

Extending The Rights of Unmarried Fathers in Zimbabwe: An Exploration of the *Sadiqi v Muteswa* [2020] ZWHHC Case



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ABSTRACT

Unmarried fathers experience significant problems when seeking visitation, custody, and guardianship rights for their children. There has been little research on the constitutional position of an unmarried man in a Zimbabwean context. This gap makes it challenging to research the legal complexities and disadvantages that unmarried fathers face. Through a doctrinal legal research approach, this article explored the current Zimbabwean legal position of unmarried fathers by analyzing the judgment of *Sadiqi v Muteswa* [2020] ZWHHC 249. In this case, an unmarried father contested the common law position that an unmarried child's mother was the sole guardian with sole custody rights over their child, as he requested to be recognized as a joint guardian. The findings of the case demonstrated that the best interest of the child carries weight and is considered by the courts, who are cognisant of the rapid changes in family patterns and redefined relationships in modern times. The Court granted the unmarried father custody of the child, moving away from the traditional and common law position. It also emphasized that the child's best interests must take precedence over prolonged litigation. The court further held that where there was existing parental agreements the doctrine of estoppel could not be used as a defense affirming the father's right to custody. This case offers important insight into Zimbabwe's evolving family law, affirming that unmarried fathers may be granted custody where it serves the child's best interests. It marks a progressive shift toward inclusive parental rights.

Keywords: Unmarried Father, Guardianship, Custody, Best Interest, Parental Agreements, Zimbabwe.

INTRODUCTION

Many children grow up in female-headed families for various reasons, including being born to an unmarried parent. As a result, the legal position of unmarried fathers has long been a contentious issue, as fatherhood has been associated with gendered cultural notions that can constrain caregiving and custody. For a long time, fatherhood was closely tied to marriage, making the position of unmarried fathers a complex and challenging one. Custody issues have been one of the most contentious issues when it comes to children and unmarried fathers. The question is, "When is a biological father not recognized as a father? The answer is when he is unmarried."¹ Unmarried biological fathers have had to take actions far beyond those required of unmarried biological mothers to exercise their rights. This has also been the position in

¹ Dara E. Purvis, "The Constitutionalization of Fatherhood," *Case W. Res. L. Rev.* 69 (2018): 541.

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the Zimbabwean context. In the case *Sadiqi v Muteswa*² it was determined that the common law position on the custody rights of biological fathers conflicted with the non-discrimination sections of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 (Constitution), specifically with sections 19(1), 19(2)(a) and section 81(1)(d), which position the child's best interests as utmost necessary in any issues that affect the child; and that every child has the right to benefit from parental care. This is also supported by Section 56(1), which states that everyone must be treated equally and fairly before the law, and Section 56 (3), which prohibits discrimination against anyone based on their status, regardless of the circumstances surrounding their birth. This case thus treats all children born to single, unmarried, and married parents equally, preserving the best interest of the child principle as envisioned by the Zimbabwean Constitution.

The case broadens the conventional understanding of the rights of an unmarried father through the best-interest approach that guides courts in decision-making. The framing of the issues in this case note examined how the concept of the best interest of the child is applied when an unmarried father initiates litigation regarding the custody of their child. Secondly, the study examines how the Court considered the evidence and facts presented to them and applied them. The case note begins with a background discussion, followed by a critique of the Court's findings. Thereafter, the interpretation of the rights of unmarried fathers under common law is discussed, and a decision is made on the findings to articulate the relevance of the case for unmarried fathers. Lastly, we look at recommendations for the future. To better understand the implications of the *Sadiqi v Muteswa* case, the existing literature on the rights of unmarried fathers in Zimbabwe shall first be examined.

LITERATURE REVIEW

Guardianship, parental rights, and responsibilities in Zimbabwe are governed by common law. Under common law, an unmarried father had no legal rights over his child.³ The common law considered an unmarried father's claim to guardianship and custody of a child to be equal to that of any other unrelated person.⁴ This meant that all parental rights and responsibilities over the child belonged to the mother.⁵ The biological father was not viewed as the minor child's guardian and did not have any parental authority, but instead was seen as any other third party concerning the child. The Guardianship of Minors Act⁶ regulates parental rights and obligations concerning custody, access rights of parents, and guardianship. Just as with common law, custody would typically reside with the mother unless a court granted the father custody rights. In *Tiwandire v Chiponda*,⁷ the child's parents had a romantic relationship during which the child was born, and that child was at the centre of these proceedings. The Court did not adhere to the standard legal position but instead took a constitutional approach, resulting in the grant of custody to the applicant. The Court held that under common law, the mother held all legitimate rights regarding a child born to unmarried parents. Conversely, the father of a child born to him when he is unmarried has absolutely no rights over that child, as evidenced by the extract below from the judgment.

This Court held that:

“Under common law, all rights in respect of a child born out of wedlock are vested in the mother, and she has the same rights as those of the parents of a legitimate child. The father of a child born out of wedlock has no rights at all about the child. Such a father is the same as a third party concerning the child. To hold that the father of a child born out of wedlock has rights in respect of the child would be to elevate the legal status of the father of such a child to that of a spouse in a divorce and allow unwarranted interference in the mother's rights over the child.”

In another case, *Estate, Elias Jonathan Kanengoni & Anor v Manyika & Ors*⁸ speaking on birth registrations, the Court stated that a “child born to parents that are not married is a child born out of

² *Sadiqi v Muteswa* (HC 3971 of 2019; HH 249 of 2020) [2020] ZWHHC 249 (18 March 2020).

³ *Katedza v Chunga & Another* [2003] ZWHHC 50, where it was held that 'Since her son was born out to unmarried parents, he is regarded under the common law of this country as being illegitimate.

⁴ Priccilar Vengesai, “The Rights of Women in Unregistered Customary Marriages in Zimbabwe: Best Practices from South Africa,” *Law, Democracy and Development* 28 (2024): 215–36.

⁵ *Docrat v Bhayat* 1932 TPD 125; *Edwards v Flemming* 1909 TH 232.

⁶ Guardianship Of Minors Act (Chapter 5:08).

⁷ *Tiwandire v Chiponda* [2004] ZWBHC 12.

⁸ (HC 8165 of 2015; HH 160 of 2017) [2017] ZWHHC 160 (9 March 2017)

wedlock.”⁹ Moreover, it highlighted that marriage would legitimize the child and give the father parental rights. When such children are born, they are usually recorded with surnames that fall under their mothers' surnames, and as a result, they lose their paternal identities.¹⁰ This is regrettable because identity is essential in Africa, where it is viewed as a direct connection between a person and their ancestors, whom one is expected to honor and respect, as they provide stability and protection.¹¹ In Zimbabwe, upon paying the bride price, the child takes on the surname of the father.¹² Children who do not use their father's surname run the risk of forfeiting any inheritance benefits if their father passes on.¹³ In addition, children born to unmarried parents face a variety of psychological problems as opposed to their peers raised in a two-parent home.¹⁴ Children born and raised in these relationships also suffer significantly as a result of people's socialized perceptions towards persons who have had extramarital affairs or are unmarried, and this extends to their children. Such prejudice has negative impacts on these children.¹⁵ This means that some might not feel like they belong if they do not inherit their father's patriarchal tradition and bloodline. Patriarchal identities are significant in African families, which often value tradition and ancestral lineage.¹⁶

South Africa presents a compelling case for the legal status of unmarried fathers, as it has adopted a progressive constitutional framework and developed a vibrant body of judicial precedents on unmarried fathers. The South African Constitution, in section 28(1)(b), states that a child is entitled to “family care or parental care, or to appropriate alternative care when removed from the family environment.”¹⁷ This means that in South Africa, a parent-child relationship is a right that translates to a responsibility that a parent has and must fulfill, regardless of their marital status. The Children's Act¹⁸ gives grounds upon which an unmarried father can have custody rights. In section 21(1)(a), the Act states that when the child is born, if the unmarried father is (or was) residing with the mother in a “permanent life partnership,” then automatic full parental rights and responsibilities accrue to him. In cases where an unmarried father was not residing with the mother when the child was born, he may automatically acquire parental rights if he consents to or applies to be named as the child's father.¹⁹ In this instance, the father may be required to pay damages to the mother's family, as stipulated in customary law.²⁰ Lastly, section 21(1)(b)(ii) has a financial aspect where the father is expected to contribute to the child's upkeep through payment of maintenance for a substantial duration, and he should contribute to the expenses involved in the daily maintenance of the child.²¹ If the unmarried father cannot use the stipulation in section 21, he has the opportunity to enter into a “parental agreement” with the mother of the child.²² If the mother opposes or frustrates the attainment of this agreement, the unmarried father can approach the Court.²³ To have the required rights awarded.²⁴ It is unclear whether the section requires the father to prove all requirements collectively or to separately prove any one of these three options as sufficient to gain parental rights and responsibilities.

⁹ *Mkudu v Manyonda and Others* (262 of 2025) [2025] ZWHHC 262 (17 April 2025)

¹⁰ Shingirai Paul Mbulayi and Simon M Kang'ethe, “Psychosocial Deficits Associated with Teenagers Born and Raised in a "Small-House" Family Setting in Cherutombo in Marondera, Zimbabwe,” *Social Work/Maatskaplike Werk* 56, no. 1 (2020): 97–108.

¹¹ Petunia Smith, Grace Khunou, and Motlalepule Nathane-Taulela, “Are You Your Father's Child? Social Identity Influences of Father Absence in a South African Setting,” *Journal of Psychology in Africa* 24, no. 5 (2014): 433–36.

¹² Livingstone Makondo, “Ethnicity and Patriarchal Protest: A Case of Dialoguing Shona Personal Names,” *Names* 56, no.1(2008): 10–18.

¹³ Mbulayi and Kang'ethe, “Psychosocial Deficits Associated with Teenagers Born and Raised in a "Small-House" Family Setting in Cherutombo in Marondera, Zimbabwe.”

¹⁴ Ma Angelita S Rabanal, “Academic Struggles and Hitches: Listening to Voices of Children Born Out-of-Wedlock,” *Solid State Technology* 63, no. 5 (2020): 1983–98.

¹⁵ Mbulayi and Kang'ethe, “Psychosocial Deficits Associated with Teenagers Born and Raised in a "Small-House" Family Setting in Cherutombo in Marondera, Zimbabwe.”

¹⁶ Mbulayi and Kang'ethe, “Psychosocial Deficits Associated with Teenagers Born and Raised in a "Small-House" Family Setting in Cherutombo in Marondera, Zimbabwe.”

¹⁷ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (par 77).

¹⁸ S 1 of the Children's Act 38 of 2005.

¹⁹ *GM v KI* 2015 3 SA 62 (GJ): One of the most important of these is *GM v KI*395, which showed that an unmarried father could acquire parental responsibilities and rights simply by consenting to be identified as

²⁰ s 21(1)(b) of the Children's Act.

²¹ *KLVC v SDI* at par 3–14.

²² S 22 of Act 38 of 2005. In 2018, the Draft Children's Amendment Bill aimed to address several uncertainties arising from the current wording of s 21.

²³ Children's Amendment Act 17 of 2022.

²⁴ Ss 23 and 24.

The South African courts have recently enhanced the unmarried fathers in birth registration and paternal leave. In *the Van Wyk case*,²⁵ the Court confirmed that certain sections of the Basic Conditions of Employment Act²⁶ and the Unemployment Insurance Fund Act²⁷ were unconstitutional because of their approach to maternity and parental leave. The Court held that it would be unfair to have parental leave provisions that discriminated based on the type of parenthood and unfairly discriminated between unmarried mothers and fathers. In another case, the *Centre for Child Law v Director General: Department of Home Affairs*,²⁸ the Constitutional Court found that the disputed sections²⁹ of the Births and Deaths Registration Act³⁰ were invalid. Section 10 default position allowed the birth registration of a child to be done under the mother's surname. Unmarried fathers were excluded and could not register the children under their surname unless the mother had consented or there was a joint request with the mother to do so.³¹ As a result of this judgment, unmarried fathers in South Africa can now register the births of their children, just like married fathers.³² These cases show a progressive move in the rights of unmarried fathers. The following paragraph will discuss the methodology that was used to inform the analysis of this paper.

METHODOLOGY

Doctrinal research was carried out, and this is a “legal way of thinking or deriving conclusions upon rational observations by analyzing the propositions pronounced by the legal institutions based on decided case laws.”³³ This legal research approach was used as it allowed for a systematic exploration of the legal principles in the case (gather, analyze, and interpret information).³⁴ The analysis of this case note is based primarily on the judgment under review, *Sadiqi v Muteswa*, and the applicable provisions of common law regarding custody rights. The case was selected for its constitutional significance, particularly its challenge to the traditional legal position regarding unmarried fathers, and for its potential to influence future legal developments in Zimbabwe and the Southern African region. This case note further adopts the best interest of the child approach as a guiding methodology. The best interest of the child has been widely adopted in both the international, regional, and national spheres. The best interest of the child is identified as a foundational principle used to enhance the rights of children.³⁵ Where an issue concerns a child, the child's best interests must be the main consideration.³⁶

The Convention on the Rights of the Child (CRC), Article 3(1), adopts this position by cementing its importance. Custody issues can often impact a child's mental, psychological, and social well-being. Therefore, when one is faced with a decision on child custody, a thorough consideration of the child's best interests must be employed.³⁷ When applying the best interests of the child, one will consider a holistic variety of factors, such as a child's physical, mental, emotional, and academic needs. This detailed application is designed to ensure that the decision made in the child custody case prioritizes the child's well-being and full development. This is not an easy task in practice, as the Court must weigh and balance the many, and at times conflicting, factors that can potentially affect the child's development.³⁸ In *Mtengwa v Mtengwa* 2010 (1) ZLR 312 (H), the Court considered the child/parent relationship, the parents' characters, ability to communicate and provide for the child's needs, the stability of the child's

²⁵ Van Wyk v Minister of Employment and Labour [2024] 1 BLLR 93 (GJ); (2024) 45 ILJ 194 (GJ); 2024 (1) SA 545 (GJ).

²⁶ 75 of 1997.

²⁷ 63 of 2001.

²⁸ [2021] ZACC 31.

²⁹ sections 9(2) and 10

³⁰ Act 51 of 1992.

³¹ Ss 10 and 9(2) of the Birth Registration Act 51 of 1992.

³² Anon., “Registration of a Child's Birth: Unmarried Fathers No Longer Treated Differently from Married Fathers,” African Legal Information, February 6, 2022.

³³ M. D. Pradeep, “Legal Research-Descriptive Analysis on Doctrinal Methodology,” *International Journal of Management, Technology and Social Sciences (IJMTS)* 4, no. 2 (2019): 95–103.

³⁴ G Bhagamma, “A Comparative Analysis of Doctrinal and Non-Doctrinal Legal Research,” *ILE Journal of Governance and Policy Review* 1, no. 1 (2023): 88–94.

³⁵ Narcisa Gales and Dumitrita Florea, “Best Interests of the Child-The Legal Determination of the Principle,” *Eur. JL & Pub. Admin.* 8 (2021): 15.

³⁶ Tommie Forslund et al., “Attachment Goes to Court: Child Protection and Custody Issues,” *Attachment & Human Development* 24, no. 1 (2022): 1–52.

³⁷ Forslund et al., “Attachment Goes to Court: Child Protection and Custody Issues.”

³⁸ Forslund et al., “Attachment Goes to Court: Child Protection and Custody Issues.”

environment, and the child's preferences, if they are mature, can be considered.” The discussion shall begin with a close examination of the facts of the case, as understanding the factual background is essential to contextualize the legal issues that will be discussed later.

Facts of the Case

In the Zimbabwean High Court, the applicant brought a case to contest the common law position that an unmarried child's mother is the child's exclusive guardian and has sole custody of the child. The applicant requested to be named as a joint guardian of the child born during their relationship. Having never been married, the applicant and respondent shared a home in South Africa, but the mother relocated to Zimbabwe to domicile with the child at the end of their relationship. At the child's birth, the unmarried parents had signed an agreement that acknowledged and confirmed the mother's rights to custody and guardianship of the child based on common law. Following this agreement, it was decided to grant the applicant access to the child as specified in the agreement details.

Additionally, the applicant's responsibilities for the child's maintenance were agreed upon. From the case, it can be seen that the child had grown up in an environment with his father. The applicant thus wanted to be recognized as a joint guardian of the minor child under the current law. The study now turns to the legal issues and the Court's decision.

The Decision and Legal Issues arising from the Case

The Court had to decide on one issue, which was whether, in the circumstances, the common law position on custody and guardianship was unconstitutional and unfairly discriminated against those born to unmarried parents. The issue in question was can an unmarried father, have any joint guardianship and joint custody rights towards his biological child under the Constitution of Zimbabwe. The basis for this claim lies in the "best interests of the child" principle as enshrined in the Constitution. The question was whether this tale would pre-eminence in this matter concerning access, guardianship, and custody of a minor child.³⁹ There was also a need to scrutinize the equality and non-discrimination provisions of the Constitution in this scenario.⁴⁰ The judge held that it was unfair to discriminate and deny a child the right to have access to a biological father based on their marital status. The judge declared that the common law position in this respect infringed sec 81(1)(a), sec 56(1), and sec (3)⁴¹ of the Constitution. The Court recognized that the right to parental care⁴² found in the Constitution entitled the child to a father's care. By defining care as more than just paying a monthly monetary lumpsum to the mother for the child, the Court's decision demonstrated a deeper understanding of what the right to parental care truly meant.⁴³ The Court deemed custody by a non-custodial parent as tantamount to the "best interests" of the child.⁴⁴ This decision of the Court leads us to the ensuing discussion of the case, where we critically examine the legal reasoning adopted, its consistency with established principles, and its broader implications for the rights of unmarried parents and the best interests of the child.

DISCUSSION

The Court found that the common law discriminated against a child born to unmarried parents, as, aside from maintenance, it did not regard the child as having a father. The court's decision in this matter was constitutionally correct. It reflected a progressive and balanced approach to parental rights as well as the best interests of the child by recognizing the father's capacity to provide a nurturing environment. In doing so, the Court reinforced the importance of evaluating parental suitability on an individual's merit rather than outdated norms.

³⁹ Section 81 provides that "a child's best interests are paramount in every matter concerning the child."

⁴⁰ Section 56 states:

(3) Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, color, tribe, place of birth, social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock."

⁴¹ Constitution of Zimbabwe, 1 of 2013.

⁴² Constitution of Zimbabwe, section states that one has a right "to family or parental care, or to appropriate care when removed from the family environment;"

⁴³ Iain Currie and Johan De Waal, *The Bill of Rights Handbook* (Juta and Company Ltd, 2013).

⁴⁴ *Alice Magodora v Blessing Moses Nduna* (2023) HH 157-23 (High Court of Zimbabwe, Harare).

The common law treatment of an unmarried father, like any ordinary unrelated individual,⁴⁵ where custody is placed, the child is in a place of fatherlessness, and they are thus not deserving of having a father-child relationship. This position gave the mother the upper hand as she would be the sole guardian and custodian of the child. In cases where the mother decides that the father will never have access to the child, the child would be deprived of such access. The association between a child and their biological father is a crucial aspect of parental care and thus cannot be denied.⁴⁶ In the African context, research indicates that fathers' involvement in early childhood care is a vital yet underexplored aspect. A father's involvement should be a wholesome approach that includes "emotional support, financial provision, and active engagement in a child's life."⁴⁷ Father involvement has positive results, which are seen in their development as they grow up.⁴⁸ Based on this premise, it is unjust and discriminatory not to grant the biological father of a child custody just because he is not married to the mother. Such a rule must be abolished, as it violates the Constitution. We agree that the Court rightly decided when it stated that "the rights of children should not be trampled upon by their parents and must be exercised without adversely affecting the rights of the children."

Further, the judgment highlights what the best interest of the child principle entails. For a long time, unmarried mothers and fathers have fought against each other regarding how the best interest standard should be formulated, with each party arguing for the principle to be applied in their favor when it is applied.⁴⁹ As such, in care and contact disputes, there have been difficulties with the interpretation and application of this provision.⁵⁰ The best interest of the child is not the rights of the mother or father being weighed against the other; rather, it is the child's best interest and well-being that takes center stage. Giving custody to both parents would enhance the best interests of the child as opposed to them continuing to litigate over the exercise of access rights. The judge determined that children benefit from having the opportunity to form a quality relationship with both parents, as well as the benefits of father involvement.

One notable aspect of the judgment that the Court managed particularly well was its careful consideration of the misuse of parental agreements by both parties in custody disputes. The facts show that a parental agreement has been signed and acknowledged. It has been the norm that in divorce, custody, or maintenance matters, private agreements entered into by the parents (married or not) are usually accepted, especially when they align with the best interests of the child. An example is South Africa, where the Children's Act governs parenting plans.⁵¹ If the unmarried father is not eligible in terms of section 21, he can pursue the parental agreement route.⁵² Such inclusion of parental agreements thus entails the use of a more comprehensive strategy that covers all aspects of parental rights and obligations related to the child's upbringing.⁵³ The Court was presented with evidence of an existing parental agreement and had to determine whether estoppel, a defense raised by the mother based on this agreement, applied. Estoppel is a principle that prevents a party from relying on specific facts due to the existence of a prior judicial pronouncement on the same issue raised by the parties.⁵⁴ The mother argued that the father was estopped from reversing an earlier representation through the parental agreement they had, wherein he had acknowledged the common law position that the mother had sole custody. On that basis, the mother was of the view that he could not then challenge in Court what he had acknowledged. The Court rejected this and highlighted that when looking at the best interest of the child, even if a party agrees or concedes

⁴⁵ Vengesai, "The Rights of Women in Unregistered Customary Marriages in Zimbabwe: Best Practices from South Africa."

⁴⁶ Anon, "Fatherhood and the Law: A Quiet Shift in Zimbabwean Family Rights," accessed April 2, 2024, <https://www.honeyb.co.zw/fathe>. Accessed 2 April 2024 <https://www.honeyb.co.zw/fatherhood-and-the-law-a-quiet-shift-in-zimbabwean-family-rights/>.

⁴⁷ Augustus Osborne and Bright Opoku Ahinkorah, "The Paternal Influence on Early Childhood Development in Africa: Implications for Child and Adolescent Mental Health," *Child and Adolescent Psychiatry and Mental Health* 18, no. 1 (2024): 156.

⁴⁸ Michael Yogman et al., "Fathers' Roles in the Care and Development of Their Children: The Role of Pediatricians," *Pediatrics* 138, no. 1 (2016).

⁴⁹ Elizabeth S Scott and Robert E Emery, "Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interest Standard," *Law & Contemp. Probs.* 77 (2014): 69.

⁵⁰ Nell Sussarah and Glynnis Dykes, "Best Interests of the Child -Difficulties with Interpretation and Application," *De Rebus DR* 22, 2024.

⁵¹Section 33 & 35.

⁵² S 22 of Act 38 of 2005.

⁵³ Robyn Shepherd, "Legal Analysis: The Role and Impact of Parenting Plans Under South African Law," *Family Law*, September 18, 2024.

⁵⁴ Clireesh Terry Cloete, "The Consequences of a Successful Estoppel Defence: A Constitutional Analysis" (Stellenbosch University, 2021).

a legal point on who holds custody rights, such a concession could not be used to prevent the party from later challenging the legal position, especially if they were raising a constitutional argument, as the applicant did. Research highlights that co-parenting agreements that value the other parent's contributions to childrearing can lead to better parent-child interactions. A key aspect is that a parenting plan or agreement must promote the child's sense of security without sacrificing their relationship with the non-resident parent.⁵⁵ If the Court had agreed to the estoppel claim, this balance would have been undermined.

The Court further examined the issue of allegations of abuse to alienate the unmarried father from parental access, offering a well-reasoned analysis. Generally, there have been ongoing debates regarding parental alienation, where parties to a custody case use abuse allegations by a parent as a basis by which the parent cannot be granted custody.⁵⁶ Courts frequently lack the necessary training to distinguish between legitimate and false allegations.⁵⁷ Parental alienation is caused primarily when a parent intentionally attempts, by their behavior or conduct, to bar the other parent from accessing the child or continuing an existing relationship.⁵⁸ It has been a common trend for unmarried individuals to review their failed relationship and reach negative insights about their former partner.⁵⁹ Parental alienation harms the children involved. The Court decided that the character facts as presented by the mother of the child did not allow itself to be swayed by character prejudgment of the unmarried father.⁶⁰ The Court, therefore, intervened to address the potential harm arising from reliance on such allegations, which are sometimes used to perpetuate bias against fathers. Instead of addressing the allegations presented by the mother regarding the suitability of the father, the Court decided that it was possible to settle the issue of the applicant's suitability without necessarily resolving the contentious character facts. By so doing, the Court moved away from the usual character narrative, which is a gender-biased way that often renders men useless and abusive.⁶¹ This is important, as it affirms the principle that both parents, regardless of marital status, should be assessed based on their actual conduct and capacity to care for the child rather than any alleged character defects. This being so, the study acknowledges that in cases where an unmarried father is abusive and unsuitable, they must not be given access, as this is contrary to the best interest of the child.

In addition, the Court took the initiative to address the issue of the impact of unending litigation on a child. Children who are the innocent victims are frequently the worst affected by the process of custody or separation of their parents.⁶² This may result in emotional and psychological harm.⁶³ The Court acknowledged that the parties' actions to attend Court to establish and nurture their parental interactions were now working contrary to the child's best interest, as they were spending more time debating about the child in Court and who had what rights. There was an ongoing conflict and extensive litigation involving the minor child.⁶⁴ It is interesting to note that, despite the Court's caution, the parents still proceeded to initiate two additional litigation proceedings after this case.⁶⁵ This raises a critical question: in such cases where there is disregard for court recommendations, should courts make pronouncements that demand policy and legislative interventions to address repeat appearances⁶⁶ before the family courts for child custody cases?

⁵⁵ Marsha Kline Pruett, "Parenting Plans Following Separation/Divorce: Developmental Considerations," *Encyclopedia of Early Childhood Development: Divorce and Separation*, 2011, 21–25.

⁵⁶ Jennifer Harman et al., "Gender and Child Custody Outcomes across 16 Years of Judicial Decisions Regarding Abuse and Parental Alienation," *Children and Youth Services Review* 155 (2023): 107187.

⁵⁷ Scott and Emery, "Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interest Standard."

⁵⁸ C. Maree, "Parental Alienation Can Be Overcome," *De Rebus*, August 1, 2018, <https://www.derebus.org.za/parental-alienation-can-be-overcome/>.

⁵⁹ Janet R Johnston and Matthew J Sullivan, "Parental Alienation: In Search of Common Ground for a More Differentiated Theory," *Family Court Review* 58, no. 2 (2020): 270–92.

⁶⁰ Simon Tebogo Lobaka, "The Failure of the South African Family Law System in Custody Battles: A Father's Perspective," *South African Review of Sociology* 54, no. 2 (2024): 177–99.

⁶¹ Lobaka, "The Failure of the South African Family Law System in Custody Battles: A Father's Perspective."

⁶² Charnelle Van der Bijl, "Considering Parental Alienation under the Aegis of the Criminal Law," *South African Journal of Criminal Justice* 29, no. 2 (2016): 140–57.

⁶³ Patrick T Davies et al., "Children's Vulnerability to Interparental Conflict: The Protective Role of Sibling Relationship Quality," *Child Development* 90, no. 6 (2019): 2118–34.

⁶⁴ *Muteswa v Sadiqi* (131 of 2021) [2021] ZWSC 131 (7 June 2021).

⁶⁵ *Muteswa v Sadiqi* (131 of 2021) [2021] ZWSC 131 (7 June 2021), *Sadiqi v Muteswa and 6 Others* (132 of 2021) [2021] ZWSC 132 (18 October 2021).

⁶⁶ Karen Broadhurst and Claire Mason, "Child Removal as the Gateway to Further Adversity: Birth Mother Accounts of the Immediate and Enduring Collateral Consequences of Child Removal," *Qualitative Social Work* 19, no. 1 (2020): 15–37.

Notably, the Court also addressed the issue of portraying the unmarried father in a positive light. From the facts, the Court deduced that the father had been present in the life of the child since the day he was born. As such, the father's care extended beyond monetary support and included opportunities to spend time with the child. This depicted a much-needed representation of unmarried fathering and showed that not all unmarried parents are non-present "deadbeat dads" who are unwilling to provide for their children.⁶⁷ The issue was handled with due consideration, underscoring the fact that fatherhood extended beyond mere financial support to encompass the child's overall well-being. Such rulings are commended and are key in addressing gender bias in custody cases and assist in deterring women from gatekeeping behaviors that deprive a child of having a relationship with the other parent.

The case marked a valuable step forward in shaping legal standards on the position of unmarried fathers and their children born to them. This can be viewed as a significant step toward gender equality in parental rights, affirming that unmarried biological fathers can have joint custody and guardianship. The law thus moved away from the position that non-marital fathers are unfit to be present and participate in their children's upbringing.⁶⁸ The Guardianship of Minors Amendment Act (2022),⁶⁹ which came after the ruling, also attests to this change as it introduced significant changes that affect parental roles and responsibilities. As highlighted above, prior to the amendment, the father's rights were exercised following a discussion with the mother. If any exercise of such rights was contrary to the mother's wishes, she could apply for an order to change them.⁷⁰ This position, therefore, restricted the unmarried fathers' right to access, as custody always resided with the mother unless a court granted the father this right. The amendment to the Act, in line with the case, thus grants both parents equal rights regarding matters of guardianship⁷¹ and custody. This means that, legislatively, fathers now have the right to participate in major decisions involving their children, such as education, religion, and health. The study is of the view that this judgment can also improve responsible fatherhood among unmarried fathers.⁷²

RECOMMENDATIONS

The Court invited the legislature to consider prohibiting the use of the term "illegitimate" when referring to children born to unmarried parents, as it stigmatized them.⁷³ It is recommended that the legislature urgently consider rephrasing and rewording the term 'children born out of wedlock.' For example, the Guardianship Amendment Act still defines "actual custody, as where the parents are not married to each other (without derogating from the common law position that minors born out of wedlock are in the custody of the mother)." It is further recommended that Zimbabwe follow the South African position in this regard. In South Africa, the term "illegitimate" is no longer used due to its discriminatory undertones. This has been replaced by the term children born to unmarried parents which is more accommodating. In *Scott v Shiri*,⁷⁴ the Court held that it is unjust for children to be negatively impacted by their parents' actions. If a child is called illegitimate, they are impacted because of the choice of their parents not to be married. Secondly, we identify that the requirement for unmarried fathers to apply and be awarded custody makes the protection of their custody and access rights more difficult than with divorced fathers. It would be important, thus, for legislation to be drafted that grants automatic custody rights to unmarried fathers following the guidance of section 21(1) of the South African Children's Act 38 of 2005, which favors co-parenting or shared care under specific requirements. This must be handled with extreme caution, though, as there are disadvantages that this can have in cases where the law is dealing with absent fathers. While it is acknowledged that the practice of law must adapt to a changing society, such legislative amendments, when made, cannot be denied and must conform to and be rooted in the best interests of the child.

⁶⁷ Sangeetha Madhavan et al., "Fathers' Financial Support of Children in a Low Income Community in South Africa," *Journal of Family and Economic Issues* 35, no. 4 (2014): 452–63.

⁶⁸ Serena Mayeri, "Foundling Fathers:(Non-) Marriage and Parental Rights in the Age of Equality," *Yale LJ* 125 (2015): 2292.

⁶⁹ Guardianship of Minors Act (Ch 5:08).

⁷⁰ Guardianship of Minors Act S 3.

⁷¹ S 2 defines guardianship as "a legal right allowing either parent to manage a minor's affairs including health, education needs, financial security or any welfare needs."

⁷² Erin Kramer Holmes et al., "Do Responsible Fatherhood Programs Work? A Comprehensive Meta-analytic Study," *Family Relations* 69, no. 5 (2020): 967–82.

⁷³ This position about unmarried fathers can only be changed by the legislature.

⁷⁴ *Scott v Shiri and Others* (70 of 2024) [2024] ZWBHC 70 (29 February 2024).

CONCLUSION

Based on this decision, it is clear that an unmarried biological father, where the facts permit, will get joint custody, full custody, or guardianship of a minor child born to them. The case led to constitutional alignment, as it harmonized common law with current constitutional provisions on equality and children's rights. This promoted an equitable framework for parental involvement. The study notes that the case of *Sadiqi v Mteswa* is a progressive move towards equality in custody cases for unmarried fathers. It agrees that the Court took a holistic approach, which enhanced the best interests of the child. The case serves as evidence of how courts can shape the contours of children's rights, as exemplified by the promulgation of the Guardian of Minors Amendment Act. The case is thus a win, encouraging fathers to interact and cultivate relationships with their children and reshaping the perception of unmarried fathers and fatherhood.

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