T v M 1997 (1) SA 54 (A)

Citation	1997 (1) SA 54 (A)
Case No	523/94
Court	Appellate Division
Judge	Scott JA, E M Grosskopf JA, F H Grosskopf JA, Nienaber JA, Harms JA
Heard	August 16, 1996
Judgment	September 19, 1996
Counsel	M C Erasmus for the appellant W J Dreyer for the respondent
Annotations	

Flynote : Sleutelwoorde

Minor - Illegitimate child - Access - By natural father - In modern South African law whether or not access to minor child granted not depending upon legitimacy or illegitimacy of child but wholly upon child's welfare which is central and constant consideration - Right or entitlement of child to have access, or to be spared access, determining whether contact with non-custodian parent to be granted.

Minor - Illegitimate child - Access - By natural father - Onus - When question of access judicially determined for first time no onus in sense of evidentiary burden or so-called risk of non-persuasion on either party - Litigation involving judicial investigation in which Court can call evidence mero motu and is not adversarial - Court to be slow to determine facts by way of usual approach adopted in opposed motions.

Minor - Illegitimate child - Access - By natural father - Generally speaking, once natural bond between parent and child (legitimate or illegitimate) established, ordinarily in best interests of child that relationship be maintained unless particular factors present of such nature that child's welfare demands that it be deprived of opportunity of maintaining contact with parent.

Headnote : Kopnota

While at common law the father of an illegitimate child, unlike the father of a legitimate child, has no right of access, the difference between the respective positions of the two fathers is not one of real substance in practice since in modern South African law whether or not access to a minor child is granted to its non-custodian father is dependent not upon the legitimacy or illegitimacy of the child but in each case wholly upon the child's welfare which is the central and constant consideration. Accordingly, and to the extent that one may choose to speak in terms of an inherent right or entitlement, it is the right or entitlement of the child to have access, or to be spared access, that determines whether contact with the non-custodian parent will be granted. (At 57H-J.)

Furthermore, when the question of access is judicially determined for the first time, there is no *onus* in the sense of evidentiary burden or so-called risk of non-persuasion on either party. This is because the litigation really involves a judicial investigation in which the Court can call evidence *mero motu* and is not adversarial. Accordingly, a Court should be slow to determine facts by way of the usual approach adopted in opposed motions. (At 58A-B.)

Generally speaking, it can be accepted that, once a natural bond between parent and child (whether legitimate or illegitimate) has been established, it would ordinarily be in the interests of the child that the relationship be maintained, unless there are particular factors present which are of such a nature that the welfare of the child demands that it be deprived of the opportunity of maintaining contact with the parent in question. (At 60B-C/D.)

The decision in the Transvaal Provincial Division in *T v M* reversed.
The following decided cases were cited in the judgment of the Court:
B v S 1995 (3) SA 571 (A)
Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)
Appeal from a decision in the Transvaal Provincial Division (Du Plessis J). The facts appear from the judgment of Scott JA.
M C Erasmus for the appellant.
W J Dreyer for the respondent.
In addition to the cases cited in the judgment of the Court, counsel for the parties referred to the following authorities:
Administrateur Natal v Trust Bank van Afrika Beperk 1979 (3) SA 824 (A)
B v P 1991 (4) SA 113 (T) at 114F, 115E-G, 117F
B v S 1993 (2) SA 211 (W)
Davids v Davids 1914 WR 142
Dhanabakium v Subramanian and Another 1943 AD 160 at 166
Docrat v Bhayat 1932 TPD 125 at 127
Douglas v Mayers 1987 (1) SA 910 (ZH) at 914E
Dunscombe v Willies 1982 (3) SA 311 (D) at 315-16
E v E and Another 1940 TPD 333
Edwards v Fleming 1909 TH 232 at 234-5
F v B 1988 (3) SA 948 (D)
F v L and Another 1987 (4) SA 525 (W) at 526E-F
Green v Fitzgerald and Others; Fitzgerald v Green and Others 1914 AD 88 at 99, 103
Harris and Others v Minister of Interior and Another 1952 (2) SA 428 (A)
Hodgkinson v Hodgkinson 1949 (1) SA 51 (E)
Marais v Marais 1960 (1) SA 844 (C)
Matthews v Haswari 1937 WLD 110
Rowan v Faifer 1953 (2) SA 705 (E) at 710A-E
S v S 1993 (2) SA 200 (W)
Segal v Segal 1971 (4) SA 317 (C) at 324B-C
Ex parte Van Dam 1973 (2) SA 182 (W)
Van Erk v Holmer 1992 (2) SA 636 (W) at 637H, 638B-F, 638G-H, 647B-E, 649, 649G-J
Vucinovich v Vucinovich 1944 TPD 143
Webster v Ellison 1911 AD 73 at 93, 98-9
Wilson v Ely 1914 WR 34
Boberg *The Law of Persons and the Family* (1977)
Schäfer *Family Law Service*
Case Information

Sonnekus and Van Westing 'Faktore vir die Erkenning van 'n Sogenaamde Reg van Toegang vir die Vader van 'n Buite-egtelike Kind' (1992) 2 *TSAR* 232 at 240
Spiro *The Law of Parent and Child* 3rd ed.
Cur adv vult.
Postea (September 19).
Judgment

Scott JA: The appellant applied on motion in the Transvaal Provincial Division for an order granting him access to his illegitimate daughter, Koketso. The relief claimed was successfully opposed by Koketso's mother who is the respondent. With the necessary leave the appellant appeals to this Court.
The application was heard by the Court *a quo* prior to the decision of this Court in *B v S* 1995 (3) SA 571 (A) . Indeed, one of the grounds upon which leave to appeal was granted was the uncertainty relating to the question of a father's right of access to his illegitimate child. Before dealing with the approach adopted by the Court *a quo* it is convenient to set out in broad terms the events preceding the hearing of the application.
The parties did not have what is commonly referred to as a 'live-in' relationship. Although their

ages do not appear from the papers, it would seem that when Koketso was born in January 1986 both the appellant and the respondent were relatively young. The respondent was still living with her parents. Nonetheless, the relationship appears to have been one of some substance and endured from 1985 to 1991.
Following the birth of her child the respondent remained at home until August 1986 when she returned to work. As her parents were also working it was arranged that the appellant would collect Koketso every morning and take her to his parents' home where his stepmother would look after her. In the evenings the appellant would take her back to the respondent's home. In November 1986, when Koketso was nine months old, the respondent left home in Mamelodi and moved to Port Elizabeth where she trained as a nurse at the Livingstone Hospital until October 1987. She did not take Koketso with her. There is some dispute as to the extent to which the appellant looked after Koketso during this period. On the respondent's version the arrangement continued as before; the appellant collected Koketso every morning, took her to his parents' home and returned her to the respondent's parents in the evening. From June 1987 this arrangement was limited to weekdays and the respondent's parents cared for Koketso over the weekends. The respondent returned to her parents' home in October 1987 and shortly thereafter obtained employment as a nurse at the Ga-Rankuwa hospital. The relationship between the parties at this stage appears to have been a happy one and there is nothing to suggest that the appellant did not continue to see Koketso on a regular basis. In August 1988 the appellant, who was a trainee systems analyst, was transferred to Pietersburg. He returned to Pretoria over weekends. On occasions the respondent would travel from Pretoria to Pietersburg with Koketso to spend the weekend with the appellant. In March 1991 the appellant returned to Pretoria. By this time Koketso was five years old. She was enrolled at a preprimary school in Pretoria. The appellant paid the fees of R300 per month.
During April 1991 the respondent discovered that the appellant was having an affair with another woman and she terminated her relationship with the appellant. The appellant continued to see Koketso but relations between the parties were far from cordial. According to the respondent, the appellant used the opportunity when visiting Koketso to force his attentions on her. She alleged that he assaulted her on a number of occasions, both before and after the break-up of their relationship. In February 1992 she informed the appellant that he was no longer to come and visit the child. By this time Koketso was six years old. At the insistence of the appellant she was placed in a private school. The fees were paid by the appellant's employer. The appellant took to visiting Koketso at school. This too was stopped at the insistence of the respondent. In early 1992 the respondent instituted a maintenance inquiry alleging that the appellant was not supporting Koketso. This was denied by the appellant. It appears, however, that the respondent and Koketso resided outside the area of jurisdiction of the court, which accordingly declined to hear the matter.
In April 1992 the respondent laid a complaint of rape against the appellant. In August 1992 he was tried and acquitted in the regional court. He responded by instituting a civil action against the respondent for malicious prosecution and obtained judgment by default in the sum of R7 000. In the mean time, the respondent had formed a relationship with another man, Mr Mamabolo. This was in the latter part of 1991. In February 1993 they were married. Mr Mamabolo established a good relationship with Koketso and during the course of 1993 commenced proceedings to adopt her. This was the position in August 1993 when the appellant instituted the application which is the subject of the present appeal.
Although the litigation did not involve divorce proceedings, the question of access to Koketso was nonetheless referred by the Court to the Family Advocate for investigation. The Family Advocate in turn sought the assistance of a social worker, Mrs Z S Semenya. Following discussions with the parties, it was agreed that a clinical psychologist, Mr Peter Jacobs, who had originally been employed by the respondent, be asked to carry out a full evaluation with regard to the question of access. In a detailed report dated 2 May 1994 Mr Jacobs subsequently recommended that the appellant be permitted access to Koketso, subject to certain conditions. The recommendation to afford the appellant access was supported by the Family Advocate and by Miss Mathole, a social worker employed by the Department of Child Welfare who had been involved in Mr Mamabolo's application to adopt Koketso. The other social worker, Mrs Semenya, in a separate report dated 16 May 1994 recommended, however, that the appellant be denied access to Koketso. I shall return to these reports later.

As previously indicated, the application was heard by the Court *a quo* (Du Plessis J) prior to this Court's decision in *B v S* (*supra*). Following that decision the position with regard to access by a non-custodian father to his illegitimate child can be summed up, I think, as follows. While at common law the father of an illegitimate child, unlike the father of a legitimate child, has no right of access, the difference between the respective positions of the two fathers is not one of real substance in practice since in our modern law whether or not access to a minor child is granted to its non-custodian father is dependent not upon the legitimacy or illegitimacy of the child but in each case wholly upon the child's welfare which is the central and constant consideration. Accordingly, and to the extent that one may choose to speak in terms of an inherent right or entitlement, it is the right or entitlement of the child to have access, or to be spared access, that determines whether contact with the non-custodian parent will be granted (at 581I-582F). Furthermore, when the question of access is judicially determined for the first time, there is no *onus* in the sense of an evidentiary burden or so-called risk of non-persuasion on either party. This is because the litigation really involves a judicial investigation in which the Court can call evidence *mero motu* and is not adversarial. Accordingly, a Court should be slow to determine facts by way of the usual approach adopted in opposed motions and explained in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 584H-585E.

The approach adopted by the Court *a quo* was that a father of an illegitimate child is not as of right entitled to access, that a Court will not lightly interfere with the exercise of the mother's rights as guardian and that a father who seeks an order affording him access 'has an *onus* to prove that compelling reasons exist for the Court to so interfere with the right of a guardian parent'. It is apparent from what has been said above that such an approach is inconsistent with the decision in *B v S* (*supra*). The sole criterion is at all times the welfare of the child and there is no *onus* as such on either party.

On the facts, the Court *a quo* concluded that the appellant had shown no particular reason why he should be afforded access. The views of Mr Jacobs and Miss Mathole were dismissed on the basis that these experts had failed to have regard to the fact that the appellant was 'asking the Court to interfere with the exercise of the parental powers by the respondent'. This too amounted, of course, to a misdirection.

In Mr Jacobs's first report dated 21 October 1993 (which was compiled on the strength of an interview which a vocational counsellor had conducted with Koketso), the possibility of a so-called 'Parental Alienation Syndrome' was first raised. According to the report, the syndrome relates to a situation in which one parent is so 'victimized' by the other that the child will go along with whatever is expected of it by the accusing parent. The report was annexed in support of the respondent's answering affidavit. In early 1994, when Mr Jacobs carried out a full psychological evaluation of Koketso with regard to the question of access, the presence of this syndrome was confirmed. According to Mr Jacobs' second report, Koketso indicated in the presence of Mr Mamabolo that she did not wish to see the appellant. Once, however, Mr Mamabolo had been asked to leave Mr Jacobs' rooms she became noticeably relaxed and anxious to see the appellant. The contact between father and daughter was conducted under close supervision and the so-called Marschak Interaction Method was used to evaluate the relationship. The description of their meeting contained in the report reads as follows:

'The life situations, mostly situations commonly found in a parent-child relationship, were presented to Koketso and (the appellant). They were requested to act out these situations. They were not allowed to ask for assistance from the observer.

(The appellant), on the whole was playful and initially followed Koketso's leads. The interaction was characterized by unrestrained physical contact.

Koketso participated actively. She was relaxed and was easily satisfied. She looked for assurance and comfort from her father. It was clear that he understands Koketso's needs. Although the relationship was initially somewhat restrained, both Koketso and (the appellant) participated freely and actively. The relationship in general was free and easy, lively and comfortable.

There was no evidence of fear for her father. Koketso and (the appellant) continued to interact in a playful manner even after the evaluation.'

Mr Jacobs concluded that the stress and anxiety which Koketso had shown with regard to the appellant did not stem from the appellant himself (as alleged by the respondent) but was caused by a fear of refusal and rejection from the respondent and Mr Mamabolo. Mr Jacobs accordingly recommended that the appellant be allowed access to Koketso but suggested, presumably because of the little contact between father and daughter over the previous two years, that for an initial period of approximately four months the access be limited to 'structured contact under supervision' following which the position would have to be reassessed.
As far as the contrary recommendation of Mrs Semenya is concerned, it appears that a factor which weighed heavily with her was Koketso's statement to her when interviewed that she was no longer interested in seeing the appellant. Whether or not the respondent or Mr Mamabolo was present at the interview is not apparent from the report. Nor does Mrs Semenya make any reference to Mr Jacobs' report and his observations regarding a 'Parental Alienation Syndrome'. What is apparent from Mr Jacobs' second report is that statements made by Koketso regarding her father were not to be taken at face value. There is nothing in Mrs Semenya's report to indicate that she was aware of this. On the contrary and as I have indicated, it appears that the attitude expressed by Koketso with regard to her father was a major consideration in arriving at her conclusion. Mrs Semenya appears to have had regard to certain other irrelevant considerations. For example, she makes the point in her report, and wrongly so, that 'legally, (the appellant) has no right of access towards his illegitimate child unless the biological mother gives him consent to see the child'. She also appears to have held it against the appellant that he had failed to commit himself in marriage to the respondent. In these circumstances the recommendation of Mr Jacobs (supported by the Family Advocate and Miss Mathole) would appear to be preferable to that of Mrs Semenya.
As is perhaps to be expected in cases of this kind, the papers abound with accusations and counter accusations by the parties. In the main, however, they are consistent with the breakdown of the relationship between the parties rather than their unsuitability as parents. There are also a number of disputes of fact relating to such matters as the extent of the appellant's contact with Koketso during her early childhood, the fulfilment of his obligation to maintain her and the like. But what is nonetheless clear is that the appellant actively participated in caring for Koketso in her early years and continued to maintain close contact with her until precluded from doing so. Indeed, for a period of approximately a year (from November 1986 to October 1987) he was the only parent with whom Koketso had any real contact. By the time the break-up of the relationship came, Koketso was already five years old. Until then, apart from certain isolated incidents, there appears to have been a happy relationship between mother, father and child. Psychological testing has shown Koketso to be a clever little girl with a high IQ. Her contact with the appellant in the past was such that a bonding between father and child was virtually inevitable. Despite the contentions of the respondent to the contrary, it would seem clear from the report of Mr Jacobs that the natural bond which ordinarily exists between parent and child has indeed been established.
Generally speaking, I think, it can be accepted that once a natural bond between parent and child (whether legitimate or illegitimate) has been established it would ordinarily be in the best interests of the child that the relationship be maintained, unless there are particular factors present which are of such a nature that the welfare of the child demands that it be deprived of the opportunity of maintaining contact with the parent in question. It is true that in the present case the appellant is said to have demonstrated a degree of irresponsibility by fathering another illegitimate child by a different woman. He also stopped paying maintenance for Koketso in November 1991 after his relationship with the respondent had turned sour. But these are hardly factors which render him unfit to maintain a relationship with his daughter. Again, it is true that the respondent has married and Koketso enjoys a good relationship with the respondent's husband in a stable family environment. This, of course, is not a novel situation. It frequently arises following a divorce. Nor, regrettably, is it uncommon that parents of young children have a very poor relationship with each other following a divorce or the break-up of the association which resulted in the birth of their children. These factors in themselves would not ordinarily justify the far-reaching step of terminating contact between the child and its father.
It follows that the Court *a quo* not only adopted the incorrect approach to the evidence but, in my view, erred in coming to the conclusion it did. The question that arises, however, is what order is

to be made at this stage. More than two years have elapsed since the judgment of the Court *a quo* was delivered. Given the history of the matter, the long delay since the appellant last had contact with Koketso and the limited nature of the initial access suggested by Mr Jacobs in 1994, it is clear that this Court is not in a position to make an order as to access. The delay of more than two years since the matter was heard by the Court *a quo* is regrettable. Ordinarily, appeals in matters of this kind would go to a Full Court of the Division concerned and no doubt steps can be taken to expedite the hearing of the appeal. In the present case, of course, leave was granted to this Court in view of the questions of law which had then not yet been resolved. No request was made for an early hearing.

Counsel for the appellant suggested two ways of overcoming the problem. The one was that an order be made similar to that granted in *B v S* (*supra*), which provides for the hearing of oral evidence. The other was that an order be made which, although along the lines of the order granted in *B v S*, makes provision merely for the filing of a further report by the Family Advocate and the filing of further affidavits by the parties. (The provisions as to costs were the same in both.) In the event of the parties not being able to reach agreement on the question of access - hopefully they will be able to do so in the light of what has been said above - it is inevitable, I think, that disputes of fact between them will have to be resolved. It seems to me therefore that the better course would be to make an order similar to that granted in *B v S* but subject, of course, to certain minor variations necessary to accommodate the difference in circumstances.

It is ordered as follows:

1. The appeal succeeds and the order of the Court *a quo* is set aside.

2. Substituted for the order of the Court *a quo* is the following order, which is subject to the terms of para 4 below:

   (*a*) The application is referred for the hearing of oral evidence, on a date to be arranged with the Registrar, on the question whether access by the appellant to his minor child Koketso will be in the best interests of the said child and if so, the nature and extent of such access.

   (*b*) The evidence will be that of the parties, of any witnesses whom they elect to call, and of any witnesses whom the Court *mero motu* elects to call.

   (*c*) The Family Advocate (with the assistance of the relevant State department rendering social welfare services) is hereby requested to investigate the parties' respective circumstances for the purpose of bringing up to date his or her report dated 27 May 1994 and delivering a revised report to the Court (with copies to each party) on the question referred to in para (*a*) above.

   (*d*) The Registrar is directed to communicate this order forthwith to the Family Advocate in order to obtain the revised report as expeditiously as possible.

   (*e*) The Registrar is directed to afford all possible preference to the allocation of the date referred to in para (*a*) above.

   (f) The costs of the application thus far are reserved for decision by the Court hearing the oral evidence.

3. The matter is remitted for the hearing of oral evidence, in terms of the order set out in para 2 above, by any Judge performing duty in the Transvaal Provincial Division.

4. Within 30 days of the date of this order the appellant shall, through his attorneys of record, notify the Registrar of the Transvaal Provincial Division in writing of his intention to pursue the application in terms of the order set out in para 2 above. If the appellant fails to give such notification, or if he fails to prosecute the application further notwithstanding such notification, that order will lapse and the order of the Court *a quo* will revive.

5. If the appellant fails in either respect referred to in para 4 above or if the resumed application contemplated in para 2 above is dismissed, the appellant shall pay the costs of appeal. However, if, pursuant to the said resumed application, the appellant obtains an order for access, each party will pay his or her own costs of appeal.

E M Grosskopf JA, F H Grosskopf JA, Nienaber JA and Harms JA concurred.
Appellant's Attorneys: *Lephoko, Ledwaba & Sekati Inc*, Pretoria; *Honey & Partners Inc*, Bloemfontein. Respondent's Attorneys: *K Pillay*, Pretoria; *Lovius-Block*, Bloemfontein.