Editorial note: Certain information has been redacted from this judgment in compliance with the law.

CASE NO: 150/97

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

ADRIANA PETRONELLA NAUDE FIRST APPELLANT

THE ADOPTIVE PARENTS SECOND APPELLANT

and

LAWRIE JOHN FRASER RESPONDENT

CORAM : SMALBERGER, SCHUTZ, SCOTT, PLEWMAN JJA et MELUNSKY AJA

HEARD : 8 MAY 1998

DELIVERED : 26 JUNE 1998

JUDGMENT

SMALBERGER JA...

SMALBERGER JA:

Introduction

On 12 December 1995 the first appellant ("Ms Naude") gave birth to a baby boy. The child ("T.") was born out of wedlock. The respondent ("Mr Fraser") is T.'s natural father. Ms Naude and Mr Fraser had previously cohabited for some months, but their relationship broke up soon after Ms Naude became pregnant.

During her pregnancy Ms Naude decided to give up her unborn child for adoption. To this end she sought appropriate counselling in August 1995 from a registered social worker. Her decision was taken in what she perceived to be the best interests of the child. The second appellants ("the adoptive parents") were in due course identified as suitable prospective adoptive parents and were approved as such by Ms Naude. The necessary pre-adoption procedures were thereupon set in

motion.

Mr Fraser did not accept Ms Maude's decision to have her baby adopted. He consequently brought an urgent application in the Witwatersrand Local Division for an interdict to prevent the child, once born, from being handed over for adoption. He also sought an order that the child be handed over to him. His application was dismissed with costs on 8 December 1995. The court (Coetzee J) held that his lack of parental authority at common law deprived him of a prima facie right to an interdict. The judgment is reported - see Fraser v Naude and Others 1997(2) SA 82 (W).

Ms Naude requested that the prospective adoptive mother be present when she gave birth. The latter underwent medical treatment to enable her to breast feed the baby after birth, and effectively took charge of T. immediately after he was born. T. has been in the custody and care

of the adoptive parents ever since. It has never been suggested that they are anything other than eminently suited to care for him.

On 14 December 1995, two days after T.'s birth, Mr Fraser's attorneys took the somewhat unusual step of writing to the Minister of Justice seeking, inter alia, an undertaking from him that their client would be afforded "a proper opportunity of being heard at the adoption proceedings which are about to take place in the Children's Court". A prompt reply was received from the Minister. Not surprisingly no undertaking was forthcoming, but the Minister expressed the belief that Mr Fraser "should at least be afforded the opportunity to be heard by the relevant commissioner".

Proceedings relating to the adoption of T. commenced in the Children's Court, Pretoria North, on 27 December 1995. They terminated, after various postponements, on 23 February 1996 when Mr Fraser was

refused leave to intervene in the adoption application by the adoptive parents. What occurred on these occasions will be dealt with in greater detail later. On the same day the adoptive parents' application for the adoption of T. was granted.

Mr Fraser launched a further application in the Witwatersrand Local Division on 24 February 1996 in which he claimed, inter alia, the disclosure of the identities of the adoptive parents, allegedly to enable him to interdict the removal of T. from South Africa pending the outcome of contemplated appeal or review proceedings. The application was dismissed with costs.

Finally, on 11 March 1996, Mr Fraser initiated review proceedings in the Transvaal Provincial Division in which he sought, inter alia, the following relief (encompassed in respectively prayers 3 to 6 of the Notice of Motion):

"3. An order reviewing and setting aside the order for the adoption of T. Naude made on the 23 rd day of February 1996.

4. An order declaring that the father of an illegitimate child is entitled to be heard on, and to participate in any hearing of, an application for the adoption of his child in terms of the Child Care Act, 74 of 1983.

5. An order declaring that section 18(4)(d) of the Child Care Act, 74 of 1983 is inconsistent with the Constitution and invalid insofar as it does not require the father's consent for the adoption of an illegitimate child.

6. An order declaring that the common law rule that the guardianship of an illegitimate child vests in its mother and not in its father, is inconsistent with the Constitution and with the spirit, purport and objects of Chapter 3 of the Constitution."

The matter came before Preiss J. He granted an order in favour of Mr Fraser setting aside the order for the adoption of T. on the basis that the Children's Court commissioner ("the commissioner") had

committed a gross irregularity in not affording Mr Fraser a proper hearing. The question as to whether section 18(4)(d) of the Child Care Act 74 of 1983 ("the Act") was inconsistent with the

Constitution and invalid insofar as it dispensed with a father's consent for the adoption of an illegitimate child, was referred to the Constitutional Court for determination. Leave to appeal was granted to this Court. The judgment of the court a quo is reported as Fraser v Children's Court, Pretria North, and Others 1997 (2) SA 218 (T).

Jurisdiction

At the commencement of his argument Mr Trengove, who appeared for Mr Fraser, raised the question whether this Court had jurisdiction to entertain the appeal. When the events giving rise to this appeal occurred, the Constitution of the Republic of South Africa Act 200 of 1993 ("the interim Constitution") applied. In Fedsure Life Assurance Limited and

Others (a judgment of this Court in case no 328/97 delivered on 23 March 1998 and as yet unreported) it was held (at page 9 of the judgment) that in terms of the interim Constitution any attack on

any administrative action on the ground that such administrative action was not lawful fell within the jurisdiction of the Constitutional Court, and for that reason outside the jurisdiction of this Court, because of the express provisions of section 101(5) of the interim Constitution (see also Rudolph and Another v Commissioner for Inland Revenue and Others 1996(2) SA 886 (A)).

The short answer (as suggested by Mr Trengove himself) would seem to be that adoption proceedings are dealt with by a children's court in the exercise of its judicial function; at the very least adoption proceedings are sui generis, having a judicial component and not being purely administrative in nature. (Napolitano v Commissioner of Child

Welfare, Johannesburg and Other 1965(1) SA 742 (A)at 745 F;Ex Parte Commissioner of Child Welfare, Durban: In re Kidd 1993(4) SA 671 (N)

at 673 B - C.) Such proceedings are therefore unaffected by the decision in the Fedsure case. In any event, this Court now has constitutional jurisdiction in terms of the provisions of the Constitution of the Republic of South Africa 108 of 1996 ("the new Constitution"). In terms of section 17 of Schedule 6 to the new Constitution "[a]ll proceedings which were pending before a court when the new Constitution took effect, must be disposed of as if the new Constitution had not been enacted, unless the interests of justice require otherwise". This Court may therefore assume a constitutional jurisdiction it would not otherwise have had if the interests of justice require it to do so. It is not necessary to consider the precise meaning of that phrase in the context of the present matter. Mr Trengove submitted, and I agree, that the

interests of justice, which would, as a

primary consideration, encompass the interests and well-being of T., require this Court to hear and dispose of the appeal. The common law position of an unmarried father.

Tills Court recently re-affirmed in B v S 1995(3) SA 571 (A) at 575 G-H that

"in Roman-Dutch law an illegitimate child fell under the parental authority, and thus the guardianship and custody, of its mother; the father had no such authority."

As a consequence, current South African law does not accord a father an inherent right of access to his illegitimate child. It does, however, recognise that access is available to the father if that is in the child's best interests (B v S at 583 G-H; see also T v M 1997(1) SA 54 (A)).

The common law rules referred to may require reconsideration having regard to the provisions of the new Constitution relating

to, inter alia, equality (section 9), the rights of a child

(section 28) and the

requirement that a court, when developing: the common law, "must, promote the spirit, purport and objects of the Bill of Rights" (section 39(2)). This, however, is not something which need concern us further in the present appeal.

The constitutionality and applicability of section 18(4)(d) of the Act Section 18(4)(d) of the Act requires only the consent of the mother of an illegitimate child for the adoption of the child. The validity of this provision, following on the referral by the court a quo, was determined by the Constitutional Court in Fraser v Children's Court, Pretoria North and Others 1997(2) SA 261 (CC). That Court held (at 272, para 21) that the section offended section 8 of the interim Constitution because it impermissibly discriminated between the rights of a father in certain unions and those in other unions. For trenchant reasons that appear from paragraphs 47 to 49 of the judgment (at 282/3), the Court held that

it could

not simply sever certain words from the section and declare them invalid, nor could it simply declare the whole of section 18(4)(d) of the Act to be invalid without invoking the proviso to section 98(5) of the interim Constitution. It accordingly made the following order:

"1. It is declared that s 18(4)(d) of the Child Care Act 74 of 1983 is inconsistent with the Constitution of the Republic of South Africa Act 200 of 1993 and is therefore invalid to the extent that it dispenses with the father's consent for the adoption of an illegitimate' child in all circumstances.

2. In terms of the proviso to s 98(5) of the Constitution, Parliament is required within a period of two years to correct the defect in the said provision.

3. The said provision shall remain in force pending its correction by Parliament or the expiry of the period specified in para 2."

Judgment was given on 5 February 1997. Parliament has not yet corrected the defect in the provision. The effect of the Constitutional Court's judgment is that section 18(4)(d) of the Act must be regarded as having

been in force and of application in relation to T.'s adoption.

Adoption

Adoption was not part of Roman-Dutch law. It was introduced into our law in 1923 in terms of the Adoption of Children Act 25 of 1923. Adoptions are currently statutorily regulated by sections 17 to 27 of the Act, and the Regulations promulgated in terms of the Act ("the Regulations"). It may fairly be accepted that these statutory provisions are the product of long experience in adoption matters.

Adoption is the legal process through which the rights and obligations between a child and its natural parent or parents are terminated, and a new parental relationship enjoying full legal recognition is created between the child and its adoptive parent or parents. Following upon adoption the child is deemed to be the legitimate child of the adoptive parent or parents as if it were

born of a lawful marriage (section 20(2) of

the Act). Adoption thus supplants the, rights of natural parents in favour of adoptive parents, while severing a child's rights in respect of the former and transferring them to the latter. It is a process which calls for a delicate balance to be struck when considering and weighing up the respective interests of all the parties concerned, subject always to the best interests of the child being paramount. The Act and Regulations give recognition to these competing interests (see e g section 18(6) of the Act and regulation 21(3) and (7)). Regulation 21(3) is designed to avoid the simultaneous presence of a natural and an adoptive parent in the Children's Court in the interests of the latter's anonymity. In this respect I agree with what was said by the judge a quo at p 233 F - H of the judgment:

"A cornerstone of an adoption hearing is the anonymity which attaches to the adoptive parents, (See, for example, reg 23(2) and 28(6).) The reasons are manifest. If the anonymity of the adoptive parents is in any way compromised, the best interests of the child will be subverted. It is clearly

undesirable that natural parents, especially the applicant, for example, who is so determined to stop the adoption by the adoptive parents, should become aware of their identity. It would in all probability lead to a prolonged tug-of-war, persisting even after an adoption. This would be inimical to the interests of the child."

The Children's Court's proceedings in relation to T.'s adoption.

The events that took place on 27 December 1995 and at subsequent appearances are dealt with in the judgment of the court a quo at 221 I to 223 J. I do not propose to canvass them afresh or in detail, but shall concentrate on what I consider to be the important aspects in relation to the present appeal.

There were appearances before the commissioner on 27 December 1995, 25 January 1996 and 15 February 1996. (These dates do not coincide with those reflected in the judgment of the court a quo but are correct as far as the record goes.) An analysis of the addresses to the court

by Mr Fraser's attorney (Mr Soller) establishes conclusively that what was sought throughout was leave to intervene as a party in the pending adoption application. This approach was no doubt premised, correctly in my view, on the basis that only if such leave was granted could Mr Fraser became a party to any proceedings relating to the application for T.'s adoption by the adoptive parents. (See in this regard section 8(2) of the Act, and particularly regulation 4(2), with which I shall come to deal.) Mr Soller's attitude on behalf of Mr Fraser was made clear at the outset when he stated, at the commencement of his address on 27 December 1995, that "[m]y application is for permission to intervene." The matter did not proceed further at that stage as the other interested parties were not present or represented. It was postponed in order to allow them an opportunity to oppose Mr Fraser's application.

The proceedings resumed on 25 January 1996. The commissioner,

acting in terms of section 7(3) of the Act, announced that he had appointed Miss L Grobbelaar to act as the Children's Court's assistant ("the assistant"). Mr Soller then again made it clear that he was applying "for leave to intervene in these proceedings". He went on to outline "the purpose of applying to intervene in the proceedings". He also hinted at a possible postponement or stay of the proceedings pending an application to the Constitutional Court to have section 18(4)(d) of the Act declared unconstitutional. (In the event nothing came of this at that stage and no recourse to the Constitutional Court was formally sought until the review

proceedings were launched.) He further raised the question of Mr

Fraser applying for the adoption of T. (Mr Fraser being qualified

to do so in terms of section 17(b) of the Act). After a response by

counsel (Mr Davis) appearing for Ms Naude and the (prospective)

adoptive parents Mr Soller again reiterated "this application was

an application to

intervene in the proceedings". He disavowed that the application was one.

that related to the merits. The matter was then further postponed to 15 February, because in the words of the commissioner, "I think in all fairness we should grant all the parties the opportunity of putting their cases before the court".

At the resumption of the proceedings the commissioner's opening remark was that "[w]e will proceed in this application in terms of regulation 4(2) of the Child Care Act". No objection was raised to this statement. The significance of this is that there was never any suggestion that the application to intervene was anything other than one under regulation 4(2). In the interim Mr Fraser had launched a counter-application for the adoption of T. and certain written reports and other documents had been filed in support thereof. In his address Mr Soller pointed out that there were now two competing applications for

adoption, and went on to add:

"I do not believe with respect in any event that it is necessary for you any longer to give a judgment in respect of the application to intervene because that has been overtaken by an application brought by the father to adopt his own child."

Notwithstanding this, when pertinently asked by the commissioner whether that meant that the application to intervene (and join as a party) was being withdrawn, Mr Soller replied "Not at all, I am persisting with my application to join". Nothing could be clearer than that. And if further confirmation of this attitude is needed it is to be found in a later comment made by Mr Soller, when replying to the submissions of Mr Davis, that his client "ought to be given permission to intervene in the present adoption proceedings. That is basis number one".

It was also in reply that Mr Soller raised for the first time, almost as an afterthought, the question of evidence being heard.

He did so mainly

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in the context of any decision to be made by the assistant with regard to whether Ms Naude had unreasonably withheld her consent to Mr Fraser adopting T..

The commissioner gave judgment on 23 February 1996. What transpired on that occasion is set out in the following paragraphs from Mr Fraser's founding affidavit in the review proceedings:

"17 On 23 February 1996, the First Respondent [the commissioner] delivered an oral judgment wherein he held that I had no entitlement to intervene in the pending adoption proceedings

18 Thereafter the Children's Court Assistant delivered the results of her investigation into the refusal by the Second Respondent [Ms Naude] to consent to the adoption application brought by me. The Childrens's Court Assistant found that no reasonable grounds existed to dispense with the Second Respondent's consent

19 Thereafter on 23 February 1996, the First

Respondent finalised the adoption application

brought by the Third Respondent [the adoptive parents] and granted an order of adoption in favour of the Third Respondent."

(The salient aspects of the commissioner's judgment are set out in

the judgment of the court a quo at 224 A-E.)

The learned judge in the court a quo came to the conclusion (at

223 I-J) that

"whatever may have been sought or submitted on the first two days, the applicant's [Mr Fraser's] claim on the final day was to have his counter-application for adoption decided by viva voce evidence. Whether his claim was adequately considered and dealt with must be tested as against the children's court judgment upon this claim."

He went on to hold (at 233 B)

"I find that the applicant sought to have his claim for adoption decided by viva voce evidence, to which I am satisfied he was entitled. The Commissioner's judgment frustrated the applicant's attempt and in the circumstances amounted to such prejudice as to constitute a gross

irregularity. In short, he was not afforded a proper hearing on. his claim for the adoption of his own son."

As will appear from what I have set out above these findings, in my view, do not entirely accurately reflect what transpired, and overlook the real thrust of Mr Fraser's application. In any event, having regard to what occurred, I do not agree, for reasons that follow, with the conclusion reached.

Was the commissioner's decision liable to review?

It is common cause that the only ground on which Mr Fraser sought to have the decision of the commissioner to grant the adoptive parents' adoption application reviewed and set aside, is that contained in section 24(1) of the Supreme Court Act 59 of 1959, namely, "gross irregularity in the proceedings".

The children's court is a creature of statute. It has no inherent

jurisdiction. It is required and obliged to follow and give effect to the provisions of the Act and the Regulations. The commissioner was accordingly bound to deal with the matters before him strictly in accordance with the Act and Regulations. Where their provisions vested him with a discretion, he was required to exercise his discretion judicially with proper regard to all relevant facts and circumstances pertaining to its exercise. Neither this Court, nor the court a quo, may simply substitute its view for that of the commissioner. The latter's exercise of his discretion is only open to attack on certain circumscribed and well-known grounds (Ex Parte Neethling and Others 1951(4) SA 331 (A)at335D-E;Reyneke v Wetsgenootskap van Die Kaap Die Goeie Hoop 1994(1) SA 359 (A) at 369 E - F).

Mr Fraser did not in his review application seek to impugn any of the provisions of the Act or Regulations, other than section 18(4)(d) of the

Act, on the grounds of lack of constitutionality. As I have pointed out, although declared unconstitutional by the Constitutional Court, the provisions of section 18(4)(d) continue to apply in terms of that Court's order until such time as it is amended by Parliament or a period of two years has elapsed from the time of such order. The commissioner was obliged to give effect to its provisions, as must this Court as matters stand at present, despite the anomalous situation that its provisions are unconstitutional. The unfortunate result, as far as Mr Fraser is concerned, is that he does not at present stand to benefit personally from the declaration of unconstitutionality, although parents similarly placed are likely to do so in future.

Regulation 21(1) and (2) provides as follows:

"(1) If a social worker's report is lodged with the children's court to the effect that the proposed adoptive parent or parents have been selected as such by a social worker

and have received counselling in respect of the proposed adoption and the court has satisfied itself on the strength of the said report and such other information as it may obtain, as regards the matters mentioned in section 18(4) of the Act, the court may, in its discretion, consider the application and make an order without giving a hearing to any person. (2) If an application has not been or cannot be disposed of in terms of subregulation (1), the clerk of the children's court shall fix a date for the hearing of the application by the children's court and he shall notify the prospective adoptive parent or parents of the inquiry and shall, at the request of the children's court assistant, issue a subpoena in the form of Form 1."

It is common cause that a social worker's report was lodged in respect of T.'s adoption application which satisfied the requirements of regulation 21(1). In terms of section 18(4)(d) of the Act, because T. was illegitimate, only the consent of Ms Naude was required for his adoption. The consent of Mr Fraser was by necessary implication excluded. The information available to the commissioner was such as

could have satisfied him with regard to the matters mentioned in section 18(4) of the Act. Consequently, before Mr Fraser appeared through, his attorney on 27 December 1995 to pursue what he perceived to be his rights in relation to the adoption application, the commissioner was in a position to exercise his discretion to dispose of the adoption application without the need for a hearing. There was no need for an inquiry at that stage, and nothing to suggest that the commissioner intended to embark upon any inquiry as envisaged in regulation 21(2).

Because of what follows, it will be convenient at this point to set out the provisions of regulation 4(1) and (2). They provide:

"(1) Subject to the provisions of regulation 21(3) and (7) a parent or an adoptive parent of a child in respect of whom a children's court holds an inquiry, the child and a respondent shall have the same rights and powers as a party to a civil action in a magistrate's court in respect of the examination of witnesses, the production of evidence and of address to the court.

(2) A commissioner may allow any person who, in his opinion, has a substantial interest in the proceedings of the children's court concerned to join the proceedings, and a person who so joins shall for the purposes of these regulations be deemed to be a party to those proceedings and shall have the same rights and duties as a party referred to in subregulation (1)."

It does not follow simply from the fact that Mr Fraser put in an appearance on 27 December 1995 that the adoption application was no longer capable of being dealt with and disposed of in terms of regulation 21(1). His appearance per se did not convert the proceedings into an inquiry as envisaged by the regulations, nor did it oblige the commissioner to convert them into an inquiry at that stage. The first consideration was whether, in the exercise of his discretion, the commissioner was prepared to allow Mr Fraser, whom he accepted had a substantial interest in the proceedings, to join the proceedings. It was to this end that Mr Fraser sought leave to intervene in the proceedings in terms of regulation 4(2).

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In the course of his judgment the judge a quo said (at 229 B -D):

"I do not agree that the proceedings before the commissioner were reg 21(1) proceedings. The applicant applied to be heard. The commissioner at no time refused to hear him on the strength of reg 21(1). On the contrary, the commissioner did accord him a hearing of a sort and then dismissed his application.
In my view, reg 21(1) gives the commissioner a discretion to deal with certain adoptions administratively without hearing persons. That is the situation where there are no disputing parties and where the hearing is accordingly unnecessary. As soon as a party with an interest objects to a proposed adoption, the matter cannot proceed administratively without hearing such party. Regulation 21(1) accordingly would have been inappropriate for the hearing which took place."

To the extent that the views expressed by the judge are at variance with what I have said above, I respectfully disagree with them. The effect of the second quoted paragraph is that as soon as a party with an interest objects to a proposed adoption an inquiry perforce must be held. There is nothing in the Act or Regulations which expressly says, or from which it

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may necessarily be inferred, that that is the case. Furthermore,

to so hold would mean that Mr Fraser, as a parent (assuming, without deciding, that the judgment of the court a quo at 228 B - H was correct on this point) of a child in respect of whom an inquiry is held, would automatically (subject to regulation 21(3) and (7)) acquire the rights and powers conferred by regulation 4(1). This would render the provisions of regulation 4(2) largely if not entirely nugatory, for it would deprive the commissioner not only of the control over the adoption proceedings that regulation 4(2) envisages, but also deny him the discretion it affords him. It would also deprive him of his power to determine whether the matter was one which could be disposed of under regulation 21(1), or whether it would be necessary to invoke the provisions of regulation 21(2). As is apparent from the resume of the relevant events before the Children's Court, Mr Fraser never sought to rely on regulation 4(1), and never claimed a right

in terms of the Act or Regulations to be a party to the pending adoption

application. What he sought was leave to intervene in the proceedings in terms of regulation 4(2). To the extent that he seeks to build a case on a foundation not previously laid, he is precluded from doing so (cf Administrator, Transvaal, and Others v Theletsane and Others 1991(2) SA 192 (A) at 195 F - 196 E, 200 G).

As appears from regulation 4(2), a person with a substantial interest in adoption proceedings does not have a right to join such proceedings. Whether or not such a person will be allowed to join depends upon the exercise of the commissioner's discretion in his or her favour. Regulation 4(2) is intended, in my view, to operate as a sifting mechanism. It enables the commissioner in exercising his discretion also to exercise control over who will be permitted to participate in the proceedings. Relevant

considerations in this regard would include the general circumstances that

bear on the matter; the nature of the applicant's interest; what the applicant's underlying purpose or motive is; what bond, if any, exists between the applicant and the child whose adoption is being sought; the need to have regard to, and maintain a balance between, the competing interests of the various concerned parties; and the need to protect the identity of the persons seeking to adopt (the list is not intended to be exhaustive). Thus if the child concerned was born in consequence of rape, the rapist would probably be turned away if he sought to join the proceedings. So too might someone who seeks to intervene from an ulterior motive and whose concern does not lie with the child; or someone whose participation in the proceedings would pose a threat to the anonymity of the prospective adoptive parents and the future well-being of the child. No blanket rule can be laid down. Ultimately each case falls to be dealt with in relation to its own particular merits (or demerits).

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In the passage from the judgment of the court a quo which I have quoted above reference is made to Mr Fraser having been accorded "a hearing of a sort". This could create a wrong impression. The fact of the matter is that it has never been suggested that the commissioner did not give Mr Fraser a proper hearing in regard to his regulation 4(2) application. Indeed, as the record shows, the commissioner went out of his way to accommodate Mr Fraser and to ensure that all the interested parties, and particularly Mr Fraser, be given a full opportunity of being heard. Nor has it ever been contended that in exercising his discretion against Mr Fraser by refusing to allow him to intervene in the proceedings the commissioner acted unreasonably, arbitrarily, capriciously or with an improper motive or purpose - in short, that he failed to exercise his discretion judicially. The review application never sought to challenge the way in which the commissioner exercised his discretion in this regard.

Once the commissioner refused Mr Fraser's application for leave to intervene, the position effectively reverted to what it was at 27 December 1995 before Mr Fraser put in his appearance, save for the counter-application for T.'s adoption subsequently lodged by Mr Fraser. Did this disentitle the commissioner from proceeding in terms of regulation 21(1) and oblige him to embark upon an inquiry in terms of regulation 21(2)? In my view not. On the law as it stood and had to be applied the counter-application was doomed to failure. It did not carry with it Ms Naude's consent, an essential pre-requisite in terms of section 18(4)(d) of the Act, unless unreasonably withheld. In terms of section 19 of the Act no consent in terms of section 18(4)(d) shall be required from any parent who is withholding his or her consent unreasonably. In terms of regulation 21(4) it was for the assistant in the first instance to investigate whether reasonable grounds existed for dispensing with

Ms

Naude's consent. She formed the opinion that no such grounds existed.

Her opinion was reached with regard to the considerations mentioned in the report she presented after Mr Fraser's application to intervene had been dismissed. In effect she concluded that Ms Naude's consent had not been unreasonably withheld, a conclusion which (so it must be inferred) was accepted by the commissioner. Once that conclusion was reached there was no need for the clerk of the court to serve the notice contemplated in regulation 21(4) requiring the person withholding consent, viz Ms Naude, to appear at a stated time and place to show why her consent should not be dispensed with. The effect of that conclusion was also that the counter-application had no prospect of success because the law precluded it being granted. Any hearing of evidence in relation thereto would have served no purpose. It must be borne

in mind that to the extent that an opportunity was sought to have evidence heard its purpose was to advance Mr Fraser's

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counter-application. This would have been an exercise in futility. It was

never sought to lead evidence, designed to defeat the adoptive parents' application for adoption, directed at showing that certain provisions of section 18(4) of the Act had not been satisfied.

It is correct that the assistant did not hear any evidence before forming her opinion, as Mr Soller in his final address suggested that she should. She had, however, been present during the presentation of argument on 25 January and 9 February 1996. She had available to her the reports and other documents filed by Mr Fraser in support of his counter-application. To that extent her opinion was an informed one. A right to be heard does not necessarily include a right to lead evidence. But in any event, her conclusion was never the subject of any attack in the review application on the ground that she failed to give Mr Fraser a hearing, nor was any

challenge directed at its acceptance by the commissioner.

The counter-application consequently presented no obstacle to the disposal of the adoptive parents' application in terms of regulation 21(1). As the matter before the commissioner was not one incapable of being disposed of in terms of regulation 21(1), there was no need to invoke the provisions of regulation 21(2). The fact that the commissioner did not make specific mention of regulation 21(1) does not detract from the conclusion that he, if the events that occurred are placed in proper perspective, acted in terms thereof. As there was no reason for the commissioner, on the information available to him, not to have been satisfied with regard to the matters mentioned in section 18(4) of the Act, there was no bar to his granting the adoptive parents' application for adoption.

It was claimed that Mr Fraser was in any event entitled to a hearing in respect of the adoption proceedings in terms of the audi alteram partem

principle at common law. In Administrator, Transvaal, and Others v Traub and Others 1989(4) SA 731 (A) at 748 G - H Corbett CJ stated the position as follows:

"The maxim expresses a principle of natural justice which is part of our law. The classic formulations of the principle state that, when a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken .... unless the statute expressly or by implication indicates the contrary."

The commissioner was alive to the fact that any decision taken by him in regard to the adoption application or counter-application would be one affecting Mr Fraser's interests. He was bound, however, to proceed in terms of the Act and Regulations. Their provisions, as the events unfolded, precluded (at least by implication) any hearing other than in respect of the regulation 4(2) application. There was accordingly no breach of the audi principle.

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Conclusion

In my view the commissioner conducted the proceedings in the Children's Court in a proper manner and in consonance with the provisions of the Act and Regulations. He allowed Mr Fraser a full hearing in regard to his regulation 4(2) application. He did not commit any gross irregularity in the proceedings, nor was he guilty of any improper exercise of his discretion. Consequently the court a quo erred in granting the review application, and the appeal must succeed.

One final point. The heads of argument filed on behalf of Mr Fraser foreshadowed the possible referral of certain issues to the Constitutional Court. These were never clearly formulated and no proper basis, factual or otherwise, was laid for such referral. Mr Fraser is obviously free to pursue any constitutional rights he

considers he may have in that Court

ORDER

A. The appeal is allowed, with costs.

B. The orders of the court a quo, with the exception of order 2,

are set aside and there is substituted in their stead the following:

"Application dismissed, with costs, such costs to include the reserved costs of 26 March, 2 April and 17 April 1996,"

J W SMALBERGER
JUDGE OF APPEAL

Schutz JA)
Scott JA)Concur
Plewman JA)

Case no: 150/97

IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

In the matter between :

Adriana Petronella Naude First Appellant

The Adoptive Parents Second

Appellant

and

Lawrie John Fraser

Respondent

Before : Smalberger, Schutz, Scott, Plewman JJA and

Melunsky AJA

Heard: 8 May 1998

Delivered : 26 June l998

JUDGMENT

/SCHUTZ JA

SCHUTZ JA:

Whilst content to concur in the judgment of Smalberger JA I find it:

necessary to make some comments about the reasoning contained in the dissenting judgment of Melunsky AJA. Two main points arise. The first is whether Mr Fraser ("Fraser") had an absolute right to be heard, as opposed to an entitlement to request that a discretion be exercised in his favour to like end. This depends upon the interpretation of sub-regulations 4(1) and (2) seen in their entire setting. The second is whether, assuming that Fraser had such a right, he could rely upon it for the first time as a ground for setting aside the adoption order after the adoption proceedings were complete, notwithstanding that he had not claimed his right at any stage during their course.

Concerning the interpretation of the regulations, Melunsky AJA

expresses the view that they, like the Act, are not easy to interpret. Although

these statutes do require application, I confess to finding less difficulty in understanding them. In the first place it helps to place regulation 4 in

perspective in relation to the Act and the regulations as a whole. The present Act, the Child Care Act 74 of 1983 is but the latest in a series, going back to 1923 where adoption is concerned. It can be safely assumed that the Act and the regulations under it are based upon a wealth of practical experience and that its main object is the protection of disadvantaged children in a wide variety of circumstances. These include but are not confined to those which may render adoption desirable. The regulations are plainly framed with this object in mind. Thus, while they cover a wider subject matter, adoption as such is covered by regulations 17 to 28, which fall under the heading "Adoptions". On the other hand, regulations 2 to 7 under the heading "Children's Courts" are of a general procedural nature.

Reg 4 is headed "Parties to inquiries and summonsing of witnesses".

Inquiries may arise in

a variety of circumstances of which adoption is but one. To take an example, an inquiry under s 13 of the Act into the "safety and welfare" of a child (see s 11) is a procedure which would then be governed in the respects dealt with therein by reg 4. It is to be noted that in such an inquiry the legislature has given parents the right to be given notice of and the duty to attend the inquiry, unless the commissioner otherwise directs (s 13(5)(a)). The starting point in the present matter is for these reasons not reg 4 but reg 21. As will be shown below that regulation, the principle one dealing with procedure in the adoption section, vests a discretion in the commissioner not to hold an inquiry in an adoption matter where circumstances suggest that this is either not necessary or not desirable. Seen in this light it will be apparent that the immediate focus of reg 4(1) is not the creation of a right in a parent in adoption proceedings, as is suggested by Melunsky AJA. In fact quite

the contrary. Reg 4(1) starts off with the exception "Subject to the provisions of

regulation 21(3) and (7)". Further, the rights conferred on parents by reg 4(1), such as they are, arise only when "a children's court holds an inquiry". In the context this is an implicit further reference to reg 21, particularly reg 21(2). By contrast reg 4(2), the discretion regulation, refers to the joinder of a person "with a substantial interest in the proceedings". Reg 21(1) provides that after the commissioner has satisfied himself of certain important matters (chiefly in the interest of the child) he "may", in his discretion, consider the application and "make an order without giving a hearing to any person". Nothing could be clearer. "Any person" can include a parent, indeed both parents. Reg 21(2) proceeds to lay down that if an application "has not been or cannot be disposed of in terms of sub-regulation (1)" an inquiry has to be arranged. There is no suggestion anywhere that if a parent, whether legitimate or otherwise, wishes to be a party, the commissioner is

not entitled to exercise the discretion expressly conferred on

him in general terms, but must hold an inquiry at the behest of that parent. Apart from the wording of the regulations, common sense demands that the commissioner's discretion should not be fettered in the way suggested. Take the case in which the social worker has reported that both (legitimate) parents are drunk through most of their waking hours. Or take the case of the man who is the father by virtue of an act of rape, or one whose object is blackmail. These examples cannot be brushed aside as extreme or implausible ones.

They illustrate why the commissioner ought to have an all-inclusive discretion. And they illustrate, in my opinion, why Melunsky AJA errs in his view that a parent, merely by virtue of being a parent, has an absolute right to insist on an inquiry being held under reg

21(2). That the legislation does not accept the paramountcy of parenthood is demonstrated by s 19 of the Act, which sets out the instances in which the consent of a parent to an adoption may be dispensed with. One of the instances is where that consent is

unreasonably withheld. Another striking example is the curtailment of any claim to be present at an inquiry, contained in regs 21(3) and (7). Further, one may ask why a grandparent who has taken in a child from birth and given it succour, should have less potential rights, when it comes to that child's adoption, than a father who has shown no interest in it, done nothing for it, nor paid a penny towards its upkeep.

If it be correct that a parent, any sort of parent that is, can insist on an inquiry under reg 21(2) that would, so the argument proceeds, lead one back to reg 4(1). Once there is to be an inquiry,

then a "parent" has an absolute right to be a party. I disagree entirely with that conclusion and the process of reasoning by which it is reached. Both a literal and a purposive reading of reg 21, as I have sought to demonstrate, leads to the conclusion that a parent is not the commissioner's master. The legislation lacks any basis that I can see to support Melunsky AJA's accentuation of the parent's rights, leading

him to the conclusion that reg 4(1) is for parents and reg 4(2) for others.

Nor do I consider that his reference to s 35(3) of the interim Constitution, with its injunction to interpret laws in accordance with the fundamental rights provided by it, takes the matter any further. The Constitution is a protean instrument encompassing all kinds of rights for all kinds of people. It does not have the narrow focus simply of protecting the rights of natural fathers to be heard in adoption proceedings at the expense of others. Not least among those others is the boy T.. The legislation strives, in an emotion-laden ambience, to achieve a balance between conflicting interests, with an emphasis upon the interests of the child and the adoptive parents. One of the inevitable consequences of the secrecy conceived in their interest is the curtailment in adoption proceedings of participation by other persons, including natural

parents. The balance that the legislation aims to achieve is no doubt an imperfect one. But no reason has

been advanced why its policy should be somehow tempered, or why it should

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not be construed according to its plain terms. S 35(3) does not confer unconstrained powers of legislation on this court. So much for construction, the basis relied upon. Throughout these lengthy proceedings, crammed with arraignments as they are, there has been no attempt to attack the constitutionality of the regulations. So that, if there are imperfections in detail, the remedy is legislation.

Melunsky AJA suggests that some obviously undesirable consequences of allowing the unreigned participation of certain kinds of parent may be alleviated by the commissioner's restrictive control of the

proceedings. To my mind this suggestion caters for form rather than substance. The right of hearing given by the one hand is to be taken away by the other. The practicality of the suggestion may also be doubted. Indeed the suggestion made would do no more than transpose the decision to be made as to whether

an inquiry is the appropriate course, to a later reconsideration of the same question after having embarked upon an inquiry. The purpose of such a division of function is obscure.

My conclusion on the first point is that a parent does not have an absolute right to be heard in adoption proceedings (proceedings as opposed to inquiries). In this case the commissioner decided not to hold an inquiry, so that, even if Fraser is a "parent", reg 4(1) did not give him an absolute right to be a party to those proceedings.

I would add, on the facts of this case, that no attempt whatever has been made to review the commissioner's discretionary decision to proceed to conclusion under reg 21(1). Nor is there anything, except a view of the law that is in my opinion mistaken, to show that he acted wrongly in doing so.

As regards the second point, if Fraser is allowed to raise his contention that he had a right under reg 4(1) (assuming now that he had such a right) for

the first time after the adoption proceedings have been concluded, there is, to my mind, a real danger that the other parties will have been denied a fair trial. It is one of the fundamentals of a fair trial, whether under the Constitution or at common law, standing co-equally with the right to be heard, that a party be apprised of the case which he faces. This is usually spoken of in the criminal context, but it is no less true in the civil. There is little point in granting a person a hearing if he does not know how he is concerned, what case he has to meet. One of the numerous manifestations of the fundamental principle is the sub-rule that he who relies on a particular section of a statute must either state the number of the section and the statute, or formulate his case sufficiently clearly so as to indicate what he is relying on: Yannakou v

Apollo Club 1974 (1) SA 614 (A) at 623G. As the proposition itself

indicates there is no magic in naming numbers. The significance is that the other party should be told what he is facing.

Another manifestation of the general principle is to be found in the decision in Administrator, Transvaal and Others v Theletsane and Others 1991 (2) SA 192 (A) at 195-197. The case that the respondent sought to make on appeal was not squarely raised in his founding affidavit. That . lacking, he tried to piece that case together out of statements in the appellant's answering affidavit. The attempt failed, because of the unfairness of possibly taking out of context statements which the appellant had made in reply to what he thought he faced and in ignorance of the case only later laid at his door. Although the emphasis was on the applicant's having to set out the facts on which he relied, so that the respondent might respond with any facts at his disposal; when the decision was followed in Government of the Province of Kwa Zulu/Natal and Another v Ngwane 1996 (4) SA 943 (A), Nienaber JA said (at 949B-C), in my view correctly:

"Had the point been spelt out in the application papers, the

respondent, duly alerted, could have responded on fact and on law." (Own emphasis).

As far as the facts in this case are concerned, I do not agree with Melunsky AJA that "the essence" of Fraser's case was that he had the right to be heard in the application of the adoptive parents. Despite the many words spoken by his attorney this was the one thing that was never claimed. What was claimed was the antithesis of such a right. And it is clear that both the commissioner and counsel for the adoptive parents and the mother understood that the claim was one under reg 4(2) and not under 4(1). Consequently there was no debate about the construction of the relevant regulations.

On appeal it was argued that the switch to reg 4(1) caused no prejudice and involved no unfairness. The argument based on that

sub-regulation was one of law purely, so it was said. I am not convinced. Just as in the application of the audi alteram partem principle one must keep the procedure

and the merits apart; one must not assume that the case is so obvious that there could have been no answer if opportunity had been offered (see the authorities mentioned in the judgment of the court a quo Fraser v Children's Court, Pretoria North and Others 1997 (2) SA 218 (T) at 231H-233A); one may not in a case of failure to claim simply assume that even if notice of claim had been given it would not have had any effect on a past course of events, that the proceedings would in any event have ground on in their settled course.

Is one entitled to assume the inevitable sameness of the proceedings in this case had Fraser's attorney relied on reg 4(1)? When answering this question one must assume, contrary to the opinion that I have earlier expressed, that the reliance would have been well placed. If that is so, then one must allow that the magistrate would probably have admitted Fraser as a party, even that the other parties might not have resisted a legal

inevitability. What would then have happened is anyone's speculation. But it is perfectly possible that after Fraser had established the identity of the adoptive parents, had cross-examined, had given oral evidence, had led witnesses, had argued, the result would have been the same; the adoption order would have been granted. But now, such is the contention, after the first years of T.'s life have already passed in the custody of the adoptive parents, the order is to be set aside, because the adoption proceedings all along had the hidden germ of avoidance within them. That because Fraser did not take his point then, only later. In my opinion there is something wrong with this argument. Suppose that Fraser believing, for whatever reason, that he did not have rights under reg 4(1), had stayed away from the proceedings altogether, could he, long after, after gaining advice that he had such rights after all, have reviewed the commissioner's decision on the ground that he could have raised the point, when in fact he did not? And if not, does

it make any difference that he gained admission to the commissioner in seeking participation, yet still failed to play his trump?

I think not. One is not here dealing with a point of law which may

without danger of prejudice be applied to the facts relevant to it, which have plainly been fully explored and established. One is dealing with the course proceedings may have taken, whether this way or that way, or some other way, depending upon what the parties may have put forward in the course of establishing the facts. It is like the case of a person who attends a meeting and claims to have the proxy of A but is refused a vote, upon its being shown that the proxy form is not that of A, who later demands that a resolution taken at the meeting be set aside because he had B's potentially decisive proxy with him, which he failed to put forward. There must come a stage at which we must say with the Romans, vigilantibus non dormientibus jura

Put more simply, I am of the view that basic justice demands that Fraser should have put forward what is now said to be the true

basis for his joinder at the right time and the right place. The heads of argument put forward on his behalf on appeal are neither timely nor the right place. For these reasons I disagree with the reasons of Melunsky AJA and concur in the judgment of Smalberger JA.

WP SCHUTZ

JUDGE OF APPEAL

CONCUR:

SCOTT JA

PLEWMAN JA

CASE NO: 150/97

In the matter between:

ADRIANA PETRONELLA NAUDE 1st

Appellant

THE ADOPTIVE PARENTS 2nd Appellant

and

LAWRIE JOHN FRASER

Respondent

Coram : Smalberger, Schutz, Scott, Plewman JJA et Melunsky

AJA Heard: 8 May 1998

Delivered: 26 June 1998

JUDGMENT

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MELUNSKY, AJA:

I have had the benefit of reading the judgment of my Brother

Smalberger JA, which I will refer to as "the main judgment", but regret that I am unable to agree with the decision to allow the appeal. I agree, however, for the reasons stated in the main judgment, that this Court has jurisdiction to entertain the appeal and that the provisions of the Constitution of the Republic of South Africa Act, 200 of 1993 ("the interim Constitution") do not preclude it from exercising such jurisdiction. It is therefore not necessary, in my view, to consider whether the interests of justice require this Court to assume jurisdiction in terms of section 17 of Schedule 6 to the new Constitution (The Constitution of the Republic of South Africa, 108 of 1996).

In the court a quo the respondent ("Mr Fraser") sought, inter alia, an order

reviewing and setting aside the order for the adoption of his son, T.. This order was granted (see Fraser v Children's Court, Pretoria North, and Others, 1997 (2) SA 218 (T)).

It was the essence of Mr Fraser's application that he, as the natural father of the child, had the right to be heard in the adoption application brought by the second appellant ("the adoptive parents") and that the children's court commissioner, by dismissing his application to intervene in those proceedings, denied him the right to be heard prior to the grant of the adoption order. The learned judge a quo, Preiss J, however, considered that what Mr Fraser sought was the right to have his own claim for adoption decided by viva voce evidence (at 233 B). He held that he was entitled to this relief, and that was the basis upon which he granted the order in Mr Fraser's favour.

In the proceedings before the commissioner Mr Fraser's attorney did indeed refer to the need for viva voce evidence to be led. But, as I understand his argument, he submitted that oral evidence would, in due course, be required to enable the commissioner to rule on three matters:

1. The adoption application by the adoptive parents;

2. Mr Fraser's counter-application for adoption; and

3. The ruling by the children's court assistant that T.'s mother, the first appellant, did not unreasonably withhold her consent to Mr Fraser's counter-application.

Mr Fraser's immediate aim before the commissioner, however, was to be heard in the adoption application made by the adoptive parents. This, too, as I have pointed out, was the ground upon which he based

his application in the court a quo. In my view, therefore, Preiss J, did not decide the

application on the grounds advanced by Mr Fraser in his founding and supplementary affidavits. But I am nevertheless of the opinion, for the reasons that follow, that the appeal against his order should be dismissed.

The question that has to be decided in this appeal depends largely upon the interpretation to be placed on the regulations promulgated under the Child Care Act 74 of 1983 ("the Act"). The provisions of most of the regulations which are relevant for present purposes are set out in the main judgment. The children's court disposed of the adoption application in terms of regulation 21 (1). For reasons which I will give later the court should, in my judgment, have held an inquiry in terms of regulation 21 (2). Moreover, and upon a proper construction of the regulations, I am of the view that Mr Fraser had

an unqualified right to be a party to the inquiry in terms of regulation 4(1), subject, of course, to the limitations imposed by regulations

21 (3) and (7).

The first question which I consider is whether it is open to Mr Fraser to rely on regulation 4(1) in this appeal on the grounds that the attorney for Mr Fraser, in the proceedings before the commissioner, did not claim to rely upon it. He sought the leave of the commissioner to intervene in the adoption proceedings or to become a party to the application for adoption. The commissioner treated this as an application to become a party in terms of regulation 4 (2). That, in my view, does not preclude this court - nor was the court a quo precluded - from holding that Mr Fraser was entitled to apply in terms of regulation 4 (1) if this is what the law provides. If Mr Fraser had the right to become a party in terms of the said regulation, this court is entitled - if not obliged - to apply that regulation despite the erroneous approach adopted in the children's court. It has often been held

that it is open to a party to raise a new point of law on appeal for the first time if it involves no unfairness to the other party and raises no new factual issues (see Paddock Motors (Pty) Ltd v Igesund 1976 (3) SA 16 (A) at 24 B-G and Bank of Lisbon and South Africa Ltd v The Master and Others 1987 (1) SA 276 (A) at 290 E-I.) Indeed, as Jansen JA said in the Paddock

Motors case at 23 F-G:

".....it would create an intolerable situation if a Court were to be precluded from giving the right decision on accepted facts, merely because a party failed to raise a legal point, as a result as an error of law on his part "

There appears to me to be no sound reason why the aforesaid principles should not apply to review proceedings. Different considerations arise where a party, whether on review or appeal, raises a point for the first time which is dependant upon factual considerations that were not fully explored in the court of first instance. This is the situation that arose in Government

of the Province of Kwa Zulu-Natal and Another v Ngwane 1996 (4) SA 943 (A) at 949 C- 950 A. The decision in Administrator, Transvaal and Others v Theletsane and Others 1991 (2) SA 192 (A) at 195 F - 196 D does not detract from the principle that a court may take cognizance of a point raised for the first time on appeal provided that it results in no unfairness and causes no prejudice.

Where the issue raised for the first time on appeal is purely a legal one, there would normally be no unfairness or prejudice to the other party provided that due notice was given of the intention to rely upon it. In the present matter, counsel for Mr Fraser explicitly submitted in their heads of argument that the decision to grant the adoption application was irregular in terms of regulation 4 (1). The appellants' counsel were not taken by surprise. They were

entitled to argue, as they did, that regulation 4(1) did not apply to the present

appeal. If this court, however, comes to the conclusion that the children's court was obliged to apply regulation 4 (1), it cannot, in the circumstances, refuse to apply it because Mr Fraser's attorney had an erroneous understanding of the legal position. Indeed, whatever Mr Fraser's attorney may have said, the commissioner was bound to apply the law as it stood. It only remains to add, on this point, that nothing turns on the fact that the commissioner has not commented on the provisions of regulation 4(1). The interpretation of the regulations is purely a matter of law and the commissioner's comments are not essential to a resolution of this issue.

I turn to deal with the regulations. The judge a quo correctly pointed out (at 229 F-I) that the provisions of the Act and the regulations contain apparent anomalies in relation to adoption

proceedings. The provisions are not easy to interpret and, in my view, it is not always clear to understand how the

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procedures are to operate in practice. In these circumstances this seems to me to be a case where this court, in interpreting the regulations, should have regard to the spirit, purport and object of Chapter 3 of the interim Constitution. Section 35 (3) imposes a duty on all courts to interpret statutory provisions and apply common law principles in accordance with the fundamental rights contained in the Chapter. Statutory provisions should be construed so as not to infringe these rights if this can be done reasonably and without doing violence to the language of the provisions. The requirement of reasonableness also applies to section 35 (2) which is interrelated to section 35 (3) and which provides for a restrictive interpretation or "reading down" of a statute to avoid invalidity (see Bernstein and Others v Bester and Others NNO 1996 (2) SA 751 (CC) at 785 F- 786 F.

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I agree with the views of Preiss J at 228 B-H that a father of a child born out of marriage is a "parent" within the meaning of regulation 4 (1). In addition to the reasons given by the judge a quo for arriving at this decision, there is the need, imposed by section 35 (3) of the interim Constitution, to interpret "parent" in a way which does not discriminate between the father of a child born out of wedlock and all other parents. It was this kind of discrimination which resulted in the Constitutional Court holding that section 18 (4) (d) of the Act was unconstitutional (see Fraser v Children's Court, Pretoria North and Others 1997 (2) SA 261 (CC) at 271 F- 272 H.)

In my view once Mr Fraser appeared and asked to be heard the commissioner was not entitled to apply regulation 21 (1) which entitles him to grant an adoption order "without giving a hearing to any person." He was then obliged to hold an inquiry in terms of regulation 21 (2). The judge

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a quo at 229 C-D went as far as to say that as soon as a party with an interest objects to a proposed adoption the matter cannot proceed administratively without hearing such a party. I do not, with respect, agree that it is necessary to hold an inquiry if any person with an interest objects to the proposed adoption. The regulations draw a distinction between a parent (regulation 4 (1)) and a person who has a substantial interest in the proceedings (regulation 4 (2)). Persons with a substantial interest in the proceedings require the consent of the commissioner to become a party to the adoption proceedings.

This brings me to consider whether regulation 4 (2) also applies to a

parent. I have considerable difficulty in holding that it does. For if a parent is to be regarded as a person who has a substantial interest in terms of regulation 4 (2), he or she would have to apply to the commissioner to become a party to

adoption proceedings and, if the commissioner granted such permission he would then be obliged to hold an inquiry in terms of regulation 21 (2). The effect would be that regulation 4 (1) would serve no purpose in so far as adoption proceedings are concerned. In my view, therefore, regulations 4 (1) and (2) can only be reconciled on the basis that the rights of a parent differ from those of a person who has a substantial interest in the proceedings. While the latter is obliged to obtain permission to join in an inquiry the former is entitled as of right to do so. The words "in respect of whom a children's court holds an inquiry" in regulation 4 (1) do not mean that a parent has a right to become a party only if an inquiry is held. These words are descriptive of the child and do not qualify the rights of the parent.

For these reasons I am of the opinion that regulations 4 (1) and (2)

read with

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the commissioner's powers in terms of regulations 21 (1) and (2) oblige the commissioner to hold an enquiry when a parent desires to be heard in relation to the adoption of his or her child. This interpretation also accords with the provisions of Chapter 3 of the interim Constitution to the extent that those provisions require that every person should have the right to be heard in proceedings in which his or her rights may be affected or whenever he or she has a legitimate expectation to a hearing. In saying this I have not lost sight of the fact that a parent is not the only person who has an interest in the proposed adoption. It may be that a parent's participation in the adoption proceedings may not be in the interests of the child or the adoptive parents.

Regulation 21 contains sufficient safeguards to prevent abuse. The commissioner is entitled to control the proceedings in the interest of the child and the prospective adoptive parents. In terms of regulation 21 (3) a parent is not entitled to be present at an inquiry unless he or she has been

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summonsed as a witness. This, it may be noted, merely means that a parent is not entitled as of right to attend but it does not

absolutely exclude his or her presence if the commissioner considers this to be necessary. The commissioner, in his discretion, may exclude the parent from being physically present but may, for instance, permit him or her to make written representations. Regulation 21 (7) provides that a parent may not attend the proceedings when the prospective adoptive parents are present. This provision, too, will minimize the risk of abuse by an unscrupulous parent. If the regulations are construed as I respectfully suggest they should be, it will result in a reasonable balance between the rights of a parent and the rights of other persons whose interests may be affected by an adoption order.

There are two other matters raised by counsel for the Mr Fraser that require mention, albeit briefly. The first was the submission that the common law

rule that parental authority over children born out of marriage vests exclusively in their mothers requires re-examination in the light of the equality provisions of the interim Constitution. There is no need for me to express an opinion on this submission, and I refrain from doing so, for even if Mr Fraser lacks parental authority he is

entitled, as a natural parent, to a hearing in terms of regulation 4 (1).

The second matter was the submission by counsel for Mr Fraser that certain provisions of the Act, by implication, clearly indicate that every parent is entitled to participate in the adoption proceedings before the children's court. In particular counsel referred to section 21 of the Act which affords the right to a parent to apply for the rescission of an adoption order and section 22 which gives the parent the right to appeal against such an order. As I am satisfied, for the reasons given, that Mr Fraser has the right to

become a party to the proceedings in terms of regulation 4 (1), it is not necessary to consider whether the aforesaid provisions have a bearing on the meaning of the regulations.

I would therefore dismiss the appeal.

L S MELUNSKY /