Jooste v Botha

High Court, Transvaal Provincial Division

Judgment date : 12/10/1999 *Case No* : 1554/99

Before : K Van Dijkhorst, Judge

Child *– right to family care, parental care, or appropriate alternative care – section 28(1)(b) of the Final Constitution – scope and ambit of the right – section 28(1)(b) contemplates that a child will be in the care of somebody who has custody over him or her – every child is entitled to be in that situation and the State is constitutionally obliged to establish, safeguard and foster that situation – the State may not interfere with the integrity of the family – the word "parental" pertains to a custodian parent – 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) – section 28(1)(b) sets out vertical socio-economic rights against the State – it does not create as between parents and children rights enforceable by children against parents that are more extensive than those recognised by the pre-constitutional law in that sphere – in particular, it does not impose a previously non-existing obligation on the father of an illegitimate child – the latter is not a "parent" within the meaning of the words "parental care" – held, in determining an exception to particulars of claim, that section 28(1)(b) does not give an illegitimate child a cause of action against his or her father to claim damages based on a failure of the father to provide the child with love, interest, attention, recognition, etc.*

Editor's Summary

Section 28 of the Final Constitution protects the rights of the child. Section 28(1)(b) provides that "every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment".

Plaintiff, the illegitimate child of Defendant, instituted action against Defendant claiming damages allegedly arising from Defendant's failure to render Plaintiff any "attention, love, cherishment, and interest".

Defendant excepted to Plaintiff's particulars of claim as disclosing no cause of action.

It was contended on behalf of Plaintiff that under the Constitution Plaintiff had such a cause of action against Defendant for damages based in delict. Such a claim would not be recognised by the common law. At common law a father had no greater duty to his natural offspring than to provide for their material welfare, if he was not married to their mother. Until recently an unmarried father had no say in the question of adoption of his child. Plaintiff's contention that a cause of action existed under the Constitution was based on the following reasoning: .In terms of section 28(1)(b) of the Constitution Plaintiff was entitled to "parental care". Defendant was his parent. Section 8(3) obliged the Court to develop the common law to give effect to that right. Section 9 prohibited unfair discrimination on the grounds of birth. There could not be a right without a

A remedy. (*Ubi ius ibi remedium*.) The Court was accordingly obliged to fashion a remedy. A mandamus would be inappropriate. The appropriate remedy was therefore a delictual action for damages.

The common law recognised the uniqueness of the complex legal relationship created by wedlock. By its nature, it differed vastly from ordinary contractual relationships of the market place. Society expected parents, children and siblings to honour the bond of B kinship between them; but of necessity, it did not grant rights to and impose concomitant obligations upon them except in the economic sphere. The "right to be loved" could not be made a legally enforceable right. Where there existed no legal obligation on parents to love their legitimate offspring, *a fortiori* there could be none in respect of illegitimate children. Despite recent statutory developments that had materially improved the rights C of a natural father in respect of his illegitimate child, neither the common law nor statute recognised the "right" of a child to be loved, cherished, comforted or attended to by a non-custodian parent as creating a legal obligation. A bond of love was not a legal bond. Plaintiff's claim, if based on the common law, would have to fail.

Section 28(1)(b) stated that every child has the right to family care or parental care or to appropriate alternative care when removed from the family environment. The three D types of care dealt with three contingencies: Where the child was part of a family; where there was no family but a single parent was the care giver; and where there was an alternative care situation because the child had been removed from the family environment. Section 28(1)(b) contemplated a child in the care of somebody who had custody over him or her. Every child was entitled to be in that situation. The State was constitu- E tionally obliged to establish, safeguard and foster that situation. The State could not interfere with the integrity of the family. In the subsection, however, the word "parental" had necessarily to 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 did not have custody) fell outside the scope of section 28(1)(b).

F The provisions of sections 28(1) and (2) of the Constitution found their antecedents in article 7(1) of the United Nations Convention of the Child. The latter stated that "the child shall have . . . as far as possible, the right to know and be cared for by his or her parents". Article 7(2) stated that State parties were obliged to ensure the implementation of these rights in accordance with their national law. This indicated a vertical obligation. G The family contemplated by the convention was therefore the normal bonded custodial relationship. The context of article 18 which stated that State parties "shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child" did not indicate that what previously was clearly of vertical operation, was now intended to operate horizontally also. A bill of rights was primarily a protective device, a buttress between State and H subject for the furtherance of individual liberty in its wide sense. The provisions of the Constitution safeguarded family life. Section 28(1)(b) was an indication of such intention. It set out vertical socio-economic rights against the State. It was not necessary to decide for purposes of the instant case to what extent they were justiciable in that context. Section 28 did not in subsection (1)(b) enact a rule of positive law that went beyond what preceded it. It did not place a previously non-existing obligation on the I father of an illegitimate child. Such a person was not a "parent" within the meaning of the expression "parental care" in the provision.

The law did not attempt to enforce the impossible. It could not create love and affection where there were none. The framers of the Constitution could not have intended the result that Plaintiff contended for. The nature of the postulated right, which fell squarely within the field of intimate human relationships, was such that it could not give rise to J legal obligations. The provision in section 28(2) that a child's best interests are of

paramount importance in every matter concerning the child, did not lead to a different conclusion. The wide formulation of section 28(2) was ostensibly so all embracing that the interests of the child would override all other legitimate interests of parents, siblings and third parties. It would prevent conscription or imprisonment or transfer or dismissal by the employer of the parent where that was not in the child's interest. Such a result could not have been intended. Section 28(2) was intended as a general guideline and not as a rule of law of horizontal application.

Accordingly, it had to be found that Plaintiff's claim was bad in law. It would serve no purpose to grant leave to amend.

Judgment

Van Dijkhorst J: There are two aspects of a parent-child relationship. The economic aspect of providing for the child's *physical* needs and the intangible aspect of providing for his or her psychological, emotional and developmental needs. The best interests of the child demand an environment of love, affection and consideration. This exception raises the question whether the moral duty to provide the latter is legally enforceable.

The plaintiff is a boy of 11 assisted by his mother and guardian Anna M Jooste (Jooste).

He sues the defendant for damages of R450 000. His particulars of claim contain the following factual allegations.

In June/July 1987 Jooste and the defendant had carnal intercourse as a result of which the plaintiff was conceived and born. They were never married. There is no allegation that they ever cohabited. The plaintiff is in the factual and legal custody and control of Jooste.

Since plaintiff's birth the defendant has refused and/or neglected to admit that the plaintiff is his natural son; to communicate with him; to render him love, cherishment (koestering) or recognition; to show any interest in him; and to take any steps which would naturally be expected of a father with respect to his son.

As a result of this refusal or neglect the plaintiff has suffered damage in the form of *iniuria*, emotional distress and loss of amenities of life.

A delictual action for damages is appropriate as:

1. the defendant is under a legal duty to render the plaintiff attention, love, cherishment, and interest; alternatively
2. in terms of the Constitution the defendant is obliged to render the plaintiff such love, cherishment, attention and interest as can normally be expected of a father towards his natural son; alternatively
3. the defendant as natural father has a duty to protect the plaintiff which includes the duty to protect his general welfare and therefore the defendant is obliged to act as set out in the aforegoing two paragraphs.

No allegation is made that the defendant does or does not pay maintenance. This case is therefore not about a failure to pay maintenance or grant monetary sustenance.

These are the material allegations in the particulars of claim. No plea has been filed yet.

A On exception it is contended that even should the factual allegations for purposes of argument be taken to be correct, no case has been made out against the defendant. Or, in legal parlance, there is no cause of action.

Although as appears from what has been set out the claim is formulated on three alternative bases, during argument counsel for the plaintiff based his case B squarely on the provisions of the Constitution, though in passing he attempted to keep the back door open with a statement that should the Constitution fail him he would rely on cases like *B v S* 1995 (3) SA 571 (A) for a delictual claim. No argument was presented along these lines.

I was not referred to authority and I know of none which indicates that in our C common law and jurisprudence prior to the advent of our constitutional democracy a claim such as this was sound in law. A father had no greater duty to his natural offspring than to provide for their material welfare if he was not married to their mother. And until recently he had not even a say in their adoption proceedings. In our common law the plaintiff as a speelkind (play child) or D overwonnen kind (bastard) would initially have had a diminished status and been prevented from attaining certain official posts, but in the times of De Groot it was merely a matter of inheritance (De Groot *Inleidinge tot de Hollandsche Rechts-geleerdheid* 1.12.4–8).

It follows that the plaintiff's claim must find its legal foundation in our Con- E stitution, or fail.

The interim Constitution Act 200 of 1993 provided in section 30:

"30 (1) Every child shall have the right –

(a) to a name and nationality as from birth;

(b) to parental care;

F *(c)* to security, basic nutrition and basic health and social services;

(d) not to be subject to neglect or abuse; and

(e) not to be subject to exploitative labour practices nor to be required or permitted to perform work which is hazardous or harmful to his or her education, health or well-being.

G (2) Every child who is in detention shall, in addition to the rights which he or she has in terms of section 25, have the right to be detained under conditions and to be treated in a manner that takes account of his or her age.

(3) For the purpose of this section a child shall mean a person under the age of 18 years and in all matters concerning such child his or her best interest shall be paramount."

H The provisions in the interim Constitution and in the Constitution of 1996 dealing with children should be evaluated in the light of the pre-existing international law on the subject. Both find their antecedents in a number of international instruments which embrace special protection for children. These are: *The International Covenant on Civil and Political Rights*; *The European Social Charter*; *The International Covenant on Social, Economic and Cultural* I *Rights*; *The African Charter on Human and Peoples' Rights*; *The American Convention on Human Rights*. The most important because it is binding is *The United Nations Convention on the Rights of the Child* (1989) which was ratified by the Republic of South Africa in 1995.

These instruments by their nature and wording have only vertical application. J The interim Constitution's Bill of Rights by its nature was held to have only

vertical application (*Du Plessis and Others v De Klerk and Another*[1] 1996 (3) SA 850 (CC)). In this light their provisions pertaining to children have to be evaluated. Also when they are repeated in the Constitution of 1996 which provides that the Bill of Rights may have horizontal application. Under the interim Constitution the plaintiff would have had no cause of action.

The argument on behalf of the plaintiff is simple, and at first blush attractive because of its simplicity: In terms of section 28(1)*(b)* of the Constitution the plaintiff is entitled to "parental care". The defendant is his parent. Section 8(3) obliges the court to develop the common law to give effect to that right. Section 9 prohibits unfair discrimination on the grounds of birth. There cannot be a right without a remedy (*ubi ius ibi remedium*). The court must therefore create a remedy. A mandamus will be inappropriate. The second best is a delictual action for damages.

Section 28 of the Constitution reads:

"(1) Every child has the right –
- *(a)* to a name and a nationality from birth;
- *(b)* to family care and parental care, or to appropriate alternative care when removed from the family environment;
- *(c)* to basic nutrition, shelter, basic health care services and social services;
- *(d)* to be protected from maltreatment, neglect, abuse or degradation;
- *(e)* to be protected from exploitative labour practices;
- *(f)* not to be required or permitted to perform work or provide services that –
  - (i) are inappropriate for a person of that child's age; or
  - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
- *(g)* not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –
  - (i) kept separately from detained persons over the age of 18 years; and
  - (ii) treated in a manner, and kept in conditions, that take account of the child's age;
- *(h)* to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
- *(i)* not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section 'child' means a person under the age of 18 years."

Section 8 reads:

"(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

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1 Also reported at 1996 (5) BCLR 658 (CC) – Ed

A (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court–

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop the common law to the extent that legislation does not give effect to that right; and

B *(b)* may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person."

Section 9 reads:

C "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

D (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on E one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

I have some doubt whether the equality provisions of section 9 do put illegiti- F mate children (to use the old phrase) on a par with children born in wedlock or customary union, especially as far as inheritance is concerned. However, for present purposes it is a useful starting point to determine the rights of a child born in wedlock against his divorced non-custodian father who cold shoulders him.

G The following questions arise for decision:

(a) Is the alleged right applicable, taking into account its nature and the nature of the duty imposed thereby? (section 8(2)). Only a finding in terms of this section will bring into operation the provisions of section 8(3).

H (b) What is the nature of this "right"? Is it a right in the legal sense?

(c) Is the "right" every child has in terms of section 28(1)*(b)* a horizontal right?

(d) Is the defendant a parent within the meaning of section 28(1)*(b)*?

(e) Is it in the public interest that the courts should create this right which cannot be enforced?

I When considering whether in terms of section 8 the common law has to be amplified, redrafted or amended it seems to me the following questions have to be answered positively:

1. Is there a conflict between common law and the Constitution on that particu- J lar point or does the common law contain a void where the Constitution has a provision?

In order to determine the answer to this question the following questions have to be answered: A

1.1 What is the exact scope of the relevant common-law provisions?

1.2 have they been modified or amplified by statute law? (The courts are not empowered to amend statute law – merely to strike it down or read it down. *Ex Parte Chairperson of the Constitutional Assembly*: *In re: Certification of the Constitution of the Republic of South Africa* [2]1996 (4) SA 744 (CC) 791H (paragraph 54)). B

2. Do the provisions of the Constitution create a "right" in the legal sense

2.1 on a vertical plane? C

2.2 on a horizontal plane?

The answer to 2.1 will depend on the wording of the constitutional provision and on the nature of the "right". In our context it brings one on the vexed terrain of the so-called second generation (or socio-economic) rights.

From the fact that there exists a vertical right in terms of 2.1 against the State it does not necessarily follow that the answer to 2.2 is positive. On the contrary, the existence of a positive right against the State may obviate the need for any horizontal provision. D

In determining whether a horizontal right is intended one has to have regard to the nature of the proposed right, its enforceability, the practicalities of the human relationships involved and whether public policy or public mores require such moral obligation to be converted into a legal obligation. It is important to bear in mind that the proposed horizontal right will not operate in a void. It will invariably infringe upon and curtail the rights of others. For example, in our context the right of the respondent to privacy and his right to freedom of (non) association. It is not improbable that now, after more than a decade, he will be integrated in a family of his own – which is entitled to have its integrity and privacy respected. These rights are also protected by our Bill of Rights. The influence upon them of the proposed horizontal right is to be carefully considered. In this evaluation Madam Justice may not turn a blind eye thereto. The horizontal application of the Bill of Rights is not mechanical or unqualified, but is to be done with circumspection (cf *In re: Certification* (*supra*) paragraphs 54–56; 202). E F G

3. Should the answer to 2.2 be positive and it be found that a constitutional horizontal right is intended, the next question is: Must this right be created *ad hoc*, piecemeal by the courts (with the attendant diversity of opinions, limited scope and stuttering pace) or by Parliament in one all-embracing legislative act? In other words, is this a terrain on which the courts can venture with confidence, or will they be groping in the dark? H

4. When it is found that a constitutional right exists which has horizontal application and its scope has been determined with due regard to section 36(1), the court will have to determine the nature of the remedy to be created. Such remedy must tend to enforce the right and not amount to mere tokenism. I

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2 Also reported at 1996 (10) BCLR 1253 (CC) – Ed J

A I turn first to the common law in respect of the right the plaintiff claims.

Marriage creates a *consortium omnis vitae* which obliges the parties to live together, grant each other reasonable conjugal rights, be faithful to and love, cherish and support each other till death (or the divorce court) do them part. But despite the moral opprobrium attached to unfaithfulness the law does not grant
B the innocent spouse the right to an interdict against or damages in respect of the adultery of the other spouse *Ex parte AB* 1910 TPD 1332; *Rosenbaum v Margolis* 1944 WLD 147, 155; *Osman v Osman* 1983 (2) SA 706 (D) 707H–708B; and cf *C v C* 1958 (3) SA 547 (SR).

Neither can conjugal rights be enforced by order of court nor love kindled
C by the Sheriff's writ. These rights are (*inter se*) not legally enforceable. The *de facto* dissolution of the marital relationship by failure to comply with marital duties can merely be dissolved *de jure*. This is because the law recognises the uniqueness of the complex legal relationship created by wedlock. It is vastly different from the arms length contractual relationship of the market place. But
D not only in its relationship between man and woman is marriage unique, so are the multiple relationships that flow from such union – mother, father and child; and children mutually. There evolves a bond of kinship – blood is thicker than water – which society expects the parents, children and siblings to honour. But it does not grant rights to and impose concomitant obligations upon the parties
E except in the economic sphere. The exhortation: love thy brother or respect thy parents is just as weak in law as: love thy neighbour (compare: LC Haupt's doctoral thesis *Die Reg van die Kind op Oorlewing, Ontwikkeling en Beskerming* 111, 122, 123, 142, 246).

Where there exists no legal obligation on parents to love their legitimate off-
F spring, it is axiomatic that there can be none in respect of illegitimate children.

In fact, the father initially did not even have a duty to maintain his illegitimate child and when the law later imposed a duty upon him it was merely an economic one (cf *Labuschagne* 1998 *THRHR* 139). The duty to maintain did not as *quid pro quo* create rights of access or parental authority (*F v L* 1987 (4)
G SA 525 (W) 526E 527B–C; *Van Erk v Holmer* 1992 (2) SA 636 (W) 647; *B v S* 1995 (3) SA 571 (A) 575D–H 579G–H; *T v M* 1997 (1) SA 54 (A) 57H–I).

A recent development was the recognition of his *locus standi* to approach the court for access (*B v S* (*supra*)). And the legislature in section 2 of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 granted him the right
H to apply for custody and even guardianship, the test being the best interests of the child. Of importance is the emphasis placed on the relationship between the child and the father and the degree of commitment the father has shown to the child. The existence of bondage between father and child is therefore important. Essential is therefore an existing (or at leas expected) cordial filial relationship between father and child.

I The Act does not grant the illegitimate child the right to apply that his father should be granted rights of access to him and there never existed any such right in the common law (Spiro *Law of Parent and Child* 4 ed 237–241; *Haupt* (*supra*) 246).

J To sum up: Despite recent statutory developments which have materially improved the rights of a natural father in respect of his illegitimate child, neither

our common law nor our statutes recognise the right of a child to be loved, cherished, comforted or attended to by a non-custodian parent as creating a legal obligation. A bond of love is not a legal bond. In so far as the plaintiff's claim is based on the common law it must fail.

While children are residing with their parents the law imposes no duty on the latter to see to their developmental interests, except in the limited field of education. It is probably taken for granted that family resources will be equitably shared to cater also for their wider needs.

This brings me to the provisions of the Constitution. In its interpretation the point of departure must be the principles set out in section 39 thereof. I bear in mind the tendency in this century to describe in international instruments needs as "rights" and moral obligations as duties, leading to uncertainty whether rights in the legal sense are intended (*In Re: KD (a minor)* 1988 1 All ER 577 (HL) 588e–g). Lord Oliver noted that the word "right" is used in a variety of senses, both popular and jurisprudentially, its scope including a contractual right, a privilege and an essential liberty – such as the so-called "right to work" – depending on its context. He referred with approval to the view of Ormrod LJ in *A v C* 1985 FLR 445, 455 that "the word 'rights' is a highly confusing word which leads to a great deal of trouble if used loosely, particularly when it is used loosely in a court of law".

It is clear that children have a legitimate interest to general physical, intellectual and emotional care within the confines of the capabilities of their care givers. Yet it is significant that the Constitution does not state that parents are obliged to love and cherish their children or give them their attention and interest. The Constitution is silent on the most important aspect of the alleged legal right.

Primarily section 28, as section 29 in respect of education, is of vertical application. That is clear from section 28(1) read as a whole. It is only the State with its power and resources that can conceivably give full effect to its provisions. As seen above the antecedents of section 28 are of vertical application. Primarily section 28(1)*(b)* is aimed at the preservation of a healthy parent-child relationship in the family environment against unwarranted executive, administrative and legislative acts. It is to be viewed against the background of a history of disintegrated family structures caused by governmental policies.

There are obviously a number of provisions in section 28(1) which can operate on a horizontal plane. But the provisions are not novel. The notion of child care was not born with the Constitution.

In order to determine whether new rules of law can or should be drawn by the courts from the general provisions of a Bill of Rights or whether this should be left to the legislature (in accordance with its vertical obligations) it is advisable to look at the overall picture of the existing law. That has been done above. The legislature has taken steps to develop this branch of our law. The Child Care Act 74 of 1983 and its various amendments as well as Act 86 of 1997 evidence a continuous concern with the plight of children. There are numerous other statutory provisions. They are summarised by Haupt (*supra*) 284–298, 305. It is in my view a subject that can with confidence be left to the legislature. A court should be hesitant to enter a field of mixed common and statutory law where at

A best it can only have authority in respect of the former. For reasons which follow, however, I do not have to decide whether to take the plunge. The Constitution does not prescribe it.

Section 28(1)*(b)* thereof states that every child has the right to family care or parental care or to appropriate alternative care when removed from the family
B environment.

The three types of care deal with three contingencies:

Where the child is part of a family. This can be either the nuclear family of father, mother and child(ren) or the extended family which includes grandparents or uncles and aunts.
C

Where there is no family but a single parent is the care giver.

Where there is an alternative care situation because the child has been removed from the family environment.

What section 28(1)*(b)* envisages, therefore, is a child in care of somebody
D 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
E 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)*.

The provisions of sections 28(1) and (2) of the Constitution do not differ
F materially from the provisions of sections 30(1), (2) and (3) of the interim Constitution. Both find their antecedents in article 7(1) of the United Nations Convention of the Child in terms of which the child shall have ". . . as far as possible, the right to know and be cared for by his or her parents". In terms of article 7(2) parties are obliged to ensure the implementation of these rights in
G accordance with their national law. Clearly a vertical obligation.

This article should be read in the light of its preamble: "Convinced that the family, as the fundamental group of society, and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its
H responsibilities within the community . . . Recognising that the child . . . should grow up in a family environment, in an atmosphere of happiness, love and understanding . . .".

The family of the convention is therefore the normal bonded custodial relationship. I have not lost sight of article 18 which states that State parties shall
I use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.

Whereas section 30(1)*(b)* of the interim Constitution mentioned only parental care, section 28(1)*(b)* of the Constitution now includes two further categories of care givers. But this in itself does not indicate that what previously was clearly of vertical operation, now is intended to operate also directly horizontally.
J Neither do the other amendments to this section brought about by the 1996

Constitution lead to a different conclusion. A bill of rights is, after all, primarily a protective device, a buttress between State and subject for the furtherance of individual liberty in its wide sense.

This does not mean that thereby the powerful indirect horizontal force of the Constitution is negatived. On the contrary. When judicial choices have to be made, judicial discretion exercised and public policy determined, this will be done with full recognition of the principles enacted in section 28. That is beyond question.

The provisions of the Constitution directly or indirectly safeguard family life and section 28(1)*(b)* is an indication of such intention (*In re: Certification of the Constitution of the Republic of South Africa* (*supra*) 808 paragraph 101–102).

Section 28(1)*(b)* sets out vertical socio-economic rights against the state. It is not necessary to decide to what extent they are justiciable in that context. It is interesting that the Constitutional Court in its certification process did not have regard to their possible horizontal application (cf *In re: Certification* (*supra*) 800 paragraph 76–78).

Does section 28 go further? Does it in subsection (1)*(b)* enact a rule of positive law that goes far beyond what preceded it?

I have already referred to one reason why it does not place a previously non-existing obligation on the father of an illegitimate child – he is not a "parent" within the meaning of the words "parental care".

There is another reason (*lex non cogit ad impossibilium*). The law will not enforce the impossible. It cannot create love and affection where there is none. Not between legitimate children and their parents and even less between illegitimate children and their fathers. That fact compellingly leads to the conclusion that the drafters of the Constitution could not have intended that result.

In my view the nature of this proposed right, which falls squarely within the field of intimate human relationships, is such that it cannot give rise to legal obligations. Affection cannot be quantified and attention is relative (cf *Haupt* (*supra*) 123, 246, 254).

In addition it will be unenforceable. A mandamus will be wholly inappropriate. To grant an action for damages will not heal any rift nor let love sprout from benevolent soil. I am not convinced that public policy, duly honed on the oilstone of section 28, requires that such moral obligation be converted into a legal duty. Contemplation of the proposed legal duty opens interesting vistas of children claiming delictual damages from their parents who in their formative years paid more attention to their own careers than to the emotional needs of their children.

The provision in section 28(2) that a child's best interests are of paramount importance in every matter concerning the child, does not lead to a different conclusion. It is a principle enacted already in respect of custody disputes in the English Guardianship of Infants Act of 1925. It is also a rule of our law and has been applied by our courts for many decades in custody matters (cf *Fletcher v Fletcher* 1948 (1) SA 130 (A) at 144). It gained statutory recognition in section 5(1) of the Matrimonial Affairs Act 37 of 1953.

A But section 28(2) has a much wider formulation. Its wide formulation is ostensibly so all-embracing that the interests of the child would override all other legitimate interests of parents, siblings and third parties. It would prevent conscription or imprisonment or transfer or dismissal by the employer of the parent where that is not in the child's interest. That can clearly not have been B intended. In my view this provision is intended as a general guideline and not as a rule of law of horizontal application. That is left to the positive law and any amendments it may undergo.

It may be of interest to mention in passing that the Supreme Court of the United States of America in *Michael H et al v Gerald D* 491 US 110 held in C 1989 that the claim that the conclusive presumption of legitimacy in Californian law infringes upon the alleged constitutional right of an illegitimate child to maintain a relationship with her natural father, was not valid.

The progressive German law which recognises the right of the illegitimate child to contact with both parents uses as yardstick the best interest of the child D and the father's voluntary acceptance and recognition of his parental care responsibilities (cf *Haupt* (*supra*) 93, 99, 100, 106). It stands to reason that absent the latter prerequisite there can be no meaningful relationship (compare the Michigan Child Custody Act 91 of 1970 section 3j as quoted by *Haupt* (*supra*) 129 which is to the same effect).

E The German law does not recognise a right of action of the child against the parent in respect of non-economic aspects of parental care (*Haupt* (*supra*) 237).

I hold therefore that there rests no legal duty on the defendant to afford the plaintiff his love, attention and affection. The claim is bad in law. It will serve no purpose to grant leave to amend it.

F Normally the costs would follow the result. I was requested to deviate from the normal order. It is a constitutional matter brought by a minor. That is a weighty consideration. As against that stands that the real plaintiff is Jooste. The plaintiff is too young to have an inkling of what this is all about. The action was ill-conceived. The predictable concomitant publicity could but affect the plaintiff G detrimentally. It was not in his interest and one wonders what Jooste's motives were in subjecting him thereto. There is no reason to make a special cost order.

The exception is upheld with costs. The claim is dismissed with costs. The costs of two counsel are allowed.

For the plaintiff:
M Chaskalson instructed by *Rudman Attorneys, Pretoria*

For the defendant:
DA Smith SC and *DB du Preez* instructed by *Dyasons, Pretoria*

The following cases were referred to in the above judgment:

Southern Africa

United States of America