CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 14/98

LAWRIE JOHN FRASER	Applicant
versus	
ADRIANA PETRONELLA NAUDE	First Respondent
THE ADOPTIVE PARENTS	Second Respondents

Decided on : 23 September 1998

JUDGMENT

CHASKALSON P:

[1] This case concerns a little boy whose parents never married. Mr Fraser, the father of the child, has applied to this Court for special leave to appeal against a decision of the Supreme Court of Appeal, alternatively for direct access to this Court. It is not necessary to set out the details of the long history of this matter. That is done in the judgments of the Supreme Court of Appeal[1] and other reported judgments dealing with this matter.[2] For the present purposes it is sufficient to say the following. Mr Fraser wanted to have

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1 *Naude and Another v Fraser* 1998 (8) BCLR 945 (SCA).

2 *Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 218 (T); *Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC).

contact with his child and to retain his status as a parent in the face of proceedings for the child to be placed by the mother for adoption. The law as it then stood was against him. As the unmarried father of a child, his consent to the adoption was not required. Ms Naude, the mother of the child and the first respondent in these proceedings, was the only person recognised by the law as having that right. If she consented, the adoption could proceed. If she withheld her consent, and did not act unreasonably in doing so, the adoption was not permissible.

[2] The proceedings for the adoption of the child were brought by the adoptive parents, who are the second respondents in this matter. The adoption application was dealt with in the Children's Court in Pretoria North. Mr Fraser sought to intervene in the proceedings in order to oppose the adoption. He also applied to adopt the child himself. Ms Naude refused her consent to his application. The refusal of consent was not found to be unreasonable. Mr Fraser's application was accordingly dismissed. Ms Naude gave her consent to the application made by the adoptive parents, which was then considered by the Children's Court and granted. Implicit in that decision was a finding that the adoptive parents were of good repute, that they were fit and proper persons to be entrusted with the custody of the child, and that the adoption would serve the interests and welfare of the child.[3] Since birth the child has been brought up by the adoptive parents as their child.

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[3] Section 18(4) of the Child Care Act 74 of 1983 provides in relevant part that:

> "A children's court to which application for an order of adoption is made . . . shall not grant the application unless it is satisfied -
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> (b) that the applicant is or that both applicants are of good repute and a person or persons fit and proper to be entrusted with the custody of the child; and

He knows them as his parents. Their family is his family. He has had no contact with Mr Fraser.

[3] Mr Fraser has never accepted the adoption and has engaged in litigation to have it set aside. He challenged the constitutionality of section 18(4)(d)[4] of the Child Care Act 74 of 1983, which required the mother, but not the father, of a child of an unmarried mother to consent to an adoption. He succeeded, but secured no relief, as this Court for good reason suspended its order to enable Parliament within 2 years to change the law in a manner which would not disturb completed adoptions.

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

[4] Section 18(4) of the Child Care Act provided at the material time that:
"A children's court to which application for an order of adoption is made . . . shall not grant the application unless it is satisfied -
(d) that consent to the adoption has been given by both parents of the child, or, if the child is illegitimate, by the mother of the child . . .".

[4] Mr Fraser also challenged the validity of the adoption, contending that he had not had an adequate hearing in the Children's Court, and that as a result, the adoption order should be set aside. He succeeded in the Transvaal High Court[5] but the decision in his favour was set aside on appeal by the Supreme Court of Appeal.[6] Mr Fraser now seeks leave to appeal to this Court against the decision of the Supreme Court of Appeal upholding the original decision of the Children's Court.

[5] We obtained a copy of the full appeal record from the Supreme Court of Appeal, which includes a record of the proceedings in the Children's Court and have given consideration to it, to the detailed arguments lodged on behalf of the parties in that matter, to the judgments of the High Court and the Supreme Court of Appeal, and to the averments made in the affidavits lodged in support of and in opposition to the application for leave to appeal to this Court.

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5 *Fraser* (T) above n 2.

6 *Naude* above n 1.

[6] Mr Fraser has raised various issues placing reliance on the provisions of section 33 of the Constitution[7] which makes provision for just administrative action and on section 28[8] which makes provision for the rights of a child. Other arguments are also advanced dealing with the common law, and the interpretation of the Child Care Act and the regulations under it. It should be mentioned that in the proceedings in the High Court, Preiss J appointed a curator ad litem to represent the interests of the child. It appears from the judgment of Preiss J that the curator ad litem opposed the application for review and supported the adoption order made.[9]

[7] The Constitution requires that provision be made for a litigant to appeal to this Court against the decision of any other court, "when it is in the interests of justice and with leave of [this] Court."[10] The prospects of success are obviously an important issue in deciding whether or not to grant leave to appeal. But they are not the only issue to be

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7 Section 33(1) of the Constitution of the Republic of South Africa, 1996, provides that:
"Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

8 Section 28(1) of the 1996 Constitution provides in relevant part that:
"Every child has the right -
(b) to family care or parental care, or to appropriate alternative care when removed from the family environment".

9 *Fraser* (T) above n 2 at 228I, 229E and 230B.

10 Section 167(6) of the 1996 Constitution provides that:
"National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court -
(a) to bring a matter directly to the Constitutional Court; or
(b) to appeal directly to the Constitutional Court from any other court."

considered when the interests of justice are being weighed.[11]

[8] It is now almost three years since the adoption order was made. Although Mr Fraser is not to blame for any delay in the proceedings, nor the time that elapsed between the judgment of the High Court and the judgment of the Supreme Court of Appeal, we cannot ignore the passage of time.

[11] *S v Pennington and Another* 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC) at paras 25-26; *Oranje Vrystaatse Vereniging vir Staatsondersteunde Skole and Another v Premier, Province of the Free State, and Others* 1998 (3) SA 692 (CC); 1998 (6) BCLR 653 (CC) at para 5.

[9] The matter concerns the status and well-being of the young adopted child. The interests of the child are paramount.[12] We are conscious of the importance of such an issue and of the strong emotions to which it has given rise. All the parties to this litigation have suffered as a result of the prolonged proceedings. But even if the application for leave to appeal were to be granted, and Mr Fraser were ultimately to succeed in his application to have the adoption order set aside, it would not be the end of the matter. The adoption proceedings would have to be re-opened and the dispute could again drag itself out through the courts. Continued uncertainty as to the status and placing of the child cannot be in the interests of the child.

[10] The matter must now be brought to an end. Accordingly, even if it could be shown that there were reasonable prospects of success in respect of the complicated procedural and jurisdictional issues that have been raised (and we express no opinion thereon), it is not in the interests of justice that a further appeal should be heard on them. In these circumstances no purpose would be served by setting down the application for leave to appeal and direct access to debate the issues that have been raised. The applications must therefore be refused. It is not appropriate that any order be made as to costs.

[11] Where applications of this kind are dismissed summarily it is not the practice of

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12 This is recognised both in section 30(3) of the interim Constitution and in section 28(2) of the 1996 Constitution.

this Court to give reasons for its decision. We considered it appropriate, however, that brief reasons should be given in the present case.

[12] The application for special leave to appeal against the decision of the Supreme Court of Appeal, alternatively for direct access to this Court, is refused.

Langa DP, Ackermann J, Goldstone J, Kriegler J, Madala J, Mokgoro J, O'Regan J, Sachs J and Yacoob J concur in the judgment of Chaskalson P.

For the Applicant:	Söller & Manning
For the First Respondent:	Van der Walt & Hugo c/o Blakes Mpanga
For the Second Respondent:	Dion Rhoder & Heunis c/o Shapiro & De Meyer Inc