The human cost of parental child abduction is high, and child abduction is an extremely harrowing experience for both the abducted child and the family ("International parental child abduction" 2002 *Hong Kong Law Reform Commission* (*HKLRC* 3) 5; see, in general, http://www.hklii.org/hk/other/hklrc/reports/2002/04/2.html, last visited 2008-12-02).

Children who are victims of abduction are in my view exposed to irretrievable harm and the emotional trauma they suffer changes their whole way of living as well as their well-being irreversibly.

The damage that parental child abduction causes cannot be undone, and the childhood of a child cannot be recaptured. The intimacy between parent and child, the contact with extended family and the self-awareness through knowing one's beginnings, are gone forever. Virtually no child possesses the ability to protect him- or herself against such and undignified and total loss (http://www.prevent-abuse-now.com/unreport.htm, last visited 2008-12-02).

Thus, the decision in *Central Authority v H supra,* confirming that children who have been abducted be returned immediately, is to be welcomed, as it acknowledges the importance of swift action in child abduction cases in order to minimise the harmful effects of child abduction on children and their families.

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THE POSTPONEMENT AND SEPARATION OF CHILDREN'S ISSUES UPON DIVORCE – QUICK RELIEF OR A GLARING MISTAKE?

K v K 2008 5 SA 431 (W)

1 Introduction

K v K is a very short decision (not even two printed pages in length) that could either be hailed as quick relief from the perspective of the parties involved in acrimonious divorce litigation or be branded as a glaring mistake from the viewpoint of the children affected by their parents' divorce. In view of the fact that the focus of private-law rules regarding the parent-child relationship is increasingly shifting from the rights and powers of parents to the rights and entitlements of children both in South Africa and internationally (see Cronjé and Heaton *South African family law* (2004) 257; Sinclair "Family rights" in Van Wyk *et al Rights and constitutionalism* (1994) 533; Van Heerden *et al* (eds) *Boberg's Law of persons and the family* (1999) 657–658; Van Heerden and Clark "Parenthood in South African law – Equality and independence? Recent developments in the law relating to guardianship" 1995 *SALJ* 141–142), the scales will probably tip in favour of the children's rights.

This shift in emphasis was aptly articulated by Foxcroft J in *V v V* 1998 4 SA 169 (C) 176C–D:

> "There is no doubt that over the last number of years the emphasis in thinking in regard to questions of relationships between parents and their children has shifted

from a concept of parental power of the parents to one of parental responsibility and children's rights. Children's rights are no longer confined to the common law, but also find expression in s 28 of the Constitution of the Republic of South Africa Act 108 of 1996, not to mention a wide range of international conventions".

2 Facts

The parties were involved in contested divorce litigation and when a rule 43 application for interim relief came before the court, the parties engaged in settlement negotiations. They apparently settled all issues, except the matter of the husband's access to their 4-year old child. It seems that the husband still wanted the family advocate to investigate the matter of access to the child, but that no such enquiry had as yet been requested when the settlement negotiations took place (paras 1 and 5).

To save the parties from incurring further legal costs, the judge who heard the rule 43 application, Goldstein J, wanted to grant the parties a divorce order there and then, but he was confronted by section 6(1) of the Divorce Act 70 of 1979 (para 2), which provides as follows:

"(1) A decree of divorce shall not be granted until the court –

(a) is satisfied that the provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstance; and

(b) if an inquiry is instituted by the Family Advocate in terms of section 4(1)(a) and 4(2)(a) of the Mediation in Certain Divorce Matters Act, 1987, has considered the report and recommendations referred to in section 4(1)".

3 Decision on section 6(1)(a) of the Divorce Act

With regard to section 6(1)(a), Goldstein J stated that the child was being properly taken care of on a daily basis by the wife and her mother, the grandmother of the child. He was therefore satisfied that the requirements of section 6(1)(a), namely that the provisions made for the welfare of the children are satisfactory, had been met (para 3). This is where Goldstein J made his first mistake. He only looked at custody – one aspect of parental authority as it used to be known (see Cronjé and Heaton *South African family law* 265; Van Heerden in Van Heerden *et al* (eds) *Boberg's Law of persons and the family* (1999) 313) before the partial enactment of the new Children's Act 38 of 2005 on 1 July 2007 (*GG* 30030 of 29 June 2007). In today's terms, he only looked at one aspect of parental responsibilities and rights (ss 18–41 of the Children's Act), namely care, without also looking at all the other elements of parental responsibilities and rights, such as contact. (Under s 18(2) of the Children's Act the parental responsibilities and rights that a person may have in respect of a child include the responsibility and the right (a) to care for the child; (b) to maintain contact with the child; (c) to act as guardian of the child; and (d) to contribute to the maintenance of the child. Heaton "Parental responsibilities and rights" in Davel and Skelton (eds) *Commentary on the Children's Act* (2007 loose-leaf) 3–4 states that the first three elements roughly match the components of parental authority, namely custody, access and guardianship). We find it astonishing that Goldstein J could have arrived at the conclusion that satisfactory provision had been made with regard to the welfare of the child by looking at only one aspect of parental responsibilities and rights.

4 Decision on section 6(1)(b) of the Divorce Act

With regard to section 6(1)(b) of the Divorce Act, Goldstein J artificially devised a plan to get past the fact that the husband would still have liked to get a report and recommendation from the family advocate on the access issue and the fact that he, as the judge, would not have been able to make a divorce order in the matter until such time as the family advocate's report and recommendations became available. He granted the divorce order there and then and more or less instructed the husband, immediately after the granting of the divorce order, to bring an application in terms of section 4(1)(b) of the Mediation in Certain Divorce Matters Act 24 of 1987 for an enquiry to be instituted by the family advocate (paras 4 and 5). After granting the divorce order, the court subsequently made another new order to the effect that the family advocate was requested in terms of section 4(1)(b) of the Mediation in Certain Divorce Matters Act to enquire into the question of access to the minor child of the parties and report thereon (para 6).

The problem with this approach is, firstly, that it frustrates the whole aim of section 6(1) of the Divorce Act, namely that the children's interests should first be taken care of satisfactorily before a divorce order can be granted. Although section 6(1) does not expressly require that the children's best interests should be paramount, it is implicit in the wording of this section that the best interests of the child principle should be applied (see Cronjé and Heaton *South African family law* (1999) 181). *In casu* the very important issue of access to the child, or rather contact with the child, was postponed to be decided on in isolation at a later stage. This state of affairs is also in direct conflict with the holistic approach that needs to be applied upon divorce (see Burman and Rudolph "Repression by mediation: Mediation and divorce in South Africa" 1990 *SALJ* 277; Clark "No holy cow: Some caveats on family mediation" 1993 *THRHR* 460). The family advocate may well find, for example, that the father is indeed better suited to be the custodian of the child and that the parties' assets should be divided in such a manner as to allow the father and child to stay on in the family home. If, however, the family home has already been awarded upon divorce to the mother of the child, such a division of matrimonial property, which would ultimately be in the best interests of the child, would no longer be an available option at the stage when the family advocate issues his or her report and recommendations on the matter. It is therefore abundantly clear that it is impossible to meaningfully consider matters concerning the custody of and access to children in isolation, since these matters are intrinsically linked to other issues bound up in the divorce decision, such as provision for the maintenance of children and ex-spouses, the division of assets and housing (see Burman and Rudolph 272; Clark 460; McEwen, Rogers and Maiman "Bring in the lawyers: Challenging the dominant approaches to ensuring fairness in divorce" 1995 *Minnesota LR* 1340–1341; Burman, Dingle and Glasser "The new Family Court in action: An initial assessment" 2000 *SALJ* 123).

The piecemeal fashion in which the court was prepared to deal with the different aspects of parental responsibilities and rights is alarming, especially in view of section 28(2) of the Constitution of the Republic of South Africa, 1996, which provides that a child's best interests are of paramount importance in every matter concerning the child, section 9 of the Children's Act 38 of 2005, which echoes section 28(2) of the Constitution, and article 3 of the United Nations Convention on the Rights of the Child (adopted by the General Assembly of the UN on 20

November 1989 and ratified by South Africa on 16 June 1995), which provides that the best interests of the child standard is a primary consideration in all actions concerning children. In this matter the perception is clearly created that the question of access is simply not important enough to stand in the way of a divorce order. As was decided in *J v J* 2008 6 SA 30 (C) para 20 there rests a duty upon the court as the upper guardian of minors "to consider and evaluate *all* relevant facts placed before it with a view to deciding the issue which is of paramount importance: the best interest of the child" (our italics).

In casu, Goldstein J further allowed himself to be influenced by financial considerations and considerations of expediency when he decided to finalise the divorce on the spot. In doing so he put the interests of the parties before the interests of the child, and lost sight of section 28(2) of the Constitution and section 9 of the Children's Act, and these sections' interpretation by the courts. In *Hay v B* 2003 3 SA 492 (W) (see in general McQuoid-Mason and Lotz "Religious beliefs and the refusal of blood transfusions for children: What should doctors do? *Hay v B* 2003 3 SA 492 (W)" 2005 *THRHR* 315) the court considered the child's best interests as "the single most important factor to be considered when balancing or weighing competing rights and interests concerning children" (494I–J). In *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 4 SA 160 (T) (also reported as [2002] 4 All SA 745) Bertelsmann J held that section 28(2) vests children with a fundamental right that their interests will come first in the process of balancing the rights of other persons with those of children (178C). Referring to the decision in *Laerskool Middelburg*, Erasmus J in *J v J supra* also made it very clear that "[i]t is the interests of the child that are paramount in all matters concerning the child and the interests of the child take preference over the interests of the parents" (para 36).

To summarise: Every child has the fundamental right that his or her interests will be considered as the single most important factor when balancing or weighing his or her rights or interests with the rights or interests of other persons (see Kruger "The protection of children's rights in the South African Constitution: Reflections on the first decade" 2007 *THRHR* 239).

From the fact that the child's best interests are paramount does not follow that all other constitutional rights may simply be ignored, or that limitations of the child's best interests are not permissible (*Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC), 2000 7 BCLR 713 (CC) para 20; *Sonderup v Tondelli* 2001 1 SA 1171 (CC) also reported as *LS v AT* 2001 2 BCLR 152 (CC) para 36; *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2003 12 BCLR 1333 (CC), 2004 1 SA 406 (CC), 2003 2 SACR 445 (CC) para 55 (*obiter*); Cronjé and Heaton *South African family law* (2004) 262). It is clear that section 28 does not act as an overbearing and unrealistic trump of all other rights. Like all rights in the Bill of Rights their operation has to take account of their relationship to other rights, which might require that their ambit be limited (*M v S (Centre for Child Law Amicus Curiae)* 2007 12 BCLR 1312 (CC) also reported as *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC), 2007 2 SACR 539 (CC) para 26). However, the child's best interests must prevail unless the infringement of those interests can be justified in terms of the limitations clause in the Constitution (s 36). In the circumstances of the case under discussion, the infringement of the child's best interests is clearly not justifiable.

The judge's subsequent order whereby the family advocate was requested to institute an enquiry in terms of section 4(1)(b) of the Mediation in Certain Divorce Matters Act is flawed in another way. A request in terms of section 4(1)(b) can only be instituted after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the Divorce Act. In this case no order with regard to access was made by the divorce court and consequently there could have been no application for the variation, rescission or suspension of such an order upon which a referral to the family advocate could have been made.

5 Conclusion

The decision in this case, in our opinion, is therefore unquestionably wrong and should not be followed. The court clearly disregarded the constitutional court's admonition in *M v S (Centre for Child Law Amicus Curiae)* (*supra* para 15) that courts must always function in a manner which at all times shows due respect for children's rights.

Hopefully, the child's rights *in casu* were not too seriously jeopardised by the postponement and separation of the access issue, but as explained above, the approach applied by Goldstein J might have very dangerous repercussions for children's rights upon their parents' divorce. Courts must remember that they are constitutionally bound to give consideration to the effect their decisions will have on children's lives (Sloth-Nielsen "Chicken soup or chainsaws: Some implications of the constitutionalisation of children's rights in South Africa" 1996 *Acta Juridica* 25).

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HUISBRAAK TEN OPSIGTE VAN 'N KARAVAAN

S v Mavungu 2009 1 SASV 425 (T)

1 INLEIDING

Die misdaad huisbraak met die opset om 'n misdaad te pleeg is baie bekend in ons strafreg. Dit het nie in die Romeins-Hollandse reg bestaan nie. Net soos saakbeskadiging, brandstigting, ontvangs van gesteelde goedere wetende dat dit gesteel is en bedrog, is dit 'n skepping van die howe gedurende die negentiende en vroeë twintigste eeue, onder die sterk invloed van die destydse Engelse reg (*R v Sabuyi* 1905 TS 170 171; *R v Fourie* 1907 ORC 58 59; *R v Johannes* 1918 CPD 488; *R v Badenhorst* 1960 3 SA 566B–C). Die misdaad kan omskryf word as die wederregtelike en opsetlike oopbreek en binnegaan van 'n gebou of struktuur met die opset om daarbinne 'n misdaad te pleeg (Milton *South African criminal law and procedure Vol II common-law crimes* (1996) 792; Snyman *Strafreg* (2006) 543; Burchell en Milton *Principles of criminal law* (2005) 857). Sekere elemente van die misdaad, te wete "oopbreek", "binnetrede" en "gebou of struktuur", is baie kunsmatig, en kan tot verskillende vertolkings aanleiding gee.