THE LAW OF PERSONS

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LEGISLATION

The South African Postbank Limited Act 9 of 2010 came into operation on 22 July 2011 (GN 607 *GG* 34476 of 22 July 2011). The implications of the Act for the law of persons — specifically the capacity of a minor to deal with deposits and investments in the Postbank — are discussed in last year's *Survey*.

SUBORDINATE LEGISLATION

The fees payable for the issuing of a birth or death certificate, reproduction of an entry in the register of births or deaths, reproduction of supporting documentation relating to an entry in the register of births or deaths, verification of information in the birth or death register, amendment of an entry in the birth register, a change of forename or surname, and a duplicate confirmation of a change of forename or surname in terms of the Births and Deaths Registration Act 51 of 1992 were amended as from 19 January 2011 (GN R22 *GG* 33941 of 19 January 2011).

In terms of the Child Justice Act 75 of 2008, a child who is accused of having committed a crime may be diverted away from formal court procedures even though he or she has the capacity to incur criminal liability (ss 41(1) and 49(1)*(b)*). However, such diversion may only be to an accredited diversion programme provided by an accredited diversion service provider (s 56(1) read with the definition of 'diversion' in s 1). The Minister of Social Development published the names and details of entities who have been accredited to provide diversion programmes and diversion services in KwaZulu-Natal, Limpopo, the Free State, Gauteng, Mpumalanga and the Eastern Cape in GN 828 in *GG* 34659 of 5 October 2011.

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Government Notice 607 in *GG* 34476 of 22 July 2011 brought the South African Postbank Limited Act into operation. The implications of the Act for the law of persons are discussed in the 2010 *Annual Survey* at 994.

DRAFT LEGISLATION

The draft Judicial Matters Amendment Bill, 2011 deals with the amendment of various Acts, including some of the provisions of the Child Justice Act ('the Act') relating to the evaluation of the criminal capacity of a minor. Clauses 49 and 58 of the draft Bill amend sections 11 and 97 of the Act by requiring the inquiry magistrate or Child Justice Court to consider the cognitive, moral, emotional, psychological and social development of the child in assessing the child's criminal capacity, and by permitting the Minister to indicate different categories or classes of persons as evaluators of different aspects of a child's development in his determinations of persons who may evaluate a minor's criminal capacity. The explanatory summary of the draft Bill was published on 27 May 2011 (Gen N 319 *GG* 34338 of 27 May 2011).

Draft regulations under the National Health Act 61 of 2003 in respect of artificial fertilization of persons were published for comment in April (GN R262 *GG* 34159 of 1 April 2011).

CASE LAW

Curator

Ex parte Beukes 2011 (5) SA 521 (WCC) relates to the issue of which Master of the High Court is obliged to submit a report for the purposes of an application to appoint a *curator bonis* for a person who is incapable of managing his or her own affairs. Uniform Rule 57(1) requires that an applicant who seeks the appointment of a curator to the person (*curator personae*) or property (*curator bonis*) of a person who is 'of unsound mind and as such incapable of managing his affairs' (a 'patient') must first apply to the court for the appointment of a *curator ad litem* to the patient. In this case, the patient was incapable of managing his affairs because of head injuries he had sustained in a motor vehicle accident in the Northern Cape. His sister had successfully applied for the appointment of a *curator ad litem* for him in the Western Cape High Court. The application had erroneously been made and granted in that court on the ground that the

patient was domiciled in the court's area of jurisdiction, while he was actually domiciled in the area of jurisdiction of the Northern Cape High Court. The *curator ad litem* successfully assisted the patient in claiming compensation from the Road Accident Fund in the Northern Cape High Court, resulting in an amount of some R500 000 being paid into the trust account of the patient's attorneys in Cape Town. As the patient was incapable of managing his affairs, a *curator bonis* had to be appointed to manage his estate, which consisted mainly of the compensation received from the Road Accident Fund.

Uniform Rule 57(6), read with Uniform Rule 57(7), stipulates that for purposes of the appointment of a *curator bonis* for a patient, the Master of the High Court 'having jurisdiction' must submit a report and supporting documents on the patient's means and general circumstances and the suitability of the suggested *curator bonis*. The application for the appointment of the *curator bonis* may only be placed on the roll for hearing after the Master has provided the report to the applicant (Uniform Rule 57(8)). The applicant (the patient's sister) wanted the Master of the Western Cape High Court in Cape Town to furnish the report, but the Master refused to do so on the ground that the Western Cape High Court did not have jurisdiction to appoint a *curator bonis* for the patient as the patient was not resident within the area of the court's jurisdiction. The applicant then approached the Western Cape High Court for an order compelling the Master in Cape Town to furnish the required report. She argued that section 4(2)*(b)* of the Administration of Estates Act 66 of 1965 conferred jurisdiction on the Master in Cape Town because the greatest portion of the patient's property was held within the area of jurisdiction of the Western Cape High Court. Section 4(2) provides as follows:

> '(2) In respect of the property belonging to a . . . person under curatorship or to be placed under curatorship, jurisdiction shall lie —
> *(a)* in the case of any such person who is ordinarily resident within the area of jurisdiction of a High Court, with the Master appointed in respect of that area; and
> *(b)* in the case of any such person who is not so resident, with the Master appointed in respect of any such area in which is situate the greater or greatest portion of the property of that person. . . .'

Binns-Ward J correctly rejected the applicant's interpretation of section 4(2) (para [7]). He held that section 4(2)*(b)* applies only to the property of a person who is not ordinarily resident within the

area of jurisdiction of a South African High Court. As the patient in this case resided within the area of jurisdiction of the Northern Cape High Court, he clearly did not fall within the ambit of section 4(2)*(b)*. Binns-Ward J explained that section 4(2)*(b)* applied to the property of a person who was not ordinarily resident in South Africa but owned property that was held or situated in South Africa, or to a person who constantly moved from place to place within South Africa and was therefore not 'ordinarily resident' anywhere in the country (para [8]). He accordingly dismissed the application (para [14]).

In an *obiter dictum* he indicated that the obligation imposed by Uniform Rule 57 on the Master of the Northern Cape High Court to provide a report did not imply that the main application regarding the appointment of a *curator bonis* for the patient necessarily had to be transferred to the Northern Cape High Court. He explained, quite correctly, that the duty to provide a report for purposes of rule 57 is distinguishable from the jurisdiction of the court to appoint a *curator bonis*, which is governed by the Supreme Court Act 59 of 1959 and the common law. Even though he did not have to decide the question, he opined that the Western Cape High Court might have concurrent jurisdiction with the Northern Cape High Court to appoint a *curator bonis* for the patient as the greatest portion of the patient's assets was held within the territorial jurisdiction of the Western Cape High Court (paras [11]–[13]). As the issue of jurisdiction falls outside the scope of the law of persons, Binns-Ward J's views in this regard are not considered further.

Parental Responsibilities and Rights of Unmarried Parents

FS v JJ and Another 2011 (3) SA 126 (SCA) is a decision on a dispute regarding parental responsibilities and rights between an unmarried father (S) and relatives of his child's deceased mother (the Js). The child was born in 2006. At the time of her birth, her parents had been living together in a permanent life partnership for some eighteen months. In terms of the common law, which applied at the time, only the child's mother acquired parental responsibilities and rights. The child's mother died of illness two months after her birth. After her mother's death, the child lived with the Js, who are her maternal grandmother and her grandmother's husband (who is not the child's grandfather). During the three and a half years the child lived with the Js, S and the Js

were involved in numerous legal disputes regarding parental responsibilities and rights in respect of the child. Several judgments were delivered by the Northern Cape High Court, one by the Western Cape High Court and one by the Children's Court. (The judgment does not indicate which Children's Court had made the order.) S lived in the area of jurisdiction of the Western Cape High Court, while the Js lived in the area of jurisdiction of the Northern Cape High Court.

The present decision is an appeal against three orders Kgomo JP had made in the Northern Cape High Court after the coming into operation of section 21 of the Children's Act 38 of 2005 ('the Act') on 1 July 2007. In terms of section 21(1), an unmarried biological father automatically acquires full parental responsibilities and rights in respect of his child if he lives with the child's mother in a permanent life partnership when the child is born (s 21(1)*(a)*). Regardless of whether he has ever lived with the child's mother, he also acquires full parental responsibilities and rights if he consents or successfully applies to be identified as the child's father or pays damages in terms of customary law, and contributes or attempts in good faith to contribute to the child's upbringing and maintenance for a reasonable period (s 21(1)*(b)*). These provisions apply regardless of whether the child was born before or after the coming into operation of the Act (s 21(4)). Despite the provisions of section 21, Kgomo JP had awarded guardianship and care of the child to the Js subject to reasonable contact between the child and S; ordered S to deliver the child to the Js; invited the Js to bring contempt proceedings against S after S had failed to deliver the child to them because he had relied on an order he had obtained in the Western Cape High Court to stay Kgomo JP's order to deliver the child to the Js; found S guilty of contempt; and ordered S to pay the Js' costs, some of it on attorney-and-client scale (*FS v JJ* paras [3], [16], [19] and [20]). Kgomo JP had awarded guardianship and care to the Js even though *(a)* the Family Advocate had indicated that S had automatically acquired parental responsibilities and rights in terms of the Act; *(b)* the Family Advocate had recommended that the child should reside with S subject to a process of reintegration; *(c)* S and the Js had obtained orders by agreement that the child would reside with S; and *(d)* the child had been living with S and his wife for some months (*FS v JJ* paras [14]–[16]).

S unsuccessfully approached the Northern Cape High Court for leave to appeal, but the Supreme Court of Appeal subse-

quently granted S leave to appeal. On appeal, the orders Kgomo JP had made were set aside (paras [3], [22], [34], [45], [48] and [55]). The unanimous judgment of the Supreme Court of Appeal was delivered by Lewis JA (Bosielo JA, and R Pillay AJA, Bertelsmann AJA, and B Pillay AJA concurring).

The Supreme Court of Appeal found that Kgomo JP had made several factual and legal errors. First of all, he had incorrectly concluded that the child's parents were not involved in a permanent relationship at the time of her birth, and that the Js had raised the child as their own 'without any demur from any quarter'. These conclusions were not supported by the evidence (paras [28]–[29]; the quotation appears in para [29]). Furthermore, although the child was living with S and his wife when the orders were made, Kgomo JP had held in his first judgment that the child should not be uprooted from the secure, familiar and warm environment she enjoyed with the Js (para [30]). He had also failed to take note of sections 7 and 9 of the Act which deal with the best interests of the child (para [32]). Section 9 expressly requires that the standard that the child's best interests must be of paramount importance is to be applied in all matters concerning the care, protection and well-being of a child. Yet Kgomo JP had never considered whether upsetting the successful integration of the child with S and his wife and returning her to the Js were in her best interests (paras [32]–[33] and [45]). Lewis JA accordingly concluded that Kgomo JP's finding that it was in the child's best interests to award guardianship and care to the Js was unwarranted (para [34]; see also para [47]).

She also criticized Kgomo JP for being 'oblivious of the fact that S had already acquired parental responsibilities and rights . . . by virtue of s 21 of the Children's Act, and that it [the court] was in effect depriving him of those responsibilities and rights' (para [33]). However, this criticism loses sight of the fact that Kgomo JP was of the view — albeit incorrectly — that S had not acquired parental responsibilities and rights as he and the child's mother had not lived together in a permanent life partnership when the child was born. The judgment of the Supreme Court of Appeal does not indicate whether Kgomo JP ever considered the possibility that S might have acquired parental responsibilities on the ground that he had consented to being identified as the child's father and had contributed or attempted in good faith to contribute to the child's upbringing and maintenance for a reasonable period. Be that as it may, Kgomo JP's orders were clearly unfounded in fact and law.

In respect of the contempt issue, Lewis JA bitterly criticized Kgomo JP for his intemperate language, bias against S, and concern for legal niceties at the expense of the child's best interests (para [43]). Furthermore, in finding S guilty of contempt Kgomo JP had failed to apply the principle that the breach of the court order which gives rise to the charge of contempt of court must be deliberate and *mala fide*, for it was clear that S had acted *bona fide* and in accordance with the order of the Western Cape High Court which had stayed execution of Kgomo JP's order to deliver the child to the Js (para [48]).

Lewis JA held, correctly, that the dispute ultimately had to be determined by the child's best interests. She concluded, equally correctly, that the orders made by the Northern Cape High Court had not served the child's best interests (para [49]). In view of the evidence, reports by experts and the child's *curator ad litem*, and the child's own wishes, Lewis JA concluded that the child's interests would be served by remaining with her father, stepmother and half-brother. The child was comfortably settled and wanted to live with them, had a strong bond with her stepmother and half-brother, and had developed a warm and loving relationship with her paternal grandparents and her stepmother's parents (paras [49]–[50]).

Lewis JA accordingly allowed S's appeal with costs. She further declared that S had full parental responsibilities and rights in respect of the child and ordered that the child should permanently live with S. She awarded the Js regular contact with the child. However, such contact had to be arranged with the mother of S's wife and had to take place at the home of the mother of S's wife or at another place agreed by her and the child's maternal grandmother. All contact arrangements first had to be discussed with S. If the parties experienced difficulty in arranging contact, they first had to attempt to resolve their difficulties through mediation before approaching the court for an order (para [55]).

As two divisions of the High Court had delivered judgments regarding the dispute between S and the Js, Lewis JA also considered the issue of jurisdiction in matters concerning a child. She concluded that the Western Cape High Court had jurisdiction when it stayed the order for delivery of the child to the Js since the child was resident in the area of jurisdiction of the court at the time (paras [36] and [37]). Therefore, this court could exercise its powers as upper guardian of all minors who are within its jurisdiction and make any order that is required by the

best interests of the child. However, one division of the High Court does not have jurisdiction to set aside or vary the order of another division (para [36]). Lewis JA found that since the Western Cape High Court had merely ordered a stay of execution of Kgomo JP's order pending the final resolution of the matter in the Northern Cape High Court, it had not set aside or varied the order of the Northern Cape High Court (para [54]). Despite this finding, Lewis JA proceeded to caution parties not to engage in forum shopping even in disputes over parental responsibilities and rights (para [38]).

Finally, in an *obiter dictum*, she pointed out that the protracted litigation had not been in the interests of any of the parties. She endorsed the view in *MB v NB* 2010 (3) SA 220 (GSJ) that mediation in family matters is a useful way to avoid protracted and expensive legal battles, and that litigation should not necessarily be a first resort in these matters. She further warned legal practitioners to heed section 6(4) of the Act which provides that in matters concerning children a conciliatory and problem-solving approach should be followed and a confrontational approach avoided (para [54]).

The judgment is welcome, in the first instance, for its emphasis on the best interests of the child. Secondly, the judgment makes it very clear that section 21 of the Act has changed the starting point in disputes between grandparents and some unmarried fathers about parental responsibilities and rights. All unmarried fathers are no longer in the position of third parties who, like grandparents, can only obtain parental responsibilities and rights by approaching the court for an order awarding such responsibilities and rights to them. Now, certain unmarried fathers are in exactly the same position as mothers and married fathers, for they too automatically acquire parental responsibilities and rights (provided the requirements set out in section 21(1) of the Act are met). Finally, it must be borne in mind that, in terms of section 22 of the Act, any person who has an interest in the child's care, well-being and development (for instance, an unmarried father who does not fall within the ambit of s 21(1), or a grandparent) can acquire parental responsibilities and rights by entering into a parental responsibilities and rights agreement with a person who has parental responsibilities and rights. However, the agreement remains unenforceable unless it is registered with a Family Advocate or is made an order of court on the parties' application (s 22(4)). If the agreement does not relate to guardianship, it may, but need not, be made an order of court;

registering it with the Family Advocate is sufficient (s 22(4)*(b)* and 22(7)). Thus, unmarried fathers who do not fall within the ambit of section 21(1) and grandparents can now acquire parental responsibilities and rights other than guardianship without having to go to court.

The unreported decision in *M v V (born N)* [2011] JOL 27045 (WCC) concerns the issue of whether an unmarried biological father who has, *de facto*, exercised parental responsibilities and rights in respect of his child and who has been acknowledged to be the child's father can be excluded from parental responsibilities and rights because of the mother's allegation, nearly a decade after the child's birth, that the father had raped her. It also deals with the question whether an unwilling parent can be compelled to enter into a parenting plan.

The father (applicant) had been part of the child's life since his birth and had assumed parental responsibilities and rights in respect of the child for the entire duration of the child's life. The parents' relationship broke down when the child was approximately eight years old. The breakdown coincided with the mother becoming involved with a man she later married. The child's father continued to pay maintenance for the child and to have contact with the child but increasingly experienced difficulties in exercising his parental responsibilities and rights. When the child was approximately ten years old, the father approached the court for an order declaring that he and the child's mother (respondent) are co-holders of parental responsibilities and rights and that he has rights of guardianship, care and contact in respect of the child.

The parties agreed that three issues would be decided as points *in limine*. The first issue was whether the father was excluded from having parental responsibilities and rights because he had, allegedly, raped the mother and was therefore disqualified as a parent by virtue of the provision in section 1 of the Act which excludes the biological father of a child conceived through rape from the definition of 'parent'. The second issue arose only if the first point was decided in the negative. In such event, the court was asked to decide whether the mother could be compelled to enter into a parenting plan with the father. The third issue arose only if the first point was decided in the positive. In such event, the court was asked to decide which party bore the onus of proving or disproving that the rape did or did not occur.

As regards the first point *in limine*, Cloete AJ noted out that it was common cause between the parties that if the exclusion in

the definition of 'parent' in section 1 of the Act did not apply to the applicant, he qualified for full parental responsibilities and rights in terms of section 21(1) of the Act (para [15]). As indicated in the discussion of *FS v JJ* above, section 21(1) affords full parental responsibilities and rights to an unmarried father if he lives with the child's mother in a permanent life partnership when the child is born or if he consents or successfully applies to be identified as the child's father or pays damages in terms of customary law, and contributes or attempts in good faith to contribute to the child's upbringing and maintenance for a reasonable period. In this case, the applicant was registered as the child's father on his birth certificate; had contributed to the child's maintenance since his birth; had had contact with the child by agreement with the child's mother since the child's birth; had been involved in major decisions regarding the child's upbringing until the breakdown of the parties' relationship; and had been involved in consulting professionals regarding the child's needs (para [16]). Thus, the child's mother had treated the applicant as the child's father for almost a decade (para [18]). Furthermore, the child had treated the applicant as his father for the duration of his life (para [19]).

After referring to these facts, Cloete AJ pointed out that all legislation must be interpreted in the context of the Bill of Rights (para [22]). She specifically referred to the child's constitutional rights to parental care, to have paramountcy afforded to his or her best interests in every matter concerning him or her, and his or her right to dignity (para [23]; ss 28(1)*(b)*, 28(2) and 10 of the Constitution of the Republic of South Africa, 1996). She also cited section 6(2)*(a)* of the Act, which provides, inter alia, that, subject to lawful limitation, the court must in all proceedings concerning a child respect, protect, promote, and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard, and the rights and principles set out in the Act (para [24]; Cloete AJ incorrectly referred to section 6(2) of the Constitution, but the quotation of the relevant section in paragraph [24] makes it clear that it is section 6(2) of the Children's Act that she had in mind). She cited and applied the child-centred and individualistic approach the Constitutional Court prescribed in *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC), and concluded that, instead of making a blanket finding on whether a rapist is always excluded as a parent, the court had to decide whether it is in the individual child's best interests for the applicant to be recognized as a co-holder of parental responsi-

bilities and rights in terms of section 21 of the Act (paras [14] and [29]). In view of the facts of the case and, in particular, the mother's acceptance of the applicant as the child's father for almost ten years; the applicant's exercising of parental responsibilities and rights; and, most importantly, the child's recognition of the applicant as his father, Cloete AJ concluded that it was not in the child's best interests to exclude the applicant from having parental responsibilities and rights. She therefore decided the first point *in limine* in the negative (paras [30] and [41.1]). However, she specifically stated that in another case another court might arrive at a different conclusion on different facts (para [30]). In doing so, she again — this time implicitly — emphasized the individualistic approach that has to be adopted in matters relating to children.

With regard to the second point *in limine*, the mother argued that she could not be compelled to enter into a parenting plan with the father as, in terms of section 22 of the Act, co-parenting is discretionary on her part because she is an unmarried mother. Cloete AJ rejected this argument. She correctly held that section 22 is inapplicable in the present case. Section 22 provides that the mother of a child may enter into a parental responsibilities and rights agreement with the biological father of a child who does not have parental responsibilities and rights. In such agreement, parental responsibilities and rights are conferred on the father. In this case, the child's father had acquired parental responsibilities and rights in terms of section 21 of the Act, thus rendering section 22 inapplicable (para [32]).

The true section of the Act which governs the issue raised in the second point *in limine* is section 33 (para [34]). Section 33(1) empowers co-holders of parental responsibilities and rights to enter into a parenting plan determining the exercise of their respective parental responsibilities and rights. Section 33(2) goes even further by compelling co-holders of parental responsibilities and rights who are experiencing difficulties in exercising their responsibilities and rights to attempt to agree on a parenting plan before they seek court intervention. Cloete AJ held that either co-holder may approach the High Court in its capacity as upper guardian of all minors if attempts to agree on a parenting plan have failed. Here, the applicant had turned to the court for the very reason referred to in section 33(2) — obtaining judicial intervention to determine the exercise of parental responsibilities and rights by parties who were experiencing difficulties in

exercising those responsibilities and rights (paras [35] and [38]). She accordingly concluded that, in view of section 33(2), the mother could be compelled to enter into a parenting plan with the father (paras [39] and [41.2]). The second point *in limine* was accordingly decided in the affirmative.

As the first point *in limine* was decided in the negative, the third point *in limine* did not have to be decided (para [40]).

The hearing regarding the main relief subsequently also came before Cloete AJ. Her decision in that matter is still unreported (*MM v AV* [2011] ZAWCHC 425 (16 November 2011). At the time of the hearing, some of the issues had been settled and orders had been made by consent. The issues that remained in dispute included the parents' responsibility and right to make joint decisions in respect of certain aspects of the child's life, including his education; aspects regarding the father's contact with the child; care arrangements when a parent or step-parent was away; and advance notification of the child's school-related and extra-mural activities and events.

The child's mother again contended that the father was not entitled to have parental responsibilities and rights as the child was, according to her, conceived as a result of rape. Even though this issue had already been decided in the earlier judgment, Cloete AJ in this judgment went further and found that the mother's 'rape allegation was nothing more than a ruse concocted . . . in order to try to exclude the applicant from M's [the child's] life' when she became involved with her future husband, who had influenced her because he was unable to put aside his personal insecurities towards the child's father (paras [84] and [86]).

The mother's second main argument again related to her being 'forced' to enter into a parenting plan. She stated that she did not like or trust the applicant, was afraid of him, and/or was uncomfortable in his company. On the evidence, Cloete AJ rejected the contention that the mother was afraid of and/or uncomfortable in the company of the father (para [85]). She further held that the High Court as upper guardian of all minor children 'must place the interests of the child and the rights of the child above those of his or her parents', as this is what is required by section 28 of the Constitution (para [31]; see also para [94] where she held that 'the interests of the child take preference over the interests of the parents'). It was common cause that father and child were devoted to each other (para [32]). Thus, co-parenting was in the

child's best interests. As the mother's argument that she should not be 'forced' to co-parent with the child's father was not founded on the best interests of the child but on her personal wishes, her argument was fatally flawed and had to be rejected (paras [33]–[34] and [94]). Further, the evidence showed that the parties had successfully made joint decisions concerning the child in the past and that there was no sound reason why they should not continue to do so (paras [62]–[66]). Cloete AJ held that, having facilitated the father's involvement in the child's life to a significant degree since the child's birth, the child's mother could not now elect not to co-parent with the child's father, unless she could show that the father did not act in the child's best interests. Cloete AJ held that any inconvenience the mother might suffer was outweighed by the interests of her child (para 95]).

Cloete AJ further dealt with the specific outstanding issues regarding co-parenting and made an order granting the father the terms of co-parenting he had sought (paras [67]–[76]). He accordingly succeeded on the merits in respect of all the outstanding issues. Cloete AJ ordered the parents to exercise their parental responsibilities and rights in accordance with a parenting plan annexed to the court order (para [107]).

Although Cloete AJ's judgments on both the points *in limine* and the main relief are supported, a warning must be added in respect of her blanket statements in the judgment on the main relief that the court as upper guardian of all minor children '*must* place the interests of the child and the rights of the child above those of his or her parents' (para [31]; emphasis added) and that 'the interests of the child take preference over the interests of the parents' (para [94]). Although section 28(2) of the Constitution provides that the best interests of the child must be 'paramount' in all matters concerning the child, the Constitutional Court has on more than one occasion held that rendering the child's best interests paramount does not mean that all other constitutional rights (including those of the child's parents) may simply be ignored or that limitations of the child's best interests are impermissible (for example, *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) para [20]; *Sonderup v Tondelli* 2001 (1) SA 1171 (CC) (also reported as *LS v AT* 2001 (2) BCLR 152 (CC)) para [29]; *S v M* (supra) paras [25], [26] and [42]; *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (4) SA 222 (CC) para [72]). Even though Cloete AJ referred to *S v M* in

her judgment on the points *in limine*, she seems to have lost sight in the judgment on the main relief of the qualification that the paramountcy of the child's best interests does not mean that the child's best interests must always prevail. However, in view of the facts in the case, the outcome of her decision would in all probability have been the same even if she had borne the qualification in mind, for the limitation of the mother's constitutional rights (privacy and freedom of association) are insignificant when compared to the advantages the continued extensive involvement of the child's father offered the child. In this case, the limitation of the mother's rights is perfectly in keeping with the Constitutional Court's view that the correct approach to the best interests of the child is to apply the 'paramountcy principle in a meaningful way without unduly obliterating other valuable and constitutionally-protected interests' (*S v M* para [25]).

The last two decisions that should be mentioned in the context of the parental responsibilities and rights of unmarried parents are *Ex parte Sibisi* 2011 (1) SA 192 (KZP) and *WW v EW* 2011 (6) SA 53 (KZP).

Ex parte Sibisi deals with the power of the Children's Court to hear matters relating to a minor's guardianship. The court held that the Children's Act does not empower a Children's Court to decide matters concerning guardianship. The decision is discussed in the chapter on Family Law.

WW v EW is the same decision as *Wheeler v Wheeler and Other Cases* [2011] 2 All SA 459 (KZP). It deals with the terms that should nowadays be used to describe what was known as 'custody' and 'access' at common law. The decision is discussed in the chapter on Family Law.