Editorial note: Certain information has been redacted from this judgment in compliance with the law.

Case number 556/93

IN THE SUPREME COURT OP SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

BARRY BAARS Appellant

and

JEANETTE ELAINE SCOTT

Respondent

CORAM: CORBETT CJ et E M GROSSKOPF, F H GROSSKOPF, HOWIE et MARAIS JJA

DATE OF HEARING : 16 MAY 1995

DATE OF JUDGMENT : 31 MAY 1995

JUDGMENT

HOWIE JA/

.....

HOWIE JA :

This is an appeal against the decision of Spoelstra J in the Witwatersrand Local Division dismissing appellant's application for the grant of access to his minor illegitimate son. Respondent is the boy's mother. The decision of the Court a quo is reported as B v S 1993 (2) SA 211 (W). The appeal is with leave of that Court.

In support of the appeal three main submissions were advanced. I shall deal with them one by one. The first was that, as a matter of law, the father of an illegitimate child has an inherent right of access, which right vests in him by reason of paternity alone. The Court below held (at 214 B-F) that appellant had no such right.

As this first submission was not dependent on the facts I shall refer to them only later.

The thrust of the present argument was this. The relevant common law writers are silent concerning

access by a father to his illegitimate child but this cannot mean

that in the times in which they wrote, a paternal right of access to an illegitimate child was not recognised. However, even if no such right was acknowledged then the Court should now, on the basis of justice and equity, declare the existence of that right in order to ensure that the father of an illegitimate child stood, as regards access, in no position inferior to that of the father of a legitimate child.

In contending that the supposed right could well have existed in Roman-Dutch law, appellant's counsel pointed out that, contrary to the position in Roman law, where an illegitimate child was regarded as having no father (see, for example. Institutes, 3.5.4), in Roman-Dutch law the father's existence and identity qua father were undoubtedly recognised. He was for instance, burdened with the duty of support and he was, like any father, barred from marrying within certain degrees of affinity. In addition, said counsel, it was consistent with some measure of

parental

authority on the father's part that, according to Brouwer, De Jure Connubiorum. vol. 1, p 32, para 15, his consent was required for the marriage of his illegitimate child.

None of those three features assists appellant. Access, like custody, is an incident of parental authority: see Boberg, The Law of Persons and the Family 459 - 460 and cases cited there. Consequently, if access is the father's entitlement as a matter of inherent legal right it can only stem from his parental authority. The duty of support and the marriage impediment in no measure imply the existence of any parental authority from which the supposed right of access could have been derived. As for Brouwer, at 39 - 40 of the volume referred to (as translated by P van Warmelo and F J Bosman, 1 st ed) the author, commenting on the paragraph relied on by appellant's counsel, was discussing a requirement of the Political Ordinance of Zeeland that consent to

marriage be given by the "ouers". Having posed the question whether this included the natural father of an

illegitimate child, he offered the answer that while in natural law it would, in civil law such a father was regarded as "onseker" and he was therefore of the view that "daar nie so sterk nadruk op sy toestemming gelê moet word nie". This authority therefore provides no support of any substance for counsel's suggestion.

The fact is that in Roman-Dutch law an illegitimate child fell under the parental authority, and thus the guardianship and custody, of its mother; the father had no such authority: Van Leeuwen, Het Roomsch Hollandsch Recht 1.7.4; Van Bynkershoek, Ouaestiones Juris Privati 3.11; Van der Linden, Kooomans Handboek 1.4.2. To acquire parental authority he had either to marry or be married to the child's mother or he had to adopt the child: Voet, Commentaries ad Pandectas 1.6.4.

In the light of those authorities it cannot, in my view, be said that the common law is silent - in

the sense of conveying nothing - as regards access by a father to his

illegitimate child. The most that can be said in support of appellant's argument is that there is nothing express on the subject. However, the very clear implication in what is indeed said is that, having no parental authority, such a father was bereft of the very power from which any supposed inherent right of access could have originated ex lege.

That was the common law that was received into this country and which must still apply unless it can be said that it has been altered in any significant way by judicial exposition since.

A study of the relevant South African case law concerning access by a father to his illegitimate child shows the following.

Access was granted by the court in Wilson v Ely 1914 WR 34 and Matthews v Haswari 1937 WLD 110 but appellant's counsel understandably disavowed reliance on those cases. They do not constitute persuasive or

even helpful

precedents in regard to the present question. In Wilson, access was granted on the erroneous basis that it was, in effect, in return for the payment of maintenance. In Matthews, the court must, one infers, have thought access to be in the interests of the child, but the law is not discussed in the judgment.

In Docrat v Bhayat 1932 TPD 125 the father applied for custody, the mother having died. The child in question was born of their Muslim marriage. In the course of his judgment De Wet J remarked (at 127-8) that the father had "no locus standi at all" as far as custody was concerned, that he was "not entitled to the custody of the child" and that he had "no legal claim to the child". These statements were not supported by reference to any authority but from what I have already said they were in line with the common law and would also have applied to the matter of access. That the court meant that the father had no claim ex lege is clear from the fact that it went

on to consider

granting custody to the father nevertheless but came to the conclusion, on the facts, that he had failed to discharge the onus of showing that the child's interests would be enhanced by its removal from the apparently satisfactory custody then being exercised by the mother's sister and her husband.

Douglas v Mayers 1987 (1) SA 910 (ZH) was a case in which the father sought access as a matter of inherent right. Reviewing the law on the present point, the court referred in its judgment to Boberg, op. cit., at 333-4, Spiro, The Law of Parent and Child, 3rd ed., at 425-6 and to the cases of Wilson, Matthews and Docrat. Reference was also made to the case of Davids v Davids 1914 WR 142 in which, apparently, (the report is not available to me) the best interests of the child led to the award of custody to the father and access to the mother. The conclusion reached by Muchechetere J on the strength of this survey was that the father had no inherent

right to access but did

have the right to claim, and be granted, access if it was in the child's best interests (see 914 D-E).

In F v L and Another 1987 (4) SA 525 (W) (the same judgment is reported as D v L and Another in 1990 (1) SA 894 (W)) the father applied for the appointment of a curator-ad-litem preparatory to his suing for a declarator inter alia that he had an inherent right of access to his child. The best interests of the child were not referred to in the papers or in argument and were therefore irrelevant to the point raised. Harms J relied on common law and case law, inter alia the decision in Docrat's case, for his conclusion that because the father could not acquire parental authority simply by reason of paternity, he had "no prima facie right of access". The Douglas case was not mentioned.

F v B 1988 (3) SA 948 (D) takes the matter no further because it was decided on the basis of both counsel's acceptance of the conclusion in Douglas as

correct.

B v P 1991 (4) SA 113 (T) was an appeal against the decision of a single Judge dismissing the father's access application. His case was that he had a right to access (what is referred to in the instant case as an inherent right) and also that such access was in the best interests of his child. Following the decision in F v L, it was held (at 114E) that the right contended for did not exist. The court then proceeded to state (at 115A) that a father could nonetheless obtain an order for access "in certain circumstances". What those circumstances were emerged later in the judgment where (at 117F) it was explained that it was for the father to show that access would be in the best interests of the child (the paramount consideration) and would not unduly interfere with the mother's right of custody.

The next case to be considered is that of Van Erk v Holmer 1992 (2) SA 636 (W). The reported decision in that matter constitutes the cornerstone

of appellant's case.

There, as recorded at 636I - 637C, an opposed access application was referred to the Family Advocate for investigation and recommendation. The latter duly recommended that access in certain defined respects be granted to the father. This recommendation was accepted by the court (Van Zyl J) and the parties then settled the matter on the basis that the father be accorded reasonable access. Their agreement was made an order of court. Despite disposal of the case in that way the parties then requested the court to furnish its reasons for accepting the Family Advocate's recommendation. In this regard the judgment reads (at 637 B-C) as follows:

> "Because of the importance of the matter, however, the parties requested that reasons should be furnished for the Court's accepting the Family Advocate's recommendation, particularly in view of the suggestion put forward that, despite the existence of precedents to the contrary, the time might have arrived for the recognition by our Courts of an inherent right of access by a natural father to his illegitimate child. Counsel for both parties and also Mr W Schroeder of the South African Law

Commission have in the meantime submitted various sources dealing with this vexed

question."

Van Zyl J acceded to this request. In his reasons he undertook a careful review of the various common law sources, the cases discussed above and a number of articles by South African academic writers for or against the inherent right for which appellant contends. The learned Judge then surveyed relevant legal provisions and writings in England, Australia, Canada and the United States of America and observed (at 646J - 647A) that, save for one instance (the Australian Family Law Council's suggestion that an inherent right not be recognised) the question of the existence of the alleged right had not arisen for consideration. Reverting to the South African sources and cases, he proceeded to set out his reasons for the eventual conclusion (at 649I - 650A) that the time had arrived for the recognition by the courts of the inherent right in issue, which recognition was justified by the precepts of justice, equity and

reasonableness and by the demands of

public policy.

In S v S 1993 (2) SA 200 (W) and in the unreported case to which I shall refer as A v D (SECLD) case 1456/92, in which judgment was given on 3 March 1995, the courts concerned declined to follow Van Erk and applied B v P, supra.

Before discussing the reasons stated by Van Zyl J in Van Erk it is necessary to analyse the circumstances in which they were given.

Nothing in the report of the case suggests that the present question of law was ever a contested issue requiring decision. In the discussion of the facts at 637 D-G and 650 A-C and the court's references to the interests of the child, the mother's opposition is stated to have been based on the assertion that the father ought not to have access, not that he was disentitled to access as a matter of law. The fact that the case was referred for the investigation and recommendation of the

Family Advocate is

consistent with the real issue being whether access was appropriate and not whether access was the father's inherent legal right. Be that as it may, even if the Family Advocate did contend for that right, consideration of the recommendation by the court did not involve the judicial process of adjudication involving the hearing of argument on both sides and the making of a considered decision disposing, either by way of a judgment or a ruling, of the issues thus presented. That being so, and apart from the fact that no reasons were asked for at that stage, the court's duty to consider and decide upon the acceptability of the report did not encompass the obligation to furnish reasons for acceptance. Reasons for rejection might have been given, if at all necessary, had the case not been settled and had it proceeded to judgment but that is quite another matter. Moreover, if, as was recommended, access by the father to the child was

desirable, it could only have been because that was in the

best interests of the child. And if it was in the best interests of the child then, on the strength of the cases which preceded Van Erk, the father was entitled to request and be granted access in any event. Accordingly, had it been necessary for the court to hear debate and to give a considered decision for accepting the Family Advocate's recommendation that decision would, on the question of an inherent right, have been obiter.

To sum up the position that obtained before the settlement, therefore, it was that any judgment on the present point would have been obiter but that no judgment or ruling was either required in law or given.

After the order was made incorporating the settlement, there was no longer any lis between the parties and the Judge's work was finally done. In the circumstances the court was asked to give its reasons on the present legal question as if it was then an issue between the parties and as if the court was

properly seized of it, neither of which

was so. And these were not reasons, reserved at an earlier stage, which had to be furnished for the purposes of possible further litigation or an appeal. Further proceedings had been excluded by the settlement.

Accepting that his reasons were given with the genuine and sincere commitment and sense of obligation on the part of the learned Judge not only to assist the parties in regard to possible future disputes between them as to access, but also to lay down the law on what is a sensitive and controversial subject, the fact is that the reasons really comprise no more than an opinion. From what has already been said they did not, and could not, constitute a judgment disposing of an issue between the litigants.

However, because of the attention which the present point has attracted in recent years, I shall consider the reasons as if they did amount to a judgment on a live issue between the parties.

The reasons appear at 647B - 649I and the essentials

may be summarised as follows. Just because the common law says nothing about a father's right of access to his illegitimate child, this does not warrant the conclusion that such right cannot exist. Access should not always or necessarily be regarded as an incident of parental authority - it can be granted when it is in the child's best interests and it cannot be said that such grant confers parental authority. Because the existence of an inherent access right is excluded by neither the common law nor legislation it is the obligation of the courts to decide the present issue in accordance with the precepts referred to above. The interests of the child do not justify an access right being dependent on whether it is legitimate or illegitimate seeing that extra-marital cohabitation is more prevalent nowadays and less disapproved of than in earlier times. Emphasis placed in judgments and writings upon the child's rights rather than those of the parents

justifies the approach that the child

should have the chance to form a lasting relationship with both parents whether or not one or other is married to a third party. Just as no distinction is warranted between legitimate and illegitimate children, so no distinction should be drawn between the rights of their respective fathers. Finally, it is a gross injustice that a father is compelled to pay maintenance when he is not entitled as of right to access and because of the reciprocal benefits of the father-child bond, he should have this right unless it is clearly not in the best interests of the child.

It seems to me that the conclusive legal answer to all these contentions is simply this. As I have explained, the common, law does indeed provide clearly enough what a father's position is as regards access in a relationship like the present, even if what is conveyed is a matter of necessary implication and not express statement. In South Africa that law

was been applied - correctly, in my view -in F v L and B v P, supra. It follows that this is not a

topic on which it is open to a court to take the approach adopted by Van Zyl J. If the law is sufficiently clear, as I consider it is, then the judicial function is to expound, not to legislate. According to the law as it is, the right to access depends for its existence on parental authority. A father such as appellant does not have that in the eyes of the law. But he may be granted access if that is in the best interests of his child.

It may well be that most fathers of illegitimate children nowadays are concerned about the welfare of their children and committed to enhancing the latter's best interests, particularly where the children are born of a so-called live-in relationship between the parents. If there are sound sociological and policy reasons for affording such fathers an inherent access right, in addition to the right they already have to be granted access where it is in the best interests of their children, then that is a

matter that can only be dealt with

legislatively.

Having stated what the law is, I proceed to consider to what extent it currently discriminates unfairly against the father of an illegitimate child as was contended on appellant's behalf.

In the first place the question arises as to how appropriate it is to talk of a parent having a legal right at all in the present context. Allied to that is the question whether proceedings such as these are, like ordinary civil litigation, adversarial in nature and whether an onus of proof is involved. Considerable guidance is afforded by recent dicta in England in cases involving children born out of wedlock.

In A v C [1985] FLR 445 (CA) Ormrod LJ said the following at 455 E-H:

> "(The Judge a quo) took the point at an early stage in the judgment, when he came to deal with the law, that it was a mistake to talk, in relation to access, in terms of rights, and he was undoubtedly, in my judgment, correct in what he said. The word 'rights'

> is a highly confusing word which leads to a great deal of trouble if it is used loosely, particularly when it is used loosely in a court of law. So far as access to a child is concerned, there are no rights in the sense in which lawyers understand the word. It is a matter to be decided always entirely on the footing of the best interests of the child, either by agreement between the parties or by the court if there is no agreement ... The first and paramount consideration (is) the welfare of the child, bearing in mind, of course, the wishes and feelings and so on of the respective parents and other people concerned with the child, but always bearing in mind that the decision must rest in terms of the best interests of the child, having taken all these other factors into account."

As regards the observation by the judge a quo in that case that "(p)rima facie a parent should have access to his child", Ormrod LJ said at 456 A-B:

> "I would differ from that only to this extent: while it is a correct statement of the general practice, it is always a little dangerous in these cases where judges talk in terms of presumption and burden of proof. It leads to many very false conclusions if it is pressed too far. It is simply a statement of common sense that in the ordinary way, as society today is constituted, both parents should be in contact with their children, even if they have parted.

It is no more than that and I would deprecate any idea that there is a presumption either way in these matters or an onus either way."

These statements, which are of just as much application in South Africa, were cited with approval in Re KD (a minor) (ward : termination of access) [1988] 1 All ER 577 (HL) at 589 c-f.

In the latter case the court of first instance refused access to the mother where her illegitimate child was in the satisfactory care of foster parents. The mother's attempts to have that result reversed failed both in the Court of Appeal and in the House of Lords. Concerning the argument that the mother had a legal right of access, which should be inhibited only if the Court were satisfied that its exercise would be adverse to the child's interests, Lord Oliver, with whose speech the other Law Lords agreed, stated (at 588 e-f) the essential concept in this regard as being that the natural bond and relationship between parent and child gives rise to universally recognised norms which ought not to be gratuitously interfered with unless the welfare of

the child dictated doing so. Noting that the

word "right" is used in a variety of senses, popular and jurisprudential, from a contractual right to a privilege to an essential liberty such as the so-called "right to work", the learned Law Lord said (at 588 g-j):

> "Parenthood, in most civilised societies, is generally conceived of as conferring on parents the exclusive privilege of ordering, within the family, the upbringing of children of tender age, with all that that entails. That is a privilege which, if interfered with without authority, would be protected by the courts, but it is a privilege circumscribed by many limitations imposed both by the general law and, where the circumstances demand, by the courts or by the authorities on whom the legislature has imposed the duty of supervising the welfare of children and young persons. When the jurisdiction of the court is invoked for the protection of the child the parental privileges do not terminate. They do, however, become immediately subservient to the paramount consideration which the court has always in mind, that is to say the welfare of the child. That is the basis of the decision of your Lordships House in J v C and 1 see nothing in R v UK which contradicts or casts any doubt on that decision or which calls now for any reappraisal of it by your Lordships. In particular, the

description of those familial rights and privileges enjoyed by parents in relation to their children as 'fundamental' or 'basic' does nothing, in my judgment, to clarify either the nature or the extent of the concept which it is sought to describe."

At 590 c-f Lord Oliver continued:

"... I do not find it possible to conceive of any Circumstances which could occur in practice in which the paramount consideration of the welfare of the child would not indicate one way or the other whether access should be had or should continue. Whatever the position of the parent may be as a matter of law, and it matters not whether he or she is described as having a 'right' in law or a 'claim' by the law of nature or as a matter of common sense, it is perfectly clear that any 'right' vested in him or her must yield to the dictates of the welfare of the child. If the child's welfare dictates that there be access, it adds nothing to say that the parent has also a right to have it subject to considerations of the child's welfare. If the child's welfare dictates that there should be no access, then it is equally fruitless to ask whether that is because there is no right to access or because the right is overborne by considerations of the child's welfare. For my part, I think that Arnold P's analysis in Hereford and Worcester CC v J A H places the emphasis perhaps too much on the necessity of finding a positive benefit to the child from parental access. As a general proposition a natural parent has a claim to access to his or her child to which the court will pay regard and it would not I think be inappropriate to describe such a claim as a 'right'. Equally, a normal assumption is, as Latey J observed to M v M (child : access; [1973] 2 All ER 81 at 88, that a child will benefit from continued contact with his natural parent. But both the 'right' and assumption will always be displaced if the interests of the child indicate otherwise ..."

In the same vein, at 591 e-f is the following passage:

> "— the parental rights or claims which undoubtedly exist and to which a proper regard must always be paid both by the court and by local authorities having the care of children are and must always be qualified by the consideration of what is best for the welfare of the child whom it is the court's duty to protect."

The dicta in these cases are clear and persuasive. They show that no parental right, privilege or claim as regards access will have substance or meaning if access will be inimical to the child's welfare. Only if access is in the child's best interests can access be granted. The child's welfare is thus the central, constant factor in every instance. On that, access is wholly dependent. It is thus the child's right to have access, or to be spared access, that determines whether contact with the non-custodian parent will be granted. Essentially, therefore, if one is to speak of an inherent entitlement at all it is that of the child, not the parent. (Cf Dunscombe v Willies 1982 (3) SA

311 (D) at 315 in fine; L. Kodilinye: "Is

access the right of the parent or the right of the child? A Commonwealth view", International and Comparative Law Quarterly vol. 41, January 1992, 190; International Convention of the Rights of the Child, United Nations General Assembly Resolution 44/25, 20 November 1989, ratified by South Africa on 29 January 1993).

The importance of that conclusion lies not only in its identification of the person in whom any inherent right truly vests but also in its demonstration of the practical reality that the father of an illegitimate child is not unfairly discriminated against. It is true that the father of a legitimate child has a right of access at common law (Lecler v Grossman 1939 WLD 41 at 44 and Botes v Daly and Another 1976 (2) SA 215 (N) at 220 F-G), with which right he can confront the mother if she refuses access. But that right will be to no avail if for any reason she persists in her refusal. He will then have to go to court for an order enforcing

access. If access is found to be adverse to the

child's welfare, he will fail. By comparison, the father of an illegitimate child who considers access is in the best interests of the child can confront the mother with the contention that he should, on that ground, be granted access. If she refuses to concede that, he will have to go to court to obtain an order granting him access. As in the other example, he will fail if access is not in the child's best interests. The difference between the respective positions of the two fathers is therefore not one of real substance in practice.

Then, in so far as it was submitted that the father of an illegitimate child should be accorded an inherent access right on the basis of justice, equity and public policy, it is, in the first place, significant that despite a thorough comparative survey of the relevant law of other countries with similar legal systems, appellant's counsel was unable to refer to any in which the right contended for has been recognised or granted. Secondly, the benefits of

justice,

equity and public policy are not only for fathers. They extend also to the mothers and children. It is difficult to see the fairness to the mother and child in a case where the father, whose contact with the mother has been little more than the act from which he derives his status, returns many years later and troublesomely insists on access to a child to whom he is a complete stranger. This may be a rare occurrence in fact but counsel has argued the principle. It is apposite here to note what Balcombe LJ said in Re H and another (minors) (adoption ; putative father's rights) (No 31 [1991] 2 All ER 185 (CA) . After recounting that United Kingdom legislation in 1987 and 1989 had improved the lot of a father by removing certain statutory disabilities attaching to his legal position vis

à vis his illegitimate child, the learned Lord

Justice said

(at 189 a-d):

"The method adopted was not to equate the

father of a child born out of wedlock with the father of a legitimate child: it was to give the putative (or

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

If the parents of an illegitimate child cannot

agree

that the father's access will be in the best

interests of

the child and he is therefore compelled to go to

court then

it seems to me to be altogether just and equitable

that he

should have to canvass, inter alia, the three points

in the

above-quoted passage in order to enable the court to establish what is best for the child's welfare. Should the parent-child relationship be one originating from their all having lived as a family (for example, within the context of a customary or religious marriage not recognised by civil law), the advantages to the child of paternal access should, in the vast majority of such cases, be self-evident and augur well for a favourable finding on the three aspects listed in Re H supra.

Finally, whilst obviously not authoritative, there are the recommendations by the South African Law Commission in its report to the Minister of Justice dated July 1994. The report, compiled after thorough research and investigation over several years on the present issue, recommends, not the recognition or grant of an inherent right, but the confirmation of the father's right to apply to court for the grant of access where such access is in the best interests of the child.

In summary, therefore, current South African law does not accord a father an inherent right of access to his illegitimate child. It recognises that the child's welfare is central to the matter of such access and that access is therefore always available to the father if that is in the child's best interests. In both these respects the law is in step with that in the leading foreign jurisdictions referred to in argument.

Appellant's first submission therefore fails.

The next submission can also be dealt with without reference to the facts. It was that the court a quo misdirected itself in approaching the matter on the basis (stated in the reported judgment at 214G) that there was an onus on appellant to satisfy the court that there was "a very strong and compelling ground" to find that access would be in the best interests of his child.

In regard to the matter of onus and the

evidence it required of appellant, the learned Judge dealt with the

subject pari passu with the question whether appellant had the inherent right discussed above. On the subject of that alleged right he considered that the court in Van Erk had erred, inter alia, in ignoring the stare decisis principle and in not regarding itself as bound by the Full Bench decision in B v P. supra. Spoelstra J then said (at 214 D- E) that the applicable principles were stated in B v P at 115C where a passage from the Douglas case, supra, was cited. The learned Judge obviously misconstrued the judgment in B v P as endorsing the relevant passage in Douglas as correct in all respects and so he adopted it and quoted it with approval himself. That passage (at 914 D-E of the Douglas case) deals with the matters of inherent right and onus and reads as follows:

> "From the above, my conclusion is that there is no inherent right of access or custody for a father of a minor illegitimate child but the father, in the same way as other third parties, has a right to claim and will be granted these if he can satisfy the Court that it is in the best interests of the child. The onus is on the

applicant, in this case the father, to satisfy

> the Court on the matter and usually the Court will not intervene unless there is some very strong ground compelling it to do so."

In B v P, however, Kirk-Cohen J (giving the judgment of the Full Bench) pointed out that it emerged quite clearly in what followed immediately upon the quoted passage in Douglas that the court in the latter case had erroneously derived the perceived need for very strong compelling grounds from what was said in Calitz v Calitz 1939 AD 56 at 64.

As observed in B v P at 115 H-I, Calitz had nothing to do with an illegitimate child. It was concerned with custody by the father of a legitimate child in a situation where the parents were neither divorced nor judicially separated. In Calitz it was noted that in Scottish law the father of a legitimate child was entitled to custody during the subsistence of the marriage and would only be deprived of it by the court, acting in effect as upper guardian, in exceptional cases where there was clear evidence of

danger

to the life, health or morals of the child. On the apparent assumption that South African law was substantially the same on this aspect, this Court held that, in the absence of such factors in the case before it, the lower court had erred in depriving the father of custody.

After analysing Calitz and reviewing other case law Kirk-Cohen J concluded in B v P (at 117 A-C) that where the court acts as upper guardian it makes no difference whether the child concerned is legitimate or illegitimate. For that reason, he said, the requirement in Douglas and F v B of very strong compelling grounds was inapplicable. With respect, that conclusion is entirely correct.

It follows that the Court a quo erred in misreading B v P in this context and in requiring appellant to show a very strong and compelling ground why he should have access.

In addition it seems to me to be necessary to

lay down

that where a parental couple's access (or custody) entitlement is being judicially determined for the first time - in other words where there is no existing court order in place - there is no onus in the sense of an evidentiary burden, or so-called risk of non-persuasion, on either party. This litigation is not of the ordinary civil kind. It is not adversarial. Even where variation of an existing custody or access order is sought, and where it may well be appropriate to cast an onus on an applicant, the litigation really involves a judicial investigation and the court can call evidence mero motu: Shawzin v Laufer 1968 (4) SA 657 (A) at 662G - 663B. A fortiori that is so in the "first time" situation. And it matters not in this regard whether the child concerned is legitimate or illegitimate.

Strong support for the view that no onus lies is to be found in the above-quoted passage in A v C, supra, at 456 A-B and its subsequent endorsement

by the House of Lords in

Re KD, supra.

Moreover, if the dispute were properly ventilated by way of as thorough an investigation as may reasonably be possible, it is, to apply the point made in Re KD at 590c, difficult to envisage when the welfare of the child will not indicate one way or the other whether there should be access. That presupposes, of course, that all the available evidence, fully investigated, is finally in. It follows that if a court were unable to decide the issue of best interests on the papers it would not let the matter rest there. While there might often be valid reasons (for example, expense or the nature of the disputed evidence) for not involving expert witnesses, at the least the court would require, and if necessary call, oral evidence from the parties themselves in order to form its own impression (almost always a vital one) of their worth and commitment. Because the welfare of a minor is at

stake a court should be very slow to determine the facts by way of the usual

opposed motion approach (Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd. 1984 (3) SA 623 (A)). That approach is not appropriate if it leaves serious disputed

issues of fact relevant to the child's welfare unresolved.

In view of these conclusions I think that the Court a quo adopted the wrong approach in holding that appellant had to discharge an onus and that the matter had to be disposed of on the admitted facts and the allegations made by respondent.

Appellant's second submission was accordingly right.

The final submission advanced for appellant was that he ought to have succeeded on the facts.

The undisputed evidence is this. When the application came before the Court below in 1992 appellant was 24 years old and respondent 29. He referred to himself in the papers as a technical

manager and she called herself a data base administrator. They lived together for most of 1988 and 1989. When they parted, apparently amicably,

respondent was pregnant. Their son, D., was born on 3 July 1990. Some months before the birth appellant again went to live with respondent. While respondent was expectant a possible abortion overseas was considered in discussion with appellant's brother, a surgeon. Appellant was present when D. was delivered by Caesarian section. He left some months after the birth. He contributed towards the hospital expenses and bought various articles for the baby, including bedding. When the couple finally parted company respondent agreed that appellant could have access. Thereafter the relationship soured. In a letter from his attorneys to hers in November 1990 it was stated that he did not acknowledge paternity but that if it was established he would maintain the child. However, it is admitted in the papers that he made maintenance payments even before that letter, namely in July and August 1990, and that he made further payments from November 1990 to January 1991.

In February 1991 there was a complete cessation of contact from which time appellant had no further access despite his efforts to obtain it and the situation between the parties became even more strained than before. After that the only paternal figure available for the child was respondent's father.

Appellant did not pay maintenance after January 1991 but took out an endowment insurance policy, with the child as beneficiary, on which the monthly premiums as at the time of the drafting of the founding affidavit were R451,85 per month.

As far as the contested evidence is concerned, appellant alleged that he was anxious to fulfil the paternal role and to maintain D. but that respondent, for no good reason, refused to accept any more maintenance payments and denied him further access.

Respondent, on the other hand, accused appellant of abusing the access opportunities she gave him.

She claimed

that when they lived together after the birth he was seldom at home and gave little, if any, time to D.. Later, when he visited her, ostensibly to see the boy, he focused his attention on threatening and even physically molesting her. For those reasons she refused him any further access after February 1991.

Respondent does not allege that appellant is of poor character, that he would make a bad father or that appellant's being with D. would affect the latter deleteriously.

The Court a quo found appellant's papers "devoid of any compelling consideration in favour of allowing ... access" (at 214I) and held that it had not been shown that refusal of access would harm the boy or that the grant of access would benefit him (at 21 5 D-E). As I understand the reasons given by the learned Judge the evidence made a neutral impression on him and it was his view of the onus and the facta probanda which were decisive. For reasons

already advanced, they should not have been decisive.

Adopting the approach outlined above as to disputed i ssues of fact in this type of litigation, I do not think that the matter was properly resoluble on affidavit. Given the general desirability of the father-child bond and given the absence of any substantial allegations against appellant's worth as a person generally, and as a father in particular, there was a materially strong possibility that further investigation and the hearing of oral evidence might reveal access to be in the child's best interests. The accusations which respondent made against appellant are consistent with the breakdown of their own relationship, not necessarily with his unsuitability as a father.

It seems to me, therefore, that this was an instance in which the court should mero motu have taken the matter further, at least by inviting or calling the parties to testify under Rule of Court

6(5)(g).

I am, in the circumstances, satisfied that the

approach of the Court a quo to evaluation of the evidence was incorrect. This was probably inevitable given the approach which the learned Judge took to the question of onus and the facts to be proved.

In the result appellant has failed on his primary submission but succeeded on the other two. The consequence must be that the appeal succeeds. The order a quo cannot stand and it ought, subject to what follows, to be replaced by an appropriate substitute order.

The practical problem that arises is this. Had the decision a quo been given, say, only a year ago, I would have had no hesitation in ordering a remittal for further hearing. What occasions difficulty, however, is the fact that the judgment was given some two-and-a-half years ago and that, as far as one knows, the child has not seen, appellant for over four years. One is entirely ignorant as to what has occurred in the meanwhile. I would hasten to add that

blame for these delays and uncertainties cannot,

on the papers, be laid at appellant's door entirely. He does appear to have delayed unnecessarily in bringing the application but on the other hand there was an unexplained delay of over a year between the judgment a quo and the order granting leave to appeal.

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

his best interests.

As regards the costs of appeal, appellant's counsel conceded that in the event of the failure of his first submission, appellant should bear such costs despite the success of the other submissions opening the way to remittal and a further hearing. On reflection, however, for reasons given below, the order in respect of appeal costs cannot be so narrowly confined.

As regards the costs in the Court a quo, the proper order to make is that they be reserved for determination by the Court that finally disposes of the application.

The remaining difficulty in the case concerns the terms of the order which will regulate the further hearing. One is most reluctant to see the parties plunged into what may amount to an expensive and protracted trial. I am therefore concerned to limit the evidence as much as proper investigation of the essentials will permit. There do not appear to be

any issues, as far as one can possibly judge from the record, which render professional expert evidence

necessary. However, it could well be of assistance to the

Court dealing with the resumed proceedings were the Family Advocate and a social welfare officer to investigate and report. The parties are the essential witnesses: above all else the Court will be concerned to evaluate their merits and demerits as people and as parents.

In so far as appellant's counsel seemed hesitant as to whether his client would avail himself of the opportunity to pursue the application further on remittal, it would seem appropriate to put appellant to terms in this regard according to which, if he fails to take the matter further, he will have to pay the costs of the proceedings thus far in the Court below and also the costs of appeal. In regard to the latter costs, however, if appellant successfully pursues the application to final determination each party will pay his or her own costs of appeal. On the

other hand if, after the hearing of oral evidence, the application is dismissed, appellant will bear the costs of appeal.

Finally, the Judge a quo not having heard evidence in the case, the resumed application may proceed before him or any other Judge of the Division concerned.

It is ordered as follows:

1. The appeal succeeds and the order of the Court a quo is set aside.

2. Substituted for the order of the Court a quo is the following order, which is subject to the terms of para 4 below:

"(a) The application is referred for the hearing of oral evidence on a date to be arranged with the Registrar, on the question whether access by appellant to his minor child D.C.S. will be in the best interests of the said child.

(b) The evidence will be that of the parties, of any witnesses whom they elect to call, and of any witnesses

whom the Court mero

motu elects to call.

c) The Family Advocate and the relevant State Department rendering social welfare services are hereby requested to investigate the parties' respective circumstances for the purpose of subsequently reporting in writing to the Court (with copies to each party) on the question referred to in para (a) above.

d) The Registrar is directed to communicate this order forthwith to the Family Advocate and the said Department in order to obtain their respective reports as expeditiously as possible.

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

f) The costs of the application thus far are

reserved for decision by the Court hearing the oral evidence."

3. The matter is remitted for the hearing of oral evidence, in terms of the order set out in para 2 above, by any Judge performing duty in the Witwatersrand Local Division.

4. Within 30 days of the date of this order appellant shall, through his attorneys of record, notify the Registrar of the Witwatersrand Local Division in writing of his intention to pursue the application in terms of the order set out in para 2 above. If appellant fails to give such notification, or if he fails to prosecute the application further notwithstanding such notification, that order will lapse and the order of the Court a quo will revive.

5. If appellant fails in either respect referred to in para 4 above or if the resumed application contemplated in para 2 above is dismissed, appellant shall pay the costs of appeal. However, if, pursuant to the said resumed application, appellant obtains an order for access, each party will pay his or her own costs of appeal.

C.T. HOWIE

JUDGE OF APPEAL

CORBETT CJ]
E M GROSSKOPF JA] CONCUR
F H GROSSKOPF JA]
MARAIS JA]

CTH/al