Disclosure in *Centre for Child Law v the Governing Body of Hoërskool Fochville*

M Tsele*

P·E·R

Pioneer in peer-reviewed, open access online law publications

Author

Michael Tsele

Affiliation

Rhodes University
South Africa

Email g10n2746@campus.ru.ac.za

Date published

18 December 2017

Editor Prof O Fuo

How to cite this article

Tsele M "Disclosure in *Centre for Child Law v the Governing Body of Hoërskool Fochville*" *PER / PELJ* 2017(20) - DOI http://dx.doi.org/10.17159/1727-3781/2017/v20i0a2134

DOI
http://dx.doi.org/10.17159/1727-3781/2017/v20i0a2134

Abstract

When a party refers to evidentiary material in the course of litigation, ordinarily this party is under an obligation to make this evidence available to his opponent, particularly when called upon to do so. However, over the years various principles have developed which make this obligation subject to certain limitations. The *Fochville* cases dealt with a situation where a party to litigation sought to withhold certain information from its adversary, notwithstanding the fact that the material had been relied upon as a ground for the institution of the litigation. This note critiques the judgments of the High Court and in particular the Supreme Court of Appeal in this dispute. In so doing, it draws on useful foreign law to argue that the Supreme Court of Appeal's judgment was an unfortunate one in that the court failed to clarify with reasonable precision the circumstances in which a party to litigation involving children's interests may legitimately resist disclosing evidence to his adversary, in which the party resisting disclosure invokes the principle of public interest immunity. In this regard, the note concludes that the High Court's overall approach to the issue is to be preferred.

Keywords

Anonymous evidence; best interests of the child; children's rights; disclosure in civil litigation; discovery; excuses for non-discovery; fairness; openness; public interest immunity; secrecy in litigation.

.....

1 Introduction

Facing the trial of his life in 1603 Sir Walter Raleigh, objecting to the admission of hearsay evidence, exclaimed:

> Let my accuser come face-to-face and be deposed. Were the case but for a small copyhold, you would have witnesses or good proof to lead the jury to a verdict; and I am here for my life.[1]

His cries were in vain; the hearsay evidence was admitted and formed the basis of his conviction. This case has gone on to become a symbol of the principles of open justice and fairness in judicial proceedings. Indeed, Raleigh's experiences played a role in the inclusion of the Confrontation Clause in the *United States Constitution*.[2] It is with Sir Walter in mind that I think the recent case of *Centre for Child Law v The Governing Body of Hoërskool Fochville*[3] raises some important questions about the principles of openness and fairness in legal proceedings. Amongst other issues, it raises the interesting question of the extent to which our law recognises public interest immunity in legal proceedings involving children's interests. This is even more so when one juxtaposes the Supreme Court of Appeal's[4] decision with that of the High Court.[5]

The primary purpose of this note is to argue that the Supreme Court missed an opportunity to develop and provide a clear test as to how courts should deal with disclosure claims in litigation involving children. This is in circumstances where discovery is resisted on the basis that if granted it will be to the severe detriment of the children concerned. Flowing from this broader point, I will address several ancillary issues which arose in this case; and these are:

a. Should any party bear an onus of proving whether the disclosure of the information sought to be withheld is warranted? If so, which party?

---

* Michael Tsele. BA LLB (Rhodes University). Part-time Lecturer and LLM Candidate, Rhodes University, South Africa. Email: g10n2746@campus.ru.ac.za.

1. Jardine *Lives and Criminal Trials* 427.

2 This *Constitution of the United States of America: Sixth Amendment* provides that "in all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him". See generally *Crawford v Washington* 541 US 36 (2004).

3 *Centre for Child Law v The Governing Body of Hoërskool Fochville* 2016 2 SA 121 (SCA) (hereinafter referred to as *Fochville* 2).

4 Hereinafter referred to as the Supreme Court or SCA, interchangeably.

5 *Governing Body of Hoërskool Fochville v Centre for Child Law; In Re: Governing Body of Hoërskool Fochville v MEC Education Gauteng* 2014 6 SA 561 (GJ), (hereinafter referred to as *Fochville* 1).

b. In cases involving children, is it sufficient for a party seeking to prevent disclosure to merely assert that so doing will not be in the best interests of the child?

2 Facts of the case

I begin by canvassing the facts of the case.[6] In late 2011, the School Governing Body of Hoërskool Fochville (SGB) launched legal proceedings seeking to interdict the Gauteng provincial education authorities in essence from forcing the school to admit certain learners, all of whom were English-speaking black children. The SGB also sought to have any decision taken to force such admissions to be reviewed and set aside on the basis that the school did not have the capacity to accommodate the concerned children and that the admission of these children was against the school's admission policy. Admission, it was argued, would lead to intolerable and unmanageable over-crowding. The provincial authorities argued that the school did have the capacity to accommodate the additional students notwithstanding its claims to the contrary by the SGB. The SGB's urgent application failed and so the students were eventually admitted into the school. It is important to note that the school is traditionally or historically an Afrikaans medium school.

In December 2012 the provincial authorities instituted legal proceedings seeking to change the school's language policy from Afrikaans medium to dual medium, in order to accommodate more black students, most of whom understood only English. The Centre for Child Law (the Centre) applied to intervene in the proceedings; and in support of the application an attorney[7] at the Centre produced an affidavit in which she detailed what she claimed was evidence of racial abuse and discrimination at the school. She stated that this evidence had been collected in the form of various interviews with a number of black children. These had been collected by means of questionnaires. The children had been told to detail their experiences at the school, and had been advised that the information would be kept confidential.

The school opposed the Centre's application, but before filing an answering affidavit it instituted interlocutory proceedings in terms of rule 35(12) of the *Uniform Rules of Court* requiring the Centre to produce for inspection the questionnaires completed by the learners, in their original form. The Centre refused to disclose, on multiple grounds. The grounds included that the communication was privileged because it was client-attorney

6 For a helpful summary of the germane facts see *Fochville* 2 paras 1-9.

7 Hereinafter referred to as the attorney or the Centre's attorney.

correspondence, and that the material had been imparted under the promise of confidentiality.

The Centre stated that the information had been collected so that the children could be provided with a means to express and place their views before the court. Importantly, the Centre also asserted that the school did not need the questionnaires in order to respond to its application to intervene. Furthermore, it was said that the children sought no relief from the allegations made, but merely wished to "participate in the litigation"[8] by having their views ventilated. The attorney's summary, it was contended, was meant to give the court a holistic view of the children's views. The application came before Sutherland J in the then South Gauteng High Court, who ordered the Centre to produce the questionnaires and hand them over to the school. He also ordered the Centre to pay the applicant's costs.[9]

Sutherland J's judgment canvassed all the grounds advanced by the Centre in refusing to disclose the material sought. The main ones were (a) privilege, (b) confidentiality, and (c) irrelevance; and in the event that the main grounds failed, (d) public interest immunity, together with the best interests of the child principle as set out in section 28(2) of the *Constitution.* The court first focused on whether any of the grounds advanced by the Centre could withstand an application in terms of rule 35(12). The rule states:

> Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording.

In this context the court engaged in an assessment of the nature of the evidence. In discussing the nature of the attorney's evidence, the court made several important observations. It found that the attorney's evidence was "hearsay",[10] that some of her evidence constituted her own personal opinion based on conclusions she claimed to have drawn from the information provided by the school, the most controversial of which pertained to allegations of racism emanating from the white children and staff at the school and directed at black children. Importantly, Sutherland J

8 *Fochville* 2 para 7.
9 *Fochville* 1 paras 85-87.
10 *Fochville* 1 para 3.6.

also concluded that the attorney's evidence had been a "distilled"[11] and "synthesised"[12] version of the children's contentions.

The court then engaged in a discussion of South African law on privilege and concluded that the questionnaires were indeed privileged but that such privilege had been impliedly waived. In so doing the court rejected the Centre's claim that it could not waive the privilege because the privilege had to be waived by the children themselves. The court found this approach misconceived because it had found that the real litigant in the case was the Centre and not the children.[13]

Sutherland J also rejected the Centre's claims of irrelevance, and in the process of dealing with the important principle of onus, he stated:

> … the Centre's answering affidavit implies that the school ought to justify a need for the documents … that assumption would be incorrect. The onus to show irrelevance as a reason to refuse compliance rests on the Centre.[14]

He accepted the school's argument that it needed the documents in order to ascertain the veracity of the allegations, and to consider putting up a rebuttal.

Having failed on all the main grounds, the court considered the broader and more general arguments based on the *Constitution*, mainly the so-called "public interest considerations"[15] and the "best interests of the child".[16] The Centre argued that it was not in the children's best interest for the questionnaires to be discovered because of the risk of "harm to individual reputation and relationships".[17] In essence, the Centre argued that the school would be able to identify the children from their handwriting and that this opened up the possibilities of retributive action against the children. In dealing with this question the court framed the issue by asking whether:

> It [is] proper that a litigant must deal with an adversary's case and be denied the supporting documentation on the grounds that a child composed them?

The court went further to ask:

> Will the CLL be, generically, inhibited from protecting children's rights if it cannot keep confidential what children reveal to it in its investigations and

11 *Fochville* 1 para 65.
12 *Fochville* 1 paras 58, 65.
13 *Fochville* 1 paras 50-53.
14 *Fochville* 1 para 62.
15 *Fochville* 1 paras 9, 67.
16 Section 28 of the *Constitution of the Republic of South Africa*, 1996 (hereinafter referred to as the *Constitution*). *Fochville* 1 para 76.
17 This contention was put forward in more detail in the Heads of Argument and during oral argument.

> does it need to be specially licensed to present, to a court, hearsay evidence, cloaking its sources with anonymity, which the court is then expected to receive and treat as safe to rely upon? Can such conduct be sanctified under the rubric of 'the best interests of the child?'[18]

The learned judge concluded that the answer was "no". He expressed the opinion that the principle of the best interests of the child should not be used as a casual mantra and that it did not mean that in every form of litigation in which children are involved, their interests must take precedence.[19] The court found that the school would not be able to cogently rebut the allegations of racism if discovery was not granted.[20] In sum, the court concluded that no justified public interest considerations warranted non-disclosure.[21] As already stated, this was in addition to its findings that confidentiality should not be used as an excuse to resist disclosure under rule 35(12) and that whatever privilege might have existed had been waived.[22] For these reasons, the court ordered disclosure.

The main case was settled,[23] but Sutherland J later granted leave to appeal against his judgment on a number of grounds.[24] The court found that the matter was not moot, given that the issue might arise in future in the context of public interest bodies trying to adduce anonymous evidence in court in circumstances where children are involved.[25] The court also accepted that another court might come to a different conclusion in relation to costs, given that the school was an organ of state, and that the issues involved had raised important constitutional questions. In this regard, the court accepted that it may have been wrong in granting a costs order against the Centre in that it failed to properly consider and apply the general principles relating to costs in constitutional litigation.[26]

3 Round two: In the Supreme Court of Appeal

The matter proceeded to the Supreme Court of Appeal. On the preliminary issue of mootness, the court accepted the appellant's argument as to why it should exercise its discretion to entertain the appeal in the light of the fact

18 *Fochville* 1 para 75.
19 *Fochville* 1 para 77.
20 *Fochville* 1 para 82.
21 *Fochville* 1 para 85.
22 *Fochville* 1 para 61.
23 The main case was the original dispute between the school and the Gauteng provincial government authorities.
24 *Centre for Child Law v Governing Body of Hoërskool Fochville; In Re: Governing Body of Hoërskool Fochville v Centre for Child Law* 2014 4 All SA 196 (GJ) (hereinafter referred to as the "CLL appeal application").
25 CCL appeal application paras 12, 14.
26 These principles are set out in *Biowatch Trust v Registrar Genetic Resources* 2009 6 SA 232 (CC).

that the main issue which gave rise to the case had been settled.[27] Ponnan JA, writing for the full bench, began his judgment by pointing out that regardless of the merits or substance of the arguments advanced in terms of rule 35(12), the school's application could and possibly should have failed for failing to adhere to rule 30A of the *Uniform Rules*, which gives guidance as to what should occur in the event that a party who is called upon to comply with a certain request in terms of the rules fails to do so.[28] He then proceeded to deal with a variety of issues. The first that I critique is what I will term the onus of proof in disclosure claims.

3.1 Onus in disclosure claims

At the heart of this case was the question posed earlier: should any party bear an onus of proving whether the disclosure of the information sought to be withheld is warranted? If so, which party?

In answering this question one notes the stark contrast between the High Court's and the SCA's judgments. In considering the issue, the SCA began by considering Sutherland J's finding that the Centre bore an onus to prove why disclosure should not be ordered. In this regard, the SCA observed that Sutherland J appeared to have placed reliance on what was said in *Gorfinkel v Gross, Hendler & Frank*,[29] where the court held that disclosure should be approached from the point of onus. The onus is that a party who refers to a document in litigation, but seeks to avoid sharing it with his adversary, must put forth acceptable reasons as to why disclosure should not be ordered. Ponnan JA rejected this approach, saying he had "reservations"[30] as to whether it was an acceptable one. Instead, he held that a court has a:

> [G]eneral discretion in terms of which it is required to try to strike a balance between the conflicting interests of the parties to the case. Implicit in that is that it should not fetter its own discretion in any manner and particularly not by adopting a predisposition either in favour or against granting disclosure.[31]

The nub of Ponnan JA's reasoning is that a court should not adopt a predisposition in favour of or against disclosure. This means that there is no need to place any form of onus or burden on any of the parties. In my view this approach is at the very least unfortunate and at worst incorrect. I believe that a court must in fact adopt an approach which recognises disclosure as a point of departure. In my view a court does not (or should not) have a

27 *Fochville 2* paras 10-14.
28 *Fochville 2* para 17.
29 *Gorfinkel v Gross Hendler & Frank* 1987 3 SA 766 (C).
30 *Fochville 2* para 18.
31 *Fochville* 2 para 18.

general discretion to decide whether or not disclosure of information mentioned or submitted in litigation should be disclosed to all the parties. The proper approach is to recognise that any material placed before court should be accessible to all parties unless exceptional circumstances exist. Implicit in this is that unless the party seeking to withhold the information can provide compelling reasons as to why disclosure should not occur, a court must order disclosure.

In my view, in adopting the general discretion approach, the Supreme Court in essence went against the overriding theme and spirit of its judgment in *City of Cape Town v South African National Roads Authority Limited*.[32] In that case the court engaged in a thorough analysis of international and foreign authorities, all of which highlight the importance of open justice. The court expressed the opinion, and rightly so, that "the default position is one of openness even in a case where the documents in question had been lawfully classified as confidential in the interest of national security".[33] The court observed that the open court principle means that "court proceedings including the evidence and documents disclosed in proceedings should be open to public scrutiny".[34] In highlighting the importance of openness being the default position, the court went on to add "it will be a dangerous thing for all litigants in both civil and criminal matters, for court documents, as a general rule to be inaccessible and unpublishable".[35] The court also held that "the right to open justice must include the right to have access to papers and written arguments which are an integral part of court proceedings".[36] The court concluded by holding that:

> [T]he animating principle therefore has to be that all court records are, by default, public documents that are open to public scrutiny at all times. While there may be situations justifying a departure from that default position … any departure is an exception and must be justified.[37]

Bearing the above in mind, it is quite difficult to understand why the court did not find that the Centre bore a heavy onus to show that disclosure should not occur.[38] In my view, a more desirable approach in such matters is that

---

32 *City of Cape Town v South African National Roads Authority* Limited 2015 3 SA 386 (SCA) (hereinafter referred to as *Sanral*).

33 *Sanral* para 16.

34 *Sanral* para 12.

35 *Sanral* para 18.

36 *Sanral* para 19.

37 *Sanral* para 48.

38 This is particularly so when one considers a number of other cases in which the court argued that, in our constitutional democracy, the default position is one of openness, whether in court or in the legislature; *Primedia Broadcasting (a Division of Primedia (Pty) Ltd) v Speaker of the National Assembly* 2017 1 SA 572 (SCA); *Multichoice (Proprietary) Limited v National Prosecuting Authority, In Re; S v Pistorius, In Re;*

generally a party seeking to withhold disclosure should bear the task of showing why this is justified. Implicit in this is that the court should adopt a view that favours disclosure. I will elaborate on this point later when I deal with foreign law within the context of developing a set of factors that courts should take into account when considering cases where a party seeks to withhold information in litigation, on the basis that disclosure will compromise the safety of a child who might be the subject of the litigation.

3.2 Best interests of the child: A determinative defence?

The second issue that I will address is whether there were any factors present in this case which justified non-disclosure. Even though the Supreme Court failed to place a specific and direct duty on the Centre to prove that non-disclosure was warranted, the Centre, to the extent that it was relevant, argued that disclosure was not in the children's best interests. In so doing it invoked the best interests of the child principle[39] and argued that this principle should sustain their arguments that non-disclosure was justified in the circumstances. Notably, in both the High Court and in the Supreme Court, the Centre seemed to place significant emphasis on the best interests of the child principle.[40] This emphasis seemed to suggest that the Centre's view was that regardless of the circumstances, the children's interest must prevail. I will briefly deal with this point, having regard to the fact that the High Court emphatically rejected this point, while the SCA appears to have been more open to accepting it.

Generally, a court should strive to protect the interests of children as widely as possible, as they constitute a vulnerable class in society. Indeed, section 28(2) of the *Constitution* states: "A child's best interests are of paramount importance in every matter concerning the child." However, the best interests of the child principle must be understood within the context of the fact that its ambit is not unlimited, a point emphasised in *S v M.*[41] Moreover, there is no hierarchy of rights in our *Constitution*,[42] and so the best interests' principle does not mean that children are accorded greater or super rights by the *Constitution*. Put differently, while the principle must be given a generous and purposive interpretation, one must bear in mind, as the High Court did,[43] that:

Media 24 Limited v Director of Public Prosecutions North Gauteng 2014 1 SACR 589 (GP).

39 Section 28 of the *Constitution* and in particular, s 28(2) states "A child's best interests are of paramount importance in every matter concerning the child".

40 *Fochville* 1 para 70; *Fochville* 2 paras 24-26.

41 *S v M (Centre for Child Law as Amicus Curiae).*2007 2 SACR 539 (CC) para 26.

42 *The Citizen 1978 (Pty) Ltd v McBride* 2011 4 SA 191 (CC) para 148.

43 *Fochville* 1 paras 76-77.

> The best interests of the child does not apply absolutely and will not trump any other competing right or interest every time … The best interests of the child does not necessarily mean that the affected right of the child should prevail every time.[44]

In short, in determining whether disclosure should be ordered in such cases, it is no determinative answer to state that disclosure or non-disclosure is in the best interests of the child. A child's best interest is a relevant consideration, but it is one of many factors that must be considered. This means a party cannot without more invoke the best interest of the child principle in order to rebut the case of his or her adversary. It follows, that since the best interest of the child is not dispositive of such issues, we must venture to consider other factors which will help guide the courts in deciding cases that have competing interests similar to the ones in the *Fochville* cases.

It bears emphasising that I do not mean to say that the best interest of the child is an irrelevant or inconsequential consideration in such cases. Indeed, Ponnan JA observed that there may well be other public interest considerations which require non-disclosure, even in circumstances where the material concerned is privileged and waiver exists.[45] This includes the fact that in some instances disclosure might not be in a child's best interest. I accept this; but this begs the question: what other factors do we take into account when deciding whether such public interest considerations exist or are compelling enough to help a court decide a matter? If a child's best interest principle is not determinative of a claim, what other considerations need to be taken into account? Sadly, the court did not speak to this question in a sufficiently clear and concise manner.

Put differently, my concern here is that the SCA's musing does not provide clear guidance as to the factors that lower courts need to take into account when dealing with the competing interests of the need for openness in litigation, on the one hand, and the interests of children, on the other.

4 Working towards developing a clearer approach

In arguing that a clear test or approach should be formulated, I will refer to the jurisprudence of courts in the United Kingdom (UK). I refer to this foreign jurisdiction bearing in mind that section 39(2) of the *Constitution* states that "when interpreting the Bill of Rights, a court, tribunal or forum …may consider foreign law". Our courts have on many occasions affirmed the importance and usefulness of foreign and comparative law in the context of

---

44 Malherbe "Impact of Constitutional Rights on Education" 440.

45 *Fochville* 2 para 26.

adjudication, more recently in *H v Fetal Assessment Centre*,[46] where Froneman J provides a useful summary regarding the application of foreign law in South African courts. I am also acutely aware of the dangers of merely translocating foreign precedent and applying it acontexually, and the fact that reliance on comparative law must be done with circumspection and only when it is contextually appropriate.[47]

Courts in the UK frequently face situations where a party to private litigation,[48] refuses to disclose certain documents or information to his or her adversary on the basis that if the concerned information is disclosed, there will be a risk of harm to a child.[49] In most instances, the party seeking to prevent disclosure argues that his adversary may take retributive action against the child.[50] On the other hand, the party seeking the information, often argues that such information is necessary in order for him or her to respond to allegations made against him and thereby vindicate his or her rights. Those seeking to withhold the documents often invoke the principle of "public interest immunity or privilege".[51] This defence allows a party withhold the information if the court is of the view that the public interests demands so.

4.1 Public interest immunity

Through a number of important decisions the UK courts have developed jurisprudence that may help us. Arguably the most important of these cases is that of *D v National Society for the Prevention of Cruelty to Children.*[52] That case accorded to people who informed the authorities of allegations of child abuse the same protection as police informants. In so doing, the court dealt with one important issue, which was raised in *Fochville*. This is whether the fact that information is imparted confidentially is enough to

46 *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) para 28.

47 *Bernstein v Bester* 1996 2 SA 751 (CC) para 133.

48 In South Africa, a guarantee of confidentiality of secret sources has often been given in the context of police informers or public interest privilege, also known as state privilege (*Van der Linde v Calitz* 1967 2 SA 239 (A)). It has also been extended to police informers. *Els v Minister of Safety and Security* 1998 2 SACR 93 (NC). The reason for this form of privilege is to ensure that the public can provide state officials with useful information without fear of reprisals. There are a few South African precedents dealing with immunity of this nature in the context of pure civil litigation. However, the courts have shown a willingness to consider the extension of such immunities even in private litigation. See *Khala v Minister of Safety and Security* 1994 4 SA 218 (W) 235H; *Bridon International GMBH International Trade Administration Commission* 2013 3 SA 197 (SCA) paras 19-22.

49 See for example *A (A Child), Re: SC* [2012] UKSC 60 (hereinafter referred to as *A Child*) and the cases cited therein.

50 *A Child* and the cases cited therein.

51 See for example *Re J (A Child: Disclosure)* [2012] EWCA Civ 1204.

52 *D v National Society for the Prevention of Cruelty to Children* HL [1977] 1 All ER 589 (hereinafter referred to as *D v NSPCC*).

ensure non-disclosure. In dealing with this point, the House of Lords stressed that it was not that the information is communicated confidentially which triggers immunity, but the public interest in encouraging society to come forward with information that may help authorities to protect the interests of children. As Lord Hailsham put it:

> Any attempt to withhold relevant evidence therefore must be justified and requires to be jealously scrutinised. The appellants noted that the dissenting judgment of Lord Denning MR which was in their favour, largely relied on the confidentiality which the appellants had pledged to potential informants. Their own contention was that, while the mere fact that a communication was made in confidence did not of itself justify nondisclosure, the fact of confidentiality was relevant to reinforce the view that disclosure would be against the public interest …. I am compelled to say that, in the breadth and generality with which they were put forward, I do not find them acceptable …. They seem to me to give far too little weight to the general importance of the principle that, in all cases before them, the courts should insist on parties and witnesses disclosing the truth, the whole truth, and nothing but the truth, where this would assist the decision of the matters in dispute.[53]

Lord Hailsham's comments clearly mean that generally it is undesirable for a court to allow a party to withhold disclosure in the context of litigation, merely because he or she asserts that the information was received confidentially.[54] This, as I will demonstrate, is contrary to what the SCA held in *Fochville,* where a high premium was placed on the fact that the Centre's attorney had promised the children that their information and identities would be kept confidential.[55]

Over the years, and building on *D v NSPCC*, courts in the UK have developed much clearer standards and tests to deal with claims in which it is alleged that the discovery of certain information may lead to some harm to children involved. As I will show, what is clear is that even where this assertion is made, the courts will not lightly refuse disclosure.

Dealing with these tests brings me back to one of the main issues in the *Fochville* cases, which is; who bears the onus of proving whether non-disclosure is justified? Is there a need for a court to adopt a predisposition

---

53 *D v NSPCC* 600.

54 See also the comments of Lord Diplock in *D v NSPCC* 594, where he said: "The fact that information has been communicated in confidence is not in itself a ground for protecting from disclosure in a court of law the nature of the information or the identity of the informant. …The private promise of confidentiality must yield to the general public interest that in the administration of justice the truth will out unless ... a more important public interest is served by protecting the information."

55 Generally speaking, an undertaking to keep material confidential will not sustain a refusal to disclose in court proceedings. Our law has always accepted that confidentiality alone is not a ground for objecting to disclosure. See *Comair v the Minister of Public Enterprises* 2014 5 SA 608 (GP) para 43.

in favour of disclosure? As previously professed, in my view the answer is "yes". My views find support in the case of *Re A (A Child)*,[56] where the UK Supreme Court highlighted the importance of a predisposition towards disclosure needing to be balanced with the interests of the child when it said:

> The presumption in favour of disclosure is strong indeed, but not so strong that it can be withheld only if the judge is satisfied that real harm to the child must otherwise ensue.[57]

The approach of the Supreme Court is supported by comments in *Re B, R and C (Children)*,[58] where it was said:

> It is for those who seek to restrain the disclosure of papers to a litigant to make good their claim and to demonstrate with precision exactly which documents or classes of documents require to be withheld. The burden is a heavy one.[59]

These statements illustrate that when a court engages in an act of balancing competing interests regarding the appropriateness of disclosure, it must adopt an approach which favours disclosure. The converse is that a heavy burden is placed on the party seeking to withhold disclosure to show why this is justified. It is for this reason that I disagree with Ponnan JA's view that a court should not take a predisposition in favour of disclosure as the point of departure.[60]

Put differently, my difficulty with the Centre's case is that it sought to place a reverse onus on the school, through requiring the school to show that it needed the documents sought, a concern shared by Sutherland J in the High Court.[61] Unfortunately, the SCA validated the Centre's approach by arguing that the school had not shown that it needed the questionnaires.[62] In my view, what ought to have transpired is that the court should have required the Centre not only to show that disclosure was merely undesirable, but to demonstrate through cogent evidence that grave harm would indeed occur if disclosure was ordered.

As Maurice KJ recently put it in *Dunn v Durham County Council*:

---

56 *A Child* para 19.
57 *A Child* para 19.
58 *Re B, R and C (Children)* [2002] EWCA Civ 1825 (hereinafter referred to as *C Children*).
59 *C Children* para 29.
60 *Fochville* 2 para 18.
61 *Fochville* 1 para 62.
62 *Fochville* 2 para 28.

> It is for the party or person in possession of the document or who would be adversely affected by its disclosure or inspection to assert exemption from disclosure or inspection.[63]

These views have been embraced by South African commentators, Pillay and Zaal who, although writing in the context of discovery through the *Children's Act* 38 of 2005, say:

> We recommend that full discovery of all significant evidential items to opposing adult parties and legal representatives become the norm in children's court litigation. This has for many years been the position in children's cases in England and Canada, for example. In these systems disclosure is the general rule and not the exception … The same approach is surely essential in South Africa.[64]

Furthermore, in *Re D (Minors) (Adoption Reports: Confidentiality)*[65] Lord Mustill elaborately set out a list of factors which constitute a test for a public interest immunity claim to succeed in a case where it is alleged that disclosure would put some interest of a child at risk. The court held that when conducting the balancing act, a court should consider: (a) whether the disclosure of the material would involve a real possibility of significant harm to the child; (b) consider whether the overall interests of the child would benefit from non-disclosure, weighing on the one hand the interest of the child in having the material properly tested, and on the other both the magnitude of the risk that harm will occur and the gravity of the harm if it does occur; (c) the court should also consider the interest of the other party in having an opportunity to see and respond to the material. The court should take into account the importance of the material to the issues in the case.

Lord Mustill's factors illustrate that the best interest of a child is but one consideration that a court must take into account. Importantly, his test recognises that a court must also consider as equally important the need for non-disclosure to be an exception to the principle of openness. It is hoped that in time, South African courts (or the legislature) will adopt a similar approach.

Another important theme in the UK authorities is that any claims that harm might ensue must be demonstrable and that harm must be reasonably likely to occur if disclosure is not withheld. Clearly, this places an onus on the party seeking to withhold disclosure to prove that such harm may ensue.

---

63 *Dunn v Durham County Council* [2013] 1 WLR 2305 para 23.

64 Pillay and Zaal 2011 *SALJ* 639.

65 *Re D (Minors) (Adoption Reports: Confidentiality)* [1995] 2 FLR 687 (hereinafter referred to as *Re D (Minors)*).

It bears mentioning that the SCA has itself dealt with a case where it was alleged that certain conduct might place children's safety and well-being at significant risk. Although the facts were different, in *KG v CB*[66] the court held that the onus is on the party who seeks to restrain such conduct and in the course avert the purported harm to prove the significance and reasonableness of the alleged fears. Van Heerden JA, citing with approval English precedent, observed:

> There is therefore an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial.[67]

In *Fochville* 2*,* Ponnan JA clearly took a less stringent assessment of the Centre's claim that there was a fear, held at least by the children, that harm or prejudice might ensue if the children's identities were disclosed.[68] He reasoned that there was nothing to suggest that such perceptions were not held in good faith or rather genuinely held.[69] In essence, he appears to have taken the appellants at their word. This approach is at odds with the more stringent approach advocated in the United Kingdom. It is simply too lenient an approach.

I do not doubt that the fears of the potential harm were held in good faith, but the mere fact that a party holds a belief in good faith is not reason enough to dispel a claim that material relied upon in litigation be disclosed to an adversary. This is even more so where the adversary alleges that he or she needs the information in order to ventilate his case. Whatever belief is held, it must be vigorously scrutinised by the court, a process which includes requiring the party that seeks to withhold disclosure to back up his or her assertions through cogent evidence.[70] In *Re D (Minors)* the court put it as follows:

---

66 *KG v CB* 2012 4 SA 136 (SCA) (hereinafter referred to as *KG*).

67 *KG* para 49.

68 *Fochville* 2 para 27.

69 *Fochville* 2 para 27.

70 In *Midi Television (Pty) Ltd t/a e-tv v Director of Public Prosecutions (Western Cape)* 2007 5 SA 540 (SCA) (hereinafter referred to as *Midi Television*), the SCA dealt with an issue involving the claim that the publication of some information might cause prejudice to a party. Nugent JA held at paras 16 and 19 that there must be a "demonstrable and substantial … real risk that prejudice will occur. … Mere conjecture and speculation that prejudice might occur will not be enough". Although the factual circumstances in *Midi Television* were different from those in the *Fochville* cases, Nugent JA's comments illustrate that claims of potential harm or prejudice ensuing should disclosure occur will not be entertained lightly.

> The court should be rigorous in its examination of the risk and gravity of the feared harm to the child, and should order non-disclosure only when the case for doing so is compelling.[71]

Anything short of this exacting standard may lead to an abuse of claims of confidentiality, or fears of the risk of harm or prejudice. After all, there is an important principle behind the need to limit the use of anonymous evidence in litigation. It is that a party must face his accuser and should be able to challenge his or her evidence.

5 The Implications of the SCA judgment

The SCA's judgment suggests that where a public interest organisation such as the Centre engages in litigation it may withhold relevant documentation from its adversary if it can show that it or the children honestly believe they will suffer harm if the material is disclosed. More disturbingly, the court suggests that once it is shown that the perception of potential harm is genuinely held, disclosure is likely not to be ordered.[72] Such a low and vague standard leaves the claim to public interest immunity open to abuse.

The courts in the UK have learnt from experience. Over the years, and far too often, public interest bodies representing children would arrive in court and refuse to disclose relevant documents on the alleged basis that disclosure might lead to harm to the children concerned.[73] The courts quickly realised that the claim of public interest immunity was being abused, to the detriment of opposing litigants. It for this reason that Lord Bingham once warned that "public interest immunity is not a trump card vouchsafed to certain privileged players to play when and as they wish".[74]

In the light of realising that social or public interest bodies were in effect abusing immunity claims, courts in the UK have begun to take a more stringent approach in dealing with such cases. As Munby LJ recently observed:

> … general statements that one sees in textbooks and hears that social work records are covered by public interest immunity which is a widely stated class claim, should now be consigned to history.[75]

---

71 *Re D (Minors)* 615.

72 *Fochville* 2 para 27.

73 See comments of Butler-Sloth LJ in *Re M (A Minor)* (1989) 88 LGR 841 849-850.

74 *Makanjuola v Commissioner of Police of Metropolis* [1992] 3 All ER 617 623. Emphasis added.

75 *Dunn v Durham County Council* [2013] 1 WLR 2305 para 44, citing Charles J in *Re (Care: Disclosure: Nature of Proceedings*) [2002] 1 FLR 755 777.

This remark was made in the context of emphasising that courts must not lightly allow public interest bodies representing children to refuse to disclose material to their adversaries in litigation. It would be unfortunate if our courts fell into the trap of giving such bodies free passes, based on the supposed progressive work they do.

The Centre is a social public interest organisation that plays a positive role in advancing the constitutional rights of children, and it has received judicial recognition for its work. However, it bears repeating that preferential treatment should not be extended to public interest organisations merely because of the progressive nature of the work they do.[76] As I have already observed, this is a point that was well captured and appreciated by Sutherland J in the High Court.[77] Such bodies should not expect to be able to withhold information from their adversaries in litigation, merely because they assert that so doing is in the best interests of a child. This is because presenting anonymous evidence is antithetical to the principle of open justice. As such, any litigant who wishes to withhold any relevant information from his adversary must provide the court with compelling reasons. This is even more so in circumstances where the information sought to be withheld has been relied upon as a basis for the institution of the legal proceedings, as was the case in the *Fochville* matter.

6 Conclusion

This note has discussed the extent to which courts should allow parties in litigation to withhold information from their adversaries on the basis that such information is not in the best interests of a child, particularly in circumstances where the information has been relied on as a basis for making allegations against one's adversary. In this regard, I have argued that in *Fochville* 2 the Supreme Court of Appeal missed an opportunity to develop a clear and concise test to be applied by courts when considering competing interests such as those that arose in the *Fochville* cases. I have also criticised the SCA's suggestion that the promise of confidentiality can be a self-standing ground for a party to resist a discovery application. I have argued that this suggestion is inconsistent with both our precedents and relevant useful foreign law. In this regard I have argued that our courts can obtain guidance from the jurisprudence of the United Kingdom, where the courts have faced questions similar or analogous to those in the *Fochville* cases. I have attempted to demonstrate that it is not sufficient for a party wishing to withhold information merely to assert that disclosure will not be in the public interest or the child's interest. This is even more so where a party merely asserts that there is a fear that if disclosure is made, some

76 *Biowatch Trust v Registrar Genetic Resources* 2009 6 SA 232 (CC) paras 16-18.
77 *Fochville* 1 para 73.

unspecified harm to the children might occur. Rather, such a party must demonstrate through cogent evidence that such harm is indeed likely to occur if disclosure is made. Proving this, I have argued, is no easy burden.

Bibliography

Literature

Jardine *Lives and Criminal Trials*
Jardine D *The Lives and Criminal Trials of Celebrated Men (1835)* (Kessinger Legacy Reprints) (Kessinger Publishing Whitefish, MT 2010)

Malherbe "Impact of Constitutional Rights on Education"
Malherbe R "The Impact of Constitutional Rights on Education" in Boezaart T (ed) *Child Law in South Africa* (Juta Cape Town 2009) 420-455

Pillay and Zaal 2011 *SALJ*
Pillay R and Zaal FN "Protecting Parties from Ambush: Some Recommendations on Discovery in Children's Court Litigation" 2011 *SALJ* 632-642

Case law

A (A Child), Re: SC [2012] UKSC 60

Bernstein v Bester 1996 2 SA 751 (CC)

Biowatch Trust v Registrar Genetic Resources 2009 6 SA 232 (CC)

Bridon International GMBH v International Trade Administration Commission 2013 3 SA 197 (SCA)

Centre for Child Law v Governing Body of Hoërskool Fochville In Re: Governing Body of Hoërskool Fochville v Centre for Child Law 2014 4 All SA 196 (GJ)

Centre for Child Law v The Governing Body of Hoërskool Fochville 2016 2 SA 121 (SCA)

City of Cape Town v South African National Roads Authority Limited 2015 3 SA 386 (SCA)

Comair v the Minister of Public Enterprises 2014 5 SA 608 (GP)

Crawford v Washington 541 US 36 (2004)

D v National Society for the Prevention of Cruelty to Children HL [1977] 1 All ER 589

Dunn v Durham County Council [2013] 1 WLR 2305

Els v Minister of Safety and Security 1998 2 SACR 93 (NC)

Governing Body of Hoërskool Fochville v Centre for Child Law; In Re: Governing Body of Hoërskool Fochville v MEC Education Gauteng 2014 6 SA 561 (GJ)

Gorfinkel v Gross Hendler & Frank 1987 3 SA 766 (C)

H v Fetal Assessment Centre 2015 2 SA 193 (CC)

KG v CB 2012 4 SA 136 (SCA)

Khala v Minister of Safety and Security 1994 4 SA 218 (W)

Makanjuola v Commissioner of Police of Metropolis [1992] 3 All ER 617

Midi Television (Pty) Ltd t/a e-tv v Director of Public Prosecutions (Western Cape) 2007 5 SA 540 (SCA)

Multichoice (Proprietary) Limited v National Prosecuting Authority, In Re; S v Pistorius, In Re; Media 24 Limited v Director of Public Prosecutions North Gauteng 2014 1 SACR 589 (GP)

Primedia Broadcasting (a Division of Primedia (Pty) Ltd) v Speaker of the National Assembly 2017 1 SA 572 (SCA)

Re B, R and C (Children) [2002] EWCA Civ 1825

Re (Care: Disclosure: Nature of Proceedings) [2002] 1 FLR 755

Re D (Minors) (Adoption Reports: Confidentiality) [1995] 2 FLR 687

Re J (A Child: Disclosure) [2012] EWCA Civ 1204

Re M (A Minor) (1989) 88 LGR 841

S v M (Centre for Child Law as Amicus Curiae) 2007 2 SACR 539 (CC)

The Citizen 1978 (Pty) Ltd v McBride 2011 4 SA 191 (CC)

Van der Linde v Calitz 1967 2 SA 239 (A)

Legislation

Children's Act 38 of 2005

Constitution of the Republic of South Africa, 1996

Constitution of the United States of America: Sixth Amendment

Uniform Rules of Court in terms of the *Supreme Court Act* 59 of 1959

List of Abbreviations

CCL	Centre for Child Law
SALJ	South African Law Journal
SCA	Supreme Court of Appeal
SGB	School Governing Body
UK	United Kingdom