CHODREE v VALLY 1996 (2) SA 28 (W)

Citation	1996 (2) SA 28 (W)
Case No	95/04774
Court	Witwatersrand Local Division
Judge	WUNSH J
Heard	August 24, 1995
Judgment	October 11, 1995
Counsel	R A Kuper for the applicant. H Barolsky for the respondent.
Annotations	

Flynote : Sleutelwoorde

Minor - Illegitimate child - Access - By natural father - Reiterated that natural father has no inherent right of access - Parent's rights and obligations with regard to access governed by interests of child - Where child born of committed relationship such as religious marriage not recognised by law, father in preferential position as against non-parents - In general, emotionally and materially to advantage of child to have communication with both parents - No contact between father and five-year-old child since one year after birth - This not necessarily meaning that relationship cannot be developed between them - In child's interest for father to have access to her - Due to strained nature of relationship between parents, such access phased in over period of time.

Headnote : Kopnota

The applicant married the respondent in accordance with Islamic law in October 1989. The marriage was dissolved by Islamic law in April 1993. One daughter, R, was born of the marriage in August 1990. The applicant sought access to the child, which access, he alleged, was being frustrated by the respondent. The respondent, however, denied this and alleged that the applicant, who had not seen R since shortly after her birth, was indifferent to her. She also alleged that any contact between R and the applicant would 'destabilise her present well being and would . . . not be in her best interest'. The affidavits were replete with disputed allegations. The Judge, being unwilling to resolve the dispute purely on the papers, considered three possible courses open to him (at 29J-30D/E): The first was to call for a report from a social worker. This option was rejected because the Judge was reluctant to entrust an important part of the enquiry to an expert without knowing what his or her competence, values, predispositions and work pressure would be. The second was the referral of the matter to an oral hearing. This option was also rejected because of the possibility that it would aggravate the existing hostility between the parties. The third was to see the parties and R in his chambers without their lawyers. Counsel were agreeable to this option and the Judge saw the parties and R separately (R with the respondent) with the object of informing himself of the personalities involved and in order to get a feel of the underlying tensions. The Judge, however, pointed out that he would not follow this course again. The Court had to exercise its function as upper guardian of minors according to recognised principles and procedures of justice, which required Judges not to examine or communicate with parties or conduct a hearing in the absence of any of the parties except in very special circumstances. Even if the private interview was conducted fairly, there was the danger that an unsuccessful party could perceive unfairness, and a sense of injustice could affect a party's fulfilment of his or her parental duties in respect of access. The Judge pointed out that if he were to see parties in his chambers in a future case, he would require all of them to be present at each interview, except in the case of a discussion

with a child who had reached the necessary age of discretion. (At 35F-36A/B.) The Court pointed out that it had been held in *B v S* 1995 (3) SA 571 (A) that the father of a child not born of a marriage recognised by the civil law had no inherent right of access to the child (at 31I), and
Held, further, that in the case of right of access, like other relationships between parent and child, a parent had both rights and obligations which were regulated and governed by the interests of the child. (At 32D/E-E.)
Held, further, that where a child was born of a committed relationship such as a religious marriage not recognised by the law, the father had a preferential position as against non-parents as far as the grant of access was concerned. (At 32E-E/F.)
Held, further, that it was generally to the advantage of a child to have communication with both its parents: important aspects of human conduct and values were ideally emphasised by both father and mother, and love and affection from both enhanced the child's security and stability. (At 32F-G/H, paraphrased.)
Held, further, that from a material point of view, there was a greater probability that a father would go beyond his common-law obligations in providing for a child, both *inter vivos* and by will, if he had an ongoing relationship with him or her. (At 32J-33A.)
Held, further, that the fact that R, through circumstances beyond her control, had had no meaningful contact with her father did not necessarily mean that a relationship could not develop between them: although the respondent might be justified in being concerned at the effect which the appearance of the applicant in her life might have on R, it was the respondent's responsibility to give her the necessary encouragement to get to know her father. (At 34H-I.)
Held, further, that, on balance, R's interest would be better served if the applicant were to have access to her, but that, in view of the strained relationship between the parties and the adverse effect that too frequent intrusions of a new influence in her life could have on R, such access had to be phased in over a period of time. (At 35B/C-D/E, paraphrased.) Application granted.
The following decided cases were cited in the judgment of the Court:
B v S 1995 (3) SA 571 (A)
Chelsea West (Pty) Ltd and Another v Roodebloem Investments (Pty) Ltd and Another 1994 (1) SA 837 (C)
Germani v Herf and Another 1975 (4) SA 887 (A)

Case Information

Application for right of access to an illegitimate child. The facts appear from the reasons for judgment.
R A Kuper for the applicant.
H Barolsky for the respondent.
Cur adv vult.
Postea (October 11).

Judgment

Wunsh J: The applicant, who is a businessman with a university degree and other academic qualifications, married the respondent, a dental assistant and receptionist who pursued some of her studies overseas, in accordance with Islamic law on 14 October 1989. Their daughter Raeesa, to whom I shall refer by that name, was born on 3 August 1990 so that she is now 5. The marriage was dissolved by Islamic law on 5 April 1993. The applicant seeks an order providing for him to have access to Raeesa. The Islamic 'divorce order' was limited to the formal requirements of the religious law. The applicant produced a typed, unsigned letter dated 5 April 1993 which, he says, confirmed an oral

agreement which the respondent refused to sign, dealing with, *inter alia*, access to Raeesa. The respondent described the letter as a fabrication which she saw for the first time when the notice of motion was served on her.
The affidavits are replete with disputed allegations. The application was postponed by the Judge first seized with it to await the decision of the Appellate Division which was to determine the 'right' to access of a father in a case such as this and has since been reported - *B v S* 1995 (3) SA 571 (A) . At the conclusion of argument, I informed counsel that, being unwilling to resolve the dispute purely on the papers, I considered that there were three courses I could take.

1. Since the Family Advocate was not prepared to be consulted because the dissolved marriage had not been and was not capable of being terminated by an order of Court, I could call for a report from a social worker. I was reluctant to do this because of my discomfort in entrusting an important part of the enquiry to an expert without knowing what his or her competence, values, predispositions and work pressure would be.

2. I could refer the matter to an oral hearing. My concern was the potential it would have to aggravate the existing hostility and the costs which would be involved.

3. I could see the parties and Raeesa in my chambers without lawyers, to better inform myself of the advantages or disadvantages to Raeesa again being brought into regular contact with her father whom she had not seen for many years. Counsel were agreeable to my taking this step and I did indeed see the parties and their daughter - separately (Raeesa with the respondent) and in the presence of my clerk on 28 and 29 September with the object of better informing myself of the personalities involved and 'getting a feel' of their underlying tensions. These are meetings which have to be conducted with care and for the limited purpose I have indicated. There is no judicial unanimity on their desirability and I shall revert to the question later.

I do not find it fruitful to canvass the conflicting allegations more than is necessary, bearing in mind of course that in proceedings of this nature I can accept the undisputed allegations of the applicant and the allegations of the respondent. What is established apart from the facts that I have already recited are:

1. The applicant did not provide a home of their own for himself, his wife and, later, their child. They resided with his parents and this caused the respondent considerable unhappiness. It may have been the main cause of the break-up of the marriage.

2. There were arguments and the respondent and Raeesa left the applicant's parents' home on more than one occasion, the last being in October 1991.

3. During the marriage the respondent worked in the applicant's business.

4. Between October and November 1991, while the respondent was staying with her parents, the applicant visited Raeesa there. The reason why visits ceased is disputed.

5. On 9 June 1992 the applicant was ordered by a magistrate to pay maintenance

for Raeesa at the rate of R460 per month. A month later the respondent asked for a divorce. The applicant says, but the respondent denies, that the grant of a divorce was a condition imposed by the respondent for the applicant to have access to Raeesa.

6. About six days after the divorce the applicant remarried. His wife is a doctor and they have a son. The applicant has a son also by his first marriage. He has pointed out that, because his religion recognises polygamous marriages, he could have married his present wife even before the formal religious divorce from the respondent.

7. It was only on 4 March 1994 that the applicant, through his attorney, wrote to the respondent calling upon her to afford the applicant access to Raeesa. The letter alleged:

   '. . . you have since being divorced from our client made every endeavour to ensure that our client has no contact with the minor child, and have in fact on various occasions maliciously returned gifts which our client sent to the minor child'.

The respondent, in her answering affidavit, denied that she frustrated access. She charged the applicant with being indifferent to Raeesa. In her response to the applicant's attorney's letter she gave the following reasons for refusing the applicant access:

1. More than two-and-a-half years had passed since Raeesa's birth and the applicant had not seen her since shortly after her birth.

2. Raeesa does not know the applicant. She is a bright and intelligent child and is very stable. Any contact between Raeesa and the applicant would 'most certainly destabilise her present well being, and would most certainly not be in her best interest'.

3. The respondent complained about the applicant's behaviour and attitude towards and treatment of her during the marriage, saying that that strengthened her conviction that Raeesa 'would be better off not knowing her father'.

4. She referred to the applicant's lack of interest in his eldest child who was perfectly healthy and normal despite the lack of communication. The applicant avers that he did see his son without the respondent's knowledge.

The applicant's reasons for saying that access to Raeesa would be in her interest are that he wishes her to get to know her half-brothers (the one is a baby and the other is aged about 13), himself and his parents. He hopes that the three children would get to know each other and that they could all celebrate religious festivals and go on outings together, resulting in an enrichment of Raeesa's life. The respondent has accused the applicant of indifference to and lack of care for her, but there is no suggestion that he has an aggressive or unstable temperament or that his behaviour or habits would render him unfit to share the company of his child, or of any other negative aspects of his character (apart from general assertions which have little value) which would have a bad influence or effect on his child. The most troublesome feature of the case is that the applicant has had no communication with Raeesa since about November 1991, nearly 4 years ago. Raeesa does not remember him. Her father figure, she confirmed to me, is her grandfather who is about 53 years old.

In *B v S* (*supra*) the Appellate Division held that the father of a child not born of a marriage recognised by the civil law has no inherent right to access to the child and continued:
'(South African Law) 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.'
(At 583G.)

In a case like this, it was held, there is no evidentiary burden or 'risk of non-persuasion' on either party (at 584J). Indeed, Professor Hahlo observed as follows in 1975 *Annual Survey of SA Law* at 60:
'At a conference held by the International Society on Family Law in West Berlin in April 1975, on "Law and the Child", which I was privileged to attend on behalf of the McGill Institute of Comparative Law, several Continental jurists put forward the view that the attitude of the courts to rights of access is changing. Access used to be regarded as a right of the non-custodian parent, of which he could only be deprived for cause, for instance, if he abused it by poisoning the mind of the child against the custodian parent. Today, we were told, emphasis is shifting from access as a right of the parents to access as a right of the child. On this view, the non-custodian spouse should be given a right of access only if (as will normally be the case) this is in the best interests of the child. The careful consideration which both Theron J in the Court below and Trollip JA in the Appellate Division gave to the interests of the boy shows that this is also the direction in which South African law is moving.'

Hahlo was referring to the judgments in *Germani v Herf and Another* 1975 (4) SA 887 (A) .
There is nothing to be gained by a debate on the semantics. Like other relationships between parent and child, in the case of access a parent has both rights and obligations, regulated and governed by the interests of the child, which are the focus of any enquiry. Where a child is born of a committed relationship, such as a religious marriage not recognised by the law, the father has a preferential position as against non-parents when the grant of access is considered. The biological relationship and genetic factors must favour him as a provider of love and other emotional support.

In my opinion it is generally to the advantage of a child to have communication with both its parents. An important part of a child's education and its acquisition of the cultural values developed by the community to which he or she belongs arises from what is called parental mediation. Very important aspects of life, human conduct and values are ideally emphasised by both father and mother. It is to a child's benefit to be the recipient of the transfer of these benefits from both its parents. Love and affection from both also enhance the security and stability of a child. Miss *Kuper*, for the applicant, drew my attention to extracts from arts 4 and 5 of Part V of the Declaration of Family Rights adopted by the General Council of the International Union of Family Organisations on 4 and 5 February 1994:
'The responsibility of bringing up the children falls primarily and jointly on the parents. The solidarity demonstrated in the upkeep and education of the children must work in their interests whatever the conjugal status of the parents and its evolution. A child is not responsible for the status of its parents and must not be the victim of it.

Article 5

. . . All children, whether born in or out of wedlock shall enjoy the same rights, especially with regard to social protection. A child has a natural need for a father and a mother. States have the duty to encourage the full exercise of paternal, maternal and parental responsibilities by legislation and appropriate means.'
From a material point of view there is a greater probability that a father will go beyond his common-law obligations in providing for a child, both *inter vivos* and by will, if he has an ongoing relationship with him or her.
In making a general observation followed by one related to the facts of the case in *B v S*, Howie JA said:
'Given the general desirability of the father-child bond and given the absence of any substantial allegations against appellant's worth as a person generally, and as a father in particular, there was a materially strong possibility that further investigation and the hearing of oral evidence might reveal access to be in the child's best interests. The accusations which respondent made against appellant are consistent with the breakdown of their own relationship, not necessarily with his unsuitability as a father.'
(At 586G-I.)
Earlier the learned Judge had said:
'It is apposite here to note what Balcombe LJ said in *Re H and Another (minors) (adoption: putative father's rights) (No 3)* [1991] 2 All ER 185 (CA). After recounting that United Kingdom legislation in 1987 and 1989 had improved the lot of a father by removing certain statutory disabilities attaching to his legal position *vis-à-vis* his illegitimate child, the learned Lord Justice said (at 189*a-d*):

> **"The method adopted was not to equate the father of a child born out of wedlock with the father of a legitimate child: it was to give the putative (or natural) father the right to apply for an order giving him all the parental rights and duties with respect to the child. . . . The reason why this method was adopted was because the position of the natural father can be infinitely variable; at one end of the spectrum his connection with the child may be only the single act of intercourse (possibly even rape) which led to conception: at the other end of the spectrum he may have played a full part in the child's life from birth onwards, only the formality of marriage to the mother being absent. Considerable social evils might have resulted if the father at the bottom end of the spectrum had been automatically granted full parental rights and duties and so Parliament adopted the scheme to which we have referred above.**
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> **In considering whether to make an order under . . . the 1987 Act the court will have to take into account a number of factors, of which the following will undoubtedly be material (although there may well be others, as the list is not intended to be exhaustive): (1) the degree of commitment which the father has shown towards the child; (2) the degree of attachment which exists between the father and the child; (3) the reasons of the father for applying for the order."**

If the parents of an illegitimate child cannot agree that the father's access will be in the best interests of the child and he is therefore compelled to go to Court, then it seems to me to be altogether just and equitable that he should have to canvass, *inter alia*, the three points in the above-quoted passage in order to enable the Court to establish what is best for the child's welfare. Should the parent-child relationship be one originating from their all having lived as a family (for example,

within the context of a customary or religious marriage not recognised by civil law), the advantages to the child of parental access should, in the vast majority of such cases, be self-evident and augur well for a favourable finding on the three aspects listed in *Re H* (*supra*).'
(At 582H to 583F.)

According to 13 Halsbury's Laws of England 4th ed para 933 at 440:
'In determining questions of access the welfare of the child is the first and paramount consideration, although as a general rule the court is slow to deprive a parent of all contact with his or her child.'

It is instructive to read the footnote to this statement:
'5. *M(P) v M(C)* (1971) 115 Sol Jo 444 (CA) (in the children's interests that access to the father should be denied: they were living in a perfectly stable environment and the only event in their lives which upset them was access); *C v C* (1971) 115 Sol Jo 467 (CA) (children happy since separated from mother and it might be disastrous if they were brought into contact with her again: mother refused access); *B v B* [1971] 3 All ER 682 ([1971] 1 WLR 1486 (CA)) (father's character as parent "absolutely untarnished"; deeply devoted to child, boy aged sixteen years; child formed a firm determination not to resume access; access refused; Court of Appeal observed that it was the duty of a parent in charge of a child to inculcate in the child a proper attitude of respect towards the other parent); *Re N (minors)* (1975) 119 Sol Jo 423 (in the long-term interest of children to be kept in contact with both parents; children should visit father in open prison, he to have reasonable access on release).'
As regards *B v S* it should be borne in mind, as pointed out by *Hahlo* in the note to which I have referred:

'Another point, not unconnected with the previous one, which became clear at the conference, is that there is a widespread conviction, in civil-law as well as common-law countries, that, when a child has reached the age of discretion, decisions vitally affecting his life should not be taken without giving weighty consideration to his own wishes.'

Raeesa has not reached such an age.
I have indicated the reasons why I consider that it would be in the interests of Raeesa if her father were able to see her and she were able to get to know him. Against that the degree of commitment shown by the applicant before his attorney's letter which started these proceedings is not impressive, although it could have been cooled by the respondent's hostile attitude to him. There is at present no attachment at all between father and child, but that is not fatal because in *B v S* when the appeal was heard, there had been no contact between the father and his child for over four years, and like here, 'the only paternal figure available for the child was respondent's father' (586B). The long time which has elapsed since the applicant has had contact with Raeesa is the feature in this case which is caused me the greatest anxiety. If I had come to the conclusion 'that time and circumstance have driven an unshakable wedge between' the applicant and his daughter (*B v S* at 587D), I would have had to let that finding prevail, but the fact that the daughter, through circumstances beyond her control, has had no meaningful contact with her father will not, on what I have seen, necessarily mean that a relationship cannot be developed between them. The respondent may indeed be justified in being concerned at the effect which the appearance of a new person in Raeesa's life will have

on her but it is her responsibility, as a caring mother who obviously has considerable influence on her daughter, to give her the necessary comfort and encouragement to get to know her father. (See *Germani v Herf and Another* (*supra*).) Some of the reasons given by the applicant for requiring access are not convincing. The bond he seeks to establish between three children will be difficult to forge if they live in separate households and will meet together only on rare occasions. But I do not believe that his quest for access is driven by an ulterior motive, although it may to some extent have been influenced by the financial obligation which has been imposed on him with regard to his daughter.

The respondent's father, who is, according to her (and Raeesa), the present father figure, is two generations away from the child and however much he cares for and concerns himself with her does not detract from the advantage she should derive from contact with her father.

I have come to the conclusion that, on balance, Raeesa's interests would be better served if the applicant were to have access to her. Because of the adverse affect that too frequent intrusions of a new influence in her life could have on Raeesa, I consider that her relationship with the applicant should be developed gradually. I enquired from the respondent, when I saw her, what her attitude would be to the exercise by the applicant of access in her presence, but she was not agreeable to this and she was probably right. The strained relationship between the parents will not be conducive to the child's happiness and stability if she has to be with them both at the same time. I have, therefore, decided on other measures for phasing in the applicant's access to Raeesa. Bearing in mind that the terms of access which I am defining differ considerably from those sought by the applicant, I shall define the right to access provisionally on the basis that the parties may, within 14 days, approach me and make representations for a variation of the terms. It is, of course, free for them at any time to approach another court for a variation of the order. Before I formulate the order, I think it is desirable to revert to my interview with the parties and Raeesa. Although it had a very limited effect on my decision and had been agreed to by the parties, I would not follow that course again for the following reasons:

1. While the Court is the upper guardian of minors in its jurisdiction, it must exercise its function according to recognised principles and procedures of justice.

2. The fair administration of justice requires a Judge not to examine or communicate with parties or witnesses or conduct a hearing in the absence of any of the parties except (perhaps) in very special circumstances (cf *Chelsea West (Pty) Ltd and Another v Roodebloem Investments (Pty) Ltd and Another* 1994 (1) SA 837 (C) at 845G-J and Lansdown and Campbell *South African Criminal Law and Procedure* vol V at 488). I do not think that the circumstances of this case were very special.

3. This is especially so where the outcome of a case depends to a large extent on judicial discretion.

4. Even if a Judge conducts a private interview fairly, there is a danger that an unsuccessful party may perceive unfairness, especially if he or she fears that statements may have been made by the other party which created what he or she thinks was a wrong impression. A sense of injustice may affect a party's fulfilment of his or her parental duties in respect of access where co-operation is important (cf Gofen 'The Right of Access to Child Custody and Dependency Cases' (1995) 62 *The University of Chicago Law Review* 857 at 876).

If I were to see parties in my chambers in a future case,

I would require all of them to be present at each interview, except for a discussion with a child who has reached the necessary stage of discretion.

The order which I make is the following: 1. The applicant shall have access to Raeesa as follows, always subject to the reasonable convenience of the respondent, the times of prayer and the overriding interests of Raeesa:

1.1 Until 31 March 1996 he may visit her at the respondent's residence or her parents' residence, wherever she may be staying, once a week as soon as practicable after early evening prayers (which I am told are called Magrib) for one hour. He is to arrange the time with the respondent beforehand. If convenient arrangements can be made with the principal of Raeesa's school, the applicant may visit Raeesa, instead of at the respondent's place of residence, at the school once a week immediately after school and take her home to the place where she lives so that she reaches home not later than two hours after school closes and a reasonable time before the commencement of Magrib. The exercise of any such option is to be arranged with the respondent at least five days in advance.

1.2 The respondent is to ensure that Raeesa is available to speak to the applicant on the telephone at reasonable times, but not more often than once a week, to be gradually increased as time goes by and to afford her the reasonable opportunity when she so desires, to telephone the applicant. 1.3 From 1 April until 30 June 1996 the applicant can remove Raeesa during alternate weekends, on a Saturday or Sunday, for a period of between four and five hours, by not less than five days' prior arrangement with the respondent, but so that she is returned a reasonable time before Magrib.

1.4 From 1 July to 31 December 1996 the applicant may remove Raeesa for a day visit on a Saturday or Sunday every alternate weekend from 9:30 am to 5 pm but so that she is returned to the respondent a reasonable time before Magrib.

1.5 From 1 January 1997 the applicant may remove Raeesa every alternate weekend from Saturday noon to Sunday at 6 pm or as soon as practicable after the conclusion of Magrib. 1.6 Thereafter the applicant shall be entitled to have Raeesa with him on alternate weekends from Friday after school to Sunday at 6 pm or as soon as practicable after the conclusion of Magrib and every alternate school holiday with the first one being the first after 30 June 1997. 2. The continuation of the applicant's access at any time is conditional on his having up until then substantially exercised the rights given to him in para 1 unless there is on any occasion good cause for his not having done so.

3. I do not think it is fair to say that either party has 'won' this case. I hope that Raeesa has. The applicant has made his point while the respondent has put before the Court considerations which have been important for me to come to a decision. In the circumstances I make no order as to costs. However, I will consider representations from the parties within the period of 14 days referred to above to vary the order as to costs.

Plaintiff's Attorney: *Mahmood Mia*. Respondent's Attorney: *Bham & Dahya*, Boksburg.