

# Legal practitioners soldier on for eight years despite numerous difficulties

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By Zama Mbatha - paralegal, and Xoliswa Maaroganye - communications intern

It is with pleasure and relief that we announce the final closure of one of our most challenging and difficult cases in the One Child A Year (OCAY) campaign.

The case first came to ProBono.Org in 2014 by the mother of two minor children after her husband had filed for divorce in 2013. In

2007, the mother sustained brain injuries and as a result was unable to understand complex language and was not able to work due to difficulties in mobility.

ProBono.Org referred the case to attorney Candida De Freitas for legal assistance on a pro bono basis. A number of other legal practitioners also assisted in the matter. The longest standing of them were attorney Jonathan Stephens and advocate Leigh Franck.

Due to the mother's medical condition, in May 2014 Adv Leigh Franck was appointed as curatrix ad litem. The duties of a curator ad litem are normally to represent the patient during legal proceedings and to compile a report on his or her investigation. The curator also advises on the feasibility of appointing a curator bonis and a curator personam.

The father claimed for primary residence of the



minor children. Our client opposed this application and the children stayed with their maternal grandmother. After she was discharged from hospital, our client was released into the care of her mother, who was a pensioner and had no means of income. The client filed for maintenance for the children, which was

eventually successful after a long battle and the father was forced to provide for his children.

The divorce was finalised in 2021, and a curator bonis was appointed earlier this year.

This was a complicated case which had many challenges and obstacles along the way, but due to the patience, dedication and tenacity of all the legal practitioners involved we were able to ensure that our client was assisted at every step of the way and the case brought to a successful conclusion.

ProBono.Org is most grateful to all the committed legal practitioners who devote their time and resources in assisting clients on a pro bono basis, regardless of how long the case may last. This case is a true victory for a vulnerable client. ●

# The employers' benefit under Section 37D of the Pension Fund Act

By Neo Maloka, Johannesburg intern

**A retirement fund is built up through the contributions of both the employer and employee over the course of the employee's employment. It attempts to hold the employers accountable, to make pay-outs to employees at their retirement age and not leave them impoverished.**

In terms of the prevailing position in South Africa, the retirement funds of employees are secured from creditors. However, in certain circumstances creditors are allowed to make a claim on a member's retirement fund. For example, the power provided to the employer in terms of section 37D of the Pension Fund Act allows a registered fund to deduct any amount due by the member to their employer for the damages suffered by the latter as a result of the employee's wrongdoing. It is evident that this provision is solely earmarked for the employer who is able to prove that misconduct took place.

Although the aggrieved employer has an exclusive right to claim from

the retirement benefits of the guilty employee for the damages suffered, one of the following requirements must be complied with in order for the claim to be successful:

- There must be a written admission of liability by the employee; or
- A civil judgement ordering an employee to reimburse the employer for the losses suffered through the misconduct, fraud or theft of the employee; or
- A criminal judgement against the employee, where the employee is found guilty of misconduct by a court of law. The court must issue a compensation order in terms of section 300 of the Criminal Procedure Act ordering the employee to reimburse the employer for the damages suffered.

It should be noted that any employer granted a civil judgement can lawfully have recourse against the provident or pension fund for the pension benefits of the employee guilty of misconduct.

It is plain that misconduct is a dominant element in a claim for damages suffered by the employer. As stated in the case of *Moodley v Local Transitional Council of Scottburgh Umzinto*, "the term misconduct must be defined in light of the word theft, dishonesty and fraud that precede it and ought to be understood to include acts of dishonesty or conduct that at least show signs of dishonesty".

What happens if an employee refuses to sign an admission of guilt? In other words, when they refuse to admit their wrongfulness and to compensate the employer for losses suffered? The only recourse available to the employer is to initiate legal proceedings against the employee and to withhold the employee's retirement funds until the proceedings are finalised. In this case, the employer has to approach the fund's board of trustees to withhold the employee's pension benefits pending the finalisation of the legal proceedings. The trustees can only withhold the employee's benefits after assessing whether the employer holds a claim that may possibly stand in court.

It goes without saying that when an employer makes an application to the pension fund for the deduction of the employee's benefit, based either on allegations of theft, fraud or misconduct, the burden of proof rests on the employer to show that the claim is valid and that it is the legitimate victim of the dishonourable acts by the employee. ●



# The role of teachers in protecting learners outside the school

By Ayanda Zulu, Johannesburg intern

Access to justice for children is defined by UNICEF as “the ability of children to obtain a remedy when their rights are being violated, not respected or denied”. Children, like their adult counterparts, have rights and disputes that require legal remedies. Due to the nature of a child, children usually do not have the ability to obtain a legal remedy on their own. In this case, parents and/or guardians take on the duty to represent the children and to ensure that their rights are not violated.

The same goes for teachers when a child is attending school. The teacher assumes the role of in loco parentis and takes on the obligation of the parent or guardian to take care of the child. This means that a teacher is responsible for protecting the child and acting in the best interest of the child. It goes without saying that the teacher also bears the responsibility to protect the child from external harm i.e. a child who has been neglected at home. This can mean that if a teacher is of the view that the child might be a victim of neglect, regardless of where it happens, they have a duty to protect that child and ensure that the child’s rights are not abused. South Africa has mandatory reporting laws that prescribe how children can be protected.

## Mandatory reporting laws

South African lawmakers recognise the necessity to protect children. As a country with the highest level of abuse and violence, it is not a far-fetched assumption that children are directly affected by neglect and abuse. The United Nations Convention on the Rights of the Child makes provision for protective and preventative measures. This includes the reporting of child abuse, neglect and maltreatment. Section 28(1)(d) of the South African Constitution states that every child has the right to be protected from maltreatment, neglect, abuse or degradation. The Children’s Act in S110(1) makes reporting mandatory and prescribes certain groups of people with a mandatory duty to report abuse and/or neglect of children. The section reads as follows:

*“...teacher...who on reasonable grounds concludes that a child has been abused in a manner causing physical injury, sexually abused, or deliberately neglected, must report that conclusion in the prescribed form to a designated child protection organisation, the provincial department of social development or a police official.”*



A teacher has a duty to report if a conclusion is drawn on reasonable grounds that a child is being neglected. I believe that a reasonable ground is a fair standard to ensure that there is limited space for mala fide reporting or reporting in bad faith. In terms of the Children’s Act, teachers have a duty to report neglect that occurs outside the school or at home. S89 of the Children’s Act further instructs that those who work at partial-care facilities must immediately report injury or abuse to the relevant authorities should it happen at the facility.

## Are mandatory reporting laws working?

Legislation is clear on the matter of mandatory reporting. However, there are barriers to reporting, especially in cases where neglect takes place outside the school. Mildred Bekink (2021) identified three barriers to reporting:

- Lack of understanding in reporting legislation and hard evidence;
- Concerns regarding legal consequences; and
- Lack of faith in child protection services.

To overcome the above barriers, it is important that teachers are kept abreast of proper guidelines and procedures to reporting. This can be achieved by providing training to teachers and information about the laws governing the topic. Schools may also work closely with social services and the police services to ensure that reporting is seamless and necessary follow-ups are done. To achieve trust in the system, teachers must be educated about the laws and perceive the protections afforded to children as being viable. ●

# The Children's Act fails to recognise permanent life partners as legal parents of children conceived through artificial insemination

By Tyler Idas, Cape Town intern

Since the recently-decided High Court case of *Jane Bwanya vs The Master of the High Court*, the Constitutional Court affirmed and acknowledged the reality of the many diversified families that exist within South African society. In the above case, the Constitutional Court recognised that the Intestate Succession Act made provision for the surviving spouse and surviving same-sex partner to claim from the estates of their deceased partners, but failed to extend the same benefit to surviving partners in opposite-sex life partnerships, thus discriminating on the basis of marital status and gender. Subsequently, the court ordered that a partner in a permanent life partnership be included wherever the word "spouse" appeared within the Intestate Succession Act.

Although South African law has been the forerunner in prioritising the recognition and development of rights in relation to the LGBTIQ+ community, through lived experience, same-sex couples still remain prejudiced due to a failure on the part of our legislature to amend the law to reflect and give effect to greater inclusivity and less discrimination on the basis of one's gender, sexual orientation and marital status.

The reality is that same-sex parents continue to endure costly legal hurdles to be fully recognised under our law as parents of a



child conceived through artificial insemination, further hindering their right to start a family. A recent trend in High Court judgments has seen an increase in confirmation that the Children's Act discriminates against unmarried partners, most notably same-sex partners in permanent life partnerships.

A recent judgment in the Pretoria High Court has declared Section 40 of the Children's Act 38 of 2005 (the Act), which regulates the parental rights of couples who conceive children through artificial insemination, unconstitutional. The judgment is seminal for unmarried couples in permanent life partnerships who want to have children through artificial insemination, and who choose not

to enter into a marriage or a civil union. This is due to the fact that the Act does not automatically recognise both individuals in a long-term partnership as the legal parents of a child conceived through artificial insemination.

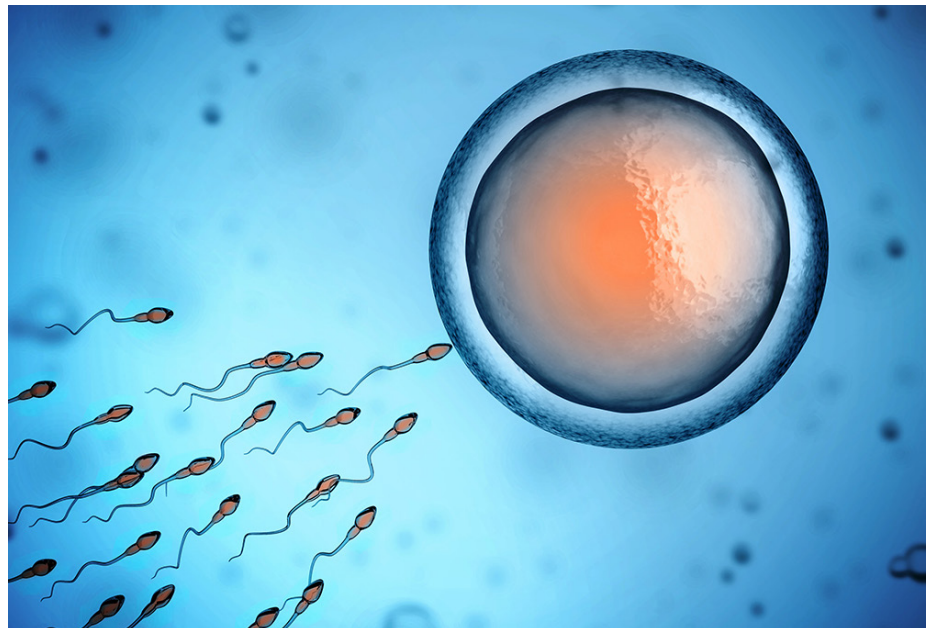
In respect of the recent High Court judgment, the same-sex couple in the case, who remain anonymous as ordered by the court, expressed their desire to start a family through artificial insemination. However, as noted by the couple, the Children's Act was a barrier to them starting a family in terms of the limitations that it imposed on the non-donating partner within the relationship. The couple said that this was unconstitutional for two main reasons. Firstly, the failure

to automatically recognise both individuals in a life partnership as the legal parents of any child they have through artificial insemination constituted unfair discrimination, mostly against same-sex couples and those who chose not to get married. Secondly, the couple argued that the Act violated the constitutional rights of children born to unmarried same-sex couples. This was because the failure to automatically recognise both partners as the legal parents would negatively impact any children they choose to have by artificial insemination.

In terms of the legal impact, any child born via artificial insemination to an unmarried couple would not have a legal right to inherit from the non-carrying or non-donating parent's estate should they die intestate. Furthermore, the non-biological parent would not have an automatic right to participate in important life decisions affecting the wellbeing of the child conceived through artificial insemination, such as parental rights relating to care and contact, education and health should the partners choose to separate, or one predeceases the other.

Currently, the Act only caters for married heterosexual couples who conceive a child through artificial insemination, in which both parents are automatically recognised as the legal parents of the child. This is applicable even in cases where only one spouse has donated a gamete (ovum or sperm) to conceive the child. Hence, the non-biological husband of the carrying spouse would automatically be recognised as the child's father rather than the biological sperm donor.

In contrast, in the event of an unmarried same-sex couple, or a couple in a life partnership choosing to conceive a child through artificial insemination, only the individual who has donated their sperm or ovum will be recognised as the legal parent of the child so conceived.



The non-donating partner will only be recognised as the legal parent should they submit an application to a High Court to adopt the child legally, or if they choose to enter into a parental rights agreement with the biological mother of the child conceived, or alternatively if a Will stipulates that they are to be appointed as the child's legal guardian in the event of death of the biological parent.

The Centre for Child Law, who stood in as *amicus curiae* in the matter, argued that the Children's Act did not specifically discriminate against same-sex couples. Instead, they argued that a same-sex couple who chose to marry, or who were in a civil union, would both automatically be recognised as the legal parents of any child that they conceived through artificial insemination. The Centre for Child Law further argued that the Act was unconstitutional on the basis that the Act failed to recognise unmarried same-sex and heterosexual couples in a permanent life partnership as the parents of any child they chose to conceive through artificial insemination based on their marital status.

The recent trend in judgments highlights the failure of our legislature to keep up with

the social development of the multifarious forms of families which exist within our society and how they come to be. Furthermore, the recent judgments indicate a shift away from the traditional forms of marriage and civil unions which were once a core feature in all societies. Acting Judge Van Veenendaal, who presided over the case, noted that it is common knowledge that these days, parties, for various reasons, preferred not to get married or to have some form of formal process.

The acting judge thus held that it is in the best interest of both the child and the lifelong same-sex partners who choose to have children through the artificial insemination process, to have legal certainty regarding their parental rights and responsibilities. The court thus ordered that Section 40 of the Children's Act, which specifically deals with artificial insemination, must now include the words "or permanent life partner" whenever it refers to a "spouse". The court stated that this would ensure that the unmarried parents who choose to have children through artificial insemination would both be recognised as the legal parents in the same way as married couples. ●



By Serisha Shunmugam  
- NH Attorneys

# The rights of unmarried fathers in South Africa

**At the outset, it is important to grasp that parental rights and responsibilities primarily refer to the care, contact and maintenance of a minor child.**

Furthermore, an unmarried father does not have automatic parental rights and responsibilities. The Act that governs instances where an unmarried father wishes to acquire parental rights and responsibilities is the Children’s Act, No. 38 of 2005 which came into operation on 1 April 2010.

In terms of this Act, and more specifically Section 21, an unmarried father may acquire parental responsibilities and rights to a child that has been born out of wedlock. However, certain factors will have to be considered prior to him acquiring such rights. These include:

- (a) At the time of the child’s birth, whether the father is living with the mother in a permanent life-partnership;
- (b) The father, regardless of whether he has lived or is living with the mother –
- consents or applies to be identified as the minor child’s father or pays damages in terms of

customary law;

- contributes or has attempted in good faith to contribute to the child’s upbringing for a reasonable period; and
- contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.

Should a dispute arise between the unmarried father and the mother of the child in respect of the unmarried father being able to fulfil any of the conditions as set out above and/or exercising his parental rights and responsibilities, the matter must be referred to the Family Advocate, a social worker, social services professional, or any other suitably qualified person.

It should be noted that should the father be dissatisfied with the outcome reached by any one of the above-mentioned individuals, he may approach the nearest High Court in order to acquire such parental rights and responsibilities.

When determining whether the unmarried father should be afforded parental rights and responsibilities, there are various factors that will be taken into consideration, such as:

- (a) The best interests of the child;
- (b) The relationship between the unmarried father and the child;
- (c) The relationship between any other person and the child, such as the mother;
- (d) The degree of commitment the unmarried father has shown towards the child;
- (e) Whether the unmarried father has contributed or attempted to contribute to the maintenance of the child.●

## Write for us



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The deadline for articles for the next issue will be:  
**1 June 2022**