

SOUTH AFRICA / JUDGMENT

V.K and Another v Minister of Home Affairs and Others (21886/2023)

[2025] ZAWCHC 219 (26 May 2025)

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COURT

Western Cape High Court, Cape Town

BEFORE

Moosa AJ

CASE / FILE NUMBER

21886/2023

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FLYNOTES:

FAMILY

– Children – Birth certificate – Details of father where child born outside of marital bonds – Requirement of DNA test – Each case must be decided on its own merits – Paternity in this case not in dispute – High Court's declaratory order under section 11(5) stands as conclusive proof of paternity – Father then entitled to have his particulars recorded on child's birth certificate – Without need to produce further proof of paternity with DNA test – Home Affairs directed to register applicant's particulars – Births and Deaths Registration Act 51 of 1992, s 11(5).

IN
THE HIGH COURT OF SOUTH AFRICA
(WESTERN
CAPE DIVISION, CAPE TOWN)

JUDGMENT

CASE NO: 21886/2023

REPORTABLE

In the matter between:-

V[...] K[...] First Applicant S[...] M[...] Second Applicant and MINISTER OF HOME AFFAIRS First Respondent DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS Second Respondent VFS GLOBAL SOUTH AFRICA Third Respondent

Coram: MOOSA AJ

Heard:

2 May 2025

Delivered:

26 May 2025 (delivered electronically to the parties)

Summary: Family law – children’s rights and rights of fathers - registration of fatherhood of child born outside of marital bonds – s 11(5) of the Births and Deaths Registrations Act 51 of 1992 – DNA paternity testing not mandatory.

ORDER OF COURT

- (a) The summary judgment application against the Third Respondent is dismissed with no order as to costs.
- (b) Any person who, by order of a high court issued under s 11(5) of the Births and Deaths Registration Act 51 of 1992, is confirmed to be the father of a child born outside of marital bonds to a South African mother is entitled as of right to have his particulars recorded on the child’s birth certificate without the need to produce further proof of paternity by way of a DNA test result.
- (c) In accordance with s 11(5) of the Births and Deaths Registration Act, 1992, the First Applicant is confirmed to be the father of P[...] K[...] M[...] (born 1 December 2020) and V[...] K[...] J[...] M[...] (born 10 March 2022), and the Second Applicant’s consent as envisaged in s 11(4) is dispensed with.
- (d) Consequentially, First and Second Respondents are directed to forthwith register the First Applicant’s particulars on the birth certificates of P[...] K[...] M[...] and V[...] K[...] J[...] M[...] as their respective fathers.
- (e) First Applicant’s application for exemption under s 7(2)(c) of the Promotion of Administrative Justice Act 3 of 2000 is dismissed.

- (f) The interim interdict granted on 30 October 2024 is extended until 31 May 2026 (or such other date as may be ordered), pending the finalisation of First Applicant's application for permanent residency on the basis of his paternity, which application is to be lodged in accordance with the provisions of the Immigration Act 13 of 2002 by no later than 31 August 2025 (or such extended date as this Court may authorise on good cause shown).
- (g) First and Second Respondents are jointly and severally liable, the one paying the other absolved, for applicants' party and party disbursements incurred in relation to Part A and Part B of this application (but excluding disbursements in relation to the summary judgment application).

Moosa AJ

INTRODUCTION

1. This judgment relates to Part B of an application located mainly in the sphere of family law – the rights of children and fathers of children born outside of marriage. Before narrating the relief sought and crystallising the issues arising for adjudication, it is necessary that I provide my reasons for an order issued at the hearing on the basis that written reasons will be provided in my

judgment.

2. At the hearing, I granted condonation for the late filing of the First and Second Respondents' (the Respondents) answering affidavit. It was filed late by more than 3 ½ calendar months and in breach of a court order.
 3. On 30 October 2024, an order was granted by Goliath AJP (as she then was) in which she directed the Respondents to file their answering affidavit by 2 December 2024. Service thereof occurred on 14 March
2025. The condonation application was filed almost a month later (ie, on 9 April 2025).
4. First Applicant, acting in person, opposed condonation on the basis of prejudice and the absence of a valid reason for lateness. He avers 'the delay was intentional and inexcusable', and that 'the explanation lacks particularity and fails to meet the standard of reasonableness required for condonation'.
 5. The founding affidavit supporting the condonation application is deposed by the State Attorney. Admirably, he accepts responsibility for the failure to comply with the court order. I am satisfied that his actions were neither wilful nor negligent.
 6. The State Attorney explains that his office received the signed

answering affidavit shortly after 28 October 2024, being the date on which it was signed by its deponent. The State Attorney was at that time involved in other litigation and arranged for the timeous delivery of the answering affidavit. This entailed preparing a filing notice and signing it on 28 October 2024, which he then promptly handed to support staff at his office with express instructions that it be appended to the signed answering affidavit once it is received and it must thereupon be delivered per the court order.

Unfortunately, this never happened.

7. On 10 March 2025, the attorney became aware that the affidavit was not filed - he read this in the First Applicant's practice note. The attorney then took steps to remedy the situation. There is nothing in the affidavit opposing condonation which gainsays the cause of the delay - an innocent administrative oversight. I find that the explanation is reasonable and covers the entire period. See *Van Wyk v Unitas Hospital and another* [2007] ZACC 24; 2008 (2) SA 472 (CC) paras 22, 25.
8. The Respondents signed their answering affidavit on 28 October 2024. They caused it to be delivered to their attorney's office promptly. They operated under the belief that their attorney, or his office, would deliver the signed affidavit in compliance with this Court's order. To refuse condonation to them in these circumstances would be unfair and harsh. There is no fault on the Respondents' part. See *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-F.
9. As for prejudice, the applicants suffered no real prejudice. The answering affidavit was served about six weeks before the scheduled hearing date. First Applicant filed a detailed reply spanning 30 pages (including annexures).
10. In these circumstances, I find that the refusal of condonation would significantly prejudice the Respondents and permit the applicants to unfairly benefit from an administrative error in the attorney's office which was beyond the Respondents' control. As this judgement shows below, this application raises issues of public significance as regards the Births and Deaths Registration Act 51 of 1992 (the BADRA). Therefore, condonation also ensures that Respondents' answering affidavit serves before this Court on a matter of substantial importance.

THE RELIEF SOUGHT AND THE ISSUES ARISING FOR DETERMINATION

11. The relief sought, and the issues therefrom for determination, are summarised as follows:
 - (a) an order, in terms of Uniform Rule 32 (UR 32), granting summary judgment against the Third Respondent in favour of the First Applicant for payment of the agreed sum of R3 085, being the aggregate application fee paid for reference no. TRV2756383 and reference no. PRP3485242, plus interest at 15% per annum from date of payment to date of final repayment;

- (b) an order declaring that when a high court confirms paternity under the BADRA and directs the Respondents to register the fatherhood of a child born outside of the bonds of marriage, then the addition of the father's particulars on the child's birth certificate after the initial birth registration is to be effected by the Respondents as per the court order without the need for the father to produce further proof of paternity by way of a DNA test result;
 - (c) an order under the BADRA confirming the First Applicant's paternity of his minor sons born outside of marital bonds to the Second Applicant, a South African citizen, namely, P[...] K[...] M[...] (born 1 December 2020) and V[...] K[...] J[...] M[...] (born 10 March 2022), and directing the First and/or Second Respondent to record the First Applicant's particulars as father on the children's respective birth certificates;
 - (d) an order, in terms of s 7(2)(c) of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA), exempting First Applicant from the duty to exhaust all internal remedies before approaching this Court for relief by way of review under the PAJA as regards the adverse decision envisaged in (e) below; and
 - (e) if an order is granted as envisaged in (d) above, then an order is sought reviewing and setting aside Second Respondent's adverse administrative decision taken on 25 July 2024 in terms of which the First Applicant is refused the issuance of a permanent residence permit (PRP) under s 26(b) of the Immigration Act 13 of 2002 (the Immigration Act).
12. First Applicant's summary judgment application is unopposed.
13. The UR 32 allows a plaintiff to obtain judgment summarily (ie, without a trial) in an action instituted by way of a summons served on a defendant who delivers a plea which is found by a high court as not raising any issue for trial, namely, a good faith (that is, bona fide) defence and/or counterclaim. For the ensuing reasons, I find that the First Applicant has failed to prove the essentials of UR 32.
14. The pre-requisites for a judgment under UR 32 are: (i) the issuance and service on a defendant of a summons claiming relief of the kind encompassed by UR 32(1) (such as, payment of a liquidated sum); (ii) the delivery of a plea which does not raise a triable issue; and (iii) the delivery of an application for summary judgment within the prescribed period, supported by an affidavit making the case that the defendant's pleadings lack a good faith defence or counterclaim.
15. While the First Applicant's claim is for a liquidated amount in money, his summary judgment application was not preceded by the issuance and service of a summons against the Third Respondent. Therefore, no plea has been filed which is alleged in the summary judgment application as lacking a triable issue.

16. Indeed, the Third Respondent has not participated in these proceedings at all.
17. First Applicant's claim for payment of an agreed sum is contained in his Notice of Motion. Since this case was launched as an application (and not as an action), UR 32 does not apply. In addition, there is no plea which can be said to contain a defence that is not in good faith or is intended purely as a delay.
18. In the premises, summary judgment is refused with no order as to costs.

SECOND ISSUE: IS SECTION 10 OR 11(4) OF THE BADRA APPLICABLE?

19. In the founding affidavit, the First Applicant avers that he is entitled to an order which obliges the Respondents to register him under s 10 of the BADRA as the father of his two sons. Respondents, on the other hand, aver that the applicable provisions are s 11(4) read with s 11(4A) of the BADRA. To resolve this dispute requires an understanding of the background facts and the pleaded case.
20. First Applicant is a Zambian citizen who entered South Africa on a visitor's visa issued under s 11(6) of the Immigration Act. Second Applicant is a South African citizen. From at least 2018, they are partners in a permanent relationship. They live together in Langa, Cape Town, but are not married to each other. From their relationship, two children are born, namely, P[...] K[...] M[...] who is presently 4 ½ years old (PKM), and V[...] K[...] J[...] M[...] who is presently 3 years old (VKM). All this is common cause.
21. Pursuant to the Second Applicant giving notice of birth under s 9(1)[1] read with s 10(1)(a)[2] of the BADRA, birth certificates were issued for PKM and VKM. Both children bear the Second Applicant's maiden surname. The children's birth certificates do not mention their fathers' details at all. First Applicant was absent when the notices of birth were done. Therefore, his details were not included. All efforts to change this position have failed. First Applicant wants the initial registration process under s 9 and s 10 to be re-done and his details included.
22. Respondents concede that no factual basis exists to doubt the genuineness of the First Applicant's fatherhood of PKM and VKM. Accordingly, I find that the Respondents have not rebutted the presumption of paternity operating by virtue of s 36 of the Children's Act 38 of 2005 (the Children's Act).[3]
23. By reason that the First Applicant's paternity of PKM and VKM are not disputed, Respondents are agreeable to amending the birth certificates to include First Applicant's particulars as the children's father. The problem is that the Respondents insist on proof of paternity through DNA testing. It is common cause First Applicant cannot afford the tests and offered to undergo the paternity tests at the Respondents' cost. They refuse to pay those costs.

24. Therefore, the First Applicant seeks an order recognising him as the children's father and an order obliging the Respondents to re-do the initial birth registration under s 9 and s 10. These provisions do not require a DNA paternity test result.

25. In his founding affidavit, the First Applicant paints a bleak picture as to his and the Second Applicants' financial position. They are poor persons living in the Langa township in rather difficult

conditions. In addition to PKM and VKM, the applicants have another dependent minor child, being Uvayo M[...] (UM) - he is the Second Applicant's biological child from a prior relationship with another man. UM is in high school. All these facts are common cause too.

26. The following undisputed statements also appear in the founding affidavit:

'20.8 The DNA fees is expensive. My partner is unemployed; my visa does not allow me to take up employment; the business is very difficult since lockdown period; we informed the Department of Home Affairs and requested that they insert my [name] on my children's birth certificates without the DNA results, or we do DNA, the Department of Home Affairs bears the cost as there is no paternity dispute as required by Section 10 of the Births and Deaths Registration Act. ...>

27.1 The visitor's visa does not allow me to work, study, and open a business account. Therefore difficult for me to provide for my family. My partner only contribute R350 SASSA [per month], both our children get R500 SASSA [per month] and its not enough and that is not the future I want for my children depending on government sponsorship.'

27. Respondents aver that the applicable regime is not s 10 of the BADRA (dealing with the initial birth registration of a child born outside of marital bonds) but rather s 11 (dealing with amendments to a birth certificate of a child born outside of marriage). I agree, albeit in part only (see below in paragraphs 38 to 44).

28. Respondents' Counsel argued that if I agree, then First Applicant's petition for relief under the BADRA must fail. I disagree. For the reasons outlined below in the paragraphs 29 to 35, I find that there no justifiable basis to non-suit him under the BADRA. Also, the interests of justice militate against such a

ruling.

29. I was partly guided by what was held in *R v Hepworth* 1928 AD 265 at 277:

'A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.'

30. More recently, Koen J (as he then was), in *S v Zuma and another* 2023 (1) SACR 621 (KZP), enjoined judicial officers to be mindful that they are not only in the vanguard for the protection of the Constitution, 1996 (the Constitution) but also of public trust and confidence in the judicial system set up to administer justice in our constitutional dispensation. To this end, Koen J wrote instructively:

‘[23] ...

(a) A court must ensure that public confidence in the justice system is maintained and not eroded;

(b) Litigants should leave the court with a sense that they were given a fair opportunity to present their case, and that they received a decision that is not only actually, but also perceived to be, fair, dispassionate, objective and free of bias.’[4]

31. I also took into account that First Applicant is a lay person without formal legal education or qualification. Although he showed an appreciably higher level of knowledge and understanding of high court rules and this Division’s practice directives as compared with other lay litigants, he remains a lay person who represents himself

because he cannot afford a lawyer. He accessed the hallowed corridors of this Court on his own seeking justice in the form of an order obliging state actors to respect his and his children’s constitutional rights.

32. I also considered that while an applicant must stand or fall by the founding papers, an applicant does not, generally, have to plead the law. In this case, the First Applicant pleaded his case with sufficient particularity that made it clear to the Respondents and I as to what he sought. He expressly pleaded that he seeks an order authorising the inclusion of his details as father in the birth certificates of PKM and VKM, and that this claim is rooted in the BADRA.

33. In his founding papers, First Applicant explained the process followed by the Second Applicant and the Respondents’ officials which led to the issuance of PKM and VKM’s birth certificates pursuant to s 10 of the BADRA without the inclusion of his details as the children’s biological father. He objects to this state of

affairs. He relies on his rights as recognised in *Centre for Child Law v Director General: Department of Home Affairs and others* 2022 (2) SA 131 (CC).

34. In reaching my decision against non-suiting the First Applicant, I also considered the paramountcy of the best interests of PKM and VKM, and that the Respondents’ refusal to register First Applicant as father is an on-going form of humiliation - it offends not only the First Applicant’s dignity rights in s 10 of the Constitution, but also the children’s dignity too. [5]

35. First Applicant acts in his own interest and in his sons' interests, as is envisaged by s 38(a) and (b) of the Constitution. He seeks to end a violation of their constitutional rights by state parties. If I were to non-suit the First Applicant, then I would be non-suiting the children too and permit on-going violations of their,

and First Applicant's, constitutional rights. That is an unpalatable outcome.

36. As regards the dignity of the applicants and their minor sons, it is a matter of real concern that the BADRA (and its regulations), as well as the Children's Act, continue to use the offensive expression 'child born out of wedlock'. In Centre for Child Law supra para 69, the apex court reminded us that this is 'outmoded legal terminology which goes to the core of dignity'.

The court wrote:

'The use of the expression "born out of wedlock" to describe a child undoubtedly injures their dignity and implies that they are not worthy of equal respect and concern. The continued distinction between children born within or out of wedlock, which the impugned law conveys, stigmatises the latter category of children.'

37. Words matter, especially in a court judgment. Therefore, except when quoting from relevant provisions in a law, this judgment will not perpetuate the stigma attached when the prevailing law brands PKM and

VKM (and other children like them) as 'born out of wedlock'. Rather, they will be referred to as being 'born outside of marital bonds'. See Centre for Child Law supra para 71.

38. I now revert to the Respondents' case alluded to above in paragraph 27. Their Counsel argued that the legal framework which applies here is ss 11(4) and (4A)[6] of the BADRA headed 'Amendment of birth registration of child born out of wedlock', read with regs 12[7] and 14(2)[8] of the Regulations on the Births and Deaths, 2014 promulgated by First Respondent under GN R128 in GG 37373 of 26 February 2014 in accordance with his delegated powers under s 32 of the BADRA. For the cogent reasons that follow, I find that this is not so.

39. In cases where s 11(4) applies (ie, when amendments to a birth certificate occur with a mother's consent), then s 11(4A) makes it compulsory ('shall be supported') for a father of a child born outside of marital bonds to provide proof of paternity by way of a DNA test result. Without such scientific proof of paternity,

the amendment cannot be effected, despite the mother's consent.

40. At the hearing, First Applicant argued that I should declare ss 11(4), (4A), and (5) unconstitutional. As this issue is not properly before me in the pleadings, I will not enter those waters. I will proceed to determine this case on the basis that the relevant provisions in s 11 are valid (until a court determines otherwise).

41. There is nothing in the applicants' pleadings indicating that Second Applicant consented to the amendment of the birth certificates to record First Applicant's particulars as father of PKM and VKM. At the hearing, she urged this Court to allow the First Applicant to remain in South Africa and to prevent his deportation. (I deal with the immigration issue later in this judgment.) From the bar, she described him as a loving father who has strong bonds with PKM and VKM. From the bar, she confirmed that, as stated in the founding papers, the First Applicant supports her and the children financially. These facts are undisputed.

42. Second Applicant's concern about the First Applicant's deportation aligns with her pleaded case. She filed a confirmatory affidavit with five paragraphs. After making the usual introductory statements, she recorded the following facts:

'4. I further confirm that, I am in a permanent partnership with V[...] K[...] and together we have two children.

5. I further confirm that I support this application for him to reside in the republic for the benefit of our children.' (my emphasis)

43. Accordingly, there is nothing in the Second Applicant's affidavit indicating that, in accordance with s 11(4) (see quote above in footnote 6), she consented to the amendment of PKM and VKM's birth certificates to include the First Applicant's particulars as father. Therefore, I am satisfied that s 11(5) of the BADRA applies to this application (and not s 11(4)).

THIRD ISSUE: IS FIRST APPLICANT ENTITLED TO RELIEF IN SECTION 11(5)?

44. There is a dearth of case law on s 11(5). Therefore, it is incumbent on me to discuss its provisions to determine if its requirements are met.

45. Section 11(5) of the BADRA reads:

'Where the mother of a child has not given her consent to the amendment of the registration of the birth of her child in terms of subsection (4), the father of such a child shall apply to the High Court of competent jurisdiction for a declaratory order which confirms his or her paternity of the child and dispenses with the requirement of consent of the mother contemplated in subsection (4).'[9]

46. Textually, s 11(5) records that declaratory relief thereunder entails two orders:

- (i) an order confirming paternity of a child; and (ii) an order dispensing with a mother's consent for amending her child's birth certificate by the inclusion of the father's prescribed particulars. Each will now be discussed in turn.

Dispensing with the Second Applicant's consent

47. A birth certificate is no ordinary document. It is a vital instrument for families universally: viewed narrowly, it gives recognition to a legal fact, namely, that the law recognises a parent-child relationship. In South Africa, this recognition underpins a range of benefits operating by law (such as, the right of a child to inherit intestate from a parent; and the right to parental care). Viewed more broadly, a birth certificate aids in acknowledging family ties between the child to whom the certificate relates and his/her extended family (ie, grandparents, uncles, aunts, and cousins), including ancestral family, a key feature in some cultures and traditions in South Africa (and elsewhere in Africa and the globe).
48. All this aligns with the indisputable fact that the birth of a child bonds him/her not only to his/her parents but to the mother and father's families too. For this reason, children's rights extend past mere parental responsibilities. The 'best interests of a child' standard includes the right of a child to, inter

alia, have contact with his/her paternal and maternal family (such as, with grandparents). See *YCM v NDM* (CA04/2024) [2024] ZAECMKHC 144 (10 December 2024). In this way, our law gives practical meaning and expression to the notion and spirit underpinning the age-old proverb that 'it takes a village to raise a child'.

49. When dealing with an application under the aegis of s 11(5), cognisance must be taken of its application in the context of an institution in the DNA of our society, namely, a family, howsoever constituted and structured. That s 11(5) must be interpreted for its application to families in a regional and global context, rather than a narrow South African context only, is clear from s 2 of the BADRA. Its provisions give this statute a very wide berth. Section 2 reads:

'The provisions of this Act shall apply to all South African citizens, whether in the Republic or outside the Republic, including persons who are not South African citizens but who sojourn permanently or temporarily in the Republic, for whatever purpose.'

50. Whatever their character, family units are vital in the fabric of our society. When applying s 11(5), family ties must be promoted and protected, including by state actors. See *Dawood and another v Minister of Home Affairs and others*; *Shalabi and another v Minister of Home Affairs and others*; *Thomas and another v Minister of Home Affairs and others* [2000] ZACC 8; 2000 (3) SA 936 (CC) paras 30 - 31. In the present case, registration of the First Applicant as father of PKM and VKM acknowledges family ties between them and recognises the children's heritage as members of the 'K[...]' family of Zambia. All this militates in favour of dispensing with the Second Applicant's consent for purposes of s 11(5).
51. When adjudicating whether to dispense with the birth mother's consent, I took into account that registering the father's name on the children's birth register (in addition to that of their

mother) is, on the one hand, consistent with the best interests of the children involved and, on the other, promotes respect for, and protection of, the children's dignity. These are entrenched fundamental rights.

52. Registration of fatherhood serves a child's best interest - it fosters family affiliation by reason that the child no longer sees him/herself as the child only of the mother but of both parents: 'Children may see themselves as being of an inferior status as they do not have a proper family, and this can cause stresses such as social isolation and social stigma.' (Centre for Child Law *supra* para 80)
53. The non-registration, or point-blank refusal to register, a father's details on a child's birth certificate infringes the father and the affected child's dignity in a most fundamental way. Registration of fatherhood is part of a father and his child's identity – it is integral to their respective sense of self and belonging which is, in turn, an important component of their sense of self-worth and value.
54. Compliant with the imperative in s 39(2) of the Constitution of promoting value-based interpretation, the construction of s 11(5) adopted in this judgment promotes the constitutional rights of fathers and of their child(ren) born outside of marital bonds. They are vulnerable groups of persons. Moreover, it promotes constitutional norms by advancing respect for, and protection of, the family, including cultural, linguistic, and religious values of an identified family. This accords with this Court's duty to 'promote the spirit, purport and objects of the Bill of Rights' (s 39(2)).
55. Although s 11(5) provides for dispensing with a mother's consent, this does not mean that the mother is overlooked in the process. Her posture to the father's application is vital. Applications of this nature involve more than simply a father's right to be acknowledged in the eyes of the law as a child's father.
56. The mother's voice falls under the rubric of the 'best interests of a child' protected in s 28(2) of the Constitution.[10] This statutory cum constitutional standard is paramount in any matter concerning a child (such as, applications to register a father's name on a child's birth certificate through amendment).
57. In this context, the following dicta in Centre for Child Law *supra* is instructive:
- '141. It cannot be seriously disputed that it is in the best interests of a child to be practically and more meaningfully linked to a loving, caring, supportive and responsible father, not just any man who happens to have fathered him or her. All things considered, the mother of that child is best-suited to tell whether the unmarried man claiming to be the father is in fact the father and a responsible one. ...
142. ... A child's mother must therefore necessarily be asked to say: (i) whether the man claiming to be the father is indeed the father; and (ii) even if he is, whether he is the kind that would help advance the best interests of the child and give expression to the paramountcy of those interests or one whose somewhat formalised association with the child would be prejudicial to the child's best interests.'

58. While the Second Applicant has not said that she consents to the amendment of PKM and VKM's birth certificates, she has not objected to it either. This is a relevant factor favouring dispensing with her consent. Moreover, the First Applicant is involved in the children's daily life, and in Second Applicant's too. It is common cause that they cohabit as husband and wife. They reside together in a dwelling at Langa and are co-parents of PKM, VKM, and UM, each having parental rights and duties. Clearly, they are a family and they live as a family.
59. All these objective facts favour the dispensing of Second Applicant's consent envisaged by s 11(5) of the BADRA. An order to this effect will be granted.

Confirmation of First Applicant's paternity of PKM and VKM

60. In any application rooted in s 11(5), an applicant bears the onus to prove his alleged fatherhood and, therefore, entitlement to the declaratory relief. To grant final declaratory relief under s 11(5), the rule of evidence in *Plascon-Evans* applies, rather than the rule in *Webster v Mitchell* for interim relief.[11]
61. It is common cause that First Applicant is the biological father of PKM and VKM. Since the presumption flowing from s 36 of the Children's Act has not been rebutted, First Applicant is entitled to judicial confirmation under s 11(5) that he is the father of PKM and VKM. An order to this effect will be granted.

FOURTH ISSUE: IS DNA TESTING MANDATORY WHEN SECTION 11(5) APPLY?

62. The main bone of contention dividing the parties concerns DNA testing. Respondents' Counsel argued that regardless of whether an amendment falls within the realm of s 11(4) or s 11(5) of the BADRA, the legal position is the same: by operation of law, proof of paternity through DNA testing is mandatory. This submission crystallises the next question for adjudication: is proof of paternity by scientific DNA testing required even after a high court confirms paternity under s 11(5)? This question of law is untested terrain.
63. The Respondents' answer is 'yes'; First Applicant's answer is 'no'. These parties were unable to provide case law directly on point to support their respective contentions. My survey of case law also uncovered none.
64. It will be recalled that it is common cause that the First Applicant is poor and cannot afford DNA testing. He argues that any requirement of DNA paternity testing being a pre-condition for amending PKM and

VKM's birth certificates, despite a court order confirming paternity, imposes undue financial hardship which would disproportionately affect him and other poor (mainly Black) parents than it would affect affluent parents (ie, those with means). This argument, in my view, has merit. I did not understand Respondents' Counsel to dispute it.

65. Respondents' Counsel conceded that DNA tests are, relatively speaking, expensive and unaffordable to poor persons (such as, to First Applicant). In my view, it is probably for this reason that the legislature, being mindful of the high levels of indigence in our country, took a policy decision not to require DNA testing as a standard requirement to prove paternity before a person is registered as a child's biological father under s 9 and s 10 of the BADRA.
66. Despite this, Respondents contend their hands are tied – they interpret the law as ordaining DNA testing for purposes of s 11(5) even if a high court confirms paternity. For the ensuing reasons, I find that this approach is inconsistent with true position emerging from a proper interpretation of the statutory provisions.
67. As a point of departure, interpreting a statute involves an analysis of the relevant law-text, having regard to its broader internal and external contextual scene, and its purpose. Equally important, statutes are to be interpreted consistently with the Constitution and through the prism of its values. See *Cool Ideas 1186 CC v Hubbard and another* 2014 (4) SA 474 (CC) para 28.
68. The highwater mark of the case advanced by the Respondents in favour of mandatory DNA testing for proof of paternity is two-fold: first, they argue it is necessary as a security measure for immigration administration under the Immigration Act; secondly, they contend that it is needed to protect the integrity of the national population register. In my view, neither argument holds water.
69. The first argument mentioned in paragraph 68 is predicated on the contents of the following extracts appearing in the Respondents' answering affidavit:
- '31. ... There have been cases where single mothers get involved in relationships with non-South African men and approach the Second Respondent to record these persons as fathers of their children even if they are not the biological fathers. This is then used to motivate for permanent residence permits due to the right that children have to be cared for by both their parents.
32. To this end, DNA testing is the only reliable method of ascertaining the paternity of the child. To do away with this requirement would pose a serious security risk of fraud and manipulation. Second Respondent would be left with no recourse as the rights of children are of paramount importance.'
70. At the hearing, Respondents' Counsel was at pains to point out that this extract is not intended to suggest that applicants are engaged in the unsavoury practice alluded to in the quote. For purposes of this case, the Respondents accept that the First Applicant genuinely, and with good reason, believes himself to be PKM and VKM's biological father. Second Applicant admits that he is their father.

71. As regards the extracts quoted above in paragraph 69, the Respondents are here seeking to use DNA testing in the realm of s 11(5) to advance purposes related to immigration regulation. However, those objectives have nothing to do with the aims of the BADRA itself, nor with s 11(5) or s 11 read holistically.
72. To this end, it is an established rule that ‘there is no principle of interpretation that requires a court without more to interpret one piece of legislation with reference to another’ (Independent Institute of Education (Pty) Ltd v KwaZulu-Natal Law Society and others 2020 (2) SA 325 (CC) para 14). Admittedly, ‘it may at times be appropriate to consider how another statute deals with a similar issue’ (my emphasis), but even then, ‘the latter statute cannot be any more than an interpretive aid.’ (Independent Institute of Education supra para 15)
73. The subject matter dealt with in s 11 of the BADRA and this statute read as a whole are unrelated to the subject matter of the Immigration Act. The long title of the BADRA records its overall purpose to be: ‘To regulate the registration of births and deaths; and to provide for matters connected therewith.’
74. Moreover, ss 11(4) and (5) of the BADRA were introduced through an amendment effected by s 8 of the Adoption Matters Amendment Act 56 of
1998. These amendments have nothing to do with immigration. Their purpose is recorded in the long title of the Amendment Act as follows: ‘and to amend the Births and Deaths Registration Act, 1992, so as to afford a father of a child born out of wedlock the opportunity to record his acknowledgement of paternity and his particulars in the birth registration of the child’.
75. Since the BADRA and the Immigration Act serve different objects, a purposive reading of s 11(5) makes it inappropriate for the Respondents to justify DNA testing in its context with reference to improved immigration regulation under the Immigration Act. This is incongruent with a purposive mode of interpretation.
76. As for the second argument advanced by the Respondents (see above in paragraph 68), I find that it is misconceived for two reasons.
77. First, a grammatical reading of the relevant statutory provisions does not support the Respondents’ contention. The wording used in s 11(4A), and regs 14(1) and (2) related thereto, indicate that their provisions do not apply to situations envisaged by s 11(5): whereas s 11(4A) applies when an amendment to a child’s birth certificate is sought with a mother’s consent, s 11(5) applies when no consent is given by the child’s mother.
78. Secondly, for purposes of s 9(1) and s 10 of the BADRA dealing with the initial birth registration within 30 days after date of birth (see above in footnotes 1 and 2), proof of paternity through DNA testing is, by operation of law, not required.

79. For purposes of s 9 and s 10, consensus between the parents as to the identity of the father is the standard required by law. If there is consensus with a child's mother as to the person with whom she had sexual intercourse and conceived the child, then the agreed father's particulars are inserted on the child's birth certificate, subject only to the father providing relevant documentation to prove his personal particulars (for eg, by way of a passport or identity document).
80. This is the legal position which applies to the initial registration of all births, irrespective whether the child is one born in or outside of marital bonds, and regardless of whether the father is a South African citizen or foreign national.
81. Therefore, the Respondents' contention that DNA paternity testing serves to protect the integrity of the population register lacks merit. If scientific DNA testing was vital for this purpose, then it can reasonably be expected that the legislature would have made it compulsory for all birth registrations, regardless of the high levels of indigence in South Africa (see above in paragraph 65). That the legislature does not require DNA testing as a stock standard

requirement for all births, speaks volumes about the fact that the absence of DNA testing is not viewed by the legislature as undermining the population register's integrity.

82. Respondents' argument also loses sight of a key fact: the population register's integrity is protected by the fatherhood of a child being confirmed by the upper guardian of a child, being a high court after it evaluates all admissible evidence. In some instances (such as, where paternity is disputed, and/or the presumption in s 36 of the Children's Act does not apply), DNA testing would probably be required to sustain a finding that an applicant discharged the onus of proving his paternity of a child whose birth certificate he seeks to amend by the inclusion of his details as father. That is a factual enquiry in each instance. The present matter is not such a case: here paternity is undisputed by the disputants.
83. Section 11(5) makes no provision for the 'conclusive proof' mentioned in s 11(4A) (ie, DNA testing dealt with in reg 14). An interpretation to the effect that a DNA test is necessary to prove paternity even after a high court confirms paternity is a construction which would have to be winkled out of contextual crevices. In an era of justification, I find such an interpretation to be unjustifiable.
84. Moreover, requiring a DNA paternity test after paternity has been confirmed by a high court is an absurd result which the legislature could not have contemplated when it enacted s 11(5) in its current form. See JR de Ville Constitutional & Statutory Interpretation (2000) at 203 - 204. What possible purpose would a DNA paternity test serve in such a situation? On this basis too, the interpretation of s 11(5) contended for by the Respondents is unjustifiable.
85. To recapitulate: This judgement must not be misunderstood – it does not do away with DNA testing as a scientific method to prove fatherhood of a child born outside of marital bonds. This judgment affirms that, for a birth certificate amendment under s 11(4) of the BADRA, s

11(4A) ordains mandatory DNA testing. This judgment holds further that there may be instances where, in an application for relief under s 11(5), a DNA paternity test would be necessary as part of the overall mosaic of evidence needed to prove fatherhood. Each case must be decided on its own merits. The kernel of this judgment on DNA testing is that once a high court performs its adjudicative role under s 11(5) and confirms paternity, then, by virtue of the rule of law, its order obliges officials at the Department of Home Affairs to amend the relevant child's birth certificate to include his/her father's details without any further proof of paternity. The high court's declaratory order under s 11(5) stands as conclusive proof of paternity.

FIFTH ISSUE: IS THE FIRST APPLICANT ENTITLED TO AN EXEMPTION ORDER UNDER SECTION 7(2)(c) OF THE PAJA?

86. In this regard, the salient common cause facts are the following: on 25 July 2024, Second Respondent declined to issue a permanent residence permit (PRP) to First Applicant who then sought to appeal the adverse administrative decision. He paid the prescribed fee. However, the earliest appointment with Third Respondent to lodge the internal appeal was 29 November 2024, which fell outside the 10-day appeal lodgement period. First Applicant then sought permission to backdate his appointment so that it fits into the 10-day statutory scheme. This request was refused. First Applicant then lodged his appeal. It was rejected on the grounds that the appeal was filed late.
87. First Applicant now seeks an order under s 7(2)(c) of the PAJA which would exempt him from first exhausting all internal appeal remedies with the Respondents as required by s 7(2)(a), and for this Court to then adjudicate his review application for the setting aside of the refusal to grant him a PRP.
88. Respondents contend that this application is meritless. They contend that First Applicant failed to show the existence of exceptional circumstances. Thus, it is not in the interests of justice that he be granted an exemption under s 7(2)(c).
89. Section 7(2)(c) of the PAJA received attention recently in *CSARS and another v Richard's Bay Coal Terminal (Pty) Ltd* (CCT 104/23) [2025] ZACC 3 (31 March 2025). The apex court affirmed its approach in *Koyabe v Minister for Home Affairs (Lawyers for Human Rights as Amicus Curiae)* 2010
- (4) SA 327 (CC) para 36, a case relied on by First Applicant in support of his case for exemption.
90. I find that the facts relied on by First Applicant do not qualify as out of the ordinary ('exceptional circumstances') to warrant the exemption order sought. Moreover, none of the circumstances relied on by him existed before, or at least when, the review application was filed. In these circumstances, the interests of justice do not favour granting the exemption order. See *NR and others v Director General: Home Affairs and another* (21762/2024)

[2025] ZAWCHC 189 (5 May 2025) para 34. On this basis, the exemption application fails.

91. As a result, it is unnecessary to consider the review application filed of record.

DISCHARGE OF THE INTERIM INTERDICT, OR NOT?

92. On 30 October 2024, an interdict was granted per Goliath AJP by agreement between the parties. The terms of the interdict were as follows:

‘6. The First and Second Respondents are hereby interdicted and restrained from initiating any process or taking any action to deport or otherwise declare the First Applicant as an undesirable person within the Republic of South Africa, pending the finalisation of this application.’

93. At the hearing, the applicants urged me not to allow steps to be taken to deport First Applicant to Zambia while his application for a PRP is not finalised. Second Applicant, in particular, argued that deportation would be against the best interests of PKM and VKM – the First Applicant supports them financially and he has a close bond

with his sons which will be broken if deportation occurs.

94. Although I have not found in his favour on the immigration issue, the declaratory relief under s 11(5) entitles First Applicant, for the first time, to have his particulars registered on PKM and VKM’s birth certificate. As such, he is also now entitled to apply for the right to reside in South Africa based on his recognised paternity.

See *Dawood v Minister of Home Affairs* supra.

95. At the hearing, First Applicant informed me that he intends to apply for a PRP on the basis of his paternity of PKM and VKM if I grant him the necessary relief under the BADRA. If the interim interdict is not

extended, then it will result in First Applicant being deported and his victory here would be hollow and his sons would be considerably

worse off financially than they already are at present.

96. Taking all this into account, I find that, in the interests of justice, an extension of the interim interdict ought to be granted for 12 months. An order to this effect will be granted on the basis that First Applicant takes the necessary steps to apply for his PRP within a defined period. It goes without saying that the First Applicant ought to be entitled to apply to this Court for the further extension of the interim interdict on good cause shown at the relevant time, if needs be.

COSTS

97. The issue of costs was debated at the hearing. First and Second Applicants seek an award of costs against the Respondents, and vice versa.

98. It is long established in our law that costs is a matter within a court's wide discretion. That discretion must be exercised judiciously having due regard for accepted legal principles. See *Kruger Bros and Wasserman v Ruskin* 1918 AD 63 at 69. In the present-day context of high court litigation, the sample list of relevant factors enumerated in Uniform Rule 67A(2) is a useful starting point. Another relevant factor is that costs usually follow on success. In this case, the protagonists have all enjoyed some measure of success.
99. I am disinclined to grant costs against the applicants. They pursued this application to enforce constitutional rights (including, the rights to dignity and to just administrative action). They acted not only for their own benefit but for the benefit of their sons (ie, PKM and VKM) and, to some extent, for the benefit generally of fathers

and their children born out of marital bonds. It is an established principle that courts ought to be slow to grant costs against

litigants enforcing constitutional rights. See *Sanderson v Attorney-General, Eastern Cape* 1997 (12) BCLR 1675 (CC) paras 43

- 44.

100. As litigants without legal representation, the applicants are not entitled to costs, save for necessary disbursements if I consider that the circumstances here merits such an award. I do. See *Milnerton Riding Club NO v Milnerton Riding School (Pty) Ltd and others*

[2022] ZAWCHC 238 para 13.

101. In reaching my decision, I considered the contents of the court file, including all prior court appearances and the reasons for postponements and delays in the finalisation of this matter. I also considered the complexity of the matter, and the conduct of the parties on both sides. Despite their meagre finances, I am particularly struck by the extent to which the applicants have gone to ensure that this matter was ready for hearing and that the court file was in order.
102. Even though they are not lawyers and have no legal training, their compliance with this Court's orders, rules, and practice directives has not gone unnoticed. They indexed and paginated the court file at my chambers; filed practice notes; bound the court papers neatly in a lever arch file with each court application separated by dividers which they provided at their expense; and delivered detailed heads of argument, including a post-hearing note at my request.
103. During my engagement with the First Applicant at the hearing,[12] he explained that he studied the court rules and practice directives because he considers it a sign of respect to this Court and its processes for the applicants to comply therewith as lawyers would in the course of presenting their cases before this Court. It became evident to me that his respect for this Court was part of his motivation for taking issue with the Respondents'

non-compliance with this Court's order that formed the subject of their condonation application.

104. Consequently, I award the applicants costs but only to the extent of their disbursements incurred in this application as a whole (ie, in Part A and Part B).

105. In the result, I grant the various orders outlined earlier under the heading 'Order of Court'.

FAREED MOOSA

ACTING JUDGE OF THE HIGH COURT

Appearances

For First Applicant: In person For Second Applicant: In person For Respondents: (First and second respondents) Ms D. Murote Instructed by: The Office of the State Attorney, Cape Town.

[1] Section 9(1) reads: 'In the case of any child born alive, any one of his or her parents, or if the parents are deceased, any of the prescribed persons, shall, within 30 days after the birth of such child, give notice thereof in the prescribed manner, and in compliance with the prescribed requirements, to any person contemplated in section 4.'

[2] Section 10 reads: '(1) Notice of birth of a child born out of wedlock shall be given— (a) under the surname of the mother; or (b) at the joint request of the mother and of the person who in the presence of the person to whom the notice of birth was given

acknowledges himself in writing to be the father of the child and enters the prescribed particulars regarding himself upon the notice of birth, under the surname of the person who has so acknowledged. ...

(2) Notwithstanding the provisions of subsection (1), the notice of birth may be given under the surname of the mother if the person mentioned in subsection

(1) (b), with the consent of the mother, acknowledges himself in writing to be the father of the child and enters particulars regarding himself upon the notice of birth.'

[2] Section 10 reads: '(1) Notice of birth of a child born out of wedlock shall be given— (a) under the surname of the mother; or (b) at the joint request of the mother and of the person who in the presence of the person to whom the notice of birth was given

acknowledges himself in writing to be the father of the child and enters the prescribed particulars regarding himself upon the notice of birth, under the surname of the person who has so acknowledged. ...

(2) Notwithstanding the provisions of subsection (1), the notice of birth may be given under the surname of the mother if the person mentioned in subsection

(1) (b), with the consent of the mother, acknowledges himself in writing to be the father of the child and enters particulars regarding himself upon the notice of birth.'

- [3] Section 36 reads: 'If in any legal proceedings in which it is necessary to prove that any particular person is the father of a child born out of wedlock it is proved that that person had sexual intercourse with the mother of the child at any time when that child could have been conceived, that person is, in the absence of evidence to the contrary which raises a reasonable doubt, presumed to be the biological father of the child.'
- [4] Litigants should not only see that justice is done but must perceive it to be done. It must be borne in mind that perception is as dangerous as reality: perception is the beholder's reality.
- [5] Section 10 reads: 'Everyone has inherent dignity and the right to have their dignity respected and protected.'
- [6] These provisions in s 11 read: '(4) A person who wishes to acknowledge himself to be the father of a child born out of wedlock, may, in the prescribed manner, with the consent of the mother of the child, apply to the Director-General, who shall amend the registration of the birth of such child by recording such acknowledgement and by entering the prescribed particulars of such person in the registration of the birth of such child. (4A) An amendment of the particulars of a person who has acknowledged himself as a father of a child as contemplated in subsection (4) and section 10 (1) (b) of the Act shall be supported by the prescribed conclusive proof of that person being the father of the child.'
- [6] These provisions in s 11 read: '(4) A person who wishes to acknowledge himself to be the father of a child born out of wedlock, may, in the prescribed manner, with the consent of the mother of the child, apply to the Director-General, who shall amend the registration of the birth of such child by recording such acknowledgement and by entering the prescribed particulars of such person in the registration of the birth of such child. (4A) An amendment of the particulars of a person who has acknowledged himself as a father of a child as contemplated in subsection (4) and section 10 (1) (b) of the Act shall be supported by the prescribed conclusive proof of that person being the father of the child.'
- [7] Regulation 12 reads: 'Notice of birth of child born out of wedlock.—(1) A notice of birth of a child born out of wedlock shall be made by the mother of the child on Form DHA-24 illustrated in Annexure 1A or Form DHA-24/LRB illustrated in Annexure 1A, whichever applicable.'

- (2) The person who acknowledges that he is the father of the child born out of wedlock must—
(a) enter his particulars and sign on Part D of Form DHA-24 illustrated in Annexure 1A or on Part D of Form DHA-24/LRB illustrated in Annexure 1B, as the case may be, at the offices of the Department and in the presence of an official of the Department as contemplated in section 10 (1) (b) of the Act; (b) submit an affidavit on Form DHA-288/C illustrated in Annexure 2D in which he— (i) states his relationship to the mother; and (ii) acknowledges paternity of the child; and (c) have his fingerprints verified online against the national population register: Provided that in the event of the father being a non-South African citizen, he must submit a certified copy of his valid passport and visa or permit, permanent residents identity document or refugee identity document.’
- [7] Regulation 12 reads: ‘Notice of birth of child born out of wedlock.—(1) A notice of birth of a child born out of wedlock shall be made by the mother of the child on Form DHA-24 illustrated in Annexure 1A or Form DHA-24/LRB illustrated in Annexure 1A, whichever applicable.
- (2) The person who acknowledges that he is the father of the child born out of wedlock must—
(a) enter his particulars and sign on Part D of Form DHA-24 illustrated in Annexure 1A or on Part D of Form DHA-24/LRB illustrated in Annexure 1B, as the case may be, at the offices of the Department and in the presence of an official of the Department as contemplated in section 10 (1) (b) of the Act; (b) submit an affidavit on Form DHA-288/C illustrated in Annexure 2D in which he— (i) states his relationship to the mother; and (ii) acknowledges paternity of the child; and (c) have his fingerprints verified online against the national population register: Provided that in the event of the father being a non-South African citizen, he must submit a certified copy of his valid passport and visa or permit, permanent residents identity document or refugee identity document.’
- [8] Regulation 14 reads: ‘Application for insertion of unmarried father’s particulars in birth register of child born out of wedlock.—(1) An application for the insertion of the father’s particulars in terms of section 11 (4) of the Act shall be made on Form DHA-1682 illustrated in Annexure 6.
- (2) An application contemplated in subregulation
- (1) made by a person who is a non-South African citizen shall be accompanied by original paternity test results, not older than 3 months, from an institution designated by the Director-General confirming that such person is the biological father of the child.
- (3) The Director-General must authenticate the veracity of the information furnished to him or her in respect of the application contemplated in subregulation
- (1) before approving the application.

(4) Upon approval of the application, the Director-General must record the particulars of the person as the father of the child on the birth register of the child and issue to such person—
(a) a birth certificate on Form DHA-5 illustrated in Annexure 4; or (b) an acknowledgement of receipt on Form DHA-25 illustrated in Annexure 3, if, for any reason, the birth certificate cannot be issued immediately.’ (my emphasis)

[8] Regulation 14 reads: ‘Application for insertion of unmarried father’s particulars in birth register of child born out of wedlock.—(1) An application for the insertion of the father’s particulars in terms of section 11 (4) of the Act shall be made on Form DHA-1682 illustrated in Annexure 6.

(2) An application contemplated in subregulation

(1) made by a person who is a non-South African citizen shall be accompanied by original paternity test results, not older than 3 months, from an institution designated by the Director-General confirming that such person is the biological father of the child.

(3) The Director-General must authenticate the veracity of the information furnished to him or her in respect of the application contemplated in subregulation

(1) before approving the application.

(4) Upon approval of the application, the Director-General must record the particulars of the person as the father of the child on the birth register of the child and issue to such person—
(a)

a birth certificate on Form DHA-5 illustrated in Annexure 4; or (b) an acknowledgement of receipt on Form DHA-25 illustrated in Annexure 3, if, for any reason, the birth certificate cannot be issued immediately.’ (my emphasis)

[9] Even though s 11(6) renders s 26(1)(b) of the Children’s Act applicable to s 11(5), only high courts are empowered to grant relief under s 11(5). Presumably, this legislative policy is informed by high courts functioning as upper guardians of children (see *RC v HSC* 2023

(4) SA 231 (GJ)), and their jurisdiction in all matters concerning a person’s status (such as, determining fatherhood of a child).

[10] Section 28(2) creates an ‘expansive guarantee’ - it is a guiding principle and a right. See *S v M* (Centre for Child Law as Amicus Curiae)

[2007] ZACC 18; 2008

(3) SA 232 (CC) para 22. The importance of protecting the best interests of children lies partly in the fact that they are a vulnerable group and partly because they lack the means to act in their own interests. See *RMD v KD* (16995/22P)

[2023] ZAKZPHC 2 (13 January 2023) para 24.

[11] The test in *Webster v Mitchell* requires a court to consider the facts averred by an applicant for interim relief, together with facts set out by a respondent that were not or could not be disputed. Based on all those facts, a court ought to form a view on whether, having regard to the inherent probabilities, the applicant would likely prevail in the second part of the application. An applicant 'could only be denied relief if the Respondent threw serious doubt on his case. In other words, the version of the Appellant should have been considered, if there was no inherent improbability therein and unless serious doubt was cast upon it by the Respondent, it should have been sufficient to carry the day.' (*RC v HSC* supra para 16)

[12] At the hearing, First Applicant sought permission to represent the Second Applicant.

I declined this request, as I am obliged to do. See *CSARS v Van der Merwe* 85 SATC 10 para 45.

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