



The South African family law at the cross-roads

VAN ZYL, G.J.

Abstract

During the past decades South African family life has undergone vast changes. Initially, family relationships were of a patriarchal type. When more and more people became urbanised the stable nuclear family system started disintegrating and in its place one now finds: many single-parent families, "concubinage" childless relationships, same-sex "marriage" relationships, dysfunctional families, parents and children who suffer from aids, families living in informal settlements, grandparents taking over the parental role. The theme of this paper is to discuss the custody of children in these circumstances. When parties divorce, the legal process steps in and tries to rearrange the deckchairs. The process is fine, but in practice the implementation is palliative. The implementation occurs in a changing South African society.

Key words: divorce, custody, alternative family relationships, legal initiatives

Introduction

It is now almost a decade since the birth of a new constitutional dispensation in South Africa. It is said that our Constitution¹ is one of the most progressive in regard to the protection of fundamental rights.² This new state of affairs brought about many changes, not only as to how our domestic law is applied, but also on a social level. Freedom, equality and dignity are now key issues and central in the new approach. Every law, be it common or statutory law, has to be tested against the principles of the Bill of Rights and if found in conflict with the principles, be declared invalid. However, the newly found personal freedoms and social change it brought about, pose huge demands for the legal system to find answers for challenging social questions hitherto unheard of.

Family life in the new South Africa

During the past decades, and more so since 1994, South African family life has undergone vast changes. The isolation that South Africa experienced for decades has finally been broken. Many more people are now economically empowered as previously disadvantaged persons are allowed to trade freely, and compete for important positions in the public sector and industry. But there are also important social changes. There is an alarming increase in the breakdown of marriage.³ Women have elevated themselves socially, asserting their rights and demanding more recognition. Children's rights have come to the fore. Serious crime against children is no

longer swept under the carpet. The whole South African society has been shocked to its foundations by the sky-rocketing crimes on children, including rape of infants and young children, family murders and domestic abuse.⁴

Traditionally all population groups maintained a relatively stable family relationship of a patriarchal type. A notable exception, of course, was the disruption of African family life by the migratory labour system during the colonial and apartheid era. However, as more and more people became urbanized, a tendency that increased after 1994, the nuclear family system started disintegrating. In its place one finds:

- Many thousands of single parent families as a result of divorce and children born out of wedlock.⁵ Many of the mothers are young and often lack a proper support system;
- Concubinage childless relationships. These relationships, although not formalised by a marriage ceremony, are sometimes long-term and stable;
- Polygamous African marriages consisting of different “houses” with children, sometimes scattered over a vast geographical area, but with one father/husband;
- Same-sex “marriage” relationships, sometimes with children, sometimes without. These children may include children born from a previous relationship from one of the partners, or a child adopted by one or both;
- Dysfunctional families, where the relationship is one of abuse (parents on children but also sometimes children on elderly parents) as well as where the parents have lost total control of their children (sometimes referred to as street children);
- Parents and children who suffer from aids, and children orphaned by aids. (In a recent television programme two six year old toddlers were shown taking care of themselves, albeit with a little assistance from their neighbours. The news footage showed them making their own bed as they prepared for the night);
- Families living in informal settlements in makeshift shelters, hardly fit for human habitation. In a harsh climate, with temperatures ranging from between freezing point to 35° C and more, their living conditions are really intolerable. They sometimes live in over-crowded conditions with no proper sanitation, running water or electricity;
- Grandparents taking over the parenting role, out of necessity because the parents cannot or are unwilling to cope with their parenting obligations. They often repeat the mistakes they have made with their own children in creating an almost social pathology.

Challenges our family law faces

The custody of children in the circumstances described above poses huge challenges to the legal system. When parties divorce, or the High Court has to intervene as upper guardian, the legal process steps in and so to speak tries to rearrange the deckchairs. The process is generally fine, but in practice the implementation is palliative. For instance:

- The demands of single parenthood are so high, that single parents often cannot cope. Many South African families are struggling financially, with unemployment in some areas as high as 36 percent.⁶ It is said that thousands of children are involved in child labour, especially in agriculture. The enforcement of maintenance orders are extremely difficult where the vast majority of people are either unemployed or employed in the informal sector without a fixed income (or sometimes even fixed address). African men are moreover notorious for their unwillingness to pay maintenance⁷;
- Even if maintenance is regularly paid, it is a poor substitute for real parental care. The non-custodian simply does not have a day-to-day involvement in a child’s life. In some cases, the biological father refuses of his own accord to have any contact and the courts are to a large extent powerless as an interpersonal relationship cannot be created by court order⁸;

- It is in practice very difficult to enforce access orders. Many custodians, because of bitterness, anger and resentfulness, simply refuse access after divorce, or in the case of extra-marital children where the biological father wants to have contact with the minor child. A new Act⁹ was recently adopted by parliament, aiming to make the refusal of contact a criminal offence. It is widely accepted that to criminalise this behaviour is seldom in the child's interests, as it may create feelings of guilt with the child if the custodian parent ultimately has to go to jail. South Africa is also a vast geographical area, with some areas with poor infrastructure. Sometimes parents live so far away from each other that regular contact is simply impossible. Similarly, where people emigrate they lose contact with the children because of the difficulty that long distance relationships create. (Emigrations have lately become the order of the day in South Africa);
- Children (and society) still find alternative relationships largely unacceptable. In a recent High Court matter two mothers were successful in forcing the government to register them both as parents of children in terms of the Births and Death Registration Act¹⁰ where the Act makes provision in the prescribed form for "father" and "mother".¹¹ This gave rise to some lively debate among lawyers and quite a few media reports followed.¹² In another case, a young boy living with his (homosexual) father and his boyfriend, was so emotionally abused and harassed by his peers that he suffered regular "blackouts", forcing an intervention by the courts to try and stabilize his situation.¹³

Initiatives to address the problem areas

Fortunately, the government is fully aware of the disruptions in family life and has initiated several worthwhile projects and new legislation to meet current family needs.

Domestic violence

A comprehensive Act on domestic violence¹⁴ is in place, making the issuing of an interdict possible, even after hours, where a risk or even a threat of family violence develops. Domestic violence is defined as a broad concept, and will even include stalking, harassment, intimidation, damage to property and "any other controlling or abusive behaviour".¹⁵

Customary marriages

Indigenous (customary) marriages of Black people have been recognized,¹⁶ allowing these women (and children) equal status (at least on paper) with their counterparts who entered into a civil marriage in terms of the Marriage Act.¹⁷

The recognition of customary marriages with effect from 15 November 2000¹⁸ is the most revolutionary family law ever enacted in South Africa. Formerly, limited recognition was granted to such marriages for various purposes, among others, in respect of succession,¹⁹ but it played second fiddle to civil marriages. The Act²⁰ recognises these marriages as marriages in the full sense of the word. This includes polygamous marriages.

The vast scope of this recognition is evident from the fact that according to the latest census almost three million marriages were traditional customary marriages.²¹ The Act does not mention lobolo (marriage goods) that form the backbone of customary marriages. Yet it provides

that the recognition is subject to the marriage being negotiated and entered into or celebrated in accordance with customary law.²² A lobolo agreement is part and parcel of the negotiations.

Finally, the Act also elevates African women to the same status as men.²³ Formerly they were regarded as minors under the guardianship of their husbands or male successor to him.²⁴

All customary marriages are in community of property²⁵ so that common law would govern the consequences. But the patrimonial consequences of those entered into before the commencement of the Act are still governed by customary law.²⁶

On the face of it the Act is a vast improvement, especially in regard to the enhanced status of women. But it has some disturbing features. I shall mention but a few:

- (a) There is provision for registration,²⁷ but failure to register does not affect the validity of the marriage.²⁸ The problem of proof of the marriage therefore still looms as large as formerly.
- (b) Customary marriages are notoriously inchoate. The conclusion is a process, rather than an event – such as signing a marriage register. Litigants may use this to suit their own purposes. They would try to prove that a union was a concluded marriage or not, depending on what they can gain from one or the other. According to the latest census²⁹ more than a million Africans were living together with a partner. I am sure many of them constitute marriages-in-the-making. In many cases, the partners wait until they (both of them – not only the groom) have enough money to pay lobolo.
- (c) African customary law also recognises ancillary marriage relationships, for instance sororate (“seantlo”) marriages if a wife is barren, “ukungena” (procreating children with a widow); and even woman-to-woman marriages (using a deceased husband’s assets to marry a wife to bear children – often to perpetuate the deceased’s name). The effect of regarding children born out of wedlock in the aforementioned situations is immense. Our law is still very much orientated towards branding children as illegitimate if there was no valid marriage.
- (d) If a man wants to marry a second wife by customary law, he must enter into a contract to regulate the patrimonial consequences.³⁰ In view of the straightforward informal consequences of customary marriages it is wishful thinking – obliging a man to enter into a formal contract.
- (e) All customary marriage must be dissolved by a court. Formerly, they could be dissolved informally. If there is a dissolution by judicial decree, it would of course create eminent legal certainty. On the other hand it is quite likely that these people, who are many, also relatively poor and unsophisticated, will not have their marriages formally dissolved. The large number of inchoate marriages will exacerbate the situation. Many will simply drift apart and experience the consequences only when the guardianship and custody of children, maintenance or succession come into play.
- (f) *Social parentage*. In traditional African marriages the whole family is responsible for the children. It is therefore not unlikely to find children in the custody of grandparents, aunts and even peers. The law, however, virtually forces one of the parents to claim custody while in fact the children are living happily in the custody of somebody else.
- (g) *Patrilocal residence*. Africans put a high premium on the concept of a family home. When a couple gets married, they create a family home. It is therefore extremely difficult for them to visualise a situation where custody of a child is awarded to the one who leaves the family home. Removal of a child from the family home breaks the child’s link with the ancestors.
- (h) *Maintenance*. The Western law concept of payment of maintenance to a custodian parent also goes against the grain. An African family head is responsible for the maintenance of all the inmates of his family home. It is hard for them to pay maintenance to somebody to maintain a child away from the family home. Many marriages have of course bro-

ken up, but the perception remains that maintenance is an obligation within the family home context.

Family law practitioners in South Africa are also supposed to accommodate to African cultural values.³¹ South African courts have all along applied African customary law in appropriate cases. The most outstanding feature that comes into play is the extended family and kinship system. Briefly, this means that African families are generally not nuclear. A person in a family context does not exist as an individual, but as a member of a group. This concept militates against the modern emphasis on individual rights and freedoms.

I don't have an answer to these problems. All I can say is that this Act constitutes an admixture of customary law and the common law of which the consequences are highly unpredictable.

New Children's Bill

A new draft Bill³² on children has seen the light. This is an attempt to address all issues relating to children in one comprehensive piece of legislation. The first part of the Bill deals with the status of children, their place within the family (including their rights and those of their parents), the statutory development of the "best interest" principle, and how parental responsibility is acquired and terminated. The second part of the Bill deals with the prevention of child abuse and neglect, and the provision of early intervention services for children and their families. The last part of the Bill places focus on those groups of children who experience particular deprivation. These children are identified as those with disabilities, those living in extreme poverty, child labourers or victims of (sexual) exploitation, children living on the street and those affected by HIV/AIDS.

Family courts

Family courts³³ (in practice more decentralized divorce courts), although "in embryo" form, have been established in an attempt to deal with children's issues in a more integrated way under one roof. Some of the pilot projects have been successful in making the courts more accessible and child friendly. The legal aid system helps the indigent with proper legal representation and NGO's manning helpdesks try to assist with advice. The family advocate system, in place for the past decade, effectively represents children in matters where their rights are at stake and also with assistance of social workers mediate large numbers of these cases effectively.

The way forward

In terms of our Constitution children have specific protection and every child is entitled to "family care and parental care, or to appropriate alternative care when removed from the family environment".³⁴ In quite a few High Court cases, the importance of the family as a unit has been recognized.³⁵ Whenever the rights of children have to be protected, the obligation falls firstly on the parents/guardians of the child(ren). Only when the parents fail to or are unable to effectively protect the rights, does the duty rest on the state.³⁶ It is therefore clear that the best way of protecting children, is within the nuclear family.

To improve the situation one should perhaps start at the beginning, the family. Traditional definitions of the family include "a man, his wife and their children". Perhaps it is time that we recognized that families can consist of a vast array of different combinations, like single parents with children, homosexual parents with children or even grandparents taking care of their grandchildren.³⁷ Only if we give full legal recognition to the family as a unit, whatever the definition, can effective protection for children be effected because it is ultimately within the family that a child should primarily be taken care of. The protection of families therefore should be a real priority. In a society with serious problems, however, it is easier said than done. Moreover, almost paradoxically, it is within the family that many children are abused, necessitating a (mostly temporary) removal of the child to a place of safety, coupled with social intervention. As a result of lack of child welfare institutions and budgetary constraints, such care is relatively a dead letter.

Furthermore, our legal system is still caught up in a structure of courts that function on an adversarial based approach. Children's courts are fortunately decentralised to deal with children "in need of care". Maintenance and protection against domestic violence are similarly available in all districts. The high courts mostly have their seats at the main provincial centres. The problem, however, is that children are still dealt with within a formal court system where decisions are taken on their behalf without allowing them a real say in their future. They can be, and often are, represented by legal representatives. But for a child to need legal representation in a matter where he/she is in need of care, not because the child has done anything wrong, but because he/she is a victim of circumstance, falls uneasy on one's sense of good practice and real protection of children's rights. Perhaps we can learn something from the inquisitorial approach applied in most European countries, instead of adjudicating on matters of a complex nature in a formal and adversarial court structure, regulated by strict rules and procedure in an environment that is anything but child friendly. In theory the courts are accessible to all and sundry. In practice high costs, complicated procedures and lengthy delays offer cold comfort.

Notes

1. The Constitution of the Republic of South Africa Act 108 of 1996.
2. Chapter 2 of the Constitution.
3. Divorces escalated from 23 865 per annum in 1991 to 35 792 per annum in 1998 (Official statistics provided by Statistics South Africa).
4. Crimes against children have received wide publicity. Beeld reported for example on 13 December 2001, page 14: "Safehouses for abused children", on 9 March 2002, page 7 "Trials for child rape to start soon", on 12 March 2002, page 2 "Sex register 'will not help children'" and on 16 October 2002 "Child rapes cause new debate on the death penalty". According to the Crime Information Analysis Centre of the SAPS 1231 rapes of children younger than eleven years were reported in Gauteng alone for the period January to September 2001.
5. According to Statistics South Africa 1,268,964 persons are living together with a partner, but without entering into a formal marriage. Burman "Illegitimacy and the African Family in a Changing South Africa", 1991 *Acta Juridica* 36-51 on 36 states categorically that children born out of wedlock are more than those born in wedlock.
6. Official statistics from the Department of Labour indicate that in the Limpopo Province, unemployment is 36,7 percent. Other provinces are slightly better off, but only by a small margin. Many knowledgeable people, however, feel that these statistics are very conservative and that the actual unemployment is much higher.
7. Bekker and Van Zyl "Custody of Black Children on Divorce" *Obiter* 2002 volume 23, 126.
8. See *Jooste v Botha* 2000 2 BCLR 187 T. Also see Bekker and Van Zyl "Unmarried fathers should not have their cake and eat it" *De Jure* 2000 No. 33 volume 1, 149.

9. Judicial Matters Amendment Act 55 of 2002. The Act came into operation on 17 January 2003. It was also widely reported in the media, for example Beeld 4 December 2002 page 7 under the title "Both parents get reasonable access."
10. 51 of 1992.
11. J & B v Minister of Home Affairs 1906/2002 unreported, Durban and Coast Local Division.
12. Beeld 12 November 2002 page 9 reported under the heading "Twins have two mothers, finds court in 'bizarre' case".
13. Unreported case TPD 30550/2000. The names of the parties are not disclosed in order to protect the child.
14. 116 of 1998.
15. Section 1 definitions.
16. Recognition of Customary Marriage Act 120 of 1998.
17. 25 of 1961.
18. The Recognition of Customary Marriages Act 120 of 1998 put into operation by Proclamation No. R.66 dated 1 November 2000.
19. Section 23 of the Black Administration Act 38 of 1927.
20. Section 2.
21. South African Statistics Census 1996.
22. Section 3 (1) (b).
23. Section 6.
24. Section 11 of Act 38 of 1927.
25. Section 7 (2).
26. Section 7 (1).
27. Section 4.
28. Section 4 (a).
29. Census 1996.
30. Section 7 (6).
31. See, generally, the United Nations Convention on the Rights of the Child 1989 – adopted in 1990 and ratified by South Africa on 16 June 1995 and the African Charter on the Rights and Welfare of the Child of 1990.
32. The draft Children's Bill was published towards the end of 2002 and will be known as the Children's Act 2002, and shall take effect on a date to be fixed by the President by proclamation.
33. Divorce Court's Amendment Act 65 of 1997.
34. Sec 28 (1) (b) of the Constitution of the Republic of South Africa Act 108 of 1996.
35. Grootboom v Oostenberg Municipality and Others 2000 3 BCLR 277 C.
36. Grootboom supra at 288 B where the court, interpreting children's sec 28 (1) (c) right to shelter, said the following: "The primary obligation to maintain a child rests upon the parents. In the event that parents are unable to provide shelter for their children, section 28 (1) (c) imposes an obligation on the state to do so...".
37. In Satchwell v President of the Republic of South Africa and Another 2002 9 BCLR 986 CC at 995 C the court found that: "In terms of our common law, marriage creates a physical, moral and spiritual community of law which imposes reciprocal duties of cohabitation and support. The formation of such relationships is a matter of profound importance to the parties, and indeed to their families and is of great social value and significance. However, as I have indicated above, historically our law has only recognised marriages between heterosexual spouses. This narrowness of focus has excluded many relationships which create similar obligations and have a similar social value."

In Du Toit and Another v Minister of Welfare and Population Development 2002 10 BCLR 1006 CC, at 1013 H – J the court found that: "Recognition of the fact that many children are not brought up by their biological parents is embodied in section 28 (1) (b) of our Constitution which guarantees a child's right to 'family or parental care'. Family care includes care by the extended family of a child, which is an important feature of South African family

life. It is clear from section 28 (1) (b) that the Constitution recognises that family life is important to the well-being of all children. Adoption is a valuable way of affording children the benefits of family life which might not otherwise be available to them.

The institutions of marriage and family are important social pillars that provide for security, support and companionship between members of our society and play a pivotal role in the rearing of children. However, we must approach the issues in the present matter on the basis that family life as contemplated by the Constitution can be provided in different ways and that legal conceptions of the family and what constitutes family life should change as social practices and traditions change."

Author note

Gerhard Van Zyl

B Proc. LLB, Family Advocate

Department of Justice

Private Bag X81

0001 Pretoria

South Africa

gvanzyl@justice.gov.za