FRASER v NAUDE AND OTHERS [i]* 1997 (2) SA 82 (W)

Citation	1997 (2) SA 82 (W)
Case No	28831/95
Court	Witwatersrand Local Division
Judge	Coetzee J
Heard	December 8, 1995
Judgment	December 8, 1995
Counsel	P Soller for the applicant N Davis for the first, third and fourth respondents. No appearance for the second respondent

Annotations

Flynote : Sleutelwoorde

Minor - Adoption - Natural father of illegitimate child seeking to prevent adoption of child by applying for interdict against mother handing child over to anyone other than natural father - Natural father at common law having no parental authority nor incidents thereof over child - Accordingly natural father having no rights protectable by interdict - Child Care Act 74 of 1983, s 18(4)(d) according with common law in this respect.

Headnote : Kopnota

The common law is clear: a (natural or biological) father of an illegitimate child has no parental authority and none of the incidents of parental authority attaches to that father. Such a father, therefore, has no rights in respect of the child which can be protected by an interdict, and s 18(4)(*d*) of the Child Care Act 74 of 1983 accords with the common law in this respect. Accordingly, he cannot claim an interdict against the mother of the child to prevent her from handing over the child to anyone other than himself in order to prevent the adoption of the child by someone else. (At 85C-D, 83C-D, 83G and 86F, paraphrased.)

Cases Considered

The following decided cases were cited in the judgment of the Court:
B v S 1995 (3) SA 571 (A)
L F Boshoff Investments (Pty) Ltd v Cape Town Municipality; Cape Town Municipality v L F Boshoff Investments (Pty) Ltd 1969 (2) SA 256 (C)
Rowan v Faifer 1953 (2) SA 705 (E)

Statutes Considered

The following statute was considered by the Court:
The Child Care Act 74 of 1983, s 18(4)(*d*): see *Juta's Statutes of South Africa 1995* vol 5 at 2-91.
Application for an interim interdict. The facts appear from the reasons for judgment. P Soller (attorney) for the applicant.
N Davis for the first, third and fourth respondents.
No appearance for the second respondent.

Judgment

Coetzee J: This is an application by the applicant, Laurie John Fraser, for an interim interdict restraining the first respondent from:

'Handing over or parting with possession of baby J (the unborn male child who forms the subject-matter of these proceedings) to anyone other than the applicant, provided that this be done when the relevant health authority (the attending gynaecologist, the hospital) certifies

that baby J can be discharged and that upon the said discharge baby J be handed to the applicant.' Certain ancillary relief is claimed, which is not of importance at this stage. It is a matter of record that relief ancillary to the main claim is being sought.

It appears from the founding affidavit that the applicant alleges he is the biological father of the baby *in utero* of the first respondent. For the purposes of this application I shall assume that he is the biological father.
Mr Soller, the attorney for the applicant, has submitted that, even if it is so that a father of an illegitimate child does not have a clear right to, *inter alia*, guardianship, it *cannot* be our law that a mother such as the first respondent is to be allowed to give her baby away for adoption as soon as it is born. I am invited to make new law and to declare that she is not entitled to do so.
It is submitted that it is neither immoral nor unfair for a biological father to bring a claim such as the present one. The order seeks to prevent the adoption and the right to do so is because it is submitted that an illegitimate father has a right to claim access to his child. It is also argued that these biological fathers' rights have not yet been judicially pronounced upon and it comes before me for the first time 'for everything in the law relating to illegitimate children'. It is argued that, because the father of the illegitimate child has a right to object to adoption, he therefore has some right to stop the adoption procedures. It was then argued that it is discriminatory against the father of the illegitimate child and that it offends against his dignity as set out in s 10 of the Constitution of the Republic of South Africa Act 200 of 1993. It was then also argued that the applicant is entitled to interim relief because there would '*be no injustice done to the first applicant*'. It was then argued that there are '*certain rights vested in the biological father*', which is the applicant. I will deal with these so-called rights which he has in terms of the statute later on.
In *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality; Cape Town Municipality v L F Boshoff Investments (Pty) Ltd* 1969 (2) SA 256 (C) at 267 Corbett J (as he then was) sets out the requisites for an applicant for temporary relief such as is being sought now, and says as follows at 267B-D:
'Briefly these requisites are that the applicant for such temporary relief must show -

(*a*) that the right which is the subject-matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, though open to some doubt;

(*b*) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;

(*c*) that the balance of convenience favours the granting of interim relief; and

(*d*) that the applicant has no other satisfactory remedy.'

First of all, the first requirement is for the applicant to establish that he has a clear right or, if not clear, then *prima facie* established though open to some doubt. An extraordinary argument by Mr Soller, attorney for the applicant, has been put before me. I decline his invitation to make new law. I consider myself bound by our common law and I consider myself bound unconditionally by what the Appellate Division has pronounced upon. It is absurd and childish for any self-respecting legal representative to summarily argue that I, sitting as a Judge of first instance, can pronounce on the correctness of the AD decisions. In *B v S* 1995 (3) SA 571 (A) the Appellate Division dealt with our common law, and the following is *inter alia* said at 575D:
'Access, like custody, is an incident of parental authority: see Boberg *The Law of Persons and the Family* at 459-60 and cases cited there. Consequently, if access is the father's entitlement *as a matter of inherent legal right* it can only stem from his parental authority. The duty of support and the marriage impediment in no measure imply the existence of any parental authority from which the supposed right of access could have been derived.'
And at 575G-H:
'The fact is that in Roman-Dutch Law an illegitimate child fell under the parental authority, and thus the guardianship and custody, of its mother; the father had no such authority: Van Leeuwen *Het Roomsch Hollands Recht* 1.7.4; Van Bynkershoek *Quaestiones Juris*

***Privati* 3.11; Van der Linden *Koopmans Handboek* 1.4.2. To acquire parental authority he had either to marry or be married to the child's mother or he had to adopt the child: Voet *Commentarius ad Pandectas*.'**
In the same case the Appellate Division held conclusively, in respect of the contended inherent right of a father of an illegitimate child to access to the child, as follows at 579H:
'According to the law as it is, the right to access depends for its existence on parental authority. A father such as appellant does not have that in the eyes of the law. But he may be granted access *if that is in the best interests of his child*. It may well be that most fathers of illegitimate children nowadays are concerned about the welfare of their children and committed to enhancing the latter's best interests, particularly where the children are born of a so-called live-in relationship between the parents. If there are sound sociological and policy reasons for affording such fathers an inherent access right, in addition to the right they already have to be granted access where it is in the best interests of their children, then that is a matter that can only be dealt with legislatively.'
(My emphasis.) (The so-called 'live-in' relationship between the applicant and the first respondent ceased in May 1995.)
After considering all the authorities the Appellate Division came to the following conclusion at 583G: **'In summary, therefore, current South African law does not accord a father an inherent right of access to his illegitimate child. It recognises that the child's welfare is central to the matter of such access and that access is therefore always available to the father if that is in the child's best interests. In both these respects the law is in step with that in the leading foreign jurisdictions referred to in argument.'** The common law is clear: a father of an illegitimate child has no parental authority and none of the incidents of parental authority attaches to that father. In other words, it is clear that the applicant has not established even a *prima facie* right, as set out by Corbett J in the *L F Boshoff* case *supra*. It has been suggested and argued that, because the applicant as a single person has the right to adopt a child, therefore he has a right to bring this application, and also because he has the right - as I understood the argument - to object to the adoption when the first respondent gives out the child for adoption, that therefore he has the right, in the words of Mr Soller 'to prevent the biological mother from discarding the child, ie handing it over to adoptive parents'. For this proposition he relied on a dictum which is found in a law publication called *Family Law Service* s E at 8, which referred to a case called *Rowan v Faifer* 1953 (2) SA 705 (E) .
I do not consider that this is in point at all. Here the applicant was the mother, a natural guardian, of an illegitimate minor child. She applied for an order calling upon the respondent, who was the biological father of the child and to whom she had willingly handed over the child, to deliver it up to her. The Court held that, although the respondent (father) might not have the rights to custody of such child, he had *locus standi* to appear to oppose, not to claim custody, and it was further held that, in view of the dispute of facts, pending the institution of the action, the child was to remain where it was. But it was not found that the biological father had any rights and, if it did so hold, it would be completely against the finding and pronouncement of the Appellate Division, and accordingly it would be wrong. It was then argued by Mr Soller, who read to me s 18(4) of the Child Care Act 74 of 1983, but unbeknown to me stopped reading halfway through the section (that the applicant's consent to the adoption had to be given before the adoption order could be made).[ii]* Section 18:
'18 Adoption of children

> **(4) A children's court to which application for an order of adoption is made in terms of ss (2), shall not grant the application unless it is satisfied -**
> **. . .**
> **(*d*) that consent to the adoption has been given by both parents of the child, . . .'**

And there Mr Soller stopped reading!! But counsel for the respondent then read to me the rest of that section, which words are singularly apposite. This shows what our law is:
'. . . or, if the child is illegitimate, by the mother of the child, whether or not such mother is a minor or married woman, and whether or not she is assisted by her parent, guardian or husband, as the case may be . . .'.
It is, therefore, clear that this accords with our common law, namely that the sole guardianship of

an illegitimate child vests in the mother and all the incidents of parental authority vest in the mother only. I certainly am not inclined to go contrary to our common law.
As a last resort it has been suggested that I should refer the matter to the Constitutional Court. Exactly what I must refer and what the Constitutional Court must decide has not been stated. *In vacuo* such submission is made. I assume, although it has not been given to me, that the attorney for the applicant might be referring to a provision in s 103 of the Constitution of the Republic of South Africa Act 200 of 1993, and I think it is to ss (4)(*b*), although I am not sure because it has not been argued.
Consequently, there is no basis whatsoever for the applicant to succeed. Insofar as he has an alternative remedy, he has a remedy, and that is he can apply for the adoption of the child in terms of s 18. He is an unmarried person and ss (1) of s 18 provides that an unmarried person can also be an adoptive parent, and there would then be competing applications and the Children's Court will have to decide what the position is. I have come to the conclusion there are no rights which the applicant has, and accordingly the application is dismissed with costs.

Applicant's Attorneys: *Soller & Manning*. First, Third and Fourth Respondents' Attorneys: *Van der Walt & Hugo*, Pretoria.

---

[i] **Leave to appeal was refused on 8 December 1995 - Eds.**
[ii] The words in brackets were inserted by the Editors as the sentence in the original judgment was incomplete - Eds.