



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 210/2016

In the matter between:

MN

Plaintiff

and

BN

Defendant

CORAM: VAN ZYL, J

HEARD ON: 12, 13 SEPTEMBER 2017;
 12 DECEMBER 2017;
 6, 7 MARCH 2018;
 19 APRIL 2018;
 14 JUNE 2018;

DELIVERED ON: 13 DECEMBER 2018; 13 JUNE 2023

[1] This trial dealt with misattributed paternity. I made the following order on 13 December 2018:

“The action is dismissed with costs, including the costs of the application for absolution of the instance, but excluding the reserved costs of 12 December 2017, which costs are to be borne by the defendant.”

- [2] The reasons for the aforesaid order follow herewith.
- [3] The trial entailed a claim for damages by the plaintiff, who is the former husband of the defendant, who discovered after the parties' divorce that he is not the biological father of the youngest of three children who were born during the subsistence of the parties' marriage.
- [4] The identity of the parties is not revealed in order to protect the identity of the children concerned.

Background and the pleadings:

- [5] The plaintiff and the defendant got married to each other on 8 May 1991. During the subsistence of the marriage three daughters were born, the youngest of whom, N, was born on 2 December 1997.
- [6] The parties were divorced on 7 February 2012 and they entered into a deed of settlement, which was also made an order of Court.
- [7] During or about February 2015 it was established through blood tests that N is not the biological child of the plaintiff.

[8] In terms of the particulars of claim the plaintiff's claim was pleaded as follows:

“5.

The plaintiff raised N under the impression that it [sic] is his own child.

6.

...

7.

During or about February 2015 it was established through blood tests that N is not the child of the plaintiff.

8.

Up to February 2015 the defendant represented to the plaintiff that N was his child and that she had an exclusive sexual relationship with the plaintiff during the time that N was conceived.

9.

When making the aforesaid representation the defendant knew it to be false.

10.

Alternatively, the defendant had a duty to disclose to the plaintiff that she had an extra-marital affair during the time that N was conceived. Her failure to inform the plaintiff hereof constitutes fraudulent non-disclosure with the intention to deceive the plaintiff.

11.

As a result of the defendant's misrepresentation, alternatively fraudulent non-disclosure, the plaintiff took the responsibility of maintaining N and paid maintenance for N up to February 2015.

12.

As a result of the defendant's misrepresentation, alternatively fraudulent non-disclosure, plaintiff suffered damages in the amount of R1 441 290.00, being the amount spent by plaintiff on the maintenance of N. The damages are calculated as set out in annexure “C” hereto.

13.

In the premises defendant is liable to pay the plaintiff the amount as aforesaid.”

[9] In her amended plea, the defendant pleaded as follows in response to the relevant averments in the particulars of claim:

“2.

AD PARAGRAPH 5

The content of this paragraph is noted.

3.

...

4.

AD PARAGRAPH 7

The content of this paragraph is denied.

5.

AD PARAGRAPH 8

5.1 It is denied that the defendant represented to the plaintiff that N is his child.

5.2 The defendant pleads that both parties acted under a mutual impression that the plaintiff is N's father.

5.3 The averment that the defendant represented that she had an exclusive sexual relationship with the plaintiff is noted.

6.

AD PARAGRAPH 9

The content of this paragraph is denied.

7.

AD PARAGRAPH 10

7.1 The content of this paragraph is denied.

7.2 The defendant pleads that both parties acted under a mutual impression that the plaintiff is N's father.

8.

AD PARAGRAPH 11

- 8.1 It is denied that the defendant misrepresented, or fraudulently failed to disclose, relevant information to the plaintiff.
- 8.2 It is admitted that the plaintiff maintained N.
- 8.3 The defendant pleads that both parties acted under a mutual impression that the plaintiff is N's father.

9.

AD PARAGRAPH 12

The content of this paragraph is denied.

10.

AD PARAGRAPH 13

10.1 The content of this paragraph is denied.

10.2 ...

11.

...

12.

The plaintiff's claim is *contra bonos mores* as it adversely affects, alternatively strains, alternatively destroys the loving and caring parental relationship between the plaintiff and the plaintiff's child N and/or the other plaintiff's children [*sic*].

13.

The plaintiff's claim as aforementioned, infringes the values of human dignity, the achievement of equality and the advancement of human rights and freedom and has the tendency to destroy the otherwise loving and caring parental relationship with the child N whose rights to family and parental care are protected under section 28 of the Constitution."

[10] In response to the defendant's amended plea (paragraphs 12 and 13 of the plea) the plaintiff filed a replication. I deem it apposite to record the totality thereof herein:

"1.

AD PARAGRAPH 12

- 1.1 It is denied. Defendant's conduct as set out in paragraphs 5 – 12 of plaintiff's particulars of claim caused the plaintiff, the other minor children, N and her biological father to falsely believe that plaintiff is the father.
- 1.2 The defendant's conduct was unlawful, and/or *contra bonos mores*, and/or not in the best interest of N.
- 1.3 Defendant, in her own interest, refused and continuous to refuse to disclose the true facts to plaintiff.
- 1.4 N is entitled to demand maintenance primarily from her true biological father as provided for in section 21(2) of the Children's Act, 38 of 2005.
- 1.5 N is entitled to know the true identity of her biological father.
- 1.6 Public policy does not negate and/or outweigh recognition of the plaintiff's rights and cause of action.

2.

AD PARAGRAPH 13

- 2.1 It is denied. Plaintiff repeats the contents of paragraph 1, *supra*.
- 2.2 Section 36 of the Constitution of the Republic of South Africa, 1996 provides that rights may be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
- 2.3 Plaintiff is entitled to the right of limitation of his obligations and freedom from unfounded demands and claims for maintenance.
- 2.4 The defendant and the natural father are responsible for N's maintenance.
- 2.5 Plaintiff is entitled to equal treatment before the law by holding defendant accountable for losses suffered due to defendant's conduct as pleaded.
- 2.6 Plaintiff is entitled to be treated with dignity which was infringed by defendant's disrespectful conduct in falsely claiming plaintiff to be the father."

Summary of the evidence:

[11] At the commencement of the trial the parties indicated that they have agreed that the *quantum* and merits be separated and that the merits be adjudicated first. I consequently granted an order in terms of Rule 33(4) and ordered accordingly.

[12] It was further indicated by the parties that the DNA results are not disputed.

The plaintiff's evidence in chief:

[13] The plaintiff used to work for the Department of Education. He subsequently resigned and was in the employment of the Department of Correctional Services for 20 years. Thereafter he resigned and was recruited by a private prison, where he is currently still employed as the managing director of the company which owns the prison.

[14] The plaintiff and the defendant met at the university where they both studied. The defendant studied Social Science and went on to become a social worker.

[15] The plaintiff testified that it was his first marriage. They discussed family planning and he stated upfront that he only wants one child, not more than one. However, eventually there were three daughters born from the marriage, in 1991, 1994 and 1997, respectively.

- [16] After their second child was born, the plaintiff raised his concern, since he previously stated that he only wanted one child. According to the plaintiff the defendant explained that she used a slimming mixture “*which washed away the contraceptives*”. According to the plaintiff he accepted the fact that they then had two children.
- [17] After the birth of the third child, N, he again raised his concern regarding the fact that they now had three children. According to the plaintiff the defendant again gave the explanation that the slimming mixture “*washed away the contraceptives*”.
- [18] The plaintiff testified that throughout their marriage nothing was said by the defendant indicating that N was not his child. According to the plaintiff the defendant created the impression that all three children were his biological children.
- [19] The plaintiff testified that when he learned that N was not his biological daughter, he was emotionally and psychologically shattered. According to him he brought her up like his own, sacrificing things that he could have done for himself.
- [20] The plaintiff explained that he was an illegitimate child and was brought up by his mother and stepfather. He only found out that his stepfather was not his biological father approximately two years before the date of his evidence. He was informed by his mother’s elder sister who his biological father is and where he originated from. The plaintiff had a desire to know his biological father. He went to look for him,

only to be informed that his biological father had passed away approximately two years before then.

[21] The plaintiff testified that he and his mother are not on speaking terms. The last time he saw her was about two to three years before the date of his evidence. He has no contact whatsoever with her. He explained that he cannot subpoena his mother to be a witness, since she and the defendant share many secrets. According to the plaintiff his mother will consequently be a hostile witness. His mother also never told him who his biological father is. He was brought up in a family in which he thought he belonged, but, according to the plaintiff, he was living a lie. He does not wish this on anybody.

[22] The plaintiff testified that at some stage the pastor's wife wanted to adopt their middle child. She had a medical condition and could not have a child of her own. The pastor's wife, however, unfortunately passed away.

[23] The plaintiff also testified that the pastor took the defendant to hospital for the delivery of N, as he, the plaintiff, was at work and he was also unaware that she was due for the delivery of N at that time. After the delivery the pastor fetched her from hospital again. When the plaintiff returned home after work, he found the defendant at home with the baby and when he enquired from her who brought her back from hospital, she responded that it was the pastor. According to plaintiff, had the defendant phoned him and told him that she had to go to hospital or that she had been

discharged and had to be fetched from hospital, he would have been able to take her to and fetch her from hospital.

[24] The plaintiff gave certain evidence with regard to alleged conversations which took place between the pastor's wife and his mother. However, since this evidence constituted hearsay evidence, it was disallowed.

[25] After the DNA results became known, the plaintiff went back to his mother enquiring from her why she did not inform him of the defendant's infidelity. The plaintiff explained that the defendant was very close to the pastor of their church which they all attended and that their close relationship was common knowledge. He therefore wanted to enquire from his mother whether she knew about the relationship between the defendant and the pastor. Although the defendant testified about what her response was, same constituted hearsay evidence and was also disallowed.

[26] According to the plaintiff fidelity was very important to him – there was no room for infidelity in their marriage.

[27] The plaintiff testified that had he known at the time of N's birth that he was not her father, he would have walked away from the marriage.

[28] During the divorce it was agreed in the settlement agreement that permanent residency of the two younger children who were still minors at the time was awarded to the defendant until the end of the academic year of 2012, where after they

were to permanently reside with the plaintiff. This arrangement was due to the fact that he could not take the children with him in the middle of the academic year. For the time period the two minor children were to reside with the defendant, the plaintiff was to pay monthly maintenance towards them in the amount of R2 000.00 per child. He also bought a car which the defendant and the eldest daughter could use for transport.

[29] However, the defendant, according to the plaintiff, went behind his back to the Maintenance Court and sought a 100% increase in the maintenance. Such an order was granted by default. It was at the time when he applied for rescission of the default maintenance order that he requested a paternity test pertaining to N.

[30] The plaintiff explained that N had a medical condition which was not in the health history of their family. Her features were also different to those of their family. She used chronic medication, which he also paid for. He was paying more maintenance than he was originally ordered to do, since he wanted peace of mind that they were well cared for. Therefore, when the defendant applied for an increase in maintenance in those circumstances, he decided to request the paternity test, which decision he took with a heavy heart, since he did not want to upset the children.

[31] The plaintiff testified that he would have filed for divorce had he known about the defendant's infidelity. According to him,

he always told the defendant that should she be unfaithful to him, he would file for divorce.

[32] According to the plaintiff the defendant used to be employed, but at some stage she resigned and became self-employed. He further testified that during the marriage he maintained the children. He ran the household, bought groceries and paid for everything. The defendant used her salary/income for her personal purposes.

[33] The plaintiff testified that his wish for N is that she should not find herself in the same position he did by not knowing her roots. He testified that at the time of his evidence she was about 20 years old. He did not inform N about the outcome of the DNA tests, since he left it to the defendant to tell her.

[34] The plaintiff testified that he now also has a question mark with regard to the paternity of the other two children. According to the plaintiff, after the first postponement of the trial, there was an agreement that the other two children will also undergo DNA tests. The plaintiff's legal team wrote emails in an attempt to arrange the DNA testing. The plaintiff testified that N then wrote an email in which she indicated that she did not want to undergo DNA testing since she knows who her biological parents are.

[35] The plaintiff explained that all three children have since been living with the defendant and that there is no meaningful communication between him and the children. He has since re-married and he and his second wife made effort to meet

with the three children and to rekindle a relationship with them. He was planning on buying a property where all three children could stay, but they were not interested in re-establishing a relationship with him, nor in his suggestion with regard to the property.

[36] After the birth of the third child the defendant continued using contraceptives, although the plaintiff is not sure whether she continued using the same contraceptive.

[37] The plaintiff testified that up to the day of his evidence, the defendant has not yet told him directly that N is not his child.

[38] He never confronted the plaintiff with regard to her relationship with the pastor, since it was only after the divorce that everything became more clear to him. He did not have any communication with the defendant after their divorce, although she remained close with his mother.

Cross-examination of the plaintiff:

[39] This part of the judgment deals with the cross-examination of the plaintiff and I will consequently not repeat indicating as such in this part of the judgment.

[40] The plaintiff confirmed that he studied education and that he worked as an educator at a high school with children between the ages of 14 and 18 years old. He also confirmed that it is the duty of parents to protect their children and to care for them.

- [41] The plaintiff testified that the discussions he had with the defendant regarding family planning occurred before they got married. As father he was happy when the children were born, but, according to him, the defendant breached their agreement to only have one child.
- [42] Several questions were posed to the plaintiff with regard to the fact that he does not want to call his mother as a witness. He gave a number of explanations in respect of this issue and testified that he is not ready to speak to her again. The last time he spoke to her was after the DNA results were received.
- [43] The plaintiff was questioned about what he meant when he testified that if it had not been for the obligation to maintain N, he could have done more for himself. He explained that all parents attempt their best to care for their children. According to him the three children born from the marriage grew up in better circumstances than many other children. They went to the best schools, he provided cars to them when they went to university and he maintained them on a medical fund. Therefore, the money which he spent on N in this regard, he could have spent on himself.
- [44] When the plaintiff was asked why he only wanted one child, he responded by stating that "*that is what I wanted*". It was put to him that the defendant did not agree to having only one child, which he denied.

[45] It was put to the plaintiff that the reason he only wanted one child was because he wanted to adopt his youngest sister who was two years old at the time and whom they took in before their first child was born. He denied same. He explained that his mother fell pregnant with his youngest half-sister only a year after she gave birth to his younger sister. He wanted to alleviate the workload of his mother and therefore he and the defendant took her in and brought her up as a sister to their other children. When asked why he did not mention this aspect of having taken in his youngest sister in his evidence in chief, he testified that there was no reason to have mentioned it. He explained that it is common knowledge that African families take care of their extended families and therefore it was his responsibility to take care of her in the circumstances.

[46] It was put to the plaintiff that after the birth of the first child, the defendant developed migraines and she was prescribed antibiotics, which had an influence on the effectiveness of her contraceptives. The plaintiff denied same. It was further put to him that after the birth of the second child, the defendant started making use of injections as contraceptive, but because she gained weight as a result thereof, she started using a slimming mixture. The plaintiff testified that he does not know what contraceptives she used, but he confirmed that she did drink a slimming mixture from time to time.

[47] It was put to the plaintiff that before the birth of the second child, he asked the defendant to undergo an abortion. The

plaintiff responded that he was not happy with having a second child. The issue of an abortion might have come up in their discussions, but that he cannot remember it. It was further put to him that he also wanted the defendant to undergo an abortion with her third pregnancy. The plaintiff responded by stating that the defendant deviated from what was agreed upon between them with regard to the number of children they were to have, but that he does not remember telling her to undergo an abortion.

[48] The plaintiff was referred to paragraph 10 of the particulars of claim where it was pleaded that the defendant had a duty to disclose to the plaintiff that she had an extra-marital affair during the time that N was conceived. The plaintiff was asked whether it is part of his case that the defendant had an extra-marital affair. The plaintiff responded that the respondent did have an extra-marital affair but that he did not know about it at the time.

[49] The plaintiff was questioned on the issue he had with the pastor. He was asked whether it is his case that the defendant had an extra-marital affair with the pastor or whether that is just his suspicion. He explained that the defendant's relationship with the pastor was too close. He also testified that one weekend the defendant went away and that they found her at her mother's house in Mafikeng with the pastor. However, when questioned whether he confronted the pastor, he answered in the negative. When asked why not, considering all the information he had, he testified that he only received the information after the DNA

testing. He did not want to confront the pastor merely based on a suspicion. He wanted proof and evidence. The plaintiff also testified that he does not know whether the defendant might have had other extra-marital affairs as well at that stage.

[50] When asked why he did not appoint a private investigator to follow the defendant, the plaintiff testified that he did not think about it and that he expected his wife to be faithful.

[51] It was put to the plaintiff that he also has other children who were born out of wedlock and of whom he is the father. In response the plaintiff testified that due to difficulties which he had with the defendant, he transferred to KwaZulu-Natal ("KZN"). There he met a lady and she fell pregnant. He explained that he came clean in that he discussed the pregnancy with the defendant, his mother and the family and that he/his family paid child damages for having impregnated the lady.

[52] The plaintiff further testified that he has another child in Pretoria who was born in 1998. He further confirmed the fact that N was born in December 1997, whilst his child in Pretoria was born in January 1998. They had therefore been conceived approximately a month apart.

[53] It was further put to the plaintiff that according to the defendant the plaintiff has two other children who were born in 1999 and 2001 respectively. The plaintiff denied same. He testified that the lady, Kelly, had one child during late

1999, but that she told him that he was not the father of the child. The lady has unfortunately since passed away. The plaintiff, however, conceded that they had been intimate whilst he was married to the defendant.

[54] The plaintiff was questioned on the fact that he testified that according to him there was no room for infidelity in their marriage, but he himself participated in acts of infidelity. The plaintiff responded that the marriage was already damaged at that stage. He filed for divorce after their second child was born.

[55] During the next part of the cross-examination a scenario was posed to the plaintiff with regard to his evidence that had he known earlier that N was not his child, he would have divorced the plaintiff. He was asked whether he would have done so even at the stage when N was only 10 or 11 years old, which he confirmed. When asked whether he would then also have instituted a claim for the repayment of the maintenance which he had paid up to that stage, he testified that if he had known the identity of the biological father, he would have asked the money from the biological father. However, he testified that he then, in those circumstances, would also have wanted visitation rights with regard to N, because it was not her fault that the situation occurred. The plaintiff also confirmed that whenever N would have visited him in those circumstances, he would have maintained her during her visits by feeding her, pay for any medical emergencies and also by buying clothes for her. He further confirmed that if N had a medical emergency under those

circumstances whilst she was with the defendant, he would have paid for such medical emergency if he was requested to do so. If he was to be asked to buy her school clothes, he would have assisted if he was able to do so. When asked whether he would have done so because he would still have regarded her as his child even though not by blood, he answered “*yes, because I considered her as a sister to my other children*”. The plaintiff also testified that he would have loved her as his own child, but that he would not have been under an obligation to maintain her.

[56] Still with regard to the scenario of the plaintiff having divorced the defendant at the time when N was 10 or 11 years old, he testified that if the biological father would have been in the picture at that stage, it would have been his responsibility to maintain N. However, he also confirmed that he would have assisted N financially if her biological father was unable to do so. He qualified it by testifying that he would have done so on humanitarian grounds and not because he was under any obligation to do so. When asked whether he would have done it only on humanitarian grounds or because he loved her, he testified that “*I brought her up as my child, I would still have loved her as a child*”.

[57] The plaintiff was asked whether he would financially assist even now should N experience a medical emergency, the plaintiff testified that he would assist her like he would any other child. He was asked whether he would do it because he still considers N to be his child, the plaintiff testified that he would help her because she would be a child who needs

help, if he has the means to do so. He, however, testified that he does not have the means to put any child through university. When asked whether he will assist N in this regard, he testified that he will do so like he would with any other child.

[58] The plaintiff was asked whether he would buy N a birthday present that coming December, to which he responded that should he have the means, he would do so.

[59] The plaintiff was asked when he decided to request the paternity test, to which he explained that it was when the defendant decided to approach the maintenance court to apply for an increase of 100% in the amount of maintenance which he was to pay. Default judgment was granted and in the process of him having that judgment rescinded, he decided to ask for a paternity test. When asked whether he decided to do that because he did not want to pay maintenance, the plaintiff responded in the negative, stating that he was already paying more than that in any event.

[60] The plaintiff was asked when he first noticed that N had different features. He responded that he cannot put his finger on it, since it was an ongoing process. However, at 5-years old she was taller than the average 5-year old and he also noticed that her ring finger was longer than her middle finger. When asked why he had not at that stage already requested a paternity test, he testified that he did not want to upset N by having such a test done.

- [61] The plaintiff also testified that had the defendant not gone to court behind his back in order to have the maintenance increased, he would have continued to maintain N.
- [62] The plaintiff was confronted with the fact that despite turbulent times in their marriage when he filed for divorce after the birth of their second child and later the different features of N which he noticed at 5-years old already, he never asked the defendant whether she was having or had an affair.
- [63] When asked how, according to the plaintiff, the defendant committed fraud, he testified that she knew that he was not the father of N, she knew who the father was and she did not say anything.
- [64] With regard to his own extra-marital affairs, the plaintiff was asked whether he came clean about them, to which he responded that he did discuss it with the defendant.
- [65] It was put to the plaintiff that the defendant will testify that she had no extra-marital affair with the pastor and that there had not been any intimacy between them. He responded that the defendant is the only one who knows whom she slept with, but when he asked her for full disclosure, she refused.
- [66] It was further put to the plaintiff that the defendant will testify that she had a "*one-night stand*" with a man, after the one-night stand she never had contact with that man again and

that after the one-night stand, she was also intimate with the plaintiff again. She was consequently under the impression that N was the plaintiff's child. The plaintiff responded that she will be cross-examined about it and that she could not have been under the impression that it was his child since she was also intimate with another man.

[67] When referred to his evidence that he decided with a heavy heart to have the DNA test done because he knew what impact it will have on N, he confirmed same, but testified that N was also entitled to know the truth. He explained how bad it was for him to have grown up with a person whom he thought was his biological father, who turned out not to be.

[68] When asked whether he had a discussion with N prior to the DNA test being done, the plaintiff testified that he fetched her from school and explained to her that a DNA test was to be done. He, however, never discussed the results with N, since he left it to the defendant to tell her. According to him it was the defendant who was unfaithful and should N have had any questions, the defendant would have known the answers to the questions.

[69] The plaintiff was asked why the pastor would have approached them to adopt a child instead of having approached an adoption agency. The plaintiff explained that in the African culture it often happens that a family or a person in the community will be approached to adopt a child from that family or person, because a child is considered to belong to the community. According to the plaintiff they had

no further discussion regarding the request to adopt, since the plaintiff and the defendant simply refused the request.

[70] It was put to the plaintiff that he was the one who approached the pastor's wife before the birth of N with the offer that she could adopt N, which he denied.

[71] With regard to their finances, it was put to the plaintiff that the defendant also contributed to the payment of their expenses. The plaintiff denied same.

[72] With regard to the email which N wrote, the plaintiff testified that N wrote that she knows who her parents are. It was put to the plaintiff that in terms of the email, N regarded the plaintiff as her father. The email was handed in as exhibit "A".

[73] During further cross-examination the plaintiff testified that he was at work in Pretoria when the defendant went into labour with their first child. He also did not go with the defendant to the doctor with her first pregnancy, since he had to work. According to him he was not informed about her specific due date, he only had an estimate thereof. The pastor took the defendant to hospital and also fetched her from hospital with the birth of their first child. The plaintiff also testified that in the African culture, with the birth of the first child, the wife's mother would normally come to assist with the process. The defendant's mother did indeed come to them prior to the birth of their first child. It was put to the plaintiff that according to the defendant he was working in KZN at the time, to which the plaintiff testified that he was working both in Pretoria and

KZN at the time and that he can't specifically remember where he was at work when the defendant gave birth, but if he had been informed, he could have taken leave.

[74] With regard to the birth of their second child, the plaintiff testified that he again did not know the due date of the child's birth and that he did not enquire about it either, because he had the right to be told. He was consequently at work when the defendant went into labour and the pastor took the defendant to hospital. It was the same with the birth of their third child. It was put to the plaintiff that the defendant will testify that the pastor did not take her to and fetched her from hospital with the birth of all three of the children, which the plaintiff denied.

[75] The plaintiff denied that he and the defendant were both close to the pastor. According to him he was not the one who asked the pastor to take the defendant to hospital and to fetch her again. However, the plaintiff did not speak to the pastor about having done so without his permission.

[76] It was put to the plaintiff that his claim for repayment of the maintenance was designed to get back at the defendant because of her extra-marital sexual encounter, despite it being to the detriment of N. The plaintiff denied this.

Re-examination of the plaintiff:

[77] During the re-examination of the plaintiff he testified that they took in his youngest sister to raise even before they had their

first child and that she was not a substitute for having a child of their own.

[78] The plaintiff was asked whether he is maintaining his child who lives in KZN, which he confirmed.

[79] When asked what he meant by "*humanitarian reasons*" in his cross-examination, the plaintiff explained that he is not the biological father of N. Although N does have a biological father and mother, he will assist her like he would any other child. However, for his own biological children he will sacrifice everything, but not for a "*community child*".

[80] With regard to his extra-marital affair the defendant had in KZN, he was asked what he meant by testifying that he "*came clean*". He testified that he came forward and revealed the relationship and the pregnancy to his family and the defendant. He explained that there was a procedure involved which was followed where the parents and the uncle were involved and damages were paid. According to the plaintiff the defendant consequently had the choice whether to stay in the marriage or whether to divorce him. He told her about the relationship so that she could make an informed decision.

[81] At the end of the re-examination, the document which reflects the paternity test results was handed in as exhibit "B".

[82] That concluded the case for the plaintiff. The trial was then postponed.

Application for absolution from the instance:

[83] When the trial continued on the next date, the defendant applied for absolution from the instance, which I dismissed. I will return to this aspect.

The defendant`s evidence in chief:

[84] The defendant testified that she resides in Mafikeng and is employed as a social worker at a wellness centre.

[85] At the time of her evidence the three daughters born during the subsistence of the parties` marriage were 26, 23 and 20 years old respectively.

[86] According to the defendant the plaintiff did mention that he wanted only one child, because at that stage they had already taken in the plaintiff`s youngest sister. The plaintiff pleaded with her that they take in his youngest sister, because she was the sixth child born in the family. The defendant, however, did not consent to having only one child. The defendant testified that she indicated to the plaintiff that she wants two of their own children, so that there would be three children including the plaintiff`s sister.

- [87] After the birth of their eldest daughter, the defendant used contraceptive pills. In 1993 she was admitted to hospital for a period of two weeks, where she was administered antibiotics for severe migraine headaches. Two months later she started feeling sick and went to the doctor, who advised her that she was pregnant with their second child.
- [88] The plaintiff enquired from her how it could have happened that she fell pregnant again. They went to their family doctor and she explained to both the plaintiff and the defendant that the antibiotics could have "*washed the contraceptives out of her system*".
- [89] The plaintiff was furious. He said to the defendant that he told her that did not want another child. He told the defendant to undergo an abortion and if not she should choose between their marriage and the baby. She indicated that she chooses the baby, which led to them fighting throughout her pregnancy.
- [90] With regard to the circumstances surrounding the birth of their second child, the defendant testified that the plaintiff knew the date when she was due to give birth. Prior to her going into labour, the plaintiff went to work in Rustenburg. She came down with flu and did not go to work. The plaintiff called the pastor and requested him to take her to their family doctor. After she visited the doctor, the pastor took her home again. Later the same day she felt as if she was going into labour, which she told the plaintiff when he phoned to hear what the doctor said. The plaintiff phoned the pastor's wife

and asked her to tell the pastor to take the defendant to the hospital, which he did. During that night the defendant gave birth to their second child. The plaintiff did not come to see her and their child in hospital. Both the plaintiff's mother and the defendant's mother were there and they informed the plaintiff on the day that the defendant and their baby were to be discharged. The plaintiff again requested the pastor to take her home.

[91] After the birth of the second child the defendant decided, after having a discussion with their doctor, that she will use an injection as contraceptive.

[92] The plaintiff at that stage filed for divorce, again saying that she should choose between their marriage and the child. She received the summons the first day after she returned back to work after her maternity leave. However, after they reached a settlement with regard to the divorce and after the plaintiff involved their parents, the pastor and the pastor's wife, the plaintiff decided to cancel the divorce proceedings.

[93] The defendant testified that she met a man from Witbank, AM. She met him at Kroonstad College, where she went for training, which training was presented by AM. They became friends. Some months later AM had to come to Pretoria for a business meeting on a particular Monday. He phoned her and asked to meet with her after work. The weekend preceding that Monday the plaintiff was at home, although he was working in Pietermaritzburg at that stage. That Monday after work she met with AM at the Wimpy at Sterland in

Pretoria at about 18h00. Whilst they were there, AM's car was stolen from the undercover parking area. The defendant consequently had to take him to the police station to report the matter. AM would have driven back to Witbank that same evening, but due to the theft of his car, he had to sleep over at a Formula 1 Hotel. The defendant drove him to the hotel. She testified that she was in a vulnerable state. They sat in the hotel room trying to figure out how he was going to get back to Witbank the following day. The plaintiff testified that "*unfortunately we slept together, I was intimate with him that night*".

[94] She left him at the hotel, since she had to go home. He took a taxi back home to Witbank the following day. That was the last time she saw him. They spoke over the phone for a week or two after the incident. She explained that she was following up on what was happening with regard to the car. Thereafter they completely stopped contact.

[95] The defendant testified that when she had sexual intercourse with AM, she was still using her contraceptive and AM also used a condom.

[96] At that stage the defendant and the plaintiff still had a sexual relationship. The Sunday preceding the relevant Monday, before the plaintiff went back to Pietermaritzburg, the plaintiff and defendant also had sexual intercourse.

[97] Some time after that, the defendant wanted to have a sterilisation done, only to find out that she was pregnant with

N. The defendant discussed the fact that she was pregnant with the plaintiff. He insisted that she undergoes an abortion. They agreed accordingly. The defendant made an appointment for the abortion at the Steve Biko Hospital. The plaintiff also came back from Pietermaritzburg for purposes of the abortion. The night before the defendant was due to undergo an abortion, they had to go for pre-abortion counselling. The plaintiff did not go with her, despite the fact that he was home. She had to go on her own. The following morning, the plaintiff woke her up and told her that they should go to the hospital for the abortion. The defendant refused. She told him that she was not going to have an abortion and that she is keeping the child. She told him that because he did not want to go with her the previous night, it appears as though the abortion was only her issue and not the issue of both of them. The defendant explained in court that the way in which she knew the plaintiff, she was scared that he will later say that she killed the child or that she had her own reasons for having undergone the abortion. He again told her that she should choose between the child and their marriage. They did not go to the hospital. The plaintiff was furious and left home. The defendant assumed that he went back to Pietermaritzburg.

[98] According to the defendant the plaintiff was not involved with the pregnancy. He only came home every two weeks. The plaintiff again left for work on a particular Sunday and on the Monday the defendant started feeling some pain. On the Tuesday a family friend of theirs, who lived in the same block

of flats, took the defendant to hospital where she gave birth to N.

[99] During the weekend before the plaintiff left for work on the Sunday, he told the pastor's wife that the plaintiff and the defendant agreed to give N to them for adoption after her birth, because they could not have children. The defendant explained in court that this came to her knowledge, because the pastor's wife phoned her, very excited about the adoption. The defendant told her that she and the plaintiff will have to discuss it, because she (the defendant) had not agreed to such an arrangement.

[100] The morning after the birth of N the plaintiff phoned the defendant at hospital and said that he hopes that the defendant has not yet bonded with N. He told her that because she is refusing that the pastor and his wife adopt N, the defendant must leave N at the hospital, she should not bring her home. The defendant told the plaintiff that she decided to keep the baby and that she is going to bring her back home.

[101] According to the defendant whilst N was growing up, she looked like the defendant, although a bit taller. She still looks like the defendant. The plaintiff never confronted her about the possibility of N not being his biological daughter.

[102] The defendant testified and agreed that the plaintiff provided in all her needs and also the needs of the children. With

regard to household expenses and the running of the household, they both contributed worked together.

[103] The defendant testified that she had no extra-marital sexual relationship with any other person than the one-night stand with AM.

[104] The defendant testified that she did not consider the possibility that AM may be the father of N, because they used a condom. She explained that if she had thought that N was AM's child, she thinks that she would have embraced the idea of an abortion in order "*to get away with the situation*". She was shocked by the DNA results, because "*I knew him (the plaintiff) to be the father. I did not give a false representation.*".

[105] The defendant testified that the plaintiff loved all their children, including N. Whenever N played alone and the defendant would tell her to play with the other children, the plaintiff would tell the defendant to leave N alone, since she is like him, even her tone of voice is like his. Despite the fact that he did not want the last two children, the plaintiff loved them and provided for them. They went to good schools. In the final divorce action, he even claimed that the primary residence of both the said two children who were still minors at the time (which included N), be awarded to him.

[106] With regard to the impact the DNA results had on them, the defendant testified that although she does not know why, the plaintiff stopped communicating with all the children even

prior to the DNA test. He even took back the car which he bought for the eldest daughter in terms of the divorce settlement agreement. The defendant testified that at the time when she presented her evidence, he was having no relationship with any of the children. His change of attitude shocked all of them, because, according to the defendant, he used to take excellent care of all three children.

[107] The defendant testified that she found out about the plaintiff's first extra-marital affair in 1994 when he filed for divorce the first time. She went to his place of work. The plaintiff and defendant work in the same department, so his co-employees knew her. In his office the defendant found photos of and cards from the lady. The defendant took the photos and cards, but kept quiet about it.

[108] With the first divorce and after the parties reached a settlement the matter was enrolled on the court roll. The evening before the divorce was due to be heard in court, the defendant took out "*all the evidence*", referring to the cards and the photos. According to her the plaintiff was shocked. He pleaded with her that they should work out their relationship. The defendant testified that the plaintiff and this lady has a son who was born in 2001, which means that the plaintiff had continued with the relationship since 1994.

[109] The defendant also testified about the other extra-marital relationship of the plaintiff with a lady from Pietermaritzburg. According to the defendant the plaintiff had this relationship whilst she was pregnant with N. This is evident from the fact

that N was born in December 1997 and the child of the plaintiff with the lady from Pietermaritzburg was born on 24 January 1998. The defendant explained how she found out about this relationship. At that stage the plaintiff refused that the defendant also takes a transfer to Pietermaritzburg. One day she went to visit him in Pietermaritzburg without his prior knowledge, although he had to come and fetch her at the bus station. When she got to the place where he was staying, she realised that a woman was also staying in that house, but the plaintiff denied it. When the defendant returned to Pretoria, she did her own research and found out what the name of the lady was. She, however, initially kept quiet about it. When she later confronted him with the information, he acknowledged that he had a relationship with her and he said he wanted to marry her.

[110] The defendant denied that the plaintiff informed her of any of the aforesaid two extra-marital relationships. He only come clean about them when she confronted him with the respective relationships at the respective times as stated above.

[111] The defendant testified that she suspects that the plaintiff had another extra-marital affair with a lady in Bloemfontein. He introduced her to the defendant and the children as his colleague. Initially she did not suspect that they had a relationship, because she was married. However, whenever she was out of Bloemfontein, she bought the children gifts. The defendant confronted the plaintiff but he disputed that they were having a relationship and averred that they were

just friends. However, the defendant could not accept it. She filed for divorce in 2010, which resulted in the parties' eventual divorce.

[112] The defendant also testified that at some stage the plaintiff wanted to marry a second wife and justified his intention on the basis that it was in accordance with his Zulu culture. The said lady was a friend of the defendant and known to the family. When the plaintiff "introduced" the said lady as the one he intended to marry, he said that the defendant agreed that they may get married. At that stage the defendant responded by saying that the plaintiff should do what he wanted to. However, they never got married and the lady unfortunately passed away.

[113] The defendant explained that at the time when N was conceived, she was still using the injections as contraceptives. However, the injections caused her to gain weight. The plaintiff put pressure on her by telling her that she was slim when he married her. She also got frustrated with her weight. She consequently started using a slimming mixture which she bought from a pharmacy in Pretoria. She in fact lost weight. When she discovered that she was pregnant with N, she went back to their family doctor, since she was the one who suggested that the defendant should use the injections. As a result of certain blood tests the doctor performed, she found a certain chemical to be present in the defendant's system. The defendant then told the doctor that she was using the slimming mixture and where she was buying it from. The doctor called the pharmacy to

find out what the ingredients of the mixture were. Thereafter the doctor explained to her that some of the ingredients of the slimming mixture “*washed away the injection*” from her system.

Cross-examination of the defendant:

[114] Like with the cross-examination of the plaintiff, this part of the judgment deals with the cross-examination of the defendant and I will similarly not be indicating it again in this part of the judgment.

[115] It was put to the defendant that the plaintiff requested the identity of N`s father on numerous occasions. The defendant denied this statement. According to her the plaintiff never asked her for a name after the DNA results became available.

[116] The defendant conceded that she knew the name of AM all along (although she did not know or think that he is N`s father). When asked whether he is contributing towards maintaining N, the defendant testified that his whereabouts were unknown to her. After the DNA results became available, she tried to trace him, but she could not find him. She has since found out that he is the head of the Barberton Prison. She, however, testified that despite the DNA results, she still believes that N is the plaintiff`s child.

[117] When asked whether the contraceptive injection and the use of a condom are hundred percent safe for purposes of birth

control, the defendant testified that with the experience she has gone through, she cannot say that it is hundred percent safe.

[118] The defendant testified that the plaintiff did not want to use condoms when they had sexual intercourse. She was consequently the only one who took the responsibility of birth control within their marriage upon herself. However, with AM she insisted that he wears a condom, because she was scared of contracting sexual diseases and because she did not want to fall pregnant.

[119] She was asked what she meant when she testified that she was in a vulnerable state the evening when she had sexual intercourse with AM. The defendant testified that she was shocked as a result of the events of the evening with the car having been stolen, after which they had no choice but to also go the police station and then she also had to take AM to the hotel as well.

[120] The defendant was questioned as to why she thought that only the plaintiff could be N's father in circumstances where she was intimate with two men. She testified that if she had known or had thought that AM was or could be the father, she would have embraced the idea of an abortion, as that would have been "a way out". However, it never crossed her mind that AM could be the father, because they made use of a condom. In response to further questions the defendant repeated her evidence that it never crossed her mind that AM may be the father of N. That is also why she never told the

plaintiff that there is a possibility that AM may be the father of N.

[121] The defendant was questioned about a statement which was put to the plaintiff on her behalf that she never consented to having only one child, which the defendant confirmed, stating that she wanted two children. She, however, conceded that the plaintiff always wanted only one child.

[122] The defendant again testified that she drank the slimming mixture after the birth of the second child. She was cross-examined on the basis that she is not an expert and therefore her evidence that it had an effect on her contraceptives, cannot be accepted. She responded that that is what the doctor told her.

[123] When she was questioned about the plaintiff's evidence that she went missing for a week, she testified that she went to her parents in Mafikeng after she and the plaintiff had a fight. According to the defendant the plaintiff threatened to kill her and out of desperation she went to her parents. The pastor, the plaintiff's uncle and his delegates found her at her parental home.

[124] It was put to the defendant that she and AM knew what had happened, whilst the plaintiff did not and she also knew that no contraceptive is hundred percent safe, which statements the defendant confirmed. When she was the asked what she should have done in the circumstances, she testified that she does not know. She was certain that N was the plaintiff's

child because she used a condom with AM, but not with the plaintiff. It was then put to the defendant that she did not have an exclusive sexual relationship with the plaintiff, but despite that she did nothing to establish who the father of N was, which the defendant confirmed. She was then asked whether she could have done something to have established paternity, to which she responded that if she had suspected that AM may be the father, she could have done something, but she was certain that the plaintiff is N`s biological father.

[125] The defendant was asked whether she thinks that she had a duty to disclose to the plaintiff about AM. She responded by saying “no”, because the plaintiff never disclosed any of his extra-marital affairs to her. He never even disclosed that he was cheating on her. She therefore did not deem it fit to disclose to him about AM. It was then put to her that the difference lies therein that she did not have to pay maintenance to an illegitimate child as a result of the plaintiff`s extra-marital affairs. However, she responded that she paid indirectly, “*because it caused a gap in our household*”. She testified that in her opinion she contributed indirectly to the maintenance of the illegitimate children of the plaintiff. With regard to N as such, the defendant testified that she and the plaintiff shared the responsibility of maintaining her, since the defendant also used her money in favour of N.

[126] It was put to the defendant that the plaintiff has only one illegitimate child. She denied same and testified that he has two children born out of wedlock. She testified that she had

a meeting with the mother of the second child, on the said mother's request, because she wanted to ask the defendant for forgiveness. She testified that the said child is also a nominated beneficiary of the plaintiff's pension. He was born during September 2001.

[127] It was denied on behalf of the plaintiff that he requested the pastor to take the defendant to hospital. The defendant explained that the pastor was a family friend and whenever a need arose within the family, the plaintiff asked the pastor to help. She persisted with her version that she did request the pastor. The time when their family friend took her to hospital with the birth of their third child, it was done on her request and not that of the plaintiff.

[128] It was placed on record that she was not going to be questioned about other girlfriends and the situation with the car(s) of the children, since those issues are not relevant to the issue at hand.

Re-examination of the defendant:

[129] In re-examination the defendant testified that the plaintiff explained that according to the Zulu culture, he was not allowed to use condoms. When asked whether he ever used a condom, she testified that during or about 2006/2007 when they moved to Bloemfontein, she insisted that he makes use of a condom, because of his history of infidelity. However, during the period 2006 to 2008 he seldom needed to use a

condom, because by that time they were separated, although they still lived together.

[130] The defendant testified that according to her the use of a condom during sexual intercourse is safer than unprotected sex.

[131] The defendant testified that she never informed N who her biological father is since N never showed interest to know; in fact, she expressed that she is not interested in knowing.

Further evidence of the defendant:

[132] I enquired from the defendant whether N shows any features of AM, to which she responded in the negative. She explained that personality wise N shows features of all the other children, their tone of voice, personalities and characters are the same. Her physical features are exactly like those of the defendant. When compared with the other two children, she looks more like the eldest child than the middle child.

[133] I allowed further questions emanating from my questions, should there be any.

[134] The defendant was further cross-examined about her evidence that when N was small and played on her own, the plaintiff said she was like him. The defendant explained that the plaintiff meant that N was acting in the same manner the plaintiff did when he was a child.

[135] During further re-examination the defendant was asked whether, when she looks at N, she would say, on face value, that she is not the plaintiff's child, to which the defendant responded that she cannot say that. She further testified that the plaintiff always said that N looks like two of his younger brothers and as she got older, he said that she has the features of his youngest brother.

[136] That concluded the defendant's case.

Exhibits "A" and "B":

[137] This matter served before me for the first time on 13 June 2017. The parties indicated that they request a postponement of the matter for purposes of further DNA testing and I made the following order on request of and by agreement between the parties:

- "1. The matter is postponed to 12 September 2017 in order to continue on 12, 13 and 15 September 2017.
2. The plaintiff will pay the defendant's wasted costs in the amount of R 9000-00 (NINE THOUSAND RAND).
3. The defendant will give her full co-operation for another DNA test regarding the paternity of the child N...and is willing that it be handed in at court as conclusive proof of the contents thereof."

[138] The email, exhibit “A”, reflects that it is from N addressed to the defendant`s attorney of record, dated 12 July 2017, with the subject “*Regarding DNA test*”. It reads as follows:

“Greetings

After receiving phone calls from both my mom (B...N...) and her attorney (Mr Stefan de Beer), urging me to attend and go through with the DNA testing, I, N..., have decided to not attend.

I deem it unnecessary to do the DNA tests because I believe I know who my parents are and to my knowledge I was raised by both L...N... and B...N... I don`t see the need to prove who conceived me.

I have accepted the current circumstances and wish to move forth with my life. I am also currently visiting external family members and therefore I will not be able to make it for the testing.

Please respect the choice that I have made.

Thank you.

N...”

[139] Exhibit “B” is a Medical Laboratory document titled “*Final Paternity Test Result*” and the “*Date of Referral*” is indicated as 20 February 2015 and the date of “*Result Approved*” is 24 February 2015, both dates being during or about the time when the plaintiff applied for rescission of the increased maintenance order which was granted by default. It also corresponds with the date averred in the particulars of claim as to when it was established that N is not the biological child of the plaintiff. From exhibit “B” it is evident that the plaintiff

and N were tested. The document also contains a short explanation regarding the “**Background about this Testing Method**” and the “**FINAL RESULT**” is recorded to be the following:

“An incompatibility with paternity was found at 2 or more markers. Paternity of Individual 1...MN...is excluded with a high degree of certainty.”

[140] Considering the abovementioned dates, it appears that the further DNA testing as agreed upon in the abovementioned court order did not take place and that the parties are relying on the original DNA tests.

[141] I have already indicated earlier in the judgment that the parties specifically indicated at the commencement of the trial that the results of the DNA tests (hence exhibit “B”) are not disputed.

Legal principles and the application thereof on the facts of the present action:

[142] Both Mr Cronje, who appeared on behalf of the plaintiff, and Mr Ploos van Amstel, who appeared on behalf of the defendant, provided me with written heads of argument in support of their respective submissions. Mr Cronje also provided me with written heads of argument in reply to certain aspects in the defendant’s heads of argument. In addition, both counsel addressed me orally on the merits of the action.

[143] It is evident from the particulars of claim that the plaintiff's cause of action is based on fraud, on the basis of a misrepresentation; alternatively, a fraudulent non-disclosure.

[144] The essential elements for a claim based on fraud are set out in **Amler's Precedents of Pleadings**, LTC Harms, 9th Edition at p. 204:

- “(a) A representation by the representor to the representee. The representation usually concerns a fact but may relate to the expression of an opinion set to be held but which is in fact not held. ... Non-disclosure can amount to a representation.
- (b) Fraud (i.e. that the representor knew the representation to be false). It is not sufficient to allege that the representation was ‘false’, because this word implies no more than that the representation was untrue. The mental element must be alleged. ... The representor must intend that the representee will act on the representation.
- (c) Causation (i.e. the representation must have induced the representee to act in response to it).
- (d) If damages are claimed, it must be alleged that the representee suffered damages because of the fraud.
- (e) If reliance is placed on fraudulent non-disclosure, facts giving rise to the duty to disclose must be set out. It is also necessary to show that the breach of the duty to disclose was deliberate and intended to deceive.”

[145] A party wishing to rely on fraud must not only plead it but also prove it clearly and distinctly. See **Courtney Clarke v Bassingthwaighe** 1991 (1) SA 684 (Nm) at 689 F - G. The *onus* is the ordinary civil *onus*, one that must be discharged

on a balance of probabilities, bearing in mind that fraud is not easily inferred. See **Gilbey Distillers & Vintners (Pty) Ltd v Morris NO** 1990 (2) SA 217 (SE) at 225 J – 226 A.

A. Fraud based on a misrepresentation – a *commissio*:

[146] In **LAWSA**, Volume 29, Third Edition, at paragraph 307 the following definition of a fraudulent misrepresentation is stated:

“A fraudulent misrepresentation, which gives rise to delictual liability, may be defined as a wrongful and intentional false representation of fact which induces another to act and which causes patrimonial loss.”
(My emphasis)

[147] The following is stated with regard to positive conduct and omissions in relation to delictual liability in **LAWSA**, Volume 15, Third Edition, at paragraph 71:

“**71 Positive conduct and omissions.** Conduct may be either a positive act (a commission) or an omission. Positive conduct may be physical conduct or it may take the form of a statement. These distinctions are of fundamental importance to the law of delict. Although they are all forms of conduct, the policy is to treat them differently for the purposes of legal liability.

[148] In **Herschel v Mrupe** 1954 (3) SA 464 (A) at 485 A the following was stated in respect of wrongfulness:

“One senses immediately that an essential element has been left out, perhaps because it was so obvious that it was unnecessary to

mention it, namely that the act or omission complained of must be an *unlawful* incursion into another's economic sphere.”

[149] The aforesaid distinction between commissions and omissions, is also very relevant when considering the issue of unlawfulness. In this regard the following extract from **LAWSA**, Volume 29, Third Edition, at paragraph 308 is, in my view, very important for purposes of the present matter:

“**308 Wrongfulness.** Since a fraudulent misrepresentation is *ex hypothesi* wrongful, wrongfulness has received scant attention in practice. In case of a *commissio*, that is a misrepresentation by word or other positive conduct, wrongfulness is usually taken for granted if it is proved that the representor acted fraudulently. Wrongfulness must be determined with reference not only to the misrepresentation itself, but also to the loss suffered. (My emphasis)

[150] With regard to the alleged misrepresentation, reliance is placed, in terms of the particulars of claim, on the allegations that “*the defendant represented to the plaintiff that N was his child and that she had an exclusive sexual relationship with the plaintiff during the time that N was conceived*”.

[151] It was also pleaded that when the defendant made the aforesaid representations the defendant knew them to be false.

[152] From the defendant's plea it is evident that the defence is based on a denial of the aforesaid allegations, with a plea that both parties acted under a mutual impression that the plaintiff is N's father. Mr Cronjé pertinently pointed out that

the averment that the defendant represented that she had an exclusive sexual relationship with the plaintiff during the time that N was conceived, was not denied, but merely “*noted*”.

[153] On the defendant`s own version she did not tell the plaintiff about her one-night stand sexual encounter with AM. However, at the same time there is no evidence that she actively or pertinently made any representations and/or lied to the plaintiff in this regard. The defendant simply kept her silence.

[154] On the plaintiff`s own version he never confronted the defendant about a possible extra-marital affair on her side, not even when he suspected same with regard to the pastor. The plaintiff did not even do so when he, according to him, saw the different health and/or bodily features of N as opposed to those of himself and/or his family.

[155] As stated in **Amler`s**, *supra*, it is not sufficient for purposes of fraud as cause of action that the representation was untrue. The plaintiff needs to prove on a balance of probabilities that the representor knew that the representation was false or untrue. In **Phame (Pty) Ltd v Paizes** 1973 (3) SA 397 (A) at 409 A, the court stated as follows in this regard:

“I pause here to observe that, despite the averment in (x), *supra*, that the representation was false, the plaintiff does not aver that it was wilfully false. Hence it does not amount to fraudulent misrepresentation; see *Breedt v Elsie Motors (Edms.) Bpk.*, 1963 (3) SA 525 (AD). The

case is therefore one of innocent misrepresentation. This was accepted by both sides.”

[156] In my view it cannot be found that the defendant made a representation by means of a positive act (a *commisio*) to the defendant as alleged by the plaintiff. There was consequently no misrepresentation. Even if I am to be wrong in my finding with regard to the existence of a misrepresentation, the plaintiff in any event failed to prove that it was a fraudulent misrepresentation, since I cannot find on the evidence that it was proven beyond reasonable doubt that the defendant knew that N was not the biological child of the plaintiff. I can consequently not find that the defendant made such representation intentionally whilst knowing that it was false or untrue.

B. Fraud based on a fraudulent non-disclosure – an *omissio*:

[157] The reliance on the alternative of a fraudulent non-disclosure, is, in terms of the particulars of claim, based thereon that the defendant had a duty to disclose to the plaintiff that she had an extra-marital affair during the time that N was conceived, which she failed to do with the intention to deceive the plaintiff.

[158] In LAWSA, Volume 15, supra, at paragraph 71 the following principles are stated with regard to liability based on alleged fraudulent non-disclosures:

“Liability for omissions is generally more restricted than liability for commissions, ... For reasons of public policy, the law is reluctant to assume too readily the existence of a legal duty in these instances. In cases involving omissions the law does not generally demand altruistic behaviour: it does not require you to love your neighbour, but only that you shall not injure your neighbour. The law also recognises that ‘words are more volatile than deeds’ and that some restriction should be placed on the scope of liability in such cases.” (My emphasis)

[159] The further principles in this regard are stated in **LAWSA**, Volume 29, *supra*, at paragraph 308:

“The requirement of wrongfulness requires specific attention where the misrepresentation consists of an *omissio* or non-disclosure (such as a failure to remove an existing false impression). Wrongfulness of a failure to speak depends on the existence of a duty to speak. If no such duty existed, the silence is not wrongful and no action will lie. There is no general duty to the world at large to make a disclosure. Such a duty arises towards particular people in particular circumstances. The criterion for determining the existence of a duty to speak lies in the legal convictions of the community (*boni mores*). ...” (My emphasis)

[160] By way of introduction I wish to refer to an extract from **Family Law Service**, B Clark, LexisNexis, May 2022, S1 77 at A60 in relation to the concept of “consortium”:

“A large part of married life is covered simply by the term ‘consortium’. Although the law is usually concerned with the consortium of the parties when the marriage relationship is destroyed or impaired by a third party, the question of consortium is also one that can be raised *inter partes*. It is accepted that the parties retain their individuality after the marriage and that they are bound to each other by legal, moral, ethical and religious ties. In general, we may summarise these ties by

saying that a clear duty to live together as husband and wife, to be faithful to one another, to give each other loyalty, assistance and support can be recognised. These are the ingredients of the consortium. But there is no clear indication that these duties are in fact legal duties which the one owes the other in spite of the fact that the spouses undoubtedly contract the marriage in the expectation that these duties will be honoured. The reason is that there are very limited legal remedies for the enforcement of these duties and this calls the legal character of the duties into question.” (My emphasis)

Is there a legal duty to disclose an extra-marital affair:

A. Australian case law:

[161] In the High Court of Australia, on appeal from the Supreme Court of Victoria, in the matter of **Magill v Magill** [2006] HCA 51 (9 November 2006) M152/2006 the court dealt with the question whether the tort of deceit can be applied in marital context in relation to false representations of paternity. The appellant and the respondent married in April 1988. They separated in November 1992 and the marriage was dissolved in February 1998. Between 1988 and 1992, the respondent gave birth to three children: a son born in April 1989, another son born in July 1990 and a daughter born in November 1991. After the separation, following an application by the respondent, the appellant made payments under the Child Support (Assessment) Act 1989 (Cth) in respect of all three children and such payments continued until late 1999. In April 2000 it was established by means of DNA testing that the appellant was not the father of either the second child or the third child.

[162] The appellant commenced proceedings against the respondent in the County Court of Victoria. The cause of action was the tort of deceit. The appellant claimed two kinds of damages. Firstly, the appellant alleged that he had suffered personal injury in the form of anxiety and depression consequential to the respondent's fraudulent misrepresentation. Secondly, he claimed financial loss, including loss of earning capacity by reason of his mental or psychological problems and loss related to the time he had spent with and money he had spent on the children under the mistaken belief that he was their father. The appellant succeeded at trial and was awarded damages. The decision of the trial judge was reversed by the Court of Appeal of the Supreme Court of Victoria on the ground that the appellant had failed to establish the essential elements of the tort of deceit. This judgment deals with the appellant's appeal in which he sought the restoration of the original award of damages.

[163] In paragraph 8 of the judgment the court referred to the averments that were made in support of the tort of deceit:

"8. ...In late 1989, the respondent represented to the appellant that he was the father of the second child. In early 1991, the respondent represented to the appellant that he was the father of the third child. Both representations were false. On the faith of the representations the appellant believed that he was the father and altered his position to his detriment. The representations were made fraudulently, with the respondent either knowing that they were false or recklessly not caring whether they were true or false. At the time of the representations the

respondent indeed intended the appellant to rely on them. As a result of the representations the appellant suffered loss and damage. ...”

[164] The court stated, *inter alia*, as follows at the respective paragraphs of the judgment, as indicated:

“21. ... False representations about paternity could be the result of carelessness rather than deliberate fraud. Furthermore, in domestic and other personal relations, in between carelessness and deliberate fraud there may be conduct which is not easy to classify in simple moral terms.”

“35. ...One of the obvious difficulties about the topic of paternity, or the wider topic of sexual infidelity, (a difficulty that is not peculiar to those topics), is the danger of creating something very close to a legal duty to disclose facts in circumstances where there could be a serious question about the existence of a corresponding ethical obligation. ... (My emphasis)

“43. ...It was the failure to disclose her extra-marital relations and their possible connection with her pregnancies that was the critical element in the deception. Yet, unless it can be said that there was then (that is, in effect, when the children were born) a legal or equitable duty to disclose the truth, her silence did not amount to a representation. ...” (My emphasis)

Gleeson CJ concluded as follows at paragraph 49 of his judgment:

“49. The matters which an individual party to a marriage might properly regard as intimate and private are not limited to questions of paternity of children of the marriage, or sexual fidelity, or to events that occurred during the marriage. Finding a duty to disclose the truth about some

matters would be inconsistent with the ethical context in which such a judgment must be made. Imposing legal consequences upon behaviour in such a relationship also may be inconsistent with the subjective contemplation of the parties and with public policy as reflected in legislation. In that connection, the extensive scheme of regulation of the legal incidents of the marriage relationship contained in the Family Law Act, based as it is largely upon a policy of minimizing the importance of questions of 'fault', forms an important part of the setting in which judgments about dishonesty, and actionable damage, must be made. The application of the common law of deceit to marital relationships is not impossible and there are no rigidly defined zones of exclusion, but attempts to construct legal rights and obligations in an unsuitable environment should fail, as did this attempt." (My emphasis)

[165] Gummow, Kirby and Crennan, JJ stated as follows at paragraphs 130 and 132 of their judgment:

"130. There is currently no recognised legal or equitable obligation, or duty of care, on a spouse to disclose an extra-marital sexual relationship to the other spouse during the course of a marriage. There is a mantle of privacy over such conduct which protects it from scrutiny by the law. ..." (My emphasis)

"133. ...Private matters of adult sexual conduct and a false representation of paternity during a marriage are not amenable to assessment by the established rules and elements of deceit. ... In the absence of a clear need for the common law to impose a legal or equitable duty of disclosure of such matters they should be left, as they are now, to the morality of the spouses, encouraged by the legislature's support for truthfulness about paternity in the various provisions of the Family Law Act which have been mentioned."

[166] In his judgment Hayne, J determined as follows at paragraphs 156 and 158:

“156. ... The trust and confidence required between marriage partners must be supplied by them; it cannot be provided by legal norms and duties in the same way as those norms and duties may regulate commercial interactions.” (My emphasis)

“158. The law cannot satisfactorily prescribe how a relationship that depends entirely upon matters wholly personal and private to the parties to it is to be maintained. The trust and confidence between marriage partners is based in much more than considerations of sexual fidelity; it is based in complex and subtle considerations of human relationships. These are not amenable to the external application of duties of the kind described.” (My emphasis)

[167] The appeal was dismissed with costs.

B. Canadian case law:

[168] In the Canadian case of **D’Andrade v Schrage** 2011 ONSC 1174, delivered on 28 February 2011 the Ontario Superior Court of Justice dealt with the question whether a marriage contract should be set aside because, unbeknown to the husband, on the day that the wife signed the contract, she was having an affair and was contemplating separation. The court stated at paragraph [73] of the judgment that there was no case on the particular point, being where a marriage contract has been set aside because of a failure to disclose an affair or an intention to separate. In paragraph [74] of the

judgment the court referred to the matter of **Saul v Himel**, which judgment I will again refer to later in this judgment with regard to the issue of public policy. The court referred to the fact that in the **Saul**-judgment it was found that ‘*separation agreements are more akin to commercial contracts than they are to family settlements*’. Thus, by implication, the requirement of *uberrima fides* would not apply. In paragraph 20 of the **Saul**-judgment, which was relied upon in the **D’Andrade**-judgment, the following was stated:

“The former husband is effectively saying that every spouse has a duty to tell his or her spouse of any extra-marital affair he or she may have had during the marriage. It is unclear whether the former husband thinks that this must be done when it occurs, immediately thereafter, or some time later. Marriage is still a private domain and the public, through the judicial system, should not be involved in scrutinising the behaviour of spouses in private matters while they are not involved in the judicial system.” (My emphasis)

[169] In paragraphs [75], [78] and [80] of the **D’Andrade**-judgment the court further found, *inter alia*, as follows:

“[75] In *D.(D.R.) v. G.(S.E.)* (2001), 2001 CanLII 28122 (ON SC), 14 R.F.L. (5th) 279 (Ont. S.C.J.) Granger J. considered a case where the ex-husband moved to set aside the provisions in a divorce judgment requiring him to pay support for a child that he later found out was not his biological child. In dealing with the claim, Granger J. found that a wife owed no duty to a husband to tell him that he might not be the father of the child.” (My emphasis)

“[78] To require spouses to disclose their thoughts about the likelihood of separation or their involvements in extra-marital sexual activity

before signing a marriage contract could have serious implications for the survival of marital relationships. ...”

“[80] In this case, the public policy implications of requiring married couples to disclose their thoughts of separation or their involvement in extra-marital relationships before executing a marriage contract are negative rather than positive. In recognition of the fact that marriages are complicated institutions, whose failure can rarely be attributed to one party or the other, the law has evolved in a fashion that by and large eliminates conduct from the analysis of financial entitlement. In essence, Mr. Schrage is seeking to reintroduce conduct into the consideration of whether a marriage contract should be set aside. This is a road the law has been down before and, based on that experience, it is a road to be avoided unless justice demands it.” (My emphasis)

[170] In the Canadian case of **Cornelio v Cornelio**, 2008 CanLII 68884 (ON SC), dated 22 December 2008, held in the Ontario Superior Court of Justice, the court referred to a line of judgments and stated as follows at para [20] of the judgment:

[20] Each of these cases refuses to recognize any obligation on the part of the mother to disclose her extramarital affair ...”

C. South African case law:

[171] In the well-known case of **DE v RH** 2015 (5) SA 83 (CC) the Constitutional Court had to determine whether there is justification for the continued existence of a delictual claim based on adultery. The first sentence of paragraph [1] of the introduction to the unanimous judgment, penned by Madlanga J, reads as follows:

“[1] Undertakings of fidelity — whether in the form of *ho lauwa*, *go laiwa* or *ukuyalwa* or solemn vows or any other form dictated by various cultures or religions — are no guarantee that adultery will not take place in marriage. In fact, adultery is probably fractionally younger than the institution of marriage. ...”

[172] At paragraph [42] of the judgment the following was stated:

“[42] ... The applicant wants the law to use punitive measures to come to his aid as the non-adulterous spouse. In this case the marriage deteriorated without obstruction or intervention by the law. The distinction is not insignificant. It is one thing for the law to protect marriages by removing all legal obstacles that impede meaningful enjoyment of married life. It is quite another for spouses to expect the law to prop up their marriage which — for reasons that have nothing to do with the law — is weakening or disintegrating.” (My emphasis)

[173] In dealing with public policy, Madlanga J stated *inter alia*, as follows:

“[51] ... Does public policy — a notion that is now informed by our constitutional values — tell us that the delictual claim founded on adultery must still be part of our law?...”

[52] ... What also comes into the equation are the softening and current trends and attitudes towards adultery. The constitutional norms and changing attitudes are not necessarily separate notions: constitutional norms also inform present-day attitudes towards adultery.

[53] Of relevance in respect of the adulterous spouse and the third party are the rights to freedom and security of the person, privacy and

freedom of association. These rights do not necessarily weigh less just because the two have committed adultery.

[54] The delictual claim is particularly invasive of, and violates the right to, privacy. This very case is illustrative of this. The Supreme Court of Appeal dealt with the abusive, embarrassing and demeaning questioning that Ms H suffered in the High Court. She was 'made to suffer the indignity of having her personal and private life placed under a microscope and being interrogated in an insulting and embarrassing fashion'. Likewise, in order to defend a delictual claim based on adultery, the third party is placed in the invidious position of having to expose details of his or her intimate interaction — including sexual relations — with the adulterous spouse. That goes to the core of the private nature of an intimate relationship.

[55] ... It is equally true that there are factors that may make the act of adultery less reprehensible and, in certain instances, not reprehensible at all. ... The antecedent question is whether — in the face of the overarching constitutional rights of the adulterous spouse and third party — there should be a delictual claim at all.” (My emphasis)

[174] The judgment continued as follows at paragraphs [60] - [63] thereof:

“[60] The right of a non-adulterous spouse that is implicated by the act of adultery is the right to dignity. ...

[61] ...

[62] Nevertheless, this potential infringement of dignity must be weighed against the infringement of the fundamental rights of the adulterous spouse and the third party to privacy, freedom of association and freedom and security of the person. These rights demand protection from state intervention in the intimate choices of,

and relationships between, people. This must be viewed in light of current trends and attitudes towards adultery, both nationally and internationally. These attitudes also demonstrate a repugnance towards state interference in the intimate personal affairs of individuals.

[63] ... That is what public policy dictates. In this day and age, it just seems mistaken to assess marital fidelity in terms of money.” (My emphasis)

[175] Mogoeng CJ, with Cameron J concurring, added to the aforesaid judgment “*[to] lay some emphasis on and give perspective to certain aspects of the main judgment*”:

“[68] The essence of marriage and what it takes to sustain it were captured by the Bundesgerichtshof as follows:

'(M)arriage is a human institution which is regulated by law and protected by the Constitution and which, in turn, creates genuine legal duties. Its essence, however, consists in the readiness, founded in morals, of the parties to the marriage to create and to maintain it.'

...

[69] ... The law does and can only create a regulatory framework for the conclusion of marriage and the enforcement of obligations that flow from it. It can also help ensure that barriers to family life are removed. The rest is in the hands of the parties to the marriage. Barring exceptions, they decide freely to get married and it is within their ability to protect their marriage from disintegrating.

[70] It bears emphasis that marriage essentially hinges on the 'readiness, founded in morals, of the parties to the marriage to create and to maintain it'. Like the Supreme Court of Appeal, I also believe

that parties' loss of moral commitment to sustain marriage may lead to its failure. For abuse of one by the other and other factors that could lead to the breakdown of marriage are in my view likely to creep in when that commitment ceases to exist.

[71] The law cannot shore up or sustain an otherwise ailing marriage. It continues to be the primary responsibility of the parties to maintain their marriage. ...

[72] I reiterate my concurrence in the judgment by Madlanga J.” (My emphasis)

[176] In **RP v PP** 2016 (4) SA 226 (KZP) at para [41] the following applicable principles were stated:

“[41] The assessment of the factors relevant to misconduct must be conducted with an awareness of prevailing social mores and attitudes. Unfortunate as it may be, extramarital affairs, instead of an observance of marriage vows, particularly faithfulness to one's spouse, are prevalent, irrespective of the age of the parties or the duration of their marriage. As a consequence, the disapproval and stigma once attached to adultery have diminished, and extramarital affairs no longer receive the censure they used to. Nevertheless, this relaxed attitude towards infidelity ought not unduly diminish the significance of such misconduct in the exercise of a court's discretion in determining an equitable redistribution. The effect of the betrayal on an aggrieved party who has remained committed to her/his marriage remains a relevant factor, and the general rule that each case must be evaluated on its own set of facts applies.” (My emphasis)

[177] I respectfully agree with the principles pronounced in the aforesaid case law.

[178] Consequently, and in my view, there exists no legal duty on one spouse to disclose the existence of an extra-marital affair to the other. The defendant therefore had no legal obligation to have informed the plaintiff of her one-night sexual encounter with AB. Her failure to have done so did consequently not constitute a fraudulent non-disclosure as claimed by the plaintiff.

[179] The plaintiff's alternative claim can consequently also not be upheld.

C: Public policy:

[180] In addition to the aforesaid, the defendant's defence is further based thereon that the plaintiff's claim is *contra bonos mores* for the reasons set out in paragraphs 12 and 13 of the amended plea, which I have already quoted earlier in this judgment.

[181] In terms of the plaintiff's replication to the defendant's amended plea, the defence that the plaintiff's claim is *contra bonos mores* is denied for the reasons set out in the replication, which I have already quoted earlier.

[182] For the sake of completeness I deem it necessary to also deal with the aforesaid issues raised in the pleadings.

[183] Section 28(2) of the Constitution of the Republic of South Africa, 108 of 1996, determines as follows:

“28 Children

(1) Every child has the right-

...

(2) A child's best interests are of paramount importance in every matter concerning the child.”

[184] Mr Cronjé referred to and relied on the judgment in **D v M & Others** 2016 JDR 0067 (GJ) in which judgment, according to Mr Cronje’s argument, “the Court confirmed that depending on the circumstances, the privacy rights of a non-consenting adult not to be tested must yield to the demand of discovering the truth in the best interests of the administration of justice”. In this regard he referred to paragraph [29] of the judgment in which the following was stated:

“[29] Murphy J, in *Botha v Dreyer* [2008] JOL 22809 T, after examining the law on compulsory blood or DNA testing in parental disputes, concludes at paragraph 42, that the Court is clothed inherently and constitutionally with jurisdiction to order parties to have blood tests where it finds that the competing rights and interests of the parties require the truthful verification of paternity by scientific methods. In arriving at that conclusion, Murphy J agreed with the view adopted by Kotze J in *M v R* 1989 (1) SA 416 (O) that it was in a Court's power to order an adult to have blood tests because it was in the best interests of the child that reliable information be obtained to gain clarity on the question of paternity. A guardian was compelled to act in the best interests of the minor child even if doing so would be contrary to her own interests. Murphy J also aligned himself with Kotze J's dictum that, depending on the circumstances, and within reasonable limits, the privacy rights of a non-consenting adult must yield to the demands of discovering the truth in the best interests of the administration of justice. I agree.

[185] Although the court made the finding pointed out by Mr Cronjé, it is necessary to take note of two important aspects raised in the aforesaid paragraph [29]:

1. The court referred to instances “where it finds that the competing rights and interests of the parties require the truthful verification of paternity”.
2. Secondly and very importantly the court referred to circumstances where it was “in the best interests of the child that reliable information be obtained to gain clarity on the question of paternity”.

[186] The matter of **ER v LB**, Case no: 2237/2013, delivered in the Western Cape High Court on 11 September 2011, was an application for the repayment of maintenance on the basis of unjustified enrichment, in circumstances where the appellant alleged that he made certain overpayments to the defendant with regard to the maintenance for the parties’ two minor children. Although the facts in that matter are distinguishable from the present matter in that the plaintiff was the biological father of the two children the fact remains that the court considered the plaintiff’s claim against the background of what the court considered to be in the best interest of the children. The court stated, *inter alia*, the following in paragraphs [28] and [29] of the judgment:

“[28] ... In particular, the applicant’s claim for repayment of the maintenance amount offends public policy ...

[29] Mr Shaw's 'constitutional' submission that the fathers would be unequally treated if they are not allowed to reclaim overpayment of maintenance is misplaced. ... The rights of the fathers or parents that Mr Shaw refers to must be considered in the context of public policy and the constitution. Those rights cannot in my view be paramount over the best interests of a child. ... (My emphasis)

[187] In **Arendse v Arendse** 2013 (3) SA 347 (WCC) the court dealt with the issue of the extent to which the children's rights and interests should be considered when a court is considering an eviction application in terms of Act 19 of 1998 ("PIE"). The parties were married in terms of Islamic law and civil law and later divorced in terms of Islamic and civil law. The main dispute between the parties pertained to whether the respondent complied with his promise of providing a house for the applicant as part of her dowry and as recorded by the Muslim Judicial Council in their marriage certificate. This determined whether the applicant had a right to reside in the house or whether the respondent could legitimately evict the applicant and their three minor children. In the Magistrate's Court the respondent was successful in obtaining an eviction order in terms of PIE. The applicant subsequently brought an application to review the eviction order in the High Court. The court found that because the application before the Magistrate concerned children, the children's constitutional rights in terms of section 28 became immediately applicable and the Magistrate's failure to have considered section 28, was fatal. The court found, *inter alia*, as follows at paragraphs [37] and [39] of the judgment:

“[37] At the very least the rights and interests of the applicant’s children, faced with an eviction at the behest of their father who has parental obligations to them, ought to have loomed large in the extraordinary circumstances of this case. The scenario before the second respondent [the Magistrate] invoked, *inter alia*, the children’s rights enshrined in s 28 of the Constitution... The second respondent appears not to have been astute to this, nor to the dictates of s 28(2) of the Constitution, which states that a ‘child’s best interests are of paramount importance in every matter concerning the child’.

[38]

[39] The second respondent simply failed to have regard to the interests of the children and to appreciate the proper scope of the first respondent’s parental duties. In ordering the children’s eviction the second respondent misconstrued the nature of the enquiry required of him and imperilled the children’s wellbeing. I agree with the submission on behalf of the applicant that, in all of the circumstances, the failure to investigate what effect the eviction order would have on the three children was a far-reaching irregularity and in itself constitutes sufficient grounds for its setting-aside.” (My emphasis)

[188] In **Juta’s Quarterly Review of South African Law**, April to June 2013 (2), Juta Law Online Publications, the author, C du Toit (BA LLB (Stell) LLM (UP) Attorney at the Centre for Child Law), made the following remarks with regard to the aforesaid judgment:

“This judgment follows a long line of case law from the Constitutional Court emphasising that children’s rights must be the primary occupation of every court concerned with matters involving children. The decision by the Magistrate shows a pre-occupation with the dispute between the parents, i.e. a parent-centred perspective, where is what is required by courts is a child-centred perspective. This is not

only the approach prescribed by the Constitution but PIE itself requires magistrates to consider the interests of the children. All courts should be reminded of the dicta of the Constitutional Court in *S v M* [Centre for Child Law as Amicus Curiae] 2008 (3) SA 232 (CC) at paras [15] and [24]]:

‘The comprehensive and emphatic language of section 28 indicates that just as law enforcement must always be gender-sensitive, so must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner which at all times show due respect for children’s rights. A truly principled child-centred approach requires a close and individualized examination of the precise real-life situation of the particular child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.’ (My emphasis)

[189] In the matter of ***MN v AJ*** 2013 (3) SA 26 (WCC) the parties got married in 1989 and a daughter N, was born in 1990. They got divorced in 1995 and the respondent paid maintenance in respect of the child until 2006, when it was discovered by means of DNA testing that N was not the respondent’s biological daughter. The respondent claimed recovery of all maintenance contributions in the Magistrate’s Court from the appellant, successfully so. The appellant, the mother of N, appealed against the order of the Magistrate’s Court. The respondent’s case was based on the *condictio indebiti*, but on appeal the court found, *inter alia*, that the respondent failed to establish a claim of enrichment. However, the court also dealt with “*Considerations of public policy*” and the court stated as follows in paragraph [75], [78] and [79]:

“[75] Finally, I turn briefly to considerations of public policy. Section 39(2) of the Constitution requires a court to promote the spirit, purport and objects of the Bill of Rights when developing the common law. ...”

“[78] Considerations of public policy must be viewed through the prism of constitutionalism. In *Barkhuizen v Napier* Ngcobo J addressed the issue as follows:

‘Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it. Indeed, the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law. And the Bill of Rights, as the Constitution proclaims, is a “cornerstone” of that democracy; “it enshrines the rights of all people in our country and affirms the democratic [founding] values of human dignity, equality and freedom”.’

[79] Given the findings which I have made above it is not necessary to come to a final decision on this aspect of the case. Suffice it to say that courts may in the future be wary of recognizing claims in circumstances such as the present which necessitate an enquiry into paternity and which may have the tendency to destroy an otherwise loving and caring parental relationship with a child whose rights to family and parental care are protected under Section 28 of the Constitution.” (My emphasis)

[190] In Juta’s Quarterly Review of South African Law, *supra*, the author to whom I referred above, C du Toit, remarked as

follows with regard to the last-mentioned judgment of **MN v AJ**:

“There is something inherently problematic in a claim for recovery of maintenance where the father-child relationship existed for more than 15 years. What is glaringly absent from the facts of the case is the nature of AJ’s relationship with his daughter, the impact that the claim for unjust enrichment has had on their relationship and perhaps, more profoundly, the impact of discovery that they are not biologically related on their relationship. As with *Arendse v Arendse*, the approach of the parents, the Magistrate in the lower court and the High Court, apart from the one paragraph *obiter*, seem exclusively parent-centred and legalistic. There is very little consideration of what the child’s right is to parental care and whether a discovery after 15 years could negate the factual and legal relationship that existed for the 15 preceding years. It is submitted that it would be contrary to children’s best interests and their right to parental care. (My emphasis)

[191] In the Canadian case of **Cornelio v Cornelio**, held in the Ontario Superior Court of Justice, referred to earlier in this judgment, the respondent father sought, *inter alia*, repayment of the child support that he paid to the applicant for two 16-year old twins after DNA testing confirmed that he was not their biological father. He sought such repayment from the date of separation in 1998, or at least from the date of a consent order of 2 May 2022, when the parties agreed to joint custody and to child support for the three children.

[192] It should immediately be mentioned that the said case is distinguishable from the present matter in that in that instance there were two Acts applicable which gave an extended meaning to the word “parent”, firstly being

somebody who “*stood in the place of a parent*” toward a child and secondly “*a person who has demonstrated a settled intention to treat a child as a child of his or her family*”. In those instances, a putative father can be held responsible for the payment of maintenance even when it turns out that he is not the biological father. However, in my view the judgment addressed certain principles which are relevant to the present matter, irrespective of the aforesaid distinction.

[193] In paragraph [12] of the judgment the court referred to the judgment by Maresca, J in **B. (B.) v. B. (C.P.)**, [2005] O.J. No. 1209, 2005 ONCJ 101 (CanLII). In that matter the respondent had received information after separation suggesting that two of the children from the marriage were not his biological offspring. After DNA testing confirmed his suspicions, he had terminated contact with the children and resisted paying support. Maresca, J determined as follows at paras [17] [20] and [21] of that judgment:

“[17] It is the relationship that existed prior to the break-up of the family unit that is relevant to the analysis. This is consistent with an approach that maintains the best interests of the children as its goal. Hindsight makes for a poor platform on which to base decisions regarding children.”

“[20] ... The appropriate question to ask is whether the relationship that existed at the time that the family was functioning as a unit, up until separation, was one in which the father treated the child as his own. To permit a father, in a sense, to ‘backdate’ his decision to parent the children ignores completely the reality of the children’s lives. Although the father may have made a different decision had he been advised of the facts at the time of the child’s birth, the fact is that he was a parent

to the child for many years. The emotional bonding, shared memories and trust that was built up over time cannot be wiped out with the stroke of a pen. For better or for worse, with intention or without it, Mr. B is the boys' father. In all the ways that fatherhood matters — love, guidance, pride, nurturing, role modelling, connection — Mr. B is a father to these boys. It is their concept of him as father that was — and continues to be — important. This was not a relationship entered into by either child or parent in a tentative or temporary fashion. It has been, since the children's birth, the only paternal relationship that either the boys or Mr. B has known.

[21] Modern society has moved away from a rigid definition of the family. Illegitimacy has been abolished. Marriage is not a pre-requisite for support. Same-sex couples raise loving, healthy families. There has been a recognition both by society at large and our legal system that it is the relationship that matters, not the legality. It is the sense of family and bonding between parent and child that is important, not whose DNA is lodged in the child's cells. To permit Mr. B to repudiate his relationship with these children, built and demonstrated over the entire course of their lives, would be grossly unfair to them. If we are to be sensitive to the realities of these boys' experience and to act in their best interests, the court must acknowledge the fact that Mr. B has demonstrated a settled intention to treat them as his own children."
(My emphasis)

[194] The court in the **Cornelio**-judgment then concluded as follows at para [13] of the judgment:

"[13] Maresca, J focused on the relationship that had developed and existed before separation, irrespective of the contention by the respondent that he never would have fostered such a relationship had he known he was not the children's biological father. She considered the unfairness that would result to the children if the only father they had known could unilaterally withdraw from the relationship and any

obligation to provide support. A best interests analysis on the facts of that case could lead to no other result." (My emphasis)

[195] The court further referred to the following circumstances which are, in my view, very relevant to the matter *in casu*:

"[24] Even if this matter were approached on the basis of fairness to the respondent By his own admission, Mr. Cornelio knew at the time of separation that his wife had an extramarital affair with 'Tony' and he developed suspicions that she had known Tony during the marriage and that he might be the father of all three of their children. Notwithstanding these suspicions, Mr. Cornelio sought joint custody of all three children and entered into a consent order that provided for his ongoing and important involvement in their lives and for the provision of child support. It was not until access was interrupted and Ms. Cornelio commenced these proceedings seeking increased child support that the respondent began pursuing this issue. ... I can only conclude that this motion by Mr. Cornelio is a response to the current conflict with the applicant and his unfortunate alienation from the children, which may well be temporary." (My emphasis)

[196] In another Canadian case, which I mentioned earlier, **Saul v Himel** (1994), 9 R.F.L. (4th) 419 (Ont. Gen. Div.), aff'd (1996) [1994 CanLII 18262 (ON SC)] the husband sued the wife for damages on the basis of fraudulent and negligent misrepresentation. In my view the background facts are very relevant to the present matter and I therefore deem it apposite to quote extensively from the judgment in this regard:

"2. Saul and Himel were married on September 26, 1959, separated in or about May 1982, and their divorce was made final on February 22,

1989. They thereafter executed a separation agreement on October 27, 1989. Himel bore four children during her marriage to Saul, ... born in 1961, ... born in 1962, ... born in 1965, and Kevin, born in 1973. During the marriage, Himel had an extramarital affair. It was determined almost twenty years later, in or about December 1992, that the child Kevin was conceived during that affair and that Saul was not his natural father.

3. On January 19, 1994, Saul had a statement of claim issued against his former wife claiming damages in the amount of \$200,000 for fraudulent misrepresentation and damages in the amount of \$200,000 for negligent misrepresentation. The claim relates to the expenses and child support Saul paid for Kevin both before and after separation and prior to his knowledge about Kevin's paternity. Saul contends in his statement of claim that he:

would have continued to love him and care for him but not have assumed completely the responsibilities of supporting and fathering Kevin from his birth and indeed would have insisted that the Defendant look to the real father of the child for support or at least assistance in that regard.

4. Himel did not tell her husband of her extramarital affair, nor did she tell him of the possibility that he may not be Kevin's father. Both parties provided emotional and financial support for Kevin during their marriage. After their marriage broke down, Kevin remained in the custody of his mother and Saul continued to provide emotional and financial support to Kevin. It appears that Saul became aware, near the end of the parties' marriage, that his wife may have had an extramarital affair and that he may not be Kevin's biological father. He did not, however, take any steps to determine parentage until December 1992, some ten years after the parties' separation.

5. In the parties' separation agreement dated October 27, 1989, Saul undertook to provide child support for Kevin. In the agreement it was acknowledged that the parties' children, including Kevin, were children of the marriage as defined in the Divorce Act. Paragraph 3 of that agreement deals with the support for Kevin. The former wife received

\$700 each month as child support for Kevin. This was to continue until the earlier of the events as set out in the agreement. ...”

[197] The court dealt with the other elements of the claims, where after the court considered the issue of “*Public Policy*” and concluded as follows at para 20 of the judgment:

“20. Do the former husband's actions offend public policy? The former husband is effectively saying that every spouse has a duty to tell his or her spouse of any extramarital affair he or she may have had during the marriage. It is unclear whether the former husband thinks that this must be done when it occurs, immediately thereafter, or some time later. Marriage is still a private domain and the public, through the judicial system, should not be involved in scrutinizing the behaviour of spouses in private matters while they are not involved in the judicial system. Saul chose to treat Kevin as a child of the marriage until 1992. In the separation agreement, Kevin is referred to as a child of the marriage. For what appears to be purely monetary reasons, as opposed to moral reasons, Saul has brought on this lawsuit against his former wife. Kevin was asked to take the paternity test, thereby dividing the children as a family unit, perhaps creating embarrassment for any or all of them. Saul seeks to not only repudiate his ongoing support for Kevin but asks for damages against his former wife for the support which was paid and was used, not for her benefit, but for the benefit of Kevin. This, in my view, offends public policy. The money paid was for child support and not spousal support.” (My emphasis)

[198] Again I respectfully agree with the approach and principles as discussed and enunciated in the aforesaid case law. The irreparable emotional damage this action caused to N, her relationship with the plaintiff and the whole family relationship, is very evident from the totality of the evidence.

[199] In addition to my findings that the plaintiff did not prove his claim on the basis of fraud, I furthermore find that his claim is *contra bonos mores* and against public policy and can for this reason also and/or in any event not succeed.

Application for Absolution of the Instance and the Costs thereof:

[200] Earlier in the judgment I indicated that Mr Ploos van Amstel applied on behalf of the defendant for absolution of the instance at the end of the plaintiff's case, which application I dismissed. I ordered that the costs of the application were to stand over for later adjudication.

[201] Both Mr Ploos van Amstel and Mr Cronjé addressed me comprehensively on the merits and demerits of the application. Mr Cronjé also filed written heads of argument in further support of his oral arguments which he advanced on behalf of the plaintiff in opposing the application.

[202] I have already set out the plaintiff's evidence in detail.

[203] The test to be applied when considering an application for absolution of the instance at the end of end of a plaintiff's case, is, *inter alia*, set out in the well-known judgment of **Claude Neon Lights (SA) Ltd v Daniel** 1976 (4) SA 403 (AD) at 409 G – H. Harms JA (as he then was) dealt with the aforesaid test in **Gordon Lloyd Page & Associates v Rivera and Another** 2001 (1) SA 88 (SCA) at para [2]:

“[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G - H in these terms:

‘. . . (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. ...’

This implies that a plaintiff has to make out a *prima facie* case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff... As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one ... The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice. ...”

[204] Credibility seldom arises when considering absolution of the instance at the end of the plaintiff's case. In the matter of **Hartzer v De Sousa** 2015 JDR 1320 (GP), to which Mr Cronjé referred, the court stated the following in this regard at para [10] of the judgment:

“[10] As for the credibility of the appellant it cannot in my view, by any stretch of imagination, be found that the plaintiff's evidence is either an utter fabrication or too vague and contradictory to constitute proof of his claim for restitution pursuant to a mutual cancellation of the agreement (***Ruto Flour Mills (Pty) Ltd v Adelson (2)*** 1958 (4) 307 (T)). In deciding whether absolution should be granted or not, it must be

assumed, in the absence of special considerations, such as for example that the evidence is inherently unacceptable, that the evidence is true (*Atlantic Continental Assurance Co of SA v Vermaak* 1973 (2) SA 525 (E)). ...”

[205] In considering the application for absolution of the instance, I deemed the following principles set out and applied at para [11] of the **Hartzer**-judgment, very applicable to the matter *in casu*:

“[11] ...The real issue concerning restitution has received preciously scant attention. This case involves not only evidence but also, and more importantly so, the consideration and application of legal principles flowing from an agreed cancellation of contract (cf *Ruto Flour Mills* (310C-E) where it was held:

‘In a comprehensive case, such as the present one, where there is a diversity of facts justifying different inferences, of which some can establish the plaintiff’s case, the Court would be acting contrary to the rules referred to, if it paused to consider the value and persuasiveness of the evidence at this stage. If the defendant wishes the Court to do so, he should close his case. The Court should hear all the evidence and leave itself free to express its view of the evidence for the plaintiff at the end of the case.’” (My emphasis)

[206] In **Brickhill v Copper Sunset Trading 223 (Pty) Ltd t/a Retail Crossings Superstar** [2012] JOL 28824 (GSJ) at para [11] the court referred to and applied the following additional principles:

[11] The court has a discretion whether to grant absolution from the instance or not. In exercising such discretion, it has to determine whether it is in the interests of justice to bring the litigation to an end.

Where the legal position is uncertain the interests of justice are better served by the refusal of absolution. (My emphasis)

[207] With regard to the last-mentioned principle to be applied when the legal position is uncertain, it is the Constitutional Court who determined same in **Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)** 2001 (4) SA 938 (CC) at para [80]:

[80] ... But where the factual situation is complex and the legal position uncertain, the interests of justice will often better be served by the exercise of the discretion that the trial Judge has to refuse absolution. If this is done, the facts on which the decision has to be made can be determined after hearing all the evidence, and the decision can be given in the light of all the circumstances of the case, with due regard to all relevant factors. This has the merit of avoiding the determination of issues on the basis of what might prove to be hypothetical facts. ...”

[208] The court may also have regard to the possibility that the plaintiff's case may be strengthened by evidence emerging during the defendant's case. See **Ruto Flour Mills (Pty) Ltd v Adelson (2)** 1958 (4) SA 307 (T) at 310 A – B.

[209] When I applied the aforesaid test and principles to the evidence of the plaintiff and considered the nature of the legal principles which stand to be adjudicated, I concluded that the application for absolution should be dismissed.

[210] When the reserved costs of the application were argued at the conclusion of the trial, Mr Cronjé and Mr Ploos van

Amstel were *ad idem* that almost a whole court day was previously spent on presenting arguments pertaining to the merits of the application. It was the first day (6 March 2018) of three court days (6, 7 and 9 March 2018) to which the trial had previously been postponed. I gave the order relating to the outcome of the application the morning of 7 March 2022, where after the trial immediately continued with the presentation of the defendant`s evidence. No court time was consequently wasted for purposes of the preparation for the application by the parties and/or for purposes of my consideration of the merits of the application.

[211] In his written heads of argument filed for purposes of the arguments on the merits of the trial, the costs thereof and the reserved costs of the application for absolution from the instance, Mr Cronjé submitted that the application was premised on the application of the decision in **DE v RH** (the judgment by the Constitutional Court on whether the cause of action based on adultery still has a place in our law), that I correctly dismissed the application and that the defendant, as the unsuccessful party to the application, should be ordered to pay the costs of the application.

[212] Mr Cronjé referred to and relied on the judgment in **De Klerk v Absa Bank Ltd and Others** 2003 (4) SA 315 (SCA) at para [1] where the Supreme Court of Appeal said the following:

“[1] Counsel who applies for absolution from the instance at the end of a plaintiff's case takes a risk, even though the plaintiff's case be weak.

If the application succeeds the plaintiff's action is ended, he must pay the costs and the defendant is relieved of the decision whether to lead evidence and of having his body of evidence scrutinised should he choose to provide it. But time and time again plaintiffs against whom absolution has been ordered have appealed successfully and left the defendant to pay the costs of both the application and the appeal and with the need to decide what is to be done next. The question in this case is whether the plaintiff has crossed the low threshold of proof that the law sets when a plaintiff's case is closed but the defendant's is not.

[213] Mr Cronjé contended that the aforesaid remarks by the court were a warning to counsel (and parties) about the risks of attendant costs orders when applications for absolution are brought at the close of a plaintiff's case.

[214] The Supreme Court of appeal made the abovementioned remarks in paragraph [1] of the judgment. In my view they were consequently made as introductory remarks. Although I agree with Mr Cronjé that the remarks were clearly intended to be a warning, I do not interpret the warning to constitute a general principle that an unsuccessful application for absolution from the instance at the close of a plaintiff's case will or should (always) be coupled with an adverse costs order against the unsuccessful defendant.

[215] It is trite that the usual order is that costs follow the event (or result), that is, the successful party should be awarded his or her costs. However, this is subject to the general principle regarding the award of costs which is well settled, as again confirmed in **Wanderers Club v Boyes-Moffat and Another** 2012 (3) SA 641 (GSJ) at 643 I – J:

“It is entirely a matter for the discretion of the court, which is to be exercised judicially upon a consideration of the facts of each case, and in essence it is a matter of fairness to both sides (cf *Gelb v Hawkins* 1960 (3) SA 687 (A) at 694A; *Graham v Odendaal* 1972 (2) SA 611 (A) at 616A; Cilliers *Law of Costs* at 2.03 – 2.05).”

[216] In **Law of Costs**, AC Cilliers, LexisNexis, Issue 41, October 2022 - SI 46 at paragraph 2.23A the following principles are cited, specifically with regard to applications for absolution from the instance:

“Absolution from the instance

Another illustration of the application of the general rule that success carries costs is that an order of absolution from the instance normally entitles the defendant to costs. Where absolution is sought unsuccessfully i.e. is not granted, the usual order, it is suggested, ought to be that the costs are to be costs in the cause. This proposition is effectively supported by the decision of the Supreme Court of Appeal in *Koukoudis v Abrina* [**Koukoudis and Another v Abrina 1772 (Pty) Ltd and Another** 2016 (5) SA 352 (SCA)], where the court said the following:

[56] At the end of the respondents’ case, the appellants applied unsuccessfully for absolution from the instance. In paragraph 2 of the order of the court *a quo*, the appellants were ordered to pay the costs of that application jointly and severally, although each party was ordered to pay its own costs for the period that the matter had stood down to allow the parties to prepare for the application. The appellants argued that they should be entitled to those costs as absolution ought to have been granted. The trial judge had a discretion as whether to grant absolution. She probably exercised that discretion on an incorrect factual basis, but it seems to me to be unnecessary to deal with the correctness of her decision in that

regard as I see no reason why a specific order as to costs in respect of the absolution proceedings need be made. *Applications from the instance and their preparation all form part of the trial proceeding and a specific order relating to those costs seems superfluous.* The appellants, however, suggested that each party should pay its own costs relating to the period the matter stood down for the preparation of the application for absolution. That order operates in favour of the respondents and so, if that's what the appellants wish, I have no difficulty in granting the request.” (My emphasis)

[217] I respectfully agree with the last mentioned principle enunciated by the Supreme Court of Appeal. Therefore, and in exercising my discretion in view of the facts and circumstances of this trial, I deem it appropriate that the costs of the application for absolution of the instance, are to be costs in the action.

The reserved costs of the postponement of the trial on 12 December 2017:

[218] On 13 September 2017, after the conclusion of the plaintiff's evidence, the trial was postponed by agreement between the parties to 12, 13 and 15 December 2017.

[219] However, the defendant was admitted to hospital on 4 December 2017, which was confirmed by a Medical Certificate, dated 6 December 2017. The parties' respective attorneys of record communicated with each other regarding the situation and on 11 December 2017 my Registrar received an email which advised that due to the defendant's

incapacity to attend the trial, the matter will be postponed by agreement between the parties.

[220] On 12 December 2017 I consequently issued the following order by agreement between the parties:

- “1. The matter is postponed to 6, 7 & 9 March 2018.
2. The costs of the postponement to stand over for later adjudication.”

[221] During argument Mr Cronjé submitted that the defendant should be ordered to pay the wasted costs occasioned by the postponement on 12 December 2017. He submitted that the plaintiff accepted the *bona fides* of the defendant with regard to her incapacity and her consequent inability to attend the trial without questioning same and agreed to the postponement. The postponement was, however, not at the instance of the plaintiff and therefore, in exercising my discretion regarding costs, I should order the defendant to pay the wasted costs.

[222] Mr Cronjé referred to and relied on the judgment in **Manong and Associates (Pty) Ltd v City of Cape Town and Another** 2011 (2) SA 90 (SCA) at para [95]:

[95] We now address the costs of the postponement occasioned by the ill-health of the company's senior counsel hours before the scheduled hearing of the appeal on 20 August 2010. The heads of argument had been drawn by junior counsel. It is necessary to record that on that day

junior counsel representing the company informed the court that the company insisted that it be represented by the senior counsel it had retained, and his instructions were that he should not present the company's case on his own. In *Cape Law Society v Feldman* 1979 (1) SA 930 (E) the respondent was confined to hospital, too ill to attend the hearing, necessitating a postponement. In that case, there was a dispute concerning liability for the wasted costs. The court, in dealing with the contention that the award of costs should depend on the outcome of the case on the merits, stated the following (at 934A – C):

'Because of the enforced absence of the respondent this case has had to be postponed *sine die*. To that substantial extent the respondent's rights have been safeguarded and to that extent he has benefited but to that same extent the applicant has been prejudiced. It would be manifestly inequitable to prejudice the applicant further by placing it in a potentially vulnerable position of having to pay the costs of postponement if it should lose the main case.'"

(My emphasis)

[223] Mr Ploos van Amstel, on the other hand, submitted that, based on the assumption that the plaintiff will be unsuccessful with his claim, he should bear the wasted costs occasioned by the postponement. In this regard Mr Ploos van Amstel relied on the judgment in **Van Staden v Union and South-West Africa Insurance Co. Ltd** 1972(1) SA 758 (ECD). In the said matter the wasted costs occasioned by a postponement were reserved in circumstances where the plaintiff was unable to attend court after he suddenly and unexpectedly developed a venous thrombosis which

necessitated that he should remain in bed. The liability for the said wasted costs was determined at the conclusion of the trial after the plaintiff was successful in his claim and has been awarded the costs of the action. The court held as follows at 760 D – F:

“If that is so then in my judgment there is no proper basis in equity or principle for holding in the present case that the plaintiff should pay the wasted costs of postponement. That postponement was caused by the fault of neither party but it was the unsuccessful defendant who, by persisting in his defence, made it necessary for the plaintiff to litigate in the first place and, during the course of that litigation the plaintiff was obliged, through no default or fault on his part, to incur the costs of a postponement. Such costs were in my view part of the overall expense to which the plaintiff was put in prosecuting a lawful claim which the defendant resisted and which expense would not have been incurred if the defendant had initially paid the damages which it has now been held liable to pay...”

[224] The aforesaid **Van Staden**-judgment was not followed in the judgment of this court in **Grobbelaar v Snyman** 1975 (1) SA 568 (O). As a result of heavy rains the defendant in the **Grobbelaar**-judgment was cut off on his farm from the outside world by floods and therefore could not attend the trial on the date of set down. The parties in the circumstances agreed that the case should be postponed *sine die*, but an agreement could not be reached as to who should pay the wasted costs as a result of the postponement. IN deviating from the **Van Staden**-judgment, the court held as follows at 570 H – 571 D:

“ADDLESON, R., het egter in *Van Staden* se saak die kwessie van die aanspreeklikheid vir die betaling van koste wat verkwis is as gevolg van 'n uitstel wat sonder enige skuld van die partye onvermydelik was, slegs vanuit die oogpunt van die uiteindelik-triomfantlike partye benader. Na my oordeel is so 'n benadering te beperk en eng. Billikheidsoorwegings geld ook by die bepaling van aanspreeklikheid vir betaling van verkwiste koste, en aangesien 'n kostebevel in wese billik teenoor albei partye moet wees, behoort die aangeleentheid vanuit die oogpunte van beide partye beoordeel te word. Die teenwoordigheid van die verweerder by die verhoor van die saak, was nie die eiser se verantwoordelikheid nie. Hy moes net sorg dat hy en sy getuies daar teenwoordig en slag gereed is. Dit het hy gedoen. Dit is klaarblyklik van groot belang vir 'n eiser dat sy vordering so spoedig moontlik bereg word. Omdat die verweerder in die onderhawige geval egter onskuldiglik afwesig was, kon eiser nie met die verhoor van sy eis voortgaan ten nadele van die verweerder nie en moes die verhoor noodgedwonge *sine die* uitgestel word.

Tot daardie belangrike mate is die verweerder se regte deur die uitstel van die saak beskerm en is hy daardeur bevoordeel, maar is die eiser daardeur tot dieselfde mate benadeel. Om vir die eiser nog verder te benadeel deur hom in die gevaar te stel om, indien hy uiteindelik in die geding die onderspit delf, die verkwiste koste van die uitstel ook nog te moet dra, is om die regverdige-gebalanseerde skaal van billikheid met die skawende juk van onbillikheid te vervang. ...”

The court held that the defendant should be ordered to pay the wasted costs.

[225] The **Van Staden**-judgment was also not followed in **Westbrook v Genref Ltd** 1997 (4) SA 218 (D). Instead, the **Grobbelaar**-judgment was followed. In the **Westbrook**-judgment a postponement was sought by the defendant

because of the death of an important witness on the day before the trial was due to start. The court said the following at 221 J – 222 D:

“I am inclined to the view that the approach taken by Addleson J in *Van Staden's* case was somewhat narrow. There is reference to the 'rash litigant' and there is reference to the fact that the unsuccessful defendant, by persisting in his defence, made it necessary for the plaintiff to litigate in the first place.

My approach to the situation is that, in the ordinary course of events, a party is permitted to litigate at the risk of payment of costs. If his conduct has been such as to demonstrate that his claim or defence was vexatious or totally without substance, then comes the time for a special order, that usually being costs on the attorney and client scale. But, in the ordinary course of events, the unsuccessful litigant, who has had a reasonable claim or defence, one in which triable issues are raised, should not be mulcted in additional costs. It is here that I see the wasted costs in issue in this case as being additional costs.

In the exercise of my discretion, I consider that the approach of M T Steyn J was correct. One must see the situation as one in which, although there was no fault on the part of the defendant, it is nevertheless a case in which the plaintiff was ready to proceed, and one in which the plaintiff is being prejudiced by the delay. I am inclined to exercise my discretion in the plaintiff's favour. (My emphasis)

[226] I respectfully agree with the last-mentioned approach.

Costs of the action:

[227] Other than for the specific costs which I dealt with above, there is in my view no reason why the general rule that costs follow the outcome of litigation, should not be applicable in

this instance. No arguments to the contrary were advanced by counsel either, in my view correctly so.

Order:

[228] For the aforesaid reasons I made the order cited at the beginning of the judgment.

C. VAN ZYL, J

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On behalf of the defendant:

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