

PLEASE NOTE: THE NAMES OF MINOR PARTIES HAVE BEEN REDACTED TO ENSURE PRIVACY

BEFORE JUDGE DR DINGAKE
IN THE HIGH COURT OF THE REPUBLIC OF BOTSWANA
HELD AT GABORONE

Case No. MAHGB - 000291-14

In the matter between:

GEOFFREY KHWARAE

Applicant

and

BONTLE ONALENNA KEAIKITSE

First Respondent

[REDACTED]

Second Respondent

MOTHUSIOTSILE TLOTLENG

Third Respondent

THE ATTORNEY GENERAL

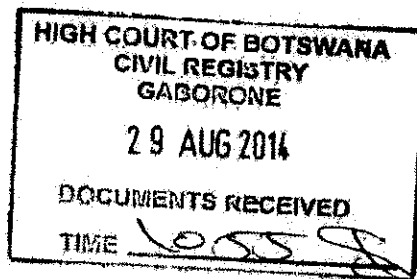
Fourth Respondent

FILING NOTICE

FILED HEREWITH:

1. Applicant's Heads of Argument;
2. Return of Service by Uyapo Ndadi.

DATED AT GABORONE ON THIS 28TH DAY OF AUGUST 2014.



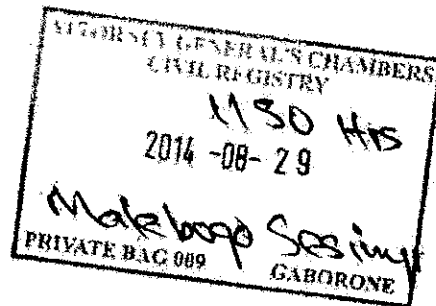
[Signature]
NDADI LAW FIRM
Applicant's Attorneys
Plot 10398,
Along Independence Avenue
White City
Private Bag BO 130
GABORONE

TO: THE REGISTRAR OF THE HIGH COURT
Private Bag 00220
GABORONE

AND TO: BONTLE ONALENNA KEAIKITSE
First Respondent
P O Box 9
RANAKA

AND TO: MOTHUSIOTSILE TLOTLENG
Third Respondent
BCL Mine
SELIBE PHIKWE

AND TO: THE ATTORNEY GENERAL
Fourth Respondent
Government Enclave
Private Bag 009
GABORONE



**IN THE HIGH COURT OF THE REPUBLIC OF BOTSWANA
HELD AT GABORONE**

CASE NO. MAHGB-000291-14

In the matter between

GEOFFREY KHWARAE

APPLICANT

And

BONTLE ONALENNA KEAIKITSE

1ST RESPONDENT

C [REDACTED] K [REDACTED]

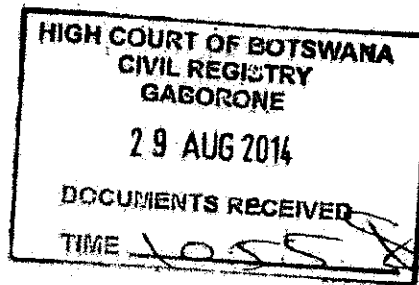
2ND RESPONDENT

MOTHUSIOTSILE TLOTLENG

3RD RESPONDENT

THE ATTORNEY-GENERAL

4TH RESPONDENT



APPLICANT'S HEADS OF ARGUMENT

INTRODUCTION

1. This application concerns the validity of section 4(2)(d)(i) of the Adoption of Children Act (Adoption Act)¹ insofar as it does not require the consent of a biological

¹ Adoption of Children Act [Chapter 28:01].



father in the adoption of a child born out of wedlock regardless of whether it is in the best interest of the child.

2. The applicant, Mr Geoffrey Khwarae, has been actively involved in the care of his daughter, C [REDACTED] K [REDACTED] the second respondent, since her birth. He is now concerned that she has been or will be adopted by the third respondent without his knowledge or consent as arguably permitted under section 4(2)(d)(i) of the Adoption Act.

3. Mr Khwarae challenges section 4(2)(d)(i) of the Adoption Act on the following basis:

- a. It is in conflict with the Children's Act No. 8 of 2009 (Children's Act).
- b. It violates the applicant's constitutional right to be free from discrimination, right to freedom from inhuman and degrading treatment, and right to a fair hearing.

4. The heads of argument will cover:

- 4.1 The facts of the matter (page 2).
- 4.2 A summary of the legal argument (page 6).
- 4.3 The Constitutional issues (page 8).
- 4.4 The relationship between the Children's Act and the Adoption Act (page 17).
- 4.5 The remedy (page 23).

FACTUAL BACKGROUND

5. The applicant, Mr Geoffrey Khwarae, is the biological father of the second respondent, C [REDACTED] K [REDACTED] a female minor. The first respondent is C [REDACTED]'s biological mother, Ms Bontle Onalenna Keaikitse.

6. During a brief romantic relationship, Mr Khwarae and Ms Keaikitse conceived O [REDACTED] in 2000.² They were not married at the time of the child's conception, nor at the time of her birth on 2 April 2001. Their romantic relationship ended before the birth of their daughter.³

7. Mr Khwarae has played an active role in O [REDACTED]'s life, including providing care and support during Ms Keaikitse's pregnancy⁴ and following O [REDACTED]'s birth.

8. Once O [REDACTED] was born, Mr Khwarae sought to support the child through providing finances and supplies.⁵ Mr Khwarae continued to follow up on the child's wellbeing, meeting the child when Ms Keaikitse permitted him to do so and supporting the child through the provision of physical means and attending to her healthcare.

9. Between 2004 and 2006, Mr Khwarae went to Norway to further his studies.⁶ His wife agreed to be available to attend to O [REDACTED]'s needs while he was away. Ms Keaikitse was informed and understood the arrangement. Indeed his wife contacted Ms Keaikitse regularly during this time to check on O [REDACTED]'s wellbeing on his behalf.⁷ Upon Mr Khwarae's return to Botswana in 2006, he reconnected with the first and second respondent and continued to support the child.⁸ O [REDACTED] spent at least one weekend every month with him and his wife.⁹

10. Due to personal difficulties between Ms Keaikitse and the third respondent, who is Ms Keaikitse's boyfriend, Ms Keaikitse asked if O [REDACTED] could live with Mr Khwarae.¹⁰ They agreed that from 2007 O [REDACTED] would stay with Mr Khwarae and that he would put

² Khwarae Founding Affidavit at para 12.

³ Id at para 13-14.

⁴ Id at para 14.

⁵ Id at para 15.

⁶ Id at para 18.

⁷ Id.

⁸ Id at para 19.

⁹ Id.

¹⁰ Id at para 20.

C [REDACTED] through school. Mr Khwarae was happy with this arrangement as he desired to raise C [REDACTED] with her half-siblings in his home.¹¹

11. In 2007, C [REDACTED] moved in with his family and was enrolled in an English Medium School.¹² They moved to Maun with Ms Keaikitse's consent.¹³ During school holidays, Mr Khwarae arranged that C [REDACTED] visited her mother at his expense.¹⁴

12. Within months of C [REDACTED] moving in, Ms Keaikitse contacted Mr Khwarae indicating that the third respondent had threatened to find and kill C [REDACTED].¹⁵ Concerned about C [REDACTED]'s safety, Mr Khwarae and his wife reported the threat to the Moshupa police who questioned the third respondent.¹⁶ The third respondent admitted to having threatened to kill C [REDACTED]. The police released the third respondent with a warning that he should stay away from the child.¹⁷

13. During the Christmas holidays in 2007-2008, Mr Khwarae arranged for C [REDACTED] to be with her mother. After C [REDACTED] returned to Mr Khwarae, Ms Keaikitse contacted him and demanded that the child be returned to her to live together with the third respondent. Mr Khwarae, concerned for C [REDACTED]'s welfare, tried to reason with Ms Keaikitse and sought the assistance of social workers.¹⁸

14. Social workers undertook to conduct assessments and advised that the child should be returned to her mother in the meanwhile.

¹¹ Id at paras 20-21.

¹² Id at para 21.

¹³ Id at para 22.

¹⁴ Id.

¹⁵ Id at para 21.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id at para 24.

15. Shortly thereafter, Mr Khwarae was contacted by Ms Keaikitse's sister who indicated that Ms Keaikitse had abandoned the child after arguing with the third respondent.¹⁹ C [REDACTED] eventually went to stay with her maternal grandmother.²⁰

16. In February 2012, Mr Khwarae launched an application in the Magistrates Court to compel a paternity test so that his rights in relation to C [REDACTED] were secured and he could provide her with greater stability.²¹ The paternity test confirmed Mr Khwarae as C [REDACTED]'s biological father. Thereafter he continued to seek involvement in C [REDACTED]'s life, but was denied.²²

17. Mr Khwarae launched an application for shared custody of C [REDACTED] in the Magistrates Court in Maun.²³ The Court considered two social workers' reports. One report recommended that Mr Khwarae be granted custody over C [REDACTED] and Ms Keaikitse be given visitation and access rights. The other report recommended that C [REDACTED] stay with Ms Keaikitse and Mr Khwarae be given access and visitation rights. The Court found that Mr Khwarae "loves his daughter so much but so [does] the mother." It considered that there were no compelling reasons to remove C [REDACTED] from her mother because she was at no threat of harm where she was then staying with her aunt in Molepolole, and that C [REDACTED] had expressed a preference to stay with her mother. The Court ordered that C [REDACTED] should stay with Ms Keaikitse and granted visitation rights to Mr Khwarae who was to provide further support as necessary in agreement with Ms Keaikitse.

18. Since then, Mr Khwarae has been denied access to C [REDACTED] and has not been permitted to see her despite the Court order.²⁴ He nevertheless continued to support her by providing finances to get her to school and providing school uniforms and attending to

¹⁹ Id at para 25.

²⁰ Id at para 26.

²¹ Id at para 30.

²² Id at para 31.

²³ Id at para 32. *Khwarae v Keaikitse and Another* MAMMN-000020-12, Magistrate Court for the district of North West held at Maun, 1 August 2008, per Principal Magistrate CT Foroma.

²⁴ Khwarae Founding Affidavit at para 33.

her medical needs through her medical aid.²⁵ In May 2013, Mr Khwarae withdrew his financial support owing to his continued denial of access to the child.²⁶

19. In December 2013, Mr Khwarae sought to persuade Ms Keaikitse to comply with the Magistrate's order. She refused.²⁷ On 2 April 2014, he called Ms Keaikitse to wish his daughter happy birthday.²⁸ Ms Keaikitse informed him that the child was in Phikwe where she lived with the third respondent. She informed him that the third respondent is adopting C██████.²⁹ Following references to third respondent as the child's "father",³⁰ Mr Khwarae has reason to believe that second respondent has already been adopted by him.

20. Mr Khwarae remains concerned about C██████ and her wellbeing. He is determined that she, being an innocent child, should not be deprived of his support because of any conflict he might have with her mother.³¹

21. However, Mr Khwarae is concerned that C██████ has been or will be adopted by the third respondent without his knowledge or consent and he has no way to ascertain whether or not C██████ has been adopted as he is irrelevant in the whole process.

SUMMARY OF LEGAL ARGUMENT

22. The applicant is challenging section 4(2)(d)(i) of the Adoption of Children Act insofar as it does not require his consent for the adoption of his child just because she was born out of wedlock.³²

²⁵ Id.

²⁶ Id at para 34.

²⁷ Id at para 36.

²⁸ Id at para 39.

²⁹ Id at para 41.

³⁰ Id at paras 4 and 35.

³¹ Id at para 37.

³² Preference is made not to employ the traditional referent of "illegitimate child" as the terminology is offensive to the child's dignity.

23. In arguing that section 4(2)(d)(i) cannot allow for the adoption of C [REDACTED] without her father's consent, we make the following arguments:

- a. That section 4(2)(d)(i) is not requiring the father's consent regardless of whether it is in the best interest of the child violates the following rights in the constitution
 - i. freedom from discrimination
 - ii. freedom from inhuman and degrading treatment
 - iii. right to a fair hearing
- b. That section 4(2)(d)(i) conflicts with the Children's Act of 2009 and based on the terms of the Children's Act, section 4(2)(d)(i) should require the father's consent to adoption subject to the best interest of the child.

24. In considering the correct interpretive approach, this Court should be guided by four principles of interpretation:

- 24.1. First, an interpretation of the law that is consistent with the Constitution and subsequent legislation must be favoured over one that infringes the Constitution and subsequent legislation.³³
- 24.2. Second, constitutional rights must be afforded a broad and generous interpretation.³⁴
- 24.3. Third, the opposite approach is to be applied in considering limitations of constitutional rights: "exceptions contained in constitutions are ordinarily to be given strict and narrow, rather than broad, constructions".³⁵
- 24.4. Fourth, domestic law should be interpreted in a manner that does not conflict with Botswana's international obligations.³⁶

³³ *Ramantle v Mmusi and Others* CACGB-104-12, Court of Appeal, 3 September 2013 (*Mmusi*) at para 58; see also *Petrus and Another v The State* 1984 BLR 14 (CA) at p 37-38.

³⁴ *Diau v Botswana Building Society* 2003 (2) BLR 409 (IC) at para 42. See also *Mmusi* at para 69.

³⁵ *Attorney-General v Dow* [1992] BLR 119 (CA) at p 132A-B.

³⁶ *Id* at p 132A-B.

CONSTITUTIONAL ISSUES

25. We submit that section 4(2)(d)(i) of the Adoption Act, not requiring the father's consent even when it is in the best interest of the child, violates the applicant's fundamental constitutional rights.

Discrimination

26. Precluding the requirement of a biological father's consent in all circumstances, for the adoption of a child born out of wedlock, is unconstitutional in that it discriminates unjustifiably against fathers on the basis of their sex and their marital status in violation of section 15 of the Constitution.

27. An inquiry into whether section 4(2)(d)(i) violates section 15 requires a two-pronged analysis:

- 27.1. Whether there is "different treatment to groups of persons wholly or mainly attributable to their respective group characteristics",³⁷
- 27.2. Whether such treatment is rational and justifiable.

28. Each prong of the inquiry is discussed below.

29. Section 15 of the Constitution provides, in relevant part:

"Protection from discrimination on the grounds of race, etc.

- (1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.
- (2) Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting

³⁷ Id.

by virtue of any written law or in the performance of the functions of any public office or any public authority.

(3) In this section, the expression "discriminatory" means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision-

...

(c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law

...

(e) whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society."

30. It is well-documented that discrimination on the basis of sex is prohibited under the Constitution.³⁸

31. As it was held in *Dow*, the classes or groups listed in section 15(3) are non-exhaustive.³⁹

32. In determining whether a particular class of people are protected under section 15(3), courts have looked to whether there is "[a]n identifiable group or class of persons

³⁸ See *Dow*.

³⁹ *Dow* pages 142 and 147.

who suffer discrimination as such group or class for no other reason than the fact of their membership of the group of class".⁴⁰

33. In this case, Mr Khwarae is subjected to differential treatment solely because he was not married to the first respondent.

34. Indeed, Botswana courts have already noted that discrimination on the basis of marital status would be prohibited. In *Ndlovu v Machehe* the High Court, as upheld in full by the Court of Appeal, considered the Roman-Dutch common law position in terms of which unmarried fathers had no legally protected relationship with their minor children. The Court held that the effect of the position was to discriminate unfairly and irrationally against fathers on the basis of sex or marital status.

35. In this case, the applicant is treated differently because of his sex and his marital status as were he a woman his consent would be required for the adoption, and were he married to Ms Keaikitse at the time she gave birth to C██████, his consent would be required. This is clearly differential treatment due to Mr Khwarae's sex and marital status.

Justification

36. We now turn to whether the differentiation on the basis of the applicant's gender and marital status was rational and justifiable.

37. Section 15(4)(e) permits differential treatment if it is reasonably justifiable in a democratic society.

⁴⁰ *Makuto v State* [2000] 2 BLR at 135

38. In addition, section 15(4)(c) provides for an exception to the discrimination prohibition "with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law."

39. However, section 15(4)(c) is not unchecked:

[The exceptions] must be rational and justifiable either as being intended to ensure that the rights and freedoms of any individual do not prejudice the rights and freedoms of others or as being in the public interest.⁴¹

40. We submit that section 4(2)(d)(i) insofar as it does not require the father's consent for the adoption of a child born out of wedlock in all cases is not rational or justifiable.

41. The differential treatment afforded to unmarried fathers under section 4(2)(d)(i) is irrational and unfair in that it, *inter alia*, would effectively allow for the unilateral termination of the rights and duties of biological fathers and entrench a view which is contrary to the best interests of the child that fathers do have or should have less attachment towards their children, particularly when not married.

42. In *Ndlovu v Macheme* the High Court, as upheld in full by the Court of Appeal, held that the effect of denying unmarried fathers a legally protection relationship with their minor children was to discriminate unfairly and irrationally against fathers on the basis of sex or marital status. This position afforded "irrational differential treatment between parents of a child simply on the ground of sex or marital status." The Court held further that-

"to visit children with the burdens that result in them being denied access to their fathers because they are considered 'illegitimate' is offensive to the ... Constitution ... and amounts to visiting the sins, if any, of the parents on the children."

⁴¹ *Mmusi* at para 72.

43. A number of other countries have struck down similar provisions as discriminatory finding that not requiring a father's consent is not rational or justifiable.

44. The Constitutional Court in South Africa considered the constitutionality of a provision similar to the presently impugned provision. In a unanimous judgment, that Court held:

"In the context of an adoption statute where the real concern of the law is whether an order for the adoption of the child is justified, a right to veto the adoption based on the marital status of the parent could lead to very unfair anomalies. The consent of a father, who after his formal marriage to the mother of the child concerned, has shown not the slightest interest in the development and support of the child would, subject to section 19, always be necessary. Conversely a father who has not concluded a formal ceremony of marriage with the mother of the child but who has been involved in a stable relationship with the mother over a decade and has shown a real interest in the nurturing and development of the child, would not be entitled to insist that his consent to the adoption of the child is necessary."⁴²

45. In considering comparative jurisprudence and legislative schemes, the Court held:

"What is evident from the modern legislative and judicial responses to the problems associated with adoption is the recognition of the fact that in determining the rights of fathers to withhold their consent to the adoption of their children it may be too simplistic merely to draw a distinction between married and unmarried fathers, and it may equally be too simplistic to discriminate between the mothers and fathers of children born in consequence of a union not formalized by marriage. Unmarried fathers, by the acceptance of their paternity and parental responsibility, may often be qualified to make the most active inputs into the desirability of such an adoption order and in certain circumstances they may legitimately wish to withhold their consent to such an adoption order. It is equally evident that not all unmarried fathers are indifferent to the welfare of their children and that in modern society

⁴² *Fraser v Children's Court Pretoria North and Others* [1997] ZACC 1; 1997 (2) SA 218 (CC) (South Africa Constitutional Court) at para 26.

stable relationships between unmarried parents are no longer exceptional. The statutory and judicial responses to these problems are therefore nuanced having regard to the duration of the relationship between the parents of the children born out-of-wedlock, the age of the child sought to be given up for adoption, the stability of the relationship between the parents, the intensity or otherwise of the bonds between the father and the child in these circumstances, the legitimate needs of the parents, the reasons why the relationship between the parents has not been formalised by a marriage ceremony and generally what the best interests of the child are. The Act in the present case may be open to attack on the grounds that it shows no adequate sensitivity to these nuances. The consent of the mother of a child born out-of-wedlock is (subject to the provisions of section 19) always a precondition. That of the father, never. ...

The question of parental rights in relation to adoption bears directly on the question of gender equality. In considering appropriate legislative alternatives, parliament should be acutely sensitive to the deep disadvantage experienced by the single mothers in our society.⁴³

46. In *Re MacVicar and Superintendent of Family and Child Services et al*,⁴⁴ the Supreme Court of British Columbia in Canada similarly held that a comparable provision was inconsistent with the Canadian Charter of Rights and Freedom's protection of equality because it discriminated against unwed fathers on the grounds of sex and marital status and had the effect of permitting the severance of the father's relationship with the child without his consent. The Court held that there was no justification for this discrimination.

INHUMAN AND DEGRADING TREATMENT

47. It is further submitted that to preclude the requirement of the biological father's consent in the adoption of his child amounts to inhuman and degrading treatment. Section 7 of the Constitution provides, in relevant part:

⁴³ At paras 43-44.

⁴⁴ *Re Mac Vicar and Superintendent of Family & Child Services et al*, 34 D.L.R. (4th) 488 (B.C.S.C. 1986) (Canada, British Columbia Supreme Court).

"Protection from inhuman treatment

- (1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."

48. In *Petrus and Another v the State*,⁴⁵ the Court of Appeal held that the prohibition in section 7 extended to five different categories of treatment: (1) torture; (2) inhuman punishment; (3) degrading punishment; (4) inhuman treatment; and (5) degrading treatment.⁴⁶

49. Using a definition referred to in *Petrus*, the High Court in *Binda and Another v the State* described "inhuman treatment" as possessing a quality of being "destitute of natural kindness or pity; brutal, unfeeling",⁴⁷ a standard which must be measured against moral standards and the "sanctity of life."⁴⁸

50. The European Court of Human Rights has held the following with respect to the prohibition of torture and inhuman and degrading treatment in Article 3 of the European Convention on Human Rights and Fundamental Freedoms:⁴⁹

"As regards the types of 'treatment' which fall within the scope of article 3 of the Convention, the court's case law refers to 'ill-treatment' that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of article 3."⁵⁰

⁴⁵ *Petrus and Another v the State* 1984 BLR 14 (CA).

⁴⁶ *Id* at para 40.

⁴⁷ *Binda and Another v the State* 2010 2 BLR 286 (HC) and *Petrus* at para 29.

⁴⁸ See *Moekena v the State* 2008 (1) BLR 151 (CA) in reference to *Moyo and Others v The State* (Crim App 12/06), unreported.

⁴⁹ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

⁵⁰ *Pretty v United Kingdom* (2002) 35 EHRR 1, para 52.

51. To preclude the applicant's right to withhold consent to C█████'s adoption is treatment that dehumanizes him and is undignified in that it terminates his manifested connection with his biological child, one which he has actively sought to establish through emotional, physical, psychological, educational and financial support. To strip him of his parental relationship with C█████ is to deny him an intimate aspect of his humanity: fatherhood.

52. The preclusion of his right to consent is therefore submitted to be inhuman and degrading treatment.'

FAIR HEARING

53. Section 4(2)(d)(i) further violates the applicant's right to a fair hearing to the extent that it does not require his consent for the adoption of C█████

54. Section 10(9) of the Constitution provides:

"Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established or recognized by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."

55. In *Tirelo v the Attorney-General and Another*⁵¹ the High Court held that section 10(9) affords a person "the constitutional right to a fair hearing of his or her case by that court within a reasonable time." A necessary corollary to the right to have a civil dispute determined by an independent and impartial court is the right to have one's case heard and to have access to the courts.

⁵¹ *Tirelo v The Attorney-General and Another* 2008 (2) BLR 38 (HC).

56. It is clear in terms of the Children's Act that non-marital biological fathers have rights of access and visitation to their children. The applicant has, in addition, a Court order affirming these rights. The conclusion of an adoption to a third party terminates his rights in their entirety. To permit that an adoption could therefore be concluded without the requirement of his input is to terminate his rights without affording him the opportunity to make his case.

57. A number of courts in other countries have similarly found that failure to require a father's consent violates the right to a fair trial and due process.

58. In *Stanley v Illinois*,⁵² the US Supreme Court held that an unwed biological father's interest in the "companionship, care, custody, and management" of his children was a "cognizable and substantial" interest that established his right to due process in relation to adoption proceedings.⁵³

59. Similarly, in *Keegan v Ireland*,⁵⁴ the European Court of Human Rights considered the 1952 Irish Adoption Act which did not require the consent of an unmarried father of a child for his or her adoption without the father being granted guardianship in certain circumstance. The Court held that the Act, *inter alia*, violated Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms which guarantees a fair and public hearing of every person's civil rights and obligations.

60. Under the Children's Act, it is clear that the best interests of the child is of paramount importance and thus, that can be the only reason to deny a father the right to consent before his child is adopted by another. Even so, such a finding could only take place after a fair hearing.

⁵² *Stanley v Illinois* 405 US 647 (1972) (USA Supreme Court).

⁵³ At 651-2.

⁵⁴ *Keegan v Ireland* 16/1993/411/490, Council of Europe: European Court of Human Rights, 19 April 1994.

61. On the facts before this Court, the applicant has sustained and manifested through concrete action a sincere desire to parent C [REDACTED], to nurture her and to protect her. His participation in C [REDACTED]'s life has been in all forms: emotional, physical, educational, financial and medical. The facts also illustrate how important his role has been in protecting C [REDACTED] from physical threats she faced from the third respondent, in keeping her in school and in ensuring she was provided for when her mother was not able to do so. Thus, beyond his biological connection to C [REDACTED], the applicant has established a cognizable and substantial interest in relation to her adoption proceedings. This is in addition to his legal interests as determined by the Magistrates Court that would be vitiated in the event of an adoption.

62. The failure to provide the applicant with a fair hearing before taking away his parental rights violates section 10(9) of the Constitution.

RELATIONSHIP BETWEEN THE CHILDREN'S ACT AND THE ADOPTION ACT

63. Section 4(2) of the Adoption Act provides, in relevant part:

"A court to which application for an order of adoption is made shall not grant the application unless it is satisfied-

- (a) that the applicant is or that both applicants are qualified to adopt the child;
- (b) that the applicant is or that both applicants are of good repute and a person or persons fit and proper to be entrusted with the custody of the child and possessed of adequate means to maintain and educate the child;
- (c) that the proposed adoption will serve the interests and conduce to the welfare of the child;
- (d) that consent to the adoption has been given-
 - (i) by both parents of the child or, **if the child is illegitimate, by the mother of the child** whether or not such mother is a minor or married woman and whether or not she is assisted by her parent, guardian or husband, as the case may be".⁵⁵

⁵⁵ Emphasis added.

64. The adoption of a child terminates all the rights and responsibilities between the child and her natural parents in terms of section 6(3) of the Adoption Act.

65. The Children's Act was promulgated in 2009 and provides in section 3 that it prevails in the case of conflict with any of law, except where the effect of its prevalence is harmful to the child's emotional, physical, psychological and moral wellbeing. In particular, section 3 states:

"In the event of any conflict or inconsistency between the provisions of this Act and any other legislation, the provisions of this Act shall take precedence, except where the exercise of the rights set out in this Act has or would have the effect of harming the child's emotional, physical, psychological and moral well-being, or of prejudicing the exercise of the rights and freedoms of others, national security, the public interest, public safety, public order, public morality or public health."

66. In light of section 3 the legislature has clearly deemed that if there is any conflict between the Adoption Act and the Children's Act, the latter prevails.

67. Furthermore, the Children's Act makes abundantly clear that both biological parents are critical in the child's upbringing, irrespective of the parents' marital status. Indeed the Children's Act presumes that the involvement of both biological parents is critical to the child's best interest.

67.1. Section 7(e) provides that a child's parents shall have the opportunity to assist and participate in decision making in terms of the Act in regard to issues that have significant impact on the child's life.

67.2. Section 13 further provides, in relevant part:

"(1) Subject to the child's best interests, every child has a right to know and be cared for by both of his or her biological parents.

- (2) A child who is born out of wedlock and does not live with both of his or her biological parents has a right to access the absent parent, and to be nurtured, supported and maintained by the absent parent.
- (3) Any parent, other relative or guardian or other person who, without reasonable excuse, refuses the absent parent access to the child shall be guilty of an offence and shall be sentence to a fine of not less than P2 000 but not more than P5 000, or to imprisonment for a term of not less than three months but not more than six months, or both.
- (4) No person shall separate a child from his or her parents, other relatives or guardian unless it is in the child's best interests to do so.
- (5) Subject to a child's age, maturity and level of understanding, any person seeking to separate the child from his or her parents, other relatives or guardian shall seek the child's consent.
- (6) Any person who contravenes the provisions of subsection (4) or (5) shall be guilty of an offence and shall be sentence to a fine of not less than P2 000 but not more than P5 000, or to imprisonment for a term of not less than three months but not more than six years, or both."

67.3. So strong is the child's right to "both biological parents" that section 13 creates penalties, with up to 6 years imprisonment, for separating a child from her biological parents contrary to the child's best interest.

67.4. Section 27 of the Children's Act further provides, in relevant part:

- "(1) The primary duty to care for and maintain a child shall rest upon the biological parents of the child.
- (2) The duties of the biological parents of a child shall, where those parents do not live together, be carried out jointly by them unless it would not be in the interests of the child."

67.5. Finally, section 28 of the Children's Act provides, in relevant part:

- "(1) Subject to the best interests of the child and section 78, every parent shall have the right, in relation to that child, to-
 - (a) Have the child live with him or her;

- (b) Control and guide the child's upbringing;
- (c) Maintain personal relations with, and have access to, the child if the child does not live with him or her

...
(2) A person who, under this section, exercises parental rights in respect of any child shall do so with the express or implied consent of other persons who have similar rights in respect to the child, subject to the best interests of the child."

68. The Children's Act centralises the primacy of both biological parents' involvement, irrespective of their marital status.⁵⁶ Not only are their duties to the child shared, but biological parents are in fact afforded a right to be a part of their child's life, to have access to them and to participate in their parenting. Because the result of adoption is to terminate the biological parent's rights and duties to that child, to do so without that parent's consent, in circumstances that are not explicitly in the child's best interests, would be in conflict with the Children's Act.

69. Finally, if there is any doubt remaining, section 28(2) of the Act provides that a person who *exercises* parental rights over a child (such as the third respondent) must do so with the express or implied consent of persons with parental rights to the child (in this case the biological father).

70. It would therefore be contrary to section 28(2) for the third respondent to exercise parental rights in respect of C [REDACTED] without the express or implied consent of the applicant unless this is in C [REDACTED]'s best interest – least of all if he actively objects to any role of guardianship or care by the third respondent.

71. Section 3 of the Children's Act allows for exceptions to the primacy of the Children's Act in cases where it may not be in the child's best interest, where it may

⁵⁶ The definition of "parent" under the Act includes biological parents. Perhaps this explains some instances and therefore not universal, where Magistrates' courts have considered as a requirement to a lawful adoption, the consent of the biological father as was the case in *July v Kirsten-Mey and Others* MAMLN-000017-13 wherein an adoption was rescinded on the basis of lack of the father's consent.

prejudice the exercise of the rights and freedoms of others or the public interest. The latter two exceptions have been discussed in more detail under the section on the protection against discrimination.

72. The best interests of the child is fundamental to both the Children's Act and the Adoption Act. Section 4(2)(c) of the Adoption Act in relevant part states:

"A court to which application for an order of adoption is made shall not grant the application unless it is satisfied-

(c) That the proposed adoption will serve the interests and conduce to the welfare of the child."

73. Factors to determine the best interests of a child in a given circumstance include the need to protect the child from harm; the person's capacity to care for and protect a child; and the child's spiritual, physical, emotional and educational needs.⁵⁷

74. In *Kirsten-Mey v July*,⁵⁸ the Court of Appeal held that "children [should] be afforded the opportunity to be brought up in a caring and loving family environment where they are properly provided for materially, emotionally and psychologically".⁵⁹

75. Similarly, in *Macheme v Ndlovu*,⁶⁰ the Court of Appeal upheld a judgment of the High Court that considered the rights of unmarried fathers to their minor children. The reasoning of the High Court judgment was upheld in full. The High Court⁶¹ held that once a natural bond had been established, it was presumptively in the best interests of the child that the relationship be maintained unless the welfare of the child demands otherwise.⁶²

⁵⁷ Section 6 of the Children's Act.

⁵⁸ CACGB-134-13, Court of Appeal, 19 May 2014.

⁵⁹ CACGB-134-13, Court of Appeal, 19 May 2014, para. 52.

⁶⁰ *Id.*

⁶¹ *Ndlovu v Macheme* 2008 (3) BLR 23(HC).

⁶² Citing *T v M* 1997 (1) SA 54 (A) (South Africa Court of Appeal).

76. This is affirmed by Botswana's international obligations. Article 21 of the Convention on the Rights of the Child, acceded to by Botswana in 1995, notes that persons concerned with the child should give their informed consent to the adoption. Article 21 provides in relevant part:

"States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary".

77. The Children's Act also emphasises that the child's best interests are generally best served by having both biological parents in his or her life.⁶³

78. Without evidence to the contrary, it must therefore be understood that it is generally in a child's best interests to maintain a parental relationship with her biological father.

79. In this case, there is clear evidence that it is in Chedza's best interest to continue having a parent-child relationship with Mr Khwarae. The Magistrates Court in awarding Mr Khwarae visitation and access rights affirmed that it was in O██████'s best interest to continue her relationship with her father.

⁶³ The South Africa Constitutional Court in *Bhe and Others v Magistrate, Khayalitsha and Others (Commission for Gender Equality as Amicus Curiae)* 2005 1 SA 580 (CC) also held that differentiation between children on the grounds of whether their parents were married at the time of conception or birth amounts to unfair discrimination against the child on the grounds of "birth". This Court's interpretation of the child's best interest should thus be guided by the injunction not to discriminate against children on the grounds of their birth. See also *Lackshmi Kant Pandey v Union of India*, Air 1984 SC 469 (India Supreme Court).

80. Furthermore, the facts before the Magistrates Court illustrate in clear terms that the applicant has consistently sought to protect, nurture and parent C [REDACTED] such that one social worker found that he should be granted primary custody.

81. It would be contrary to C [REDACTED]'s best interest to deny Mr Khwarae the ability to consent before any possibility that she is adopted by another.

82. In light of the importance placed on the role of biological parents in a child's life, and the legislature's clear guidance that the provisions of the Children's Act should prevail when any conflict between statutes occurs, we submit that section 4(2)(d)(i) not requiring a father's consent cannot stand.

83. The consideration of a father's consent would not be anomalous with the way in which the child's best interests are typically considered in adoption proceedings. Indeed the courts do consider the father's wishes in some instances.⁶⁴ What the applicant seeks is the legal right to assert the right to withhold consent, subject to the child's best interest. Without such a right, the parental rights of unmarried biological fathers are inadequately protected.

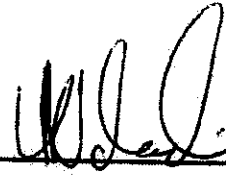
REMEDY AND CONCLUSION

84. For the reasons set out above the applicant seeks the following relief:

- 84.1. a declaration that section 4(2)(d)(i) of the Adoption Act insofar as it does not require an unmarried father's consent to adoption of his child regardless of the best interest of the child violates his constitutional rights and is in conflict with the Children's Act.

~~Signature~~

84.2. a declaration that the second respondent shall not be adopted without his consent and that any adoption that has occurred without his consent be revoked.



UYAPO NDADI

ATTORNEY FOR THE APPLICANT

LIST OF AUTHORITIES

Legislation

Adoption of Children Act [Chapter 28:01].

Children's Act No 8 of 2009.

Case Law

Attorney-General v Dow [1992] BLR 119 (CA).

Binda and Another v the State 2010 2 BLR 286 (HC).

Diau v Botswana Building Society 2003 (2) BLR 409 (IC).

Khwarae v Keaikitse and Another MAMMN-000020-12, Magistrate Court for the district of North West held at Maun, 1 August 2008, per Principal Magistrate CT Foroma.

Kirsten-Mey v July CACGB-134-13, Court of Appeal, 19 May 2014.

Macheme v Ndlovu 2009 (1) BLR 120 (CA).

Makuto v the State 2002 (2) BLR 130 (CA).

Moekena v the State 2008 (1) BLR 151 (CA).

Moyo and Others v The State (Crim App 12/06), unreported.

Ndlovu v Macheme 2008 (3) BLR 23(HC).

Petrus and Another v The State 1984 BLR 14 (CA).

Ramantele v Mmusi and Others CACGB-104-12, Court of Appeal, 3 September 2013.

Tirelo v the Attorney-General and Another 2008 (2) BLR 38 (HC).

International Legal Instruments

Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

International and Foreign Case Law

Bhe and Others v Magistrate, Khayelitsha and Others (Commission for Gender Equality as Amicus Curiae) 2005 1 SA 580 (CC) (South Africa Constitutional Court).

Fraser v Children's Court Pretoria North and Others [1997] ZACC 1; 1997 (2) SA 218 (CC) (South Africa Constitutional Court).

Keegan v Ireland 18/1993/411/490, Council of Europe: European Court of Human Rights, 19 April 1994.

Lackshmi Kant Pandey v Union of India, Air 1984 SC 469 (India Supreme Court).

Lehr v Robertson 463 US 248 (1983) (USA Supreme Court).

Pretty v United Kingdom (2002) 35 EHRR 1 (European Court of Human Rights).

Re Mac Vicar and Superintendent of Family & Child Services et al, 34 D.L.R. (4th) 488 (B.C.S.C. 1986) (Canada, British Columbia Supreme Court).

Stanley v Illinois 405 US 647 (1972) (USA Supreme Court).

T v M 1997 (1) SA 54 (A) (South Africa Supreme Court of Appeal).

BEFORE JUDGE DR DINGAKE

**IN THE HIGH COURT OF THE REPUBLIC OF BOTSWANA
HELD AT GABORONE**

Case No. MAHGB - 000291-14

In the matter between:

GEOFFREY KHWARAE

Applicant

and

BONTLE ONALENNA KEAIKITSE

First Respondent

C [REDACTED] K [REDACTED]

Second Respondent

MOTHUSIOTSILE TLOTLENG

Third Respondent

THE ATTORNEY GENERAL

Fourth Respondent

RETURN OF SERVICE

I,

UYAPO NDADI

do hereby state that:-

1. I am an adult male of full legal capacity and an officer of this Honorable Court, practicing as an attorney and proprietor at the law firm styled Ndadi Law Firm.
3. I have on the **11th day of July 2014 at 14:00 p.m.**, served a copy of a Court Order dated **23rd June 2014** upon the above named Fourth Respondent by handing over a copy to the said Fourth Respondent, **Dr Atalia Molokimme**, employed by the Attorney Generals as the Attorney General.
5. At the time of service of the said documents upon **Dr Atalia Molokimme** I duly explained the nature, contents and exigencies thereof to her.



UN

5. For all of which this is my proof thereof.



UYAPO NDADI