REPORTABLE

CASE NO.: SA 17/2005

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

I JESSICA THUDINYANE **Appellant**

and

ALBINUS INDILA EDWARD **Respondent**

Coram: SHIVUTE CJ and MARITZ JA

Heard: 6 July 2006

Delivered: 12 October 2012

APPEAL JUDGMENT

SHIVUTE CJ (MARITZ JA CONCURRING):

[1] The respondent (then as applicant) brought application on notice of motion in the High Court seeking, from the appellant (cited as the respondent in the proceedings in the Court below), among other things, an order granting him access to his minor child born outside marriage. The appellant is the child's mother. The respondent has accepted the legal position that he had no parental authority in respect of his child - who was born out of wedlock - but maintained that he was merely seeking reasonable access to the child. By seeking this relief, the respondent

claimed to restore the *status quo* which he asserted had existed prior to the end of 2000 when he was granted access to the minor child by the appellant. The respondent further alleged that the appellant through her actions tacitly agreed to or created visiting rights which he was desirous of maintaining. It was also the respondent's allegation that the appellant had waived any bar and/or restriction which could possibly prevent him from such access which existed prior to the end of 2000. The respondent, however, rightly in the end abandoned this last-mentioned proposition when the appellant counteracted it with ample authority to the contrary. The respondent argued that in terms of Article 15(1) of the Constitution,[1] it was in the best interest of the child to know her biological father and to be cared for by him.

[2] The appellant did not dispute that the respondent was the natural father of the child but denied that, through her actions, she had tacitly agreed to grant the respondent any of the rights which he was seeking to enforce in these proceedings. Appellant alleged that the respondent had ceased to visit the child and, from the child's point of view, simply vanished for an extended period. She submitted that it was due to his absence for a period of four years that he, in effect, had become a stranger to the child. She maintained that on the occasions when the respondent visited the child before his disappearance, he was never with the child for a period long enough to establish what her needs were.

Background

[1] Which provides that: 'Children shall have the right from birth to a name, the right to acquire a nationality and, subject to legislation enacted in the best interests of children, as far as possible the right to know and be cared for by their parents.'

[3] It is common cause that the appellant and the respondent were involved in an intimate relationship for three years. A baby girl was conceived and born of this relationship. The relationship between the parties ended shortly after the birth of their child. The respondent nevertheless continued to visit their child intermittently and for short periods once during each of the following months: June, July, September, October and December 2000 as well as January, April, May, June and December 2001.

[4] The respondent alleged that when, after his return, he had attempted to regain access to the child by approaching the appellant for her consent, his efforts were met with blatant refusals from the appellant. His legal representative also attempted to ascertain the appellant's banking details so that the respondent could pay maintenance. This was corroborated by an affidavit by the respondent's legal practitioner. Appellant denied these allegations.

[5] A letter was addressed to the appellant on 21 May 2002 by the respondent's legal practitioners requesting access to the child on every second weekend. Appellant's legal practitioners replied on 13 June 2002 offering the respondent structured access. The respondent's legal practitioners replied on 16 September 2002 by merely stating that the respondent 'is happy to go on as he has done so far, to pay maintenance on a monthly basis and to visit the minor child when it is suitable to (the appellant)'. This was interpreted by the appellant to be a rejection of the offer, which was intended, according to her, to be structured. The appellant maintained that

circumstances had in the meantime changed: she got married to another man and the child had grown accustomed to her stepfather. She was therefore no longer prepared to agree to the structured access previously offered. The appellant submitted that, because of the change in circumstances, it was not in the child's best interest that the respondent should be allowed access to her. The appellant maintained that access would 'only create confusion in the relationship between the child and her stepfather, who has been supporting her up to now'.

[6] In his replying affidavit, respondent says that structured access to the child had been his wish all along and that he was unable to recall why he had responded, through the mouth of his legal practitioner, in the manner he did, adding that: 'I can only surmise that it is a result of a communication between me and my legal practitioner'.

[7] The application was called before Shikongo AJ who, having heard arguments by counsel on both sides, directed that the application be referred for a hearing of oral evidence and that reports of evaluation of the parties had to be compiled and submitted by appropriate personnel from the Ministry of Health and Social Services or by a mutually agreed on child or clinical psychologist on the question whether access by the respondent to the minor child would be in the best interest of the child. This was confirmed in a letter from the Registrar of the High and Supreme Courts dated 14 July 2005.

[8] Parties communicated with each other with the view to effectuating the directives given by the learned Judge. On 10 August 2005, however, the learned Judge handed down his ruling on the application, without first hearing the evidence which he had previously ordered should be heard. In it he ordered that the respondent be granted access to the child as per Annexure 'A' to the notice of motion[2] and furthermore ordered the appellant to pay the costs of the application.

[9] The issues that called for determination by the Court below were the following:

1. Whether or not it was in the best interest of the minor child that access be granted to the respondent; and

2. Should the Court answer the aforementioned question in the affirmative, what are the terms and conditions, if any, on which the said access should be granted?

Findings by the High Court

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[2]Which reads as follows:

'(a)For the first 6 months to visit the said child in Swakopmund every alternative weekend commencing on Saturday at 10h00 until 16h00 and on Sunday commencing at 10h00 until 16h00 and to take such child to the Applicant's mother's residential address in Swakopmund during these times.

(b) Thereafter and until such child attends school to take such minor child every alternative weekend commencing on Friday afternoon till Sunday at 16h00 as well as holidays which holidays shall be varied so that the applicant shall have the said child with him every alternative Christmas holiday.

When the said child attends school to take such minor child every alternative weekend commencing on Friday afternoon till Sunday at 16h00 and every alternative long and short school holiday which holiday shall be varied so that the Applicant shall have the said child every alternative December holiday.'

[10] The learned Judge gave the following explanation for giving judgment prior to having heard oral evidence, including expert evidence, which he had initially deemed necessary:

> 'My follow up inquiries with the Registrar's office on the expected time frame within which aforementioned directives would be attended to, however, revealed that the estimated duration of the process itself might defeat the stated object of obtaining a just and especially, an expeditious decision. In this regard, I was alerted to the fact, that besides the likelihood that adjudication on the envisaged oral evidence may eventuate only sometime after February 2006, the finalization of the welfare report, assessed against past trends, is unlikely to be in the shortest period of time as optimistically wished for.
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> Accordingly, and considering the interest of the parties in securing expeditiously the pronouncement of this court on the issue brought before it, and taking into account that the further evidence sought *mero motu*, would have been supplementary to that proffered by the litigants themselves, I am inclined and have decided to proceed with pronouncing myself on the issues raised and argued by the litigants in this matter.'

[11] With regard to the issue of the best interest of the minor child, it was found that the respondent could not rely on a bond having developed between the child and himself. The Court below further made a finding that it was in the best interest of the child to maintain contact with her biological father and to be cared for by him. The Court applied the *dictum* of the South African Supreme Court of Appeal in *T v M* 1997 (1) SA 54 (A) that, in the absence of any factors which are of such a nature that the welfare of the child demands that he/she be deprived of the opportunity of enjoying access to the parent in question, it should be in the best interest of the child that access by the father be granted.

[12] In deciding whether the respondent's proposed access as per Annexure 'A' of his notice of motion should be granted, the High Court decided that the same reasoning was to be adopted in relation thereto. The learned Judge found that there were no factors militating against allowing such access and that, having two loving father figures even if one was not present on a permanent or continuous basis, could hardly be said to be against the interest and/or welfare of the minor child. The Court therefore decided that it was in the best interest of the minor child that such access, as outlined in Annexure 'A' to the notice of motion, be granted.

[13] Before I turn to consider counsel's arguments on the reasoning and findings of the Court *a quo*, I should first deal with an issue that has affected this appeal. The appeal was heard by me, together with my Brothers Maritz JA and O'Linn AJA. Our Brother O'Linn AJA became indisposed at the time the judgment was circulated for his consideration. To our regret, his health has not improved since then and he remains indisposed and unable to further deal with the appeal. The legal position in such an eventuality is settled: Pursuant to the provisions of s 13(4) of the Supreme Court Act, 15 of 1990 and as discussed by this Court in earlier judgments, amongst others, in *Wirtz v Orford and Another* 2005 NR 175 (SC), my Brother Maritz JA and I can validly and properly finalise the matter, provided we agree on the outcome of the appeal.

Counsel's submissions on appeal

[14] Proceeding now with the consideration of arguments advanced by counsel: the appellant was represented by Mr G Dicks while Mr Mouton argued the appeal on behalf of the respondent. It was submitted on behalf of the appellant that the Court below correctly referred the matter for oral evidence and rightly ordered a welfare report or the report of a child or clinical psychologist to be produced in order to ascertain whether granting access would be in the best interest of the minor child. Counsel, however, argued that the Court below erred in not following through with the directives it had issued. Counsel continued to advance argument that the finding by the Court below that it was in the minor child's best interest to grant respondent access to the child was erroneous since no enquiry was conducted to determine what is in the best interest of the minor. He accordingly moved for an order remitting the matter to the High Court to hear evidence of the parties and experts.

[15] Counsel for the respondent, on the other hand, strenuously argued in support of the findings by the Court below. Counsel submitted that the High Court correctly applied the facts in concluding that it was in the child's best interest that access to her be granted to the respondent. The respondent accordingly urged for the confirmation of the order of the Court below granting access and the issue of the extent of access to be referred to that Court for determination.

Issues on appeal

[16] At the commencement of the hearing of the appeal, the appellant made application for condonation for non-compliance with certain rules of the Rules of Court

and for reinstatement of the appeal. Counsel for the respondent indicated that the application was no longer being opposed. Having been persuaded that a case had been made out for relief, the application was granted. Counsel on both sides were broadly in agreement with the law applicable to the facts of the case. Their differences lie in the application of those principles to the facts. In addition to the heads of argument filed in terms of the Rules of Court, counsel were requested to prepare supplementary heads of argument on the applicability of the United Nations Convention on the Rights of the Child (the Convention) and Article 15(1) of the Namibian Constitution (the Constitution) to the matter. Counsel for parties were *ad idem* and submitted as follows regarding the applicability of the Convention to Namibia: Article 63(2)*(e)* of the Namibian Constitution provides that the power to agree to the ratification or accession to international agreements which have been negotiated and signed by the President of Namibia or his delegate vests in the National Assembly. The Convention was signed by Namibia on 26 September 1990 and ratified on 30 September 1990. Accordingly, and in conformity with Article 144[3] of the Namibian Constitution, the Convention became part of Namibian law.

[17] The best interest of the child is the paramount consideration in any investigation or decision concerning a child directly or indirectly. This is evident from the relevant provisions of the Constitution as well as the Convention. Since parties are in agreement concerning the legal principles governing this appeal, the issue remaining for decision is whether the Court below was correct in deciding the

[3] Article 144 provides: 'Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.'

application without hearing the evidence on the issues that it had identified required oral hearing. The determination of the scope and ambit of what is in the best interest of the child in the context of granting access by a parent will undoubtedly be informed by relevant legal principles followed by a factual application of those principles. The genesis of any substantive legal discussion should be the Constitution. Article 14(3) of the Namibian Constitution should be the starting point in the consideration of the right of the child. The Article provides that:

> 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.'

[18] As already mentioned, Article 15(1) which is more on the point makes provision, amongst other things, for the right of each child to know and be cared for by his or her parents, as far as possible. This last qualification is vital, in that it is not an absolute right, as it remains a factual question whether it is in the best interest of the child that such a right be granted. Furthermore, as alluded to by counsel, in Namibia, international agreements such as the Convention, appear to have similar force of law as accorded to legislation, in the absence of any constitutional provision or Act of Parliament contradicting the law or agreement in question. The Convention refers profoundly to the child's best interest being paramount in any decision concerning the child. It employs a language similar to that found in Article 15(1) of the Constitution. It says in article 7(1) that 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) of the Convention, State Parties are under obligation to ensure implementation of these

rights in accordance with their national law. The provision regarding ‘as far as possible’ the right to know and be cared for by their parents must be read against the preamble of the Convention that, like Article 14(3) of the Constitution, places much emphasis on the family as a unit and the need to afford the necessary protection to its members and particularly children so that it can fully assume its responsibilities within the community. The preamble to the Convention also recognizes ‘… that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding’. Article 3(1) of the Convention enjoins State Parties to the Convention to ‘undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and to this end, shall take all appropriate legislative and administrative measures’. It is evident therefore that decisions involving children should be informed by the above constitutional imperatives and the need for Namibia to comply with its international obligations in terms of the Convention.

[19] Numerous cases which all have a bearing on the main issue to be determined were cited by counsel on both sides and it is not necessary to recite them here. Save to say that I had regard to them in coming to the conclusion I have arrived at in this matter. One of such authorities, however, stands out as being prominent and to the point and this is the decision of the South African Supreme Court of Appeal in *B v S* 1995 (3) SA 571 (A). It is necessary to single it out. At page 584H of the judgment,

Howie JA, writing for the Court, observed that there was no onus on the natural father, in an application for granting access to his child to show 'a very strong and compelling ground' why he should have access. Such application in substance involves judicial investigation into the child's best interest. The learned Judge of Appeal went on to remark at 584I-585B as follows:

> 'In addition it seems to me to be necessary to lay down that where a parental couple's access (or custody) entitlement is being judicially considered for the first time - in other words where there is no existing Court order - there is no onus in the sense of an evidentiary burden, or so-called risk of non-persuasion, on either party. This litigation is not of the ordinary civil kind. It is not adversarial. Even where variation of an existing custody or access order is sought, and where it may well be appropriate to cast an onus on an applicant, the litigation really involves a judicial investigation and the Court may call evidence *mero motu*. *A fortiori* that is so in a "first time" situation. And it is irrelevant in this regard whether the child concerned is legitimate or illegitimate.' (Reference to authorities omitted.)

[20] At 585E-F the learned Judge made the following pertinent remarks:

> 'Moreover, if the dispute were properly ventilated by way of as thorough an investigation as may reasonably be possible, it is … difficult to envisage when the welfare of the child will not indicate one way or the other whether there should be access. That presupposes, of course, that all the available evidence, *fully investigated*, is finally in. It follows that if a Court were unable to decide the issue of the child's best interests on the papers, it would not let the matter rest there. While there might often be valid reasons (for example, expense or the nature of the disputed issues) for not involving expert witnesses, at the least the Court would require, and if necessary call, oral evidence from the parties themselves in order to form its own impression (almost always a vital one) of their worth and commitment. Because the

> welfare of a minor is at stake, a Court should be very slow to determine the facts by way of the usual opposed motion approach, which would be inappropriate if it left serious disputed issues of fact relevant to the child's welfare unresolved.' (Reference to authorities omitted and emphasis supplied.)

[21] I am in respectful agreement with the above *dicta*. Granted that the superior courts are the upper guardians of minor children it makes sense that these proceedings should take the form of a judicial inquiry. In the present case, the initial approach of the Court below to refer the matter for oral evidence was correct. In my view, there were many issues of fact in dispute between the parties which should have been dealt with at the oral hearing. Furthermore, although the appellant did not hand in the report compiled by a clinical social worker who apparently evaluated the appellant and her family, the Court below was informed of its availability and should have requested the report and given the respondent an opportunity to dispute it if so advised. This is in line with reaching a just finding.

[22] The appellant had no issue with granting unstructured access to the minor child by the respondent in the past. Her main contention with the access in question seems to revolve around the prolonged absence of the respondent in the minor child's upbringing and the changed circumstances in her and the child's life. She also appears to have taken issue with the respondent's degree of attachment and commitment to the minor child; the underlying motives for bringing the application for access at a stage when the minor child had settled in with her new family; the

allegation that the minor child had grown to consider her stepfather as her ‘real father’, and the impact the sudden access may have on the minor child.

[23] The Court below reasoned that the sooner any possible confusion created by access to the child after the changed circumstances was tested the better and that it was tolerable for the child to have two father figures, even if one was not permanent. I am not in agreement with this reasoning, as it evinces a certain degree of indifference to the minor’s best interest. Doubtless, ‘the best interest of the child’ includes the child’s emotional and psychological wellbeing. Neither this Court nor the Court below could determine these without assistance of expert evidence. The Court below therefore erred in not seeing through the directives it had given to hear oral evidence. It has emerged from the papers that after the learned Judge had ordered the application to be referred to the hearing of the evidence, counsel intimated in Chambers that the evidence of the parties would not take the application any further, but that it was necessary to hear expert evidence. While the parties were preparing to obtain reports from experts, the judgment granting access was handed down. I think that the Court below erred in this approach. Having ordered the application to be referred to the hearing of oral evidence, the Court below could not proceed to decide the application without affording the parties an opportunity to address it on the effect of deciding the application without hearing evidence. As this Court pointed out in *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and Others* 2011 (2) NR 469 (SC), at par 40, when at some stage of the proceedings, parties are limited to particular issues either by agreement or a ruling of the Court, as a general

principle, the Court cannot unilaterally alter the position without affording the parties an opportunity to make submissions on the proposed new tack in the course of the proceedings.

[24] With regard to other findings by the Court below, I must note that, whilst I agree in principle with the finding that save for the prolonged absence of the respondent there did not appear to be other factors present, at least on the papers, which tended to show that access may not be in the child's best interest, I am concerned that the Court below did not appear to have considered that there may be a possibility that the child's emotional and psychological balance may be disturbed by the sudden introduction of another father figure she may no longer have any recollection of. This is an important factor in deciding whether or not access should be ordered at this stage of her development and, if so, how she should be introduced to the notion. It cannot be decided on affidavit and as such the Court below should have taken the matter further by obtaining expert evidence.

[25] In the view I take of the matter, access should not have been granted until it had been determined after a thorough investigation of all the available evidence whether it would be in the best interest of the child to grant access. The dilemma, of course, is that a long time has passed and it raises the question how the matter should now proceed. The child has grown older in the meantime and, with that, has undoubtedly advanced intellectually, became evolved psychologically and acquired more adaptive and social skills – all of which affect her level of maturity and her

readiness to be introduced to her natural father. I am of the opinion that the type of enquiry that was ordered by the Court below is essential and indispensable in the circumstances of this case and that it should take the child's current level of intellectual and psychological development into account. This Court is not in a position to conduct such enquiry. The matter should therefore be remitted to the High Court for that Court to hear oral evidence as *inter alia* contemplated in the initial order that Court had issued. That Court is best suited to deal with the matter. It is thus necessary to engage the services of professional persons, such as social workers and/or a child psychologist to assist the Court hearing the resumed application whether the child will adapt to the introduction of changes in her life at this stage. The remarks of Howie JA made against the background of similar circumstances in *B v S* (above*)* are apt. He said at 587D-E:

> '[I]t may well be that access will be in the child's best interests and that he should not be disadvantaged by respondent's refusal of access (if unjustified) or by the inadequacies inherent in forensic procedure. If the evidence on remittal shows that time and circumstance have driven an unshakable wedge between appellant and himself, so be it. On the other hand, if that does not turn out to be the case, then there is still sufficient left of his formative childhood to permit paternal access to operate to his benefit if access be found to be in his best interests.'

[26] I am persuaded that remitting the matter to the High Court for the hearing of evidence will certainly be in the minor child's best interest in the circumstances of this case and be in line with article 9(3) of the Convention which provides that:

> ‘States shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interest.’

[27] The possibility that the respondent may not pursue the application in the event that remittal is ordered should not be discounted. To guard against such possibility, the respondent as the architect of the application for access should be put to terms to ensure that he prosecutes the application if he is still so minded or advised. This will be reflected in the order below.

Costs

[28] As to the costs of the appeal, counsel for the appellant argued that if the decision of the Court below is set aside, then the appellant is successful and should therefore be awarded the costs of the appeal. Counsel for the respondent, on the other hand, submitted that if the appeal is dismissed, the respondent is entitled to costs. However, if the appeal is allowed, either the appellant be ordered to pay the costs of the appeal or each party should pay his or her costs. Counsel argued that there was neither onus on the respondent to give oral evidence in the Court below nor had any allegation of wrong doing been levelled against the respondent for the failure to hear evidence. My own view on the issue of costs is that as far as the costs of the application in the High Court are concerned, those should be reserved for determination by the Court that will hear evidence and dispose of the application. As to the costs of the appeal, I am of the view that although the current proceedings are not of the ordinary civil kind, the appellant was entitled to appeal against a clearly

erroneous judgment and order of the Court below. The respondent on the other hand had a choice to either abide the decision of this Court or to oppose the appeal. Having elected to oppose the appeal and the appellant essentially being successful, the respondent should be ordered to pay the costs of appeal at the very least limited to his opposition of the appeal.

Order

[29] The order similar to the one made in *B v S* (above) in relation to remittal and consequential issues would be appropriate and I propose to borrow liberally from the order made in that matter. The following order is accordingly made:

1. The appeal succeeds.

2. The order by the High Court is set aside and there is substituted for the following order:

> ‘(a) The application is referred to oral hearing of evidence on a date to be arranged with the Registrar on the question whether access by the applicant to the minor child will be in the best interest of the child, and if so determining the extent to which such access be granted.

(b) The evidence referred to in paragraph (a) above will be that of the party who elects to testify and any witnesses he or she may call as well as witnesses that may be called by the Court.

(c) The Directorate: Child Welfare Services in the Ministry of Gender Equality and Child Welfare is hereby directed to investigate the parties' respective circumstances for the purpose of subsequently reporting in writing to the Court (with copies to each party) on the question referred to in paragraph (a) above.

(d) The Registrar is directed to communicate this order forthwith to the Directorate: Child Welfare Services in the Ministry of Gender Equality and Child Welfare in order to obtain their respective reports as expeditiously as possible.

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

(f) The costs of the application shall be costs in the cause.'

3. The matter is remitted to the High Court for the hearing of oral evidence in terms of the order set out in paragraph 2 above by any other Judge in the event that the learned Judge who dealt with the matter may not be

available and for the further adjudication of the matter as the Court may deem meet.

4. If minded to pursue the application, the respondent must, within 30 days of the date of this order, notify the Registrar of the High Court, Windhoek, in writing of his intention to pursue the application in terms of the order set out in paragraph 2 above. If the respondent fails to give such notice, or fails to prosecute the application further notwithstanding such notification, the order in paragraph 2 above will lapse and the application shall be deemed to have been withdrawn.

5. The respondent is ordered to pay the appellant's costs of the appeal limited to his opposition of the appeal, such costs to include the costs of one instructed and one instructing counsel.

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SHIVUTE CJ

I agree

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MARITZ JA

APPEARANCES

APPELLANT:	G Dicks
	Instructed by:
	Kirsten & Co
RESPONDENT:	CJ Mouton
	Instructed by:
	Conradie & Damaseb