

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

DR DINGAKE J.

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

CASE NO: MAHGB 000 291 - 14

In the matter between:

GEOFREY KHWARAE

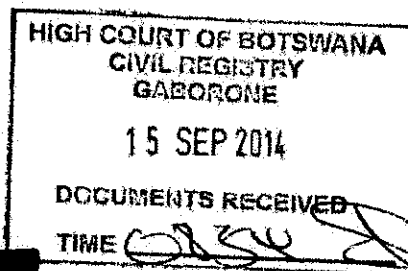
and

BONTLE ONALENNA KEAIKITSE

C [REDACTED] K [REDACTED]

MOTHUSIOTSILE TLLENG

THE ATTORNEY GENERAL



Plaintiff

1<sup>st</sup> RESPONDENT  
2<sup>nd</sup> RESPONDENT  
3<sup>rd</sup> RESPONDENT  
4<sup>th</sup> RESPONDENT

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4<sup>TH</sup> RESPONDENTS HEADS OF ARGUMENT

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BE PLEASED TO TAKE NOTICE THAT the 4<sup>TH</sup> Respondents hereby file the following Heads of Argument in opposition to the Application;

**INTRODUCTION**

1. This is an Application wherein the Applicant seeks inter alia, an Orders declaring that Section 4 (2)(d)(i) of the Adoption Act is unconstitutional in so far as it permits without the consent of the Biological father to an illegitimate child, the adoption of the said child and more specifically that it violates the following provisions;
  - a) The right to be free from discrimination as provided by Section 3 and 15 thereof;  
and,

- b) The right to be free from inhuman and degrading treatment guaranteed by Section 7 thereof.
2. The Applicant subsequently brought an Application seeking protection thereto alleging that the purported adoption of the 2<sup>nd</sup> Respondent by the 3<sup>rd</sup> Respondent (if any) was ultra vires for reason that the Applicant's consent had not been obtained and sought to reverse the decisions of the 1<sup>st</sup> and the 3<sup>rd</sup> Respondents.
  3. The Attorney General was cited as the 4<sup>th</sup> Respondent as is a requirement in terms of Section 18 (2) of the Constitution as read with Order 70 of the High Court Rules.
  4. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents sought to defend the matter out of time and found themselves no suited by the defluxion of the dies indicæ, the Court finding that the reasons they advanced for the delay were weak and did not reflect the requisite seriousness with which Court process should be attended.
  5. However and due to the serious nature of the case and the ramifications resultant from a default order without consideration of the attendant issues, the Court directed that the Attorney General prepare heads of argument and assist the Court in determining the veracity of the prayers.

### **BRIEF ASSESMENT OF THE CORE ISSUES**

6. This case raises very fundamental and very important issues the determination whereof have far reaching implications to our society at large more especially that they touch on a very sensitive matter, that of parentage and the rights, duties and obligations attendant thereto especially in relation to the question of legitimacy and illegitimacy.
7. It is accepted that our society and indeed other communities and societies globally ground their assessment and judgment on the notion that morality, dignity, esteem, character, etc stem from the family unit. The very existence of humanity even across religions recognizes that the family unit is central to the classification of that which is good and morally acceptable.
8. Central to the family unit is institution of matrimony or marriage, an ideal so revered that grounds the very pivot upon which society currently measures the character of morality in humanity. Religion, upon which most societies measure morality elevates the institution even to the status of divinity, so sanctimoniously that issue derived out of it were previously not recognized as belonging or worthy.

9. The status of men and women was measured on this pivot such that one was regarded as lower in rank and hierarchy if they were not married. Children that were born out of the institution were shunned as were men who seduced women out of wedlock to the point of fornication resulting in conception.
10. Such men had no rights over such children who were generally deemed as outcasts even to the maternal family to which they belonged.
11. Society is however ever evolving and has gradually chipped away at these stringent rules to the point where today uncertainty lies in determining the role of illegitimate children in their biological fathers' lives and vice versa.
12. As such these heads will not delve into a detailed analysis of the facts but will centre their arguments on the legal points and arguments that this contentious matter raises.

### **ISSUES FOR ARGUMENT**

13. The following issues have been identified by the 4<sup>th</sup> Respondent as those that will be addressed at the hearing;

### **RIGHT TO DEMAND CONSENT**

- 13.1 Whether the Applicant has the right to demand that his consent be sought and granted prior to the adoption of the said child.

### **IN RESPECT TO PRAYERS 1 –**

#### **Discrimination and Inhuman and Degrading Treatment**

- 13.2 If the Applicant is able to establish a lawfully recognized right, whether such right has been contravened contrary to the provisions of Section 3 and 15 of the Constitution
- 13.3 If the Applicant is able to establish a lawfully recognized right, whether the conduct described under Section 4 (2) (d) (i) amounts to inhuman and degrading

treatment as envisaged by the type sought to be guarded against by Section 7 of the said Constitution in relation to the Applicant and the circumstances.

### **IN RESPECT TO PRAYERS 2 AND 3 –**

#### **Prevention and/or Revocation of the Adoption**

- 13.4** Whether if at all the Applicant is entitled to prevent adoption or to a revocation of any adoption order if given, regard being had to the status quo antè especially in light of and with consideration to the best interests of the child (2<sup>nd</sup> Respondent).

### **RIGHT TO DEMAND CONSENT**

- 14.** The first question in determining this matter and before addressing the issue of whether there has been and infringement of any of the Applicant's fundamental rights under the Constitution is to determine whether or not the said Applicant does indeed have any such right which he can claim is being infringed by a law subordinate to the Constitution such as to warrant it being declared ultra vires and of the provisions of the said Constitution.
- 15.** In attempting to give weight to the above, the Applicant has raised two matters herein, the right to equal treatment and the right not to be discriminated against.
- 16.** From the above the question that merges, given the present subject matter of this suit, is whether the right in question, can it be termed a fundamental human right inherent in all human being such as to warrant protection under the Constitution.
- 17.** Section 4 of the Adoption Act provides as follows;
- "4 (1) ...**
- (2) A court to which application for an order of adoption is made shall not grant the application unless it is satisfied –**
- (a) ...**
- (b) ...**
- (c) ...**
- (d) That consent to the adoption has been given –**
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- (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;"**

18. It is submitted that the right to consent from an illegitimate father is not necessary under our statutory law as appears in the Section above. It therefore follows that the Applicant does not have any right unless and until the statute has been amended to specifically include the consent of illegitimate fathers.

19. In the case of **DEBORAH JAN KIRSTEN MEY vs JOSHUA JULY**, Court of Appeal Case No. **134-13** the Court laid the question to rest as follows;

**"The second question was whether the respondent's asserted right to be consulted about the adoption and to consent thereto was well founded. Under Section 4(1)(d)(i) of the Adoption Act, if the child's mother is unmarried, no consent to adoption is required from the father."**

**@ p35: para 55 of the cyclo-style Judgment**

20. The Applicant has in its Founding Affidavit argued that because the Children's Act grants him certain other rights in determining the child's welfare, maintenance and upbringing that it went as an inferred conclusion that a right to consent could also be implied. This position is also disputed as wrong, as was further stated in the case of **DEBORAH JAN KIRSTEN MEY vs JOSHUA JULY** supra.

21. It is submitted that what was created was not a right to demand consent but rather, the act merely detailed his duties as concerns his right to involvement in the child's upbringing.

Judge Lesetedi J.A had this to say at page 38 making reference to the Children's Act;

**"Under the repealed Act there is no definition of a parent and in terms of the common law the consent of the father of a child born out of wedlock has no parental rights over that child. The new Children's Act no. 8 of 2009 does not in any of its provisions require the consent of the biological father of a child born out of wedlock to be a condition precedent to the adoption of the child. The Act gives such father greater rights of involvement in the child's upbringing and outlines in detail his duties. To that extent it does not conflict with or override the Adoption Act. What flows from the Children's Act of 2009 is that the father**

would now expect to be consulted if he had hitherto involved himself in the life of the child. His views and the nature and extent of his involvement in the child's welfare and upbringing would then be factors to be taken into account in deciding on a totality of every other relevant consideration whether the adoption would be in the child's best interests."

22. It is submitted that the Applicant under our common law as well as customary law, the father of an illegitimate child had no rights over the child. He had no involvement in the child. While the law has evolved and recognized that certain duties can and have now been attributed to the father, the said father should be allowed more involvement in the child's life.
23. It is however submitted that that is where it ends. The father only has greater rights of involvement than he previously had and in no way should this be translated into meaning that the father now has anything more. Certainly not the right akin to a guardian as that still vest in the maternal lineage of the child.
24. It is therefore submitted that the Application should be dismissed on that count. The Applicant however further argued certain Constitutional violations as shall be discussed herein.

### **IN RESPECT TO PRAYERS 1 (a)**

25. The Applicant has raised the argument that by so being deprived the right to consent he is being discriminated against. Section 3 of the Constitution creates and establishes that every individual shall enjoy such rights and freedoms afforded every human, subject to those limitations provided in the provisions specifically dealing with the right and freedom.

### **DISCRIMINATION**

26. Section 15 of the Constitution provides as follows;

"15. (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) ...

(3) In this Section, the expression "discrimination" means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by

race, tribe, place of origin, political opinion, 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 accorded to persons of another such description.”

27. This section clearly provides against discrimination and goes further to detail attributes necessary for the qualification of discriminatory conduct. The question is whether the Applicant falls within these criteria.

#### **Description of the Applicant**

28. The relevant extrapolations from subsection (3) are that one must fall within a specific description of persons and that such persons are being treated differently from other persons with the same description.

#### **Males vs Females**

29. In this case it is the Applicant's argument that he is being discriminated by virtue of his sex and in particular, being male. In other words he is not being treated in the same manner as that to which female persons are being treated.
30. This argument, it is proposed, must fail as it clearly implodes on its-self. It is submitted that it should fail for reason that the Applicant wants the description under which he fall to be that of sex.
31. Counter to this argument is the simple reality that there are males who are afforded the same treatment as their female counterparts, that is to say married males. There is clearly no discrimination between these two categories on account of sex.
32. To this, the description of the Applicant must be more clearly defined.

#### **Married vs Unmarried**

33. It is proposed to this Honorable Court that what in actual fact the Applicant seeks, is to convince and bring the Court into its confidence that, he is being discriminated by virtue of being an unmarried man as opposed to a married man. That is in reality the
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description of persons under which the Applicant fall that is to say that of unmarried males.

34. It is submitted, if the Court accepts the above proposition (which it is submitted is the correct one), that even then the Applicant's reliance on this Section must fail. This description relates to social standing and not to any of those mentioned in Section 15(3) and certainly cannot be squeezed in to the sex category.
35. Even if the description were to be extended to that of unmarried and taken further, there can still be no discrimination as the issue of unmarried males has been dealt with by the Court of Appeal as described herein above. There can therefore be no discrimination as that description has no rights of adoption upon which discrimination can be measured. There can be no discrimination as there is nothing from which it can be pegged against.
36. Section 15 (3) does not prohibit discrimination on grounds of social standing or status and certainly not marital status and therefore this prayer should be dismissed.

### **Unmarried Males vs Unmarried Females**

37. The position however changes when dealing with males and females who are unmarried as clearly they are members of the opposite sex and thus fall within one of the categories described in subsection (3).
38. Under normal circumstances an argument approached from this angle could succeed as clearly there is discrimination between the two descriptions on account of sex, the one being male and the other being female, both of whom are unmarried.
39. However the Constitution provides an exception to this. Section 15 (1) as read with subsection (4) reveal the following;

**"15. (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) & (3) ....**



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

- (a) ...**
- (b) ...**
- (c) With respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;**
- (d) ...**
- (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 disadvantage 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."**

**40. Subsection (4) (e) further provides for preferential treatment where such is reasonably justifiable in a democratic society. This point shall be dealt with later.**

### **Section 15 (4) (c)**

**41. It is submitted that in this instance we are dealing with adoption, one of those instances specifically prohibited by Section 15 (4) (c).**

**42. Subsection 4(c) is peremptory in nature as is evidenced by the use of the word "shall" and as such requires strict compliance therewith. This should bring the matter to an end under the circumstances. We are dealing with provisions relating to adoption which are specifically prohibited.**

**43. The Applicant has however argued that this subsection (4) (c) should not go unchecked and rightfully so as was explained in the case of *Ramantele v Mmusi and Others* CACGB 104 – 12 @ para 72.**

**"I therefore agree with the respondents that the derogations contained in section 15(4) of the constitution are not unchecked. They 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."**

**See also: para 25 – "Section 3 is the substantive umbrella section which entrenches the inherence of the set out fundamental rights in each individual or person...but of course, subject to the rights and freedoms of others or public interest."**

44. Clearly from this the test check is whether the enjoyment of the right infringes that of others or public interest.

#### **Rational and Justification**

45. Section 4(1)(d)(i) of the Adoption Act it is submitted is an attempt at the codification of both the common law as well as the customary laws of Botswana. To understand the rational and justification behind this section, one must look at from its origin and the purpose it served.
46. In terms of our Customary Law, a child born out of wedlock belongs to the mother's family. The child of an unmarried woman belongs to her mother's home.
47. The father of such a child had no legal rights over the same due to the surreptitious nature of conception. Such child was normally referred to as "ngwana wa digkora" to denote his illegitimate status.

**See: Shapera @ P 171 - 172**

48. In terms of our Common Law the same principle also applies. Parental power over a child is acquired by birth in lawful wedlock. An illegitimate child was considered and remains a child of the mother's family and is treated as a child of the mother's home.

**See: Roman Dutch Law @ page 38 - 40**

49. Of importance and note is that both Legal Systems share the same concept that fathers of children born out of wedlock could only acquire rights through legitimization either by subsequent marriage or through the process of adoption. By no other. The children were considered children of the mother's family. (presumably because of the lack of independence at the time)
50. Underlying this seemingly severe restriction or disadvantage was the institution of matrimony.
51. The Court can be persuaded into agreement that, so highly converted was this institution that any element that tended to derogate from its purity was shunned to the highest of degrees. It was considered by communities globally and remains one of the cornerstone of morality and the very fabric through which social character is measured. So powerful was this institution that it even transcended all stages of civilization from what was deemed advanced to the lowest ends of socializations, through religious beliefs as well as the natural and supernatural.

52. Among the threads that wove this fabric was the matter of offspring and identifiable genetic line. At the time technology was not so developed such that the only way to ensure the above was through the institution. A way of ensuring that members of society would not violate this concept was to provide sanctions on those fathers who conceived offspring other than within the institution. Depriving them of the right to claim legitimacy over the issue was seen as one of the suitable deterrents.

### **The Rights**

53. As society evolved and levels of sophistication began to emerge, mothers of children born out of wedlock became more independent they also acquired the ability to raise their children as single parents. With this came certain rights and obligations. The standard practice of the illegitimate child being one of the children of the mother shifted to a situation which saw single mother acquiring the rights over the child.

54. Currently that is the position of our law. The right over a child born out of wedlock vest with the mother and up until recently the father had none. The father of the child was still considered to be the father of the mother.

55. The position has currently changed through various legislative instruments which now see the biological father being recognized as the father of the child although his rights are only limited to the best interests of the child in so far as upbringing. The biological father acquires a limited right to be consulted only where the biological father has been actively involved in the child's life from the beginning.

See: **DEBORAH JAN KIRSTEN MEY vs. JOSHUA JULY** supra @ P38

**"The Act gives such father greater rights of involvement in the child's upbringing and outlines in detail his duties. To that extent it does not conflict with or override the Adoption Act. What flows from the Children's Act of 2009 is that the father would now expect to be consulted if he had hitherto involved himself in the life of the child. His views and the nature and extent of his of his involvement in the child's welfare and upbringing would then be factors to be taken into account in deciding on a totality of every other relevant consideration whether the adoption would be in the child's best interests."**

56. At no point are the biological fathers the right to demand consent upon adoption created.

57. Of common cause was the notion that when some impregnated an unmarried woman they had the obligation to marry that individual and failure so to do was seen as a very serious blemish on both parties's standing in society.
58. Under our Customary Law the infringing father was and is still even charged a number of beasts as a sanction for having violated the not only the lady in question but for also disrespecting the mother's family and bringing shame upon them.
59. So serious was this indictment that in others cultures and religions, the mother as well as the child are put to death.

### **The Rights of the Family**

60. From the above explanation certain attributes are clear. The mother of the child as well as the mother's family enjoyed certain privileges and rights that derived from their daughter's chastity and purity. Dignity, social integrity, honor respect, good moral character and most importantly to the mother, good or favorable prospects of marriage etc. the list is endless.
61. These are attributes that the families as well as the daughter have a right to enjoy in their existence and interaction with society.
62. It is submitted therefore that this is the rational and justification behind Section 4(1)(d)(i) of the Adoption Act which it is submitted accords with the exception created by Section 3 of the Constitution. To depart from this line would be to permit the infringement of the right of the family and the mother as mentioned above.
63. The above has since developed into our culture as well as a practice that is accepted as law. Not only is it unquestioned as our customary law it was even taken into
64. It is further submitted that when the drafters of the Constitution when including the exception to Section 15 (1) & (3) had this in mind hence Section 15 (4) (c).

## **Section 15 (4) (e)**

65. Section 15 (4) (e) of the Constitution reads as follows;

**“(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 disadvantage 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.”**

66. The proviso to Section 3 of the Constitution not only deals with the protection against infringement of other people's right it also seeks to protect against traversing the public interest.

**“the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said right and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”**

67. The Drafters of our Constitution envisaged a situation where an important matter of public interest could be challenged and rendered redundant while through the use of this and other provisions of the Constitution while in actual fact, such would not be in the public interest. For instance society just simply does not accept and is not ready for a particular change.

68. It is submitted that this is a matter of extreme public interest as it touches on one of the fundamental components that define our social and moral character. The issue of the illegitimate child is one that has an entire process of resolution devoted to it under our customary regime and it is one of the more important considerations when dealing with premarital negotiations but to mention a few.

69. To protect society from this injustice which prima facie would appear to be correct law, while in reality, going against public interest, especially in matters such as this dealing with discrimination, the additional safe guard as is embodied under Section 15 (4) (e) was deemed necessary.

70. In **Chivanduka & Anor v MINISTER OF HOME AFFAIRS OF ZIMBABWE & Anor 200 (4) SA 1 (ZS)**, dealing with a provision analogous to Section 15 (4) (e) of our Constitution, the Zimbabwe Supreme Court laid down the following three fold test to be applied in

determining whether or not a limitation of the rights therein mentioned (Right to freedom of association) was reasonably justifiable in a democratic society.

- 70.1 the legislative objective which the limitation is designed to promote is sufficiently important to warrant overriding a fundamental right;
- 70.2 the measures designed to meet the legislative objective are rationally connected to it and are not arbitrary, unfair or based on irrational considerations;
- 70.3 the means used to impair the rights or freedoms are more than is necessary to accomplish the objective.

See also: **BOPEU & 3 Others v The Minister of Labour & Anor (unreported)** wherein DINGAKE J. approved the above.

71. It is submitted that all three requirements or considerations have been sufficiently covered in the above paragraphs. As already mentioned herein above, objective of limitation cannot be overstated. It touches on the fundamental notion of what Botswana terms morally correct.

See: Para 45 – 63 above.

#### **Custom, Tradition, Accepted Practice, Culture**

72. In another case, **Woods & Anor v Minister of Justice, Legal and Parliamentary Affairs & Others 1995 (1) BLR SA 703 (ZS)**, the court opined that;

**"...the quality of reasonableness of the provision sought to be impugned is to be adjudged on whether it arbitrarily or excessively invades the enjoyment of the guaranteed right according to the standards of a society that has proper respect for the rights and freedoms of the individual."**

73. It is submitted that the standard with which society views this matter is of such importance such that it has through time even developed into law. So entrenched has this practice become that it forms part of our custom, culture and tradition.

74. It is submitted that a deviation from the above would not be in accordance with our custom and culture, not to mention tradition. In essence it would not be in the public interest to deviate from our culture on such a serious and strongly viewed practice.

75. If at all, it is submitted in the alternative, that this matter is one deserving of a national referendum to determine the public's perception on the point.

76. In conclusion, it is submitted that this prayer be dismissed.

### **INHUMAN AND DEGRADING TREATMENT**

77. The Applicant has also sought to rely on Section 7 of the Constitution and attribute his plight to and as being inhuman and degrading. Section 7 provides as follows

**"No person shall be subjected to inhuman or degrading punishment or other treatment."**

78. The constituents of what constitutes inhuman and degrading were described in the case of *Binda and Anor v The State* 2010 (2) BLR 286 as;

**"In proscribing torture, inhuman or degrading treatment, the Constitution of Botswana lays down a moral standard which must be observed. The United Nation Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment include in the definition of "torture" any act by which severe mental pain and suffering is intentionally inflicted on a person for the purpose of punishing him for an act he has committed. It does not include mental pain and suffering arising only from, inherent in or incidental to lawful sanctions. Inhuman treatment is treatment which is destitute of natural kindness or pity, brutal, unfeeling and cruel,"**

79. It is submitted that the Applicant does not fall within the category envisaged by the above description, in the slightest. The treatment which the Applicant is subject as a result of his inability to consent to any envisaged adoption of the 2<sup>nd</sup> Respondent cannot be classified under the above definition.

80. At the very best, it is submitted that the Applicant is suffering disappointment but certainly not torture or cruelty such as to cause "severe mental pain and suffering.

81. Further thereto, any pain and suffering if any exists is certainly not intentionally inflicted as punishment.

82. On the contrary, the Applicant is subject to his own failure to make an honest woman out of the 1<sup>st</sup> Respondent and his failure to take responsibility at the time he was supposed to so do.

83. It is therefore submitted that this prayer must be dismissed with costs.

### **FAIR HEARING**

84. The Applicant has sought to rely on Section 10 (9) of the Constitution and sought to advance the argument that by permitting the adoption to proceed, while he has a Court Order permitting him visitation and other privileges, that this would tantamount to taking away those rights without giving him a fair hearing.

85. Section 10 (9) is clear and there is no need to recapitulate it her.

86. What is apparent is that it speaks of where someone has instituted proceeding and the ensuing fair hearing.

87. In this case it is submitted that the Applicant has not instituted any proceeding and one fails to see how this section is intended to apply in the case of the Applicant. If the Applicant feels that any adoption will take away his rights, he is permitted and should correctly approach the Court for an appropriate Order wherein Section 10 (9) shall apply.

88. If the child has been adopted, the Applicant can always make application for a rescission order in terms of the Adoption of Children's Act, Section 8 whereof provides as follows;

**"8. (1) (c) that for reasons set out in the application the adoption is to the detriment of the child."**

89. At this stage it is premature to invoke Section 10 (9) for reason that the Applicant has not instituted the envisaged proceedings as required. It must be pointed out that the onus at this point rests with the Applicant to show that the adoption is to the Detriment of the child.

See: **DEBORAH JAN KIRSTEN MEY vs. JOSHUA JULY supra @ P36, para 59 – 65**  
Especially para 64.

**"...the respondent had to show that he had either a clear case or at least a prima facie case being open to doubt. That would have been demonstrated by making averments in his affidavit showing that, firstly, he had locus standi in terms of the law to bring the rescission of adoption application....; or, that for reasons set out in the affidavit(s) in support of the interim order the adoption was to the detriment of the child."**



90. In any event, there is nothing to indicate that the child has been adopted as the Applicant claims. The Application is premature and reliance on this ground cannot be sustained.

### **RELATIONSHIP BETWEEN THE CHILDREN'S ACT AND THE ADOPTION OF CHILDREN'S ACT**

91. THE Applicant also raises the argument that there exists a conflict in the Adoption Act and the Children's Act. He seek to convince the Court that if the child is adopted the consequences thereof would be to terminate the rights of the biological father as are granted or contained in the Children's Act.

92. This position is wrong and as is submitted should be rejected by the Court. The position was clarified in the case of **DEBORAH JAN KIRSTEN MEY vs. JOSHUA JULY** supra @ P33, para 52. – 55.

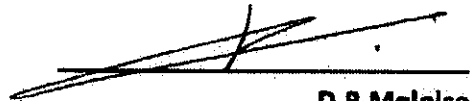
For the sake of emphasis I shall also repeat the finding of the Court at page 38 para 61

**"The Act gives such father greater rights of involvement in the child's upbringing and outlines in detail his duties. To that extent it does not conflict with or override the Adoption Act. What flows from the Children's Act of 2009 is that the father would now expect to be consulted if he had hitherto involved himself in the life of the child. His views and the nature and extent of his of his involvement in the child's welfare and upbringing would then be factors to be taken into account in deciding on a totality of every other relevant consideration whether the adoption would be in the child's best interests."**

93. It is therefore submitted that this position fails from the onset and that this Application should be dismissed with costs.

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**DATED AT GABORONE ON THIS 5<sup>th</sup> DAY OF SEPTEMBER 2014**



**D.B Molise  
For/Attorney General  
Attorney General's Chambers  
Government Enclave  
Private Bag 009  
GABORONE**

**TO: THE REGISTRAR OF THE HIGH COURT  
Private Bag 001  
GABORONE**

**AND TO: NDADI LAW FIRM  
Plot 10398, Independence Avenue  
White City  
Private Bag 130  
GABORONE**