize their specific parental responsibilities and rights or they could simply carry on without any formal legal agreement and without involving the law. I deal more with this argument under the application as the first respondent also raised this issue as one of the defences to Part A of the main application.

[20] If however unmarried parents wish to formalize their agreement in respect of their children, so the first respondent argued, they have the option of a parenting plan agreement which has to comply with the prescripts set out in section 34 of the Children's Act, which is to have it either registered by the office of the Family Advocate or to have it made an order of court. Should unmarried parents decide to have a parenting plan registered with the office of the Family Advocate, such parenting plan can be amended or terminated by the office of the Family Advocate without the intervention of the court, in terms of section 34(4) or by the court in terms of section 34(5) of the Children's Act.

[21] Mr Bezuidenhout argued that when an application in terms of section 34(5) is brought before court, section 34(6) requires the court to apply the

provisions of section 29 of the Children's Act, more specifically subsections (4) and (5) thereof, which provide that the court may for the purposes of the hearing order that a report and recommendations of a Family Advocate, a social worker or other suitably qualified person must be submitted to court.

[22] Accordingly, it was submitted on behalf of the first respondent that it is not the provisions of the Act that are unconstitutional, but that the Act is simply not applicable to parents who were never married, and that the provisions of the Children's Act would apply in such instance. Consequently, the first respondent concluded that there is a clear government purpose for the differentiation between never married parents and divorced or to be divorced parents.

#### **SUBMISSIONS ON BEHALF OF THE MINISTER AND THE OFFICE OF THE FAMILY ADVOCATE**

[23] Ms Dayanand-Jugroop appeared on behalf of both the Minister and the office of the Family Advocate (Johannesburg and Pretoria).

[24] It was submitted that from a plain reading of the Act it is concerned solely with the interest of married persons who are involved in divorce proceedings and with a consideration of the interests of minor children of the marriage in such divorce proceedings. The title of the Act and sections 4(1)(a) and 4(1)(b) refer to divorce proceedings that are before the court or proceedings in terms of the Divorce Act which are the jurisdictional requirements for the office of the Family Advocate to undertake an inquiry

on any matter concerning the welfare of the minor children involved in the proceedings and to furnish the court and recommendations.

[25] Ms Dayanand-Jugroop confirmed that there is no policy in place as suggested by the applicant. It is simply a case where the Family Advocate is bound to the provisions of the Act and is obliged to comply with them.

[26] Ms Dayanand-Jugroop submitted that neither the Minister, nor the Family Advocate can refute the fact that the Act does not provide for the interests of unmarried litigants and their minor children. This, so it was argued, *prima facie* constitutes a differentiation between married and unmarried parents or litigants.

[27] On behalf of the Family Advocate, Ms Dayanand-Jugroop submitted that the Act discriminates against unmarried parents, including unmarried fathers and that its office therefore recognises the fact that unmarried parents have no choice but to obtain a court order in order to direct the Family Advocate to conduct an investigation into what is in the best interests of the minor children before a court can make a final decision in litigation involving these unmarried parents. It was submitted further the Act is outdated, pre-constitutional legislation and that its relevance is questionable for a number of reasons.

[28] In its current form, the Act disregards the fact that "*[E]veryone is equal before the law and has the right to equal protection and benefit of the law*"<sup>6</sup> and that it "*unfairly discriminate directly or indirectly against anyone on*

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<sup>6</sup> Section 9(1) of the Constitution.

*...grounds, of ... marital status.*<sup>7</sup> Once discrimination on the ground of marital status is established, section 9(5) of the Constitution provides that such discrimination *"is unfair unless it is established that the discrimination is fair"*.

[29] The Act may have been rationally connected to a legitimate government purpose when it was enacted (to ensure the best interests of minor children during divorce proceedings), but this applied to a dispensation when marriage was the only legally recognised partnership, which is unsustainable in a new constitutional order and the changing nature of society where *"families that are established outside of civilly recognised marriages should not be subject to unfair discrimination"*.<sup>8</sup>

[30] Consequently it was submitted on behalf of the Minister that the absence of a reason or a legitimate government purpose for the differentiation is absent and that such discrimination therefore cannot be justified and would be found to be inconsistent with the Constitution.

[31] Accordingly, the Minister submitted that he would not oppose a finding by this court that the Act, in particular sections 4(1)(a) and (b) are inconsistent with the Constitution. It was however submitted that the court should suspend any declaration of invalidity of the Act for a period of at least two years in order to give the legislature an opportunity to cure the constitutional defect. The suspension was motivated by referring to the ongoing work undertaken by the South African Law Reform Commission

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<sup>7</sup> Section 9(3) of the Constitution.

<sup>8</sup> *Volks (supra)* at paragraph 106.



(*"the Commission"*), more specifically Project 100D, which deals with alternative dispute resolution in family matters and involves the development of an integrated approach to the resolution of family law disputes.

[32] The Commission has produced issue paper 31 and discussion paper 148 that address the concerns raised in respect of the Act and the Family Advocate. In this regard the possibility of fully revising the Act to take account of the increased functions of the Family Advocate as set out in various pieces of legislation, cannot be excluded. More importantly, it also acknowledges that the office of the Family Advocate should perhaps be allowed to conduct inquiries in matters involving all children under any circumstances after the breakdown of a relationship.

[33] The Commission has identified the fact that the Act is premised solely on the aftermath of divorce and that it therefore shows a narrow understanding of family law and in doing so, negates the steps that have been taken in developing a more realistic understanding of family, which includes unmarried partners and other stakeholders in parental responsibilities and rights pertaining to children.

[34] The Minister expressed a word of caution though and that is that the court should not be too prescriptive in the manner in which the constitutional defect should be cured so as not to constrain the legislature in the routes it may wish to take.

[35] The office of the Family Advocate and the Minister express some concern

about the increase in requests for inquiries that will be made, should section 4 of the Act found to be inconsistent with the Constitution and be declared invalid. The significant change in landscape in which the Family Advocate performs its duties cannot be ignored: -

- [a] The Minister submitted that when the Act came into effect in 1990, the Family Advocate serviced only the six High Courts, or Supreme Courts as they were then known within the former apartheid South Africa;
  - [b] Today the Family Advocate services all 714 courts in the country, which include all High Courts, designated Regional Courts in terms of the jurisdiction of the Regional Courts Amendment Act, all Magistrate's Courts in terms of the Children's Courts, Maintenance Courts and Domestic Violence Courts;
  - [c] There are only 111 Family Advocates nationally;
  - [d] There are now 90 family counsellors who have been appointed on a full-time basis rather than for the limited period as set out in section 3 of the Act;
  - [e] The Act should be aligned to the Children's Act in light of the Family Advocate's expanded role brought about by the Children's Act.
- [36] These figures clearly indicate that the budget and staff compliment of the office of the Family Advocate requires urgent attention and revision. The possibility of appointing experienced family law practitioners from private

practice in the position of *ad hoc* Family Advocates to alleviate the immediate workload, could be considered a viable alternative.

[37] However, in my view although the speed at which the referrals are made, might increase, the number of referrals may not. The only saving grace for the Family Advocate until now was that the prerequisite referral orders slowed down the process. That is not to say that a process of direct referral, without court intervention, will necessarily increase the workload. Referrals will happen quicker.

[38] As an interim measure, the Minister supported the remedy proposed by the *amicus curiae* and that is the reading-in of a paragraph (c) in sections 4(1)(a) and 4(2) of the Act. This reading in would include a reference to any matter concerning the welfare of a minor or dependent child of the marriage and/or permanent life partnership concerned.

### **SUBMISSIONS ON BEHALF OF THE *AMICUS CURIAE***

[39] Mr Courtenay on behalf of the Centre for Child Law submitted that the judicial requirement imposed on unmarried parents to first obtain a court order before the office of the Family Advocate can conduct an investigation, violates several of their fundamental rights and most importantly those of their children.

[40] It was argued further that the exclusion of unmarried couples from the investigative and reporting mandate of the Family Advocate is unconstitutional for the following reasons: -

- [a] It evidently discriminates against married and unmarried parents;
  - [b] There is evidently a distinction drawn by the legislature between married and unmarried couples;
  - [c] The distinction also has no rational connection to any legitimate government purpose and the legislation places an unfair burden on unmarried parents to obtain a service that is fundamental to the finalization and proper adjudication of their dispute;
  - [d] The distinction violates the child's right to have her best interests considered as of paramount importance;
  - [e] It is contrary to the principle that any action or decision should minimize further legal and/or administrative proceedings and not exacerbate them;
  - [f] It inadvertently risks denying a child of an unmarried parent the right to be heard especially in circumstances where the first respondent welcomes an application for a referral as it would allow for the vetting of applications which may consequently result in a refusal and exclusion of any participation by the affected child.
- [41] Accordingly, it was argued on behalf the *amicus* that there is no constitutional justification for the exclusion of children born from unmarried parents from the protection afforded by the Act.

## **AN ANALYSIS OF THE CONSTITUTIONAL CHALLENGE**

[42] Whether the Act unfairly discriminates and offends against the rights of unmarried parents and children born from unmarried parents, this court must apply the *Harksen* test.<sup>9</sup>

[43] The place of birth of the Family Advocate and the source from which it derives its powers, remains the Act, despite the fact that the obligations of the office of the Family Advocate have to a certain extent been extended by the provisions of the Children's Act to include: -

[a] mediating disputes between unmarried parents as to whether an unmarried father automatically acquired parental responsibilities and rights;<sup>10</sup>

[b] assisting in the drafting of parental responsibilities and rights agreements;<sup>11</sup>

[c] preparing and filing of a report when so requested by the Children's Court.<sup>12</sup>

[44] It is common cause between the parties that the provisions of the Act only apply to divorcing or divorced parents. It is also common cause that the application of the Act is conditional on there being a statutory defined court process already instituted.

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<sup>9</sup> *Harksen v Lane N.O.* 1991 (1) SA 300 (CC).

<sup>10</sup> Section 21(3)(a) of the Children's Act.

<sup>11</sup> Section 22 of the Children's Act.

<sup>12</sup> Section 29(5)(a) of the Children's Act.

- [45] It is further common cause that unmarried parents are not entitled to rely on the provisions of the Act to simply enlist the services of the Family Advocate after the institution of legal process by completing a standard form. This has led to the development of a practice of launching an application in two parts, part A being an application to direct the office of the Family Advocate to conduct an investigation and recommendation and part B for the final relief sought by a party in relation to issues concerning minor children.
- [46] It is common cause between the parties that the category of unmarried parents and their children are differentiated by the Act. But does the differentiation bear rational connection to a legitimate government purpose? It certainly used to. The Family Advocate was established by the promulgation of the Act at a time "*when divorce rates were increasing in South Africa, and there was an urgent need to protect the interests of children*".<sup>13</sup> However, as a society the institution of marriage in our country is no longer a prerequisite for children to be regarded as "*legitimate*".
- [47] As was held by Supreme Court of Appeal ("*the SCA*") in *Paixão* under the pen of Cachalia JA: -

*"Our courts have emphasized the importance of marriage and the nuclear family as important social institutions of society, which give rise to important legal obligations, particularly the reciprocal duty of support placed upon spouses. The fact is, however, that the nuclear family has, for a long time, not been the norm in South Africa. South Africans have lower rates of marriage and higher rates of*

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<sup>13</sup> South African Law Reform Commission, issue paper 31, p 265, paragraph 4.3.1.

*extramarital childbearing than found in most countries.*<sup>14</sup>

[48] The SCA emphasized that: "*Cohabitation outside of a formal marriage is now widely practiced and accepted by many communities universally*".<sup>15</sup>

[49] The Constitutional Court recently supported and endorsed the SCA's approach in *Bwanya*<sup>16</sup>: -

"[32] *Understandably, a predominant refrain in this court's reasoning in the cases I have discussed is that manifestations of families are many and varied and all are worthy of respect and legal protection.*"

[50] The first respondent argues that the discrimination is fair. In support it relies on *Volks*. However, the Constitutional Court in *Bwanya* questioned the correctness of *Volks* and the majority ultimately found it to be wrong. The majority in *Volks* held that the exclusion of the surviving partner of a permanent heterosexual life partnership from an entitlement to claim maintenance under the Maintenance of Surviving Spouses Act does not constitute unfair discrimination. Dealing with the words "*marriage*" and "*spouse*", the court adopted the approach that "*spouse*" relates "*to a marriage that is recognised as valid in law and not beyond it*" and "*a number of relationships are excluded, such as same sex partnerships and permanent life partnerships between unmarried heterosexual cohabitants*". *Volks* therefore concluded by holding that an interpretation that includes permanent life partnerships strains the language of section 2(1) of the

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<sup>14</sup> *Paixão v Road Accident Fund* 2012 (6) SA 377 (SCA) paragraph [30] and [31].

<sup>15</sup> *Paixão (supra)* paragraph [35].

<sup>16</sup> *Jane Bwanya v The Master of the High Court, Cape Town*

## Maintenance of Surviving Spouses Act.

[51] In stark contrast the Constitutional Court in *Bwanya* found that the exclusion of permanent heterosexual unmarried life partners from the maintenance benefit afforded by section 2(1) amounts to discrimination on the ground of marital status and is unfair. It also concluded that the exclusion of surviving permanent opposite sex life partners from enjoying benefits under section 1(1) of the Intestate Succession Act amounts to unfair discrimination.<sup>17</sup>

[52] In rejecting the *Volks* decision, the Constitutional Court in *Bwanya* reasoned as follows: -

*"[52] The reality is that as at 2016, 3.2 million South Africans were cohabitating outside of marriage and that number was reported to be increasing. Thus we find a substantial number of families within this category. Indeed in Paixão the court said:*

*'[T]he fact is... that the nuclear family [in context, using this term to refer to a family centred on marriage] has, for a long time, not been the norm in South Africa.<sup>18</sup> Unsurprisingly, Dawood says 'families come in many shapes and sizes'. The definition of the family also changes as social practices and traditions change. In recognising the importance of the family, one must take care one to entrench particular forms of family at the expense of other forms.<sup>19</sup>*

*Surely, this caution applies equally to the institution of marriage, which is foundational to the creation of one category of family. To paraphrase what was said about family, we should be wary not to so emphasize the importance of the institution of marriage as to*

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<sup>17</sup> *Bwanya* paragraph [92].

<sup>18</sup> *Paixão* at paragraph [31].

<sup>19</sup> *Paixão* at paragraph [31].



*devalue, if not denigrate, other institutions that are also foundational to the creation of other categories of families. And this must be so especially because the other categories of families are not only a reality that cannot be wished away, but are on the increase."*

- [53] The conclusion arrived at was that "[T]here is no question that all categories of families are definitely deserving of legal protection."<sup>20</sup> Bwanya therefore rejected the "choice argument" supported by *Volks* and as argued by the first respondent in this matter and stated further: -

*"[67] ... Permanent life partnerships must be accorded the necessary respect as they are one of life's realities; an institution through which many in our society lead their lives, give and receive love in return, engage in lovemaking, find solace, seek and get protection and all manner of support, form families, enjoy some of life's myriad pleasures with those they love, and receive sustenance and - in the case of children born or raised within those relationships - nurture."*

- [54] Bwanya's quote from *Miron Concurrence L'Heureux-Dubé J* says it all: -

*"It is inappropriate ... to condense the forces underlying the adoption of one type of family unit over another into a simple dichotomy between 'choice' or 'no choice'. Family means different things to different people, and the failure to adopt the traditional family form of marriage may stem from a multiplicity of reasons - all of them equally valid and all of them equally worthy of concern, respect, consideration, and protection under the law."<sup>21</sup>*

- [55] Moreover provisions of the Act discriminate against the children of unmarried parents. In this regard the majority decision in *The Centre for*

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<sup>20</sup> *Paixão* at paragraph [53].

<sup>21</sup> At paragraph [102].

*Child Law*<sup>22</sup> is instructive: -

*"[7] The differentiation and supremacy of a married couple in comparison to unmarried couples continues to be problematic. South African society is not homogenous, and it must be accepted that the concept of 'marriage' no longer retains its stereotypical meanings...*

*[71] Children born to parents outside the marital bond are blameless, yet the retention of section 10 of the Act serves to harm children born outside of wedlock. The status of being born out of wedlock, in effect, penalises the child and the unmarried father, and of course the mother too. This differential treatment of children born out of wedlock is invidious and unconstitutional. This differential treatment cannot be justified.*

*[72] While society may express its condemnation of irresponsible liaisons outside the bonds of marriage, visiting this condemnation on an infant, through the application of the law, is illogical and unjust. This court has warned against punishing children for the sins of their parents; rather, children must be regarded as autonomous right-bearers and not 'mere extensions' of their parents. Moreover, imposing undue burdens on the 'child born out of wedlock' is contrary to the basic concept of our system that legal burdens should be imposed on relationships between individuals. Obviously, no child is responsible for her birth and penalising the child is an ineffectual, as well as an unjust way of forcing parents to comply with stereotypical norms of the supremacy of the marital family."<sup>23</sup>*

[56] In *Freedom of Religion*<sup>24</sup> the Constitutional Court described children as constitutionally recognised independent human beings, inherently entitled to the enjoyment of human rights, regardless of whether they are orphans

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<sup>22</sup> *The Centre for Child Law v Director-General: Department of Home Affairs and Others* [2021] ZACC 31.

<sup>23</sup> At paragraphs [70] to [72].

<sup>24</sup> 2020 (1) SA 1 (CC).

or have parents.<sup>25</sup>

[57] In *S v M* the Constitutional Court gave appropriate recognition to the child's rights to dignity: -

*"Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them... Individually and collectively all children have a right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood."*<sup>26</sup>

[58] The Constitutional Court in *Teddy Bear Clinic* held that: -

*"(1) Children are precious members of our society and any law that affects them must have due regard to their vulnerability and their need for guidance. We have a duty to ensure that they receive the support and assistance that are necessary for their positive growth and development. Indeed, this court has recognised that children merit special protection through legislation that guards and enforces their rights and liberties."*<sup>27</sup>

[59] There can therefore be no legitimate government purpose for this

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<sup>25</sup> At paragraph [46].

<sup>26</sup> *S v M (Centre for Child Law as amicus curiae)* 2008 (3) SA 232 (CC) paragraphs [18] and [19].

<sup>27</sup> *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (2) SA 168 (CC).

differentiation based on marital status when it comes to the treatment of children. Such discrimination cannot be justified, cannot be in the best interests of children and I therefore that it is inconsistent with the Constitution.<sup>28</sup>

## **THE APPLICATION**

[60] The applicant and the first respondent are no strangers to living abroad.

[61] They met in 2007 when the first respondent was in Knysna (Western Cape) during his holiday from France where he was living and working as a professional rugby player. The parties' romantic relationship developed and in August 2008, the applicant followed the first respondent the town of Oyonnax, France. The applicant fell pregnant with their first child during November 2008. She gave birth in France. During 2011 the first respondent's contract with his former employer terminated and he concluded a new contract with the rugby team, Grenoble, France for a period of a further three years commencing in April 2011. In December 2010 the applicant fell pregnant with the parties' second child and gave birth in France in September 2011.

[62] The parties' romantic relationship ended during June 2015 and the first respondent agreed that the applicant could return with the children to South Africa.

[63] It is common cause that the first respondent has parental responsibilities

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<sup>28</sup> *Van der Merwe v Road Accident Fund and Another* 2006 (4) SA 230 (CC) at paragraph [63].

and rights in respect of the minor children in terms of section 21 of the Children's Act.

[64] As alluded, the parties entered into a parenting plan on the 15<sup>th</sup> of March 2016. In terms of clause 2.1 of the parenting plan the parties agreed that they would act as co-guardians of the children as provided for in section 18(2)(c), 18(3), 18(4) and 18(5) of the Children's Act. Primary residence was agreed to be the home of the applicant and that she would act as the children's primary caregiver.

[65] As provided for in clause 3.1 of the parenting plan, the first respondent was awarded contact with the children during every alternate weekend for a period of no less than two days commencing on a Friday at 13:00 until the Sunday at 17:00. It was also agreed that the children would spend half of each holiday with each of the parties and that Christmas and Easter would alternate.

[66] The facilitator clause provides as follows: -

"4.4 *The parties agree that if they are unable to reach agreement on any issue concerning the children's best interests and/or any issue where a joint decision is required in respect of the children, the dispute shall be referred to the Facilitator in writing and he/she will attempt to resolve the dispute as speedily as possible without recourse to litigation.*

4.5 *The Facilitator's recommendations/directives shall be binding on the parties in the absence of any Court Order overriding such recommendations/directives.*

4.6 *Unless otherwise determined by the Facilitator (which shall be*

*the case where one of the parties is unreasonable or unrealistic regarding the issue referred to the Facilitator, in the sole discretion of the Facilitator), the parties shall be responsible for the Facilitator's costs in equal shares."*

- [67] Joint decisions are provided for in clause 2.1.2 of the parenting plan and includes major decisions about the children's schooling and tertiary education, their mental healthcare and medical care, decisions affecting contact between the children and their parents and decisions which are likely to significantly change the children's living conditions or have an adverse effect on their wellbeing.
- [68] Regarding the appointment of a facilitator and the implementation of clause 4 of the parenting plan, the first respondent states that he is not opposed to the applicant leaving the country, but that he does not support the relocation of the children. He denies that the applicant had no other option but to institute an application and emphasizes that a facilitator must be appointed to deal with disputes concerning the best interest of the children.
- [69] During 2019 the applicant and her husband started discussing the possibility of emigrating. They were both concerned about the future of the country for their children and the prospects for their future education. The applicant wants to enrol the children in a private high school, but states that the first respondent has already complained about the excessive school fees at a model C school. She therefore knows that he would not be prepared to contribute to private schooling. As a result, the applicant researched schools in New Zealand and Australia and found that there are private

schools in these countries that are affordable and cost the same as certain government schooling in South Africa.

[70] Initially the applicant and her husband considered New Zealand. They received confirmation based on her husband's skills that they would qualify to emigrate there. In September 2019 the applicant approached the first respondent to inform him that they were looking into relocating in the hope that they might be able to reach some agreement on this issue.

[71] The first respondent's response was that he would not support a relocation and his proposal was that the children should live with him in George in the event of the applicant and her husband leaving South Africa.

[72] A few weeks later the applicant conducted further research into New Zealand and Australia and decided that Australia would be a better fit for them for the following reasons: -

[a] They know people who have already relocated and already have a support system in that the applicant's husband's aunt lives in Canberra, Australia and has been living there for over 10 years;

[b] In addition, four of their close friends and their families have recently moved to Sydney, which is only a few hours' drive away from Canberra;

[c] There is a huge community of South Africans all across Australia. They have already networked with fellow ex-South Africans who have provided advice and support to them and responded warmly and

helpfully to all their enquiries;

[d] Australia also seems to have a very family-centric approach. They have both been drawn by the mindset of the country which prioritises time with family and offers a favourable quality of life with an emphasis on outdoors and a healthy lifestyle;

[e] Moreover, the parties' son informed the applicant during the course of 2019 that many of his classmates were emigrating and leaving South Africa. One morning, after watching something on television about Australia, their son volunteered that they should also look into moving there. He was excited at the idea of moving to Australia.

[73] During October 2019 the applicant and her husband made contact with an Australian emigration consultant and with her husband's employer in Australia. From the moment the Australian office saw her husband's CV, they expressed an interest in hiring him.

[74] The applicant's husband has a child from a former marriage relationship. He discussed the possibility of relocating with their son to Australia with his former wife and she agreed.

[75] During October 2019 the applicant sent a further message to the first respondent informing him that they were seriously considering moving to Australia. Again, the first respondent stated that he would not give his consent to their relocation.

[76] During February 2020 the applicant married her current husband. She



launched the current application during September 2020 and because she and the first respondent were never married, she requested an order directing the office of the Family Advocate to conduct an investigation and provide a written recommendation.

### **Grounds of opposition**

[77] In opposition the first respondent states that the applicant has made out no case for an urgent investigation to be conducted by the office of the Family Advocate as prayed for in her notice of motion. It was also submitted on behalf of the first respondent during argument, that the application insofar as it related to the relocation, lacks detail and substance.

[78] The first respondent submitted that the applicant has not kept to the terms of clause 4 (the facilitator clause) of the parenting plan, which clause specifically provides that a facilitator must be employed to resolve any dispute between the parties. Accordingly, the first respondent avers that the applicant is in breach of the parenting plan agreement and that the application has been instituted prematurely.

[79] The first respondent asserts that the applicant followed the incorrect process as brought Part A of the application in terms of the incorrect Act. In support, it was contended on behalf of the first respondent that form 9 of the regulations to the Children's Act requires the Family Advocate, social worker or psychologist to certify that a parental plan complies with the best interest of the child and that the same procedure is required during any application to court to amend or terminate a parenting plan which had been

made an order of court. On this basis it was contended further that this process can be embarked upon without any court application as it is incumbent on a court to *mero motu* take steps to ensure that any amendment of a parenting plan complies with the best interests of the child standard. The court can then decide which steps are necessary, including an investigation by the Family Advocate to ensure compliance with the best interests of the child standard.

[80] The first respondent submitted that this can be done as part of the application for an amendment of a parenting plan and the court can then order the Family Advocate to investigate what is in the best interest of the children even before the matter is set down. By the time the matter is enrolled for hearing, the Family Advocate's report will then be available to all the parties and the court, so the first respondent contends.

[81] The first respondent agreed in his submissions, however, that in the case of never married parents it would require a court order to engage the Family Advocate when they wanted to have their parenting plan amended, but that such an order can be obtained by way of an application in terms of section 34(5)(a) of the Children's Act. The first respondent submitted that the court will then in terms of section 29(5)(a) of the Children's Act order the Family Advocate to investigate and prepare a report with recommendations "*for purposes of the hearing*".

[82] The first respondent submitted therefore that only one application is required and the investigation of the Family Advocate precedes the first hearing of the matter in court. The first respondent submitted that this

process is no different to the one followed by divorced parents who are also required to bring an action or application before a court in terms of the Act before they can access the Family Advocate.

[83] The first respondent does not deny the fact that he wanted to remain in France for a number of reasons, not least of which was that he had started the process of applying for French citizenship which he wished to complete by residing in France for longer. He informed the applicant that he was doing this for the benefit of the children as well as himself as the children would then qualify for citizenship through him. The first respondent confirms that he was in the process of acquiring French citizenship and that it would have been for the benefit of their children. He asserts that in acquiring dual citizenship it would make travelling to European countries significantly easier and less costly.

[84] The first respondent remained living in France for approximately a year and five months after the applicant returned to South Africa with the minor children. The children went to visit the first respondent in France for about a month during September 2015. During 2015 the first respondent indicated to the applicant that it was his intention to settle in Cape Town, South Africa. This is after the applicant and the children relocated to Johannesburg on the 17<sup>th</sup> of June 2014. The first respondent relocated to George, Western Cape in December 2015 and married in April 2018.

[85] He acknowledges that due to the nature of his employment which does not allow him to work from home, that his wife would take over parental responsibilities when he is not there during the day.

[86] As far as the education of the children is concerned, the first respondent holds the view that the standard of education received at a private school in South Africa is no different than an education received at a public school. He takes issue with the manner in which the applicant conducted her research. The first respondent also appears to criticize the applicant for having left France in that she had not considered the children's best interest at the time and the opportunities they may have received had they remained resident in Europe.

### **DELIBERATION ON THE APPLICATION**

[87] In my view the first respondent's criticism of the applicant's research and the information that she provided regarding her husband's employment, the children's schooling and accommodation in Canberra, Australia is without merit.

[88] From a reading of the founding papers, the applicant has also actively taken steps to find employment in Canberra, Australia.

[89] The applicant's husband had already received his contract of employment as a business development manager for the Canberra branch of Kyocera Document Solutions in Australia at the beginning of March 2020. The applicant deals in detail with her husband's earnings and his net income. She also states that he has been unable to take up his employment by 1 May 2020 as agreed, as a result of the Covid crisis. However, his employers assured him that they would keep his position available for him.

[90] The applicant explains that the visa application had not yet been lodged

with the Department of Home Affairs as once a visa is granted, the visa applicant has a certain amount of time within which the visa is to be activated. This has not been possible due to the Covid pandemic and the closing of borders.

[91] Lastly but certainly not the least, the applicant deals in her founding papers with the first respondent's contact with the minor children in the event of a relocation.

[92] The applicant dealt in much detail with the lifestyle in Canberra, Australia, with the accommodation that is available, the children's education, medical cover and emotional support system. In my view, the information establishes a *prima facie* case for a referral to the office of the Family Advocate. There the first respondent would have the added benefit of raising any concerns that he may have to enable the Family Advocate to properly investigate the best interests of the children.

[93] I am unable to agree with the first respondent's submission that there is no significant difference in the two processes referred to or that section 34 and 29 of the Children's Act provides for one application only. Section 34(5) of the Children's Act provides as follows: -

*"A parenting plan that was made an order of court may be amended or terminated only by an order of court on application -*

*(a) by the co-holders of parental responsibilities and rights who are parties to the plan;*

*(b) by the child, acting with leave of the court; or*

- (c) *in the child's interest, by any other person acting with leave of the court."*

[94] Thereafter, section 34(6) provides that: -

*"Section 29 applies to an application in terms of subsection (2) which in turn provides as follows:*

- (2) *An application by co-holders contemplated in section 33(1) for the registration of the parenting plan or for it to be made an order of court must -*

(a) *be in the prescribed format and contain the prescribed particulars; and*

(b) *be accompanied by a copy of the plan."*

[95] Section 29(1) confers jurisdiction on the High Court, a Regional Court dealing with a divorce matter and the Children's Court within whose area of jurisdiction the child is ordinarily resident to hear applications in terms of specific sections of the Act. Those sections relate to making a parental responsibilities and rights agreement an order of court, court-assigned contact and care, court-assigned guardianship, an order confirming paternity, and suspension, termination, extension or circumscription of parental responsibilities and rights.

[96] The powers conferred on the court by section 29(5) and (6) broadly correspond to those a court has in respect of the divorce of a couple with minor or dependent children.<sup>29</sup>

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<sup>29</sup> Commentary on the Children's Act, RS9, 2018, Chapter 3 - page 33.

[97] It is significant that section 34(4), the section which governs the amendment and termination of a parenting plan, was registered with the Family Advocate, does not stipulate any requirements for the application.

[98] In *PD v MD*<sup>30</sup> the court held that since section 34(5) deals only with the formal procedure for amending a parenting plan and does not found the basis upon which or the circumstances in which a parenting plan may be amended, the section does not affect a court's powers to make an order amending arrangements relating to a child. Consequently the section does not limit the court's power to terminate, extend, suspend or restrict parental responsibilities and rights in terms of section 28 even if a parenting plan is in operation and has been made an order of court.

[99] In *VN v MD and Another*<sup>31</sup> the court held that despite the absence of an express legislative requirement to this effect, the assistance of a Family Advocate, social worker or psychologist, or mediation through a social worker or suitably qualified person must be sought in respect of the amendment of parenting plan that has been made an order of court just like it must, in terms of section 33(5), be sought in respect of the development of a parenting plan, because the reason for requiring the assistance or mediation is the same in both instances. The assistance or mediation is required especially if a significant period of time has elapsed since the existing parenting plan was made an order of court.<sup>32</sup>

[100] Subsection 29 (1) clearly excludes its application to section 34. Moreover,

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<sup>30</sup> 2013 (1) SA 366 (ECP).

<sup>31</sup> 2017 (2) SA 328 (ECG).

<sup>32</sup> Commentary on the Children's Act, RS9, 2018, Chapter 3, p 46.

section 29(4) provides that when considering an application contemplated in subsection (1), the court must be guided by the principles set out in chapter 2 to the extent that those principles are applicable to the matter before it. In terms of section 29(5) the court may for the purposes of the hearing, contemplated in section 29(1), order that a report and recommendations of a Family Advocate, a social worker or suitably qualified person must be submitted to the court.

[101] Ultimately, even on the first respondent's own version, non-married parents are still excluded because if they do not have a parenting plan, they are left out in the cold.

[102] As far as a referral to the Family Advocate is concerned, when it comes to matters concerning parenting plans, section 34 of the Children's Act does not provide for a referral to the Family Advocate for investigation and recommendation. In my view, the reason for this omission is plain and that is to allow a court sitting as upper guardian to retain its powers and inherent jurisdiction to refer a matter to the Family Advocate for investigation under any circumstances.

[103] Moreover, from a reading of the applicant's notice of motion, more particularly part B, she in fact applies for an amendment to the parenting plan. However, because section 34 of the Children's Act does not provide for an automatic referral to the office of the Family Advocate for investigation, the applicant had no alternative but to approach the court for an order for a referral. In my view the applicant was not wrong in applying the Act. Either way, an application for a referral to a Family Advocate was



inevitable.

[104] In any event if I were to follow the first respondent's argument to it logical conclusion, especially considering that he seeks the setting aside of the parenting plan in its totality, the nature of the relief sought would similarly necessitate a referral to the Family Advocate.

[105] The applicant states that they have never appointed a facilitator in the four years since the parenting plan was concluded. However, the applicant states that the first respondent has made it clear that he would not agree to the children's relocation and accordingly there would be no benefit to having the dispute mediated, especially as they have never had a facilitator in place. The applicant is therefore of the view that an application to court for the relocation of the children is the only alternative and that mediation would be a futile exercise.

[106] I am not persuaded that facilitation would serve any purpose under the circumstances. Firstly, the first respondent remains steadfast in his refusal to allow the children to relocate to Australia and the applicant is not wavering either about the idea of relocating. Such a fundamental stalemate cannot be resolved in mediation.

[107] Moreover, I am not convinced that a facilitator is empowered to mediate issues pertaining to guardianship, which includes a decision to remove the children from the borders of South Africa as provided for in section 18(3)(c)(iii), more specifically because section 18(5) of the Children's Act, provides that "[U]nless a competent court orders otherwise, the consent of

*all the persons that have guardianship of a child is necessary in respect of matters set out in subsection (3) (c)".*

[108] The purpose of and role performed by the office of the Family Advocate in disputes involving minor children cannot be overstated. In 2003, this Court in *Soller*<sup>33</sup> aptly described the position of the Family Advocate as follows: -

*"..the Family Advocate, as required by legislation, reports to the court on the facts which are found to exist and makes recommendations based on professional experience. In so doing the Family Advocate acts as an advisor to the court and perhaps as a mediator between the family who has been investigated and the court."*<sup>34</sup>

[109] In *Terblanche*<sup>35</sup> the court described Family Advocates as:

*"..particularly well equipped to perform such functions and duties, having at his or her disposal a whole battery of auxiliary services from all walks of life, including family counsellors appointed in terms of the Act and who are usually qualified social workers, clinical psychologists, psychiatrists, educational authorities, ministers of religion and any number of other persons who may be cognisant of the physical and spiritual needs or problems of the children and their parents or guardians, and who may be able to render assistance to the Family Advocate in weighing up and evaluating all relevant facts and circumstances pertaining to the welfare and interests of the children concerned."*<sup>36</sup>

[110] The facts remains that the parties simply do not see eye to eye on the issue of relocation. An objective investigation and recommendation is therefore

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<sup>33</sup> *Soller N.O. v G and Another* 2003 (5) SA 430 (W).

<sup>34</sup> At p 437.

<sup>35</sup> *Terblanche v Terblanche* 1992 (1) SA 501 (W).

<sup>36</sup> At 503E - I.

imperative in order assist the court ultimately in arriving at a decision that would serve the best interests of the minor children. I am accordingly inclined in granting the Applicant an order for a referral.

### **CONSTITUTIONALITY RAISED *MERO MOTU***

[111] I consider it necessary to briefly deal with the context within which the first respondent took issue with the point of constitutionality raised by this court *mero motu*. In his heads of argument, Mr Bezuidenhout clarified the position by submitting that it is not the first respondent's contention that a court may not raise a constitutional issue *mero motu*, but that "*courts should observe the limits of their power. They should not constitute themselves as the overseers of laws made by the legislature...*" and "*should raise and consider the constitutionality of laws ... where this is necessary for the proper resolution of the dispute before them*".<sup>37</sup>

[112] Accordingly, it was submitted on behalf of the first respondent that in the matter at hand the dispute could have been resolved without considering the constitutionality of certain parts of the Act, especially as the constitutionality issue contributes to one of the mischiefs this court wanted to avoid, namely delays in finalizing the matter as speedily as possible and in the interest of the children. Mr Bezuidenhout relied in support on *Director of Public Prosecutions, Transvaal*.<sup>38</sup>

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<sup>37</sup> *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (7) BCLR (CC) paragraph [39].

<sup>38</sup> *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development (supra)* paragraph [47].

[113] Mr Bezuidenhout argued that the Act is only regarded as outdated or out of step with our constitutional order if it is to be used as a legal basis for anything else than what it was promulgated for, namely divorcing or already divorced parents. Never married parents would find their recourse in the Children's Act.

[114] This court's entitlement to raise a constitutional issue *mero motu* under these circumstances is fortified by the very same authority Mr Bezuidenhout relied on: -

*"... There are two situations in which a court may, on its own accord, raise and decide a constitutional issue. The first is where it is necessary for the purpose of disposing of the case before it, and the second is where it is otherwise necessary in the interests of justice to do so. It will be necessary for a court to raise a constitutional issue where the case cannot be disposed of without the constitutional issue being decided. And it will ordinarily be in the interest of justice for a court to raise, of its own accord, a constitutional issue where there are compelling reasons that this should be done..."*<sup>39</sup>

[115] The Constitutional Court in *Director of Public Prosecutions* elaborated on the second situation referred to, as follows: -

*"It is neither necessary nor desirable to catalogue circumstances in which it would be in the interests of justice for a court to raise, of its own accord, a constitutional issue. This is so because this depends upon the facts and circumstances of the case. An example that comes to mind is where the issue has become moot between the parties, but its immediate resolution **will be in the public interest***

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<sup>39</sup> *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development (supra)* paragraph [39].

***and the matter has been fully and fairly aired before the court...***<sup>40</sup>(my emphasis)

[116] It was argued by Mr Courtenay on behalf of the *amicus curiae* that in the present instance it is evidently in the interests of justice to resolve this issue for the following reasons: -

- [a] The court is constitutionally enjoined to uphold and protect the rights contained in the bill of rights;<sup>41</sup>
- [b] There are several rights' violations that are systemic and need to be addressed to ensure that other similarly situated parents do not also suffer the same fate;
- [c] It is an issue that frequently arises, in the sense that applications to authorize the Family Advocate to investigate are commonplace in this division and therefore, a decision on this aspect may well resolve the need for such applications and thereby reduce wasted court time and putting parents through unnecessary and costly expense.

[117] As upper guardian I have a duty to protect and uphold the best interests of minor children. By turning a blind eye to the ongoing discrimination of children of unmarried parents, I would be failing in my duties. Afterall, "[T]here can be no keener revelation of a society's soul than the way in

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<sup>40</sup> *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development (supra)* paragraph [40].

<sup>41</sup> Section 8(1) of the Constitution.

*which it treats its children.*<sup>42</sup>

[118] And as was stated in *YG v S*:<sup>43</sup> -

*"In the present case, the constitutional rights implicated are the rights of children, who are afforded particular protection under the bill of rights. ... If ... mootness is reason enough for a court like the one to refuse to consider the constitutional issue, it would mean that children's rights are continued to be placed in potential jeopardy unless and until the legislature took action. This would be contrary to section 28(2) of the Constitution, which provides that the child's best interests are paramount in every matter concerning a child. It would also place the courts in the invidious position of having to ignore the potential unconstitutionality of the common law rule, and thus bringing them into conflict with their duty under section 8(1) to apply the bill of rights, and their duty under section 39(2) to develop the common law in line with the bill of rights."*

[119] Accordingly I find that the constitutional challenge raised by the court *mero motu* was justified, in the best interests of children and the public.

## **COSTS**

[120] There are no winners and no losers in matters of this kind. At this stage of the application proceedings, I am inclined to give both parents the benefit of the doubt that they acted in the best interests of their children. In my view any costs order against either party at this stage would only serve to

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<sup>42</sup> Address by President Nelson Mandela at the launch of the Nelson Mandela Children's Fund, Pretoria, 9 May 1995

<sup>43</sup> 2018 (1) SACR 64 (GJ) as confirmed by the Constitutional Court in *Freedom of Religion in South Africa v Minister of Justice and Constitutional Development* 2019 (11) BCLR 1321 (CC).

aggravate the relationship between them further, and would impact negatively on the children. I therefore exercise my discretion towards reserving the issue of costs for determination at the final hearing of Part B of the main application and the counter-application.

[121] When it comes to the constitutional challenge, it is so that the Commission's work has been ongoing since at least 2016. However, as at 2022, neither the Commission nor Parliament appear to be any closer to finding a solution and to promulgating legislation to address the defects in the Act. This is regrettable given the fact that the only ones who continue to suffer are the weak and the vulnerable.

[122] However, I do take into account that the Minister did not oppose the constitutional challenge and acknowledged its deficiencies. I also take cognisance of his valuable input. For this reason I would not grant a costs order against the Minister at this stage, but leave this issue to the Constitutional Court to finally determine.

## **ORDER**

[123] In the circumstances I make the following order: -

"1. *The office of the Family Advocate is directed to urgently investigate whether it would be in the best interests of the minor children of the applicant and the first respondent, namely: -*

*1.1 DB, a boy, born on the 29<sup>th</sup> of August 2009; and*

*1.2 MB, a girl, born on the 17<sup>th</sup> of September 2011,*

*to relocate with the applicant to Canberra, Australia as sought by the applicant in part B of this application, and whether the relief sought by the first respondent in the counter-application would serve the children's best interests.*

2. *The office of the Family Advocate is requested to file a report containing its recommendations within 15 (fifteen) days from date of this order.*
3. *Both the applicant and the first respondent are granted leave to supplement their papers upon receipt of the Family Advocate's recommendation.*
4. *Part B of the main application and the first respondent's counter-application is postponed sine die.*
5. *The costs occasioned by the hearing of 24 August 2021 are reserved for final determination at the hearing of part B of the main application and the counter-application.*
6. *Section 4 of the Mediation in Certain Divorce Matters Act, 24 of 1987 ("the Act"), is declared to be inconsistent with the Constitution of the Republic of South Africa, 108 of 1996, and invalid.*
7. *The declaration of invalidity is referred to the Constitutional Court for confirmation in terms of section 172(2)(a) of the Constitution of the Republic of South Africa, 108 of 1996.*
8. *The declaration of invalidity is suspended for a period of 24 (twenty four) months from the date of confirmation by the Constitutional Court to enable Parliament to take steps to cure the constitutional defects identified in this judgment.*
9. *As a temporary measure and pending the decision of the Constitutional Court on the validity of the Act:*
  - 9.1 *the word 'or' between paragraphs 4(1)(a) and 4(1)(b)*



*as well as between paragraphs 4(2)(a) and 4(2)(b) is struck out and a new paragraph (c) in both sections 4(1) and 4(2) is to be read in and shall read as follows:*

*'(c) After an application has been instituted that affects (or is likely to affect) the exercise by a parent of any parental responsibilities and rights provided for in section 18(2)(a) to (c) and 18(3) of the Children's Act, 38 of 2005 or after an application has been instituted by a non-parent as contemplated in sections 23 and 24 of the Children's Act, 38 of 2005.'*

*9.2 The words 'of a marriage concerned' as they appear in sections 4(1)(b) and 4(2)(b) are struck out.*

*9.3 All requests for inquiries envisaged in paragraph 9.1 above shall be made to the Family Advocate by the completion of an Annexure B form found in the Regulations to the Act.*

*10. The costs occasioned by the filing of written submissions and the hearing of the 10<sup>th</sup> of January 2022 are reserved for determination by the Constitutional Court when it decides on the validity of the Act."*



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**F BEZUIDENHOUT**

**ACTING JUDGE OF  
THE HIGH COURT**

**DATE OF HEARING:** 24 August 2021

10 January 2022

**DATE OF JUDGMENT:** 2 February 2022

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