THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 379/06

In the matter between:

AD	**First Appellant**
DD	**Second Appellant**

and

DW	**First Respondent**
CW	**Second Respondent**
ROODEPOORT CHILD AND FAMILY WELFARE SOCIETY	**Third Respondent**
CENTRE FOR CHILD LAW	**Amicus Curiae**

CORAM: HEHER, PONNAN JJA AND HANCKE, SNYDERS AND THERON AJJA

DATE OF HEARING: 9 MAY 2007

DATE OF DELIVERY: 1 JUNE 2007

Summary: Family Law – Child – Inter-country adoption – Application for sole custody and guardianship – Best interests of the minor child to be removed from the country in terms of an adoption effected in the children's court pursuant to the provisions of the Child Care Act 74 of 1983. Principle of subsidiarity not satisfied.

Neutral citation: This case may be cited as AD *v DW* [2007] SCA 87 (RSA).

JUDGMENT

THERON AJA/

Introduction

[1] Mr and Mrs DG (the appellants) instituted proceedings in the Johannesburg High Court for an order that sole custody and guardianship of the minor child, RJW (R), be awarded to them. The appellants also sought ancillary relief to the effect that R be declared to have been abandoned, that the order by the children's court placing her in the foster care of Mr and Mrs W (the first and second respondents) be discharged and that the appellants be authorised to leave South Africa with R with a view to adopting her in the United States of America. The High Court (Goldblatt J) dismissed the application. It is against this order that the appellants appeal, with the leave of the High Court.

Factual background

[2] R was found abandoned a few days after her birth, head-first in a bucket, under a tree in a veld in the Roodepoort area on 14 November 2004. She was taken to the premises of the Roodepoort Child and Family Welfare Society (the third respondent) and on 16 November 2004 the third respondent applied for and was granted an order by the Commissioner of Child Welfare ('the Commissioner') for R to be placed in the care of the first and second respondents. The first and second respondents, American citizens, now resident in South Africa, have established and administer 'Baby Haven', a home for abandoned babies, in Gauteng. R has been in their care since 17 November 2004, and in terms of an order by the Commissioner granted on 11 January 2005, they were appointed her foster parents. To date, neither R's parents nor family have been traced.

[3] During 2005, the appellants, also American citizens, visited the first and second respondents, with whom they shared a long-standing friendship, in South Africa. It was then that the appellants met R. They became extremely fond of her and took steps towards adopting her. To that end, they thereafter met with Ms Deborah Wybrow, their South African attorney, and Ms Karen Law, their American attorney, to discuss their

desire to adopt R. The appellants' suitability as adoptive parents is not in dispute. It is apparent from the evidence that they are fit and proper persons to adopt and that they are possessed of sufficient means to adequately maintain and educate R. As stated by Goldblatt J they are 'caring and decent persons who for purely altruistic purposes' wish to adopt R.

Issue

[4] It is trite that the high court, as upper guardian of all minors, has inherent jurisdiction to grant a custody and guardianship order in respect of a minor child. It is common cause that the children's court has sole jurisdiction to grant an adoption order. The grant of the order sought by the appellants would result in the sanction, by this court, of an alternative route of an inter-country adoption, under the guise of a custody and guardianship application. In my view, the issue is whether it is in R's best interests to grant the order sought or to require that an application for her adoption be made in the children's court.

Proceedings in the High Court

[5] All three respondents supported the appellants' application. Goldblatt J was concerned about the unusual order sought and appointed an *amicus curiae* to assist the court on, inter alia, South Africa's obligations in terms of the Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption 1993 ('the Hague Convention') and developments in South Africa regarding inter-country adoption since the Constitutional Court decision in *Minister of Welfare and Population Development v Fitzpatrick*.[1]

[6] The *amicus curiae* considered it necessary to obtain affidavits from persons familiar with the policy and practice of inter-country adoption and in response filed

[1] 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC). In *Fitzpatrick* the Constitutional Court declared s 18(4) of the Child Care Act 74 of 1983, which expressly prohibited adoption of South African children by non-South Africans, unconstitutional. No inter-country adoption had taken place prior to this decision.

heads of argument together with affidavits deposed to by Ms Pamela Wilson, a registered social worker in the employ of the Johannesburg Child Welfare Society and Dr Maria Mabetoa, the Chief Director: Children, Youth and Family in the National Department of Social Welfare ('the Department'). Wilson states that she has been part of the adoption team at Johannesburg Child Welfare for the past 23 years and has been involved in inter-country adoption since 2001. According to Wilson, the adoption team has, since June 2001, placed 98 children in inter-country adoptions, three of which were to the United States of America. They have finalised adoptions, in the children's court, to Hague Convention countries as well as countries which are not signatories to the Convention.

[7] Dr Mabetoa explained that one of the principles underpinning the Department's inter-country adoption policy is that a child should be adopted within South Africa and inter-country adoption should only be considered as an alternative when a satisfactory solution cannot be found within South Africa. Dr Mabetoa gave the following overview of the current inter-country adoption policy:

'A profile on every child that cannot be placed locally, including the efforts undertaken to place the child, must be submitted to the Department …. Only after the Department has agreed in writing, [can an] inter-country adoption … be considered. The Department … reports relevant cases to the national missing person register of the South African Police Service to ensure that a child considered for an inter-country adoption is not a missing child. The inter-country adoptions are done via the Children's Court and according to provisions prescribed in Chapter 4 of the current Act. The rules as prescribed in the [Hague] Convention are followed as [the] Central Authorities in [both] the countries agree to the adoption.'

[8] The judge *a quo* found that it was not for the high court to decide what is in R's best interests – that should be done by the children's court in accordance with the provisions of the Child Care Act 74 of 1983 ('the Child Care Act'). He stated that the high court should not be placed in the position of having to fulfill the functions of a Commissioner who is better trained and more experienced in these matters than high

court judges. The learned judge considered that he was bound by the *dicta* in *Fitzpatrick* that the children's courts 'are the sole authority empowered to grant orders of adoption'. Central to the court's finding, is the following passage by Goldstone J in *Fitzpatrick*:

'[In terms of the Act] the children's courts … are charged with overseeing the well-being of children, examining the qualifications of applicants for adoption and granting adoption orders. The provisions of the Act creating children's courts and establishing overall guidelines advancing the welfare of the child offer a coherent policy of child and family welfare. If appropriately and conscientiously applied by children's courts the main provisions of the Act would meet the most serious of the concerns of the Minister and the *amicus curiae*. [The Minister and the *amicus curiae* were concerned that if inter-country adoption was to be allowed with immediate effect, three specific problems could result: (a) the inability of the Department to facilitate thorough background investigations of non-citizens; (b) insufficient legislative protection against child trafficking; and (c) inadequate provision to give effect to the principle of subsidiarity.] The provisions of section 24 of the Act are designed to deter the practice of child trafficking, making the exchange of consideration in an adoption a criminal offence. Until the safeguards and standards envisaged by the Minister are introduced, children's courts are able to prevent the feared abuses in the cases of citizens and non-citizens alike.'[2]

Adoption in South Africa

[9] The Act which governs adoption in South Africa is the Child Care Act. The Act establishes children's courts, presided over by Commissioners (magistrates and assistant magistrates), which are empowered to deal with adoptions. In terms of this legislation, adoption falls under the exclusive jurisdiction of the children's court.[3] Section 18(1)(b) provides that no adoption order may be made before the consideration of a prescribed report from a social worker. In considering an adoption application the children's court must take into account the religious and cultural

[2] Para 31.

[3] Section 18(1)(a)reads:

'The adoption of a child shall be effected by an order of the children's court of the district in which the child concerned resides.'

background of the child as well as that of the prospective parents.[4] In terms of section 18(4) a children's court may *not* grant an adoption order unless it is satisfied that: (a) the applicant(s) are qualified to adopt in terms of s 17 and possess adequate means to maintain and educate the child; (b) the applicant(s) are of good repute and fit and proper persons to be entrusted with the custody of the child; (c) the adoption will serve the interests and be conducive to the welfare of the child; (d) the necessary consent to the adoption, where applicable, has been given or if the child is in foster care, the foster parent has indicated in writing that he or she does not wish to adopt the child.

[10] It was only after the decision in *Fitzpatrick* that it became necessary to provide a legal framework, consistent with international law, to adequately regulate inter-country adoption. This has led to the promulgation of the Children's Act 38 of 2005 ('the Children's Act'). It is anticipated that this Act will come into operation during 2008. Although the Children's Act is not yet in operation, it is relevant as a statement of government's policy approach to inter-country adoption. When the Children's Act comes into operation, the Guardianship Act 192 of 1993 will be repealed and applications for guardianship will be governed by s 24 of the Children's Act which provides that such applications may be made to the high court. However, s 25 limits the application of s 24 to South African citizens and provides that a guardianship application by non-South African citizens must be regarded as an inter-country adoption. Section 261 regulates the position regarding inter-country adoption. In terms of this section a foreigner resident in a Hague Convention country who wishes to adopt a South African child must first apply to the central authority of that country, which authority is tasked with submitting a report to the South African central authority. The Act appoints the Director-General of the Department as the central authority[5] and no inter-country adoption may take place without the Director-

[4]Section 18(3) read with s 40.
[5]Section 257(1).

General's approval. The Director-General is obliged to maintain a register for the purposes of keeping a record of adoptable children and of fit and proper adoptive parents.[6] If the central authorities of both countries agree, then the application is processed by the children's court. In terms of s 273 no person may process or facilitate an inter-country adoption otherwise than in terms of the Children's Act.

International Legal Framework for Inter-country Adoption

[11] South Africa acceded to the Hague Convention on 21 August 2003. One of the objectives of the Hague Convention is to establish safeguards to ensure that inter-country adoption takes place in the best interests of the child and with respect for the child's fundamental rights as recognised in international law.[7] However, in terms of s 231 of the Constitution, an international treaty shall not have effect until enacted into domestic legislation. The Children's Act provides for the enactment of the Hague Convention and will bring the latter into operation when the Act itself becomes operational. Despite the fact that the Hague Convention has not yet been enacted into domestic legislation, its provisions cannot be disregarded. The fundamental principles which underlie the Hague Convention are drawn from the United Nations Convention on the Rights of the Child ('the UNCRC'), particularly Article 21, which South Africa has ratified.

[12] South Africa ratified the UNCRC in 1995 and the African Charter on the Rights and Welfare of the Child ('the African Charter') in 2000. Article 21 of the UNCRC

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[6] Section 232(1).

[7] The objects of the Hague Convention as encapsulated in Article 1 are:
'(a) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law;
(b) to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;
(c) to secure the recognition in Contracting States of adoptions made in accordance with the Convention.'

provides important protections for children.[8] In accordance with the principle of subsidiarity, Article 21 provides that inter-country adoption may be considered as an alternative means of child-care, if the child cannot suitably be cared for in terms of domestic measures. Subsidiarity requires that priority be given to placing the child with his or her family of origin and that domestic measures be given preference over inter-country adoption.[9] Despite the fact that the principle of subsidiarity has not been expressly provided for in domestic legislation, our courts are obliged, in terms of s 39(1)(b) of the Constitution to take this into account when assessing the best interests of the child, as it is a well established principle of international law.[10] The principle of subsidiarity is also enshrined in Article 24(b) of the African Charter, but in somewhat stronger terms; inter-country adoption should only be considered as 'the last resort'.[11]

Adoption *vis-a-vis* Custody and Guardianship[12]

[8] Article 21 provides as follows:
'States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:
(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.'

[9] Fact Sheet No 36 on Intercountry Adoptions, International Social Service General Secretariat, International Reference Centre for the Rights of Children Deprived of their Family, available http://www.iss-ssi.org/ Resource_Centre/New_Documents/documents/FactSheetNo36ENG.pdf.

[10] *Minister for Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC) para 32 fn 33. Goldstone J, in para 32 states that one of the concerns 'that underlie the principle of subsidiarity are met by the requirement in s 40 of the [Child Care] Act that courts are to take into consideration the religious and cultural background of the child, on the one hand, and the adoptive parents, on the other'. In terms of s 39(1)(b) a court is obliged, when interpreting the Bill of Rights, to consider international law.

[11] Article 24 reads, in relevant part:
'States Parties which recognize the system of adoption shall ensure that the best interest of the child shall be the paramount consideration and they shall:
(a) …
(b) recognize that inter-country adoption in those States who have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, as the last resort, be considered as an alternative means of a child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin'.

[12] See generally Van Heerden, Cockrell, Keightley, *Boberg's Law of Persons and the Family* 2 Ed (1999) 450-452.

[13] Counsel for the appellants contended that the same legal consequences flow from a custody and guardianship order as an adoption. For the reasons that follow, I do not agree with that contention. An order of adoption is permanent and the status of the child in relation to his or her adoptive parents is clear. An adopted child is deemed in law to be the legitimate child of the adoptive parents.[13] If a child is taken out of the country on the basis of a custody and guardianship order there is a risk that the adoption order in the receiving country may not be granted. There arises a mutual claim for support between the child and the adoptive parents, which also extends to adoptive relations such as grandparents and siblings. Adoption terminates all rights and obligations existing between the child and the pre-adoptive parents and their relatives. A child who has been placed in the custody and under the guardianship of 'parents' will not inherit unless specifically named in their will. On the other hand, adoption creates rights of intestate succession between the child and the adoptive parents, which rights extend to the adoptive relatives.[14] The child's biological parents can withdraw consent to the adoption and apply for rescission within the time frames set by the Child Care Act. The biological parents of the child are completely excluded from the adoption process if that process happens in another country. It is acknowledged that there is no apparent prejudice on this score as R has been abandoned. It is however not inconceivable that R's biological parents may, in the future, make enquiries as to her whereabouts. But the best interests standard applied by the high court is not without limitation. Although, in this matter, the best interests of R are of paramount importance, this court is enjoined, in terms of s 28(2) of the Constitution, which creates a right for all the country's children, to consider the rights

of children generally and the effect which an order of this court may have on other children.[15] When an adoption is concluded in South Africa, it must by law be

[13] Section 29(2) of the Children's Act 33 of 1960.
[14] Sections 1(4)(e) and (5) of the Intestate Succession Act 81 of 1987.
[15]Section 28(2) reads: 'A child's best interests are of paramount importance in every matter concerning the child.' See also *Sonderup v Tondelli* 2001 (1) SA 1171 (CC); 2001 (2) BCLR 152 (CC) paras 28-32.

registered with the registrar of adoptions, which allows, inter alia, for the child to trace the details surrounding his or her adoption at a later stage.

[14] An important feature of the case is this. According to the immigration information furnished by the appellants' American attorney, R's status in America will be more secure if she was to be adopted by the appellants as opposed to being taken out of South Africa in terms of a custody and guardianship order. Law states that if the appellants were to be granted an adoption order by a South African court, R would, upon entry into the United States of America, automatically be granted American citizenship. In the event that R enters the Unites States under a custody and guardianship order, she will receive lawful permanent residence status which is not a secure status. Law explains:

'The lawful permanent resident must renew their status periodically. If the lawful permanent resident violates U.S. law, for example, by not renewing his or her status, he or she can be deported. Accordingly, if the status of R is not renewed, she could be deported, and at the renewal stage, the authorities would enquire into the adoption and progress being made to regulate her stay in the United States of America. For this reason, it is critical for lawful permanent residents to secure citizenship as soon as possible.'[16]

The following evidence of the appellants' local attorney, confirms R's precarious status under a custody and guardianship order:

'I have also, since the inception of this particular matter, been advised by the United States Consulate that it may have difficulty with an order of sole guardianship and sole custody, notwithstanding that similarly worded orders have been the basis upon which visas have been granted in all of our previous applications.'

Wybrow goes on to request that the court, in the exercise of its jurisdiction as upper guardian, 'grant an adoption' of R in favour of the appellants. This is, in my view, an

[16]Law states that she and the appellants' local attorney had previously worked together in connection with the adoption of two South African orphans by an American family. The family were awarded an order for custody and guardianship of the children in December 2004. It is noted that almost a year later, when Law deposed to her affidavit, the adoption of the children had not yet been finalised.

acceptance that R will enjoy safeguards under an adoption order, which are not available to her in terms of a custody and guardianship order.

[15] The problem with granting a custody and guardianship order with a view to concluding an adoption in a foreign country is that such an approach circumvents local adoption law and falls short of the standards and safeguards provided by such law. This is contrary to the principles of the UNCRC and the African Charter which requires that the child concerned enjoys standards and safeguards equivalent to those existing in the case of national adoption.[17] These standards and safeguards should apply both to procedures before an adoption order is made and to the status of the child following the grant of such an order.[18] South Africans wishing to adopt a child would be required to make application to the children's court. There is no good reason why an alternate route, via the high court, should be available to foreigners, particularly when there are policies and procedures in place, in the children's court, to deal with inter-country adoption.

Best interests of the child

[16] It was submitted, on behalf of the appellants, that the high court, as upper guardian of all minors, has inherent jurisdiction to grant an order for custody and guardianship upon a consideration of the best interests of a minor child and it is in fact ideally suited to consider the permanent placement of minor children.[19] It was further contended that the inherent jurisdiction of the high court allows for flexibility in the determination of the best interests of the child, in accordance with the provisions of s 28(1)(b) of the Constitution,[20] whereas the children's court, as a creature of statute, is

[17]Articles 21(c) and 24(c) of the UNCRC and the African Charter, respectively.

[18] Professor Dr. William Duncan, *Fundamental Principles of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, a paper delivered at The Hague Forum for Judicial Expertise, in The Hague, Netherlands, 3-6 September 2006.

[19]The concept 'permanent placement' is not defined in South Africa law. The only form of placement (with non-biological parents) that may be described as 'permanent' is adoption. At the hearing counsel for the appellants accepted that permanent placement, in the context of this matter, meant adoption.

[20]Section 28(1)(b) provides that every child has the right 'to family care or parental care, or to appropriate alternative care when removed from the family environment'.

bound by the statutory limitations imposed upon it. In this regard reliance was placed on the statement by Goldstone J in *Fitzpatrick* that 'it is necessary that the [best interests] standard should be flexible as individual circumstances will determine which factors secure the best interests of a particular child'.[21] Counsel for the appellants also argued that if this court were to refuse the application it would be placing the interests of the child secondary to departmental policies and procedures.

[17] This reasoning is flawed and I am unable to agree with it. Both the *amicus curiae* and the Department cautioned against the grant of the order sought on the basis that it would sanction an inter-country adoption, without the necessary safeguards and protections intended for the benefit of the child, in accordance with domestic and international law. The fundamental principle which underlies the relevant international treaties is the best interests of the child. Article 3 (1) of the UNCRC gives content to the best interests requirement as follows:

'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'[22]

Furthermore, Article 21 of the UNCRC requires States to ensure that the best interests of the child is the paramount consideration in adoption.[23] Similarly, the best interests standard is foundational to the objects of the Hague Convention.[24] These international instruments seek to protect the best interests of the child by ensuring, inter alia, that inter-country adoptions take place in the best interests of the child, that they are conducted in a responsible and protective manner with the aim of eliminating the various abuses which have been associated with inter-country adoptions. I am of the view that it is in the best interests of children generally that inter-country adoptions be effected in accordance with the principles of these international instruments.

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[21] Para 18.

[22] The African Charter contains a similar provision, Article 4(1), which reads:
'In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.'

[23]Above fn 8.

[24]Artice 1. Above fn 7.

[18] The appellants sought, in reply, to make out a case that they had approached the high court for relief on the basis that they were precluded from approaching the children's court by reason of the Department's policy not to countenance inter-country adoptions to the United States. In support thereof, the appellants rely on a statement made by an official from the Department, Ms Rose Msini, that:

'[The Department's] concern lies with the need of our children to be placed inside the country as far as possible before considering inter-country adoptions, and to ensure that all avenues to recruit adoptive parents locally are explored. Since we do not have any working agreement with the United States of America, *we do not think it will be possible to look at the possibility of inter-country adoption*.'(Emphasis added.)

The appellants also rely on the statement made to their attorney by Ms Raath, a Commissioner attached to the Johannesburg children's court, on 24 January 2006 (which date is after the launch of this application) that 'a policy decision had been taken not to allow inter-country adoptions to the United States of America'. As I have already mentioned that is a new case sought to be made out in reply.

[19] The first appellant, in her founding affidavit, states that they approached the high court because they were advised by their legal representatives that pending the finalisation of the Children's Act and the consequent enactment of the Hague Convention, there were no:

'regulations in place to govern intercountry adoptions. I have therefore been advised by my attorneys that, pending the finalization of the abovementioned legislation and the formal enactment of the Hague Convention, permanent placements are best dealt with by the High Court in its capacity as upper guardian of all minor children. We have been advised that, as upper guardian of all minors, the High Court has, with due regard to the best interests of the minor child, inherent jurisdiction to grant an application for full custody and full guardianship. We have furthermore been advised, in light of the circumstances of this matter, that the appropriate forum would be the High Court, hence this application to the High Court.'

In light of the evidence of Wilson and Dr Mabetoa setting out the current inter-country adoption policy, it is clear that the appellants were incorrectly advised that there were no 'regulations' in place to govern such adoptions. It is apparent from this passage that the appellants, on advice, took a conscious decision to approach the high court on the basis of the inherent jurisdiction of that court. It is implied from the passage that the appellants were of the view that the high court was better suited than the children's court, to properly deal with this matter. This sits ill with their later assertions that having regard to the attitude of the Department, they believed that they could not approach the children's court.

[20] I am not persuaded, on the evidence, that the Department has adopted a policy not to approve inter-country adoptions to the United States. According to Wilson, she has, since 2001, been personally involved in three inter-country adoptions involving American applicants. Dr Mabetoa also confirms that inter-country adoptions to non-contracting states can take place provided they occur within the appropriate framework and with the necessary safeguards. In any event, even if it is accepted, for purposes of this argument, that the Department's policy was not to allow inter-country adoption to the United States, that does not, in my view, justify the appellants approaching the high court for relief and in the process circumventing the adoption procedure provided for in the Child Care Act. The appellants' first port of call should have been the children's court, and if necessary, they could, thereafter, have taken the matter on review or appeal to the high court.

[21] Wybrow stated in her affidavit:

'The position of the Applicants is that the question of legal costs has become a matter of great concern to them and it *may* prove impossible to secure representation for any *future appearances*.' (My emphasis.)

By no stretch of the imagination can that be construed as suggesting that the appellants' financial resources were at an end. Wybrow has continued to act for the appellants and senior counsel appeared on their behalf in this court. It would appear that since the deposition of Wybrow's affidavit on 27 February 2006, the appellants have secured funding for 'future appearances'. Even if their financial resources have since been depleted, that would be an entirely irrelevant consideration in the determination of the appeal. Litigation in the high court is undoubtedly expensive. Appeals to this court, more so. The absence of financial resources can hardly tip the scales in favour of a particular litigant. In any event, an adoption application in the children's court is inexpensive and can be instituted without the use of legal practitioners and private adoption agencies. In fact, the adoption mechanism in the children's court is aimed at cost-effectiveness and minimising the role of legal practitioners and private adoption agencies.

Principle of Subsidiarity

[22] To ensure compliance with the principle of subsidiarity as expressed in Article 21 of the UNCRC it must be established that the child cannot be cared for through foster care or adoption or other suitable care in his or her country of origin.[25] The appellants allege that during the time R has been in the care of the first and second respondents, no other potential parents had expressed an interest in having R placed with them. It is also alleged that the third respondent has been unable to secure any prospective parents for R. In support of this allegation the appellants rely on the statement in Hanekom's report that:

'On 23rd of August 2005, the social worker [in the employ of the third respondent who was responsible for supervising the care of R by the first and second respondents] informed me that *the baby will possibly go overseas, and she agreed to it if it is in the child's best interest.'* (Emphasis added.)

[25] *Minister for Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC) para 23 fn 13.

That hearsay statement by Hanekom contemplates as early as August 2005 when R was but nine months old, the possibility of her adoption by foreigners. Moreover, it represents the high water mark of the appellants' case insofar as satisfaction of the principle of subsidiarity is concerned. That, on any reckoning, falls far short of what would ordinarily be required of a prospective adoptive parent in a matter of this kind. And for this reason alone, if nothing else, the appellants had to fail. R's voice has not been heard in this application. The third respondent, who ought to have represented R's best interests, has failed to do so. It must be borne in mind that the *amicus curiae* was appointed to assist the court below on, inter alia, developments in South Africa regarding inter-country adoption, and not to represent R.

[23] It was common cause that the responsibility to have investigated whether there was suitable care available for R in South Africa rested with the third respondent. The third respondent has not indicated what steps, if any, it took to secure suitable local care for R. It would appear that the third respondent had aligned itself with the appellants and had failed to approach the matter on the basis that adoption should be child-suited and not parent-suited. This is precisely one of the practical objectives of the Hague Convention – to ensure that the inter-country adoption process becomes 'less that of finding a suitable child for a [family] and more that of finding a suitable family for a child'.[26] This case is a classic illustration of the need and importance for an 'independent' social worker as envisaged by the Department in its current inter-country adoption framework; a social worker who does not deal directly with the prospective adoptive parents.

[24] Counsel for the appellants contended that there was nothing more that the appellants could have done in order to satisfy the court that no suitable care was available locally for R. I am not persuaded that that is so. It is trite that it is the

[26] Professor Dr. Duncan, *Fundamental Principles of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, *supra*.

appellants, as the parties seeking relief, who must satisfy the court that they are entitled to the relief sought. The Constitutional Court in *Fitzpatrick* cautioned that, until the new child care legislation is in operation and infrastructure and international agreements are put in place, prospective adoptive applicants:

> 'will have a greater burden in meeting the requirements of the [Child Care] Act than they will have thereafter. *They will have to rely on their own efforts and resources in placing all relevant information before the children's court*.'[27] (Emphasis added.)

In my view the appellants have not discharged the 'burden' resting on them. The evidence of Hanekom, based on the hearsay evidence of a social worker clearly weighted in favour of the appellants who had omitted to properly investigate the possibility of suitable local care, is, in my view, insufficient to establish that the principle of subsidiarity has been complied with as to justify the removal of R to the United States. The children's court, in considering an application for adoption, is obliged to refuse such application where all the relevant information has not been placed before the court.[28] It is thus, in my view, simply wrong to approach the matter on the basis of a *prima facie* case. To talk of a rebuttal of a *prima facie* case, is, with respect, to ignore the provisions of s 18(4) of the Child Care Act.[29]

[25] There is evidence from Wilson as to the availability of prospective local adoptive parents, including black South Africans, eager to adopt female children from birth to five years of age. It has been suggested that the Department has admitted that there are no procedures to identify prospective adoptive parents. There is no evidence to support such a suggestion. It would appear that there is a flaw in the present system of matching children available for adoption with prospective parents. Prospective parents who are waiting to adopt a child can be 'bypassed' by a system that allows some prospective parents to approach the high court and in this way 'jump the queue'. The bond that has been established between the appellants and R should not come into

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[27] 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC) para 34.

[28] Section 18 of the Child Care Act. *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC) para 33.

[29] Above para 9.

the reckoning at all. That is precisely the kind of practice that the Hague Convention eschews. The development of a bond with a child by prospective adoptive parents, without following the appropriate channels and getting onto the appropriate waiting lists results in the kind of queue-jumping witnessed here. The Children's Act will address this problem as it will establish a central register both of children available for adoption and prospective parents. There is not a shred of evidence that anyone made enquiries about the availability of prospective adoptive parents for R. As I have already indicated, the third respondent, whose function it was to do, aligned themselves with this application from the outset.

Application to lead further evidence

[26] The evidence sought to be introduced is to the effect that R has remained in the care of the first and second respondents since the application was heard by the High Court and that no person has shown an interest in adopting or fostering her. In my judgment, that evidence does not take the matter any further. The appellants launched this application on 14 October 2005. The High Court handed down judgment on 21 April 2006 and shortly thereafter, on 12 May 2006, the appellants applied for leave to appeal to this court, which leave was granted on 14 June 2006. In these circumstances it would have been foolhardy to attempt to secure other prospective adoptive parents for R while the matter was *sub judice*. The matter has in fact been *sub judice* for almost two years.

Conclusion

[27] It may indeed be in R's best interests to be adopted by the appellants. But the process the appellants have chosen is fraught with difficulties. In my view it is not in R's best interests that she be removed from the country in terms of a custody and guardianship order, without the protection and safeguards of an adoption first effected in the children's court. This court, as well as the high court, should not sanction an

adoption procedure which is in conflict with international treaties which South Africa has ratified and which are designed to safeguard the best interests of the child. The appellants are not without a remedy. It is still open to them to approach the children's court for relief – a remedy which is by far more cost effective than the route they have chosen.

[28] For these reasons, the appeal is dismissed.

Snyders AJA concurred.

L V Theron
Acting Judge of Appeal

HEHER JA:

[29] I have read the judgment of Theron AJA. I respectfully disagree with her conclusion. In my assessment the best interests of the child R were overwhelmingly favoured by the grant of the application.

Introduction

[30] Goldblatt J said in the court *a quo*:

'Whilst *prima facie* it appears that if the child is in due course adopted by the applicants she will have a secure and nurturing home and accordingly it was strenuously argued by the applicants that I

in my capacity as upper guardian of the child should grant the orders in that this would be in the best interest of the child, as will appear more fully hereunder I am of the view that it is not for this court to decide what is in the best interest of the child and that this should be done in accordance with the procedures set out in terms of the Child Care Act 74 of 1983.'

[31] In my view that manifests a fundamentally flawed approach. Section 28 of the Constitution (to which I shall return later) provides:

'(2) A child's best interests are of paramount importance in every matter concerning the child.'

[32] The first task of the learned judge was to determine whether the High Court possessed jurisdiction to try the merits of the application. If it did, he was bound to consider and evaluate all relevant facts placed before him with a view to deciding the issue which was of paramount importance.

[33] That process did not exclude the possibility that the best interests of the child might lie in the ultimate decision of another court which for appropriate reasons of law and fact was competent to decide the matter. But that is a conclusion which could only be arrived at as a result of balancing all the relevant aspects affecting the child's interest, including the public interest and the interest of the applicants in so far as such matters bore on the interest of the child. Similarly, while the interests of children generally are important they are only so to the extent that the child in *this* case will benefit or be adversely affected by the furtherance or limitation of those interests because this matter concerns the child R and no other. The peculiar facts of this case cannot be determinative or even persuasive of the rights of any other child whose interests are not the same.

[34] The learned judge's approach limited him to legal and policy considerations. The result was, as I shall attempt to demonstrate, an unsatisfactory triumph of form over substance.

Jurisdiction

[35] The applicants sought an order of sole custody and sole guardianship. That was not a disguised attempt at circumventing the adoption laws. They made it clear that they intended to apply for an adoption order in the United States in due course and

they presented their case with a view to showing that the ultimate objective was attainable in fact and law.

[36] The high court, as the upper guardian of minors, is empowered and under a duty to enquire into all matters concerning the interest of children. It may make orders for custody and guardianship and does so on a daily basis. The children's court, a creature of statue, is expressly empowered to make orders for adoption. One may infer from the detail in which the exercise of its powers are circumscribed in the Child Care Act that the legislature intended it to exercise the power of adoption to the exclusion of a high court. However no powers to make orders for sole custody or guardianship are expressly included in its enabling legislation nor, I think, are to be implied. A high court and the children's court are equally open to persons who are not South African citizens.

[37] In the circumstances the High Court was, as to jurisdiction, competent to hear the application. I should note that such competence does not appear to have been disputed in the court *a quo* and was conceded in this Court.

The relevance of adoption procedures to the application

[38] I wish to make it clear at the outset that a determination of what is in the best interests of a child who is the subject of an application like the present one required the High Court to ensure that the fullest protection is afforded to the child. Any order which it might ultimately make must needs have been preceded by an investigation which satisfied the court that no reasonable inquiry remained unanswered. The applicants sought an order which would enable them to control the future of the child beyond the protection of South African law. These considerations persuade me that, although the applicants did not seek an order for adoption, the case which they presented should nevertheless have been measured against the standards which they would have been obliged to meet if they had done so. If the application falls

materially short of those standards the High Court would have failed in its duty to the child if it granted the application and the appeal cannot succeed. The balance of this judgment is premised on the need to test the application accordingly.

Factors relevant to the operation of s 28(2) in the application

i) Factors personal to the child

At the time of the application R Joy W was almost eighteen months old. She has now reached two and a half years. Her parents are unknown and cannot be traced. One cannot exclude the possibility that at some future time the mother may come forward and establish her kinship but that seems unlikely. R is of African origin. She has, since her first week in this world, been cared for by foster parents, the first and second respondents, who are American citizens living in South Africa. They are reaching the stage where, because of multiplying responsibilities, they will be obliged to place her in an orphanage or similar institution unless she is first adopted. The evidence establishes that as a child grows towards the age of five the prospects of adoption diminish. Until the launching of the application no prospective adoptive parent had shown an interest in R. At the hearing of the appeal counsel for the applicants moved to have additional evidence placed before the court by affidavit of the foster father, David W, deposed to on 5 December 2006, the essential allegations of which are the following:

‘3. R was placed in the care of the Second Respondent and me on 17 November 2004. To date, no one other than the First and Second Appellants has ever expressed any interest whatsoever in making R a permanent part of his or her life.

4. In particular, no one other than the First and Second Appellants has visited R whilst she has been in our care with a view to adopting her, fostering her in our place and stead, or hosting her for weekends or for any part of each week.

5. In contrast, the First and Second Appellants have been in frequent telephonic and email communication with the Second Respondent and myself, with a view to enquiring about the progress being made by R and to keep themselves appraised of her development and well-being.

6. The Second Appellant even returned to Johannesburg in July 2006, accompanied by his eldest son, Django DG Junior, to spend time with R and introduce her to his son.
7. Although several of the other children in the care of Second Respondent and myself have been adopted during the time R has been living with us, R remains in the foster care of the Second Respondent and myself as she has done since 17 November 2004.
8. The Second Respondent and I had agreed to foster R temporarily until a permanent family could be found for her. We are not seeking to adopt R, nor is it our intention to have her live with us permanently.
9. R is now over two years of age. In my opinion, she will languish, in an institution if a permanent family is not found for her: she requires parental care, even if that is in another country.'

[39] The admission of the affidavit was not seriously opposed. Its content is clearly relevant and material. The best interests of a minor child are dynamic not static. In my opinion the affidavit contains information essential to a just and sufficient determination of those interests and should be admitted. Counsel for the *amicus curiae*, the Centre for Child Law, submitted that it must carry little weight since the application and the pending appeal would probably have discouraged interest in the child. That is an inference which in my view does not reach a level of probability. In any event the future prospects of the child must be judged by what has happened and what is probable in the future and not by what may have happened in different circumstances.

[40] What is clear is that R has a need for and a right to family or parental care (s 28(1)(b) of the Constitution). Her prospects of satisfying either the need or the right are bleak and diminishing as the months pass.

ii) Factors personal to the applicants

[41] I consider it unnecessary to enter upon detail in this regard. The applicants' case is entirely unquestioned. Their own evidence of a stable, happy and secure family life

in reasonably affluent circumstances and an attractive environment is supported by affidavits from persons who know them and by the report of the Virginian adoption agency, Autumn Adoptions Inc, which carried out a comprehensive investigation. Every personal circumstance seems to favour the applicants as future adoptive parents for the child. One is bound to conclude that the future which they offer her is a glowing one which would be difficult to match at a level of material, emotional and spiritual concerns even in the Republic of South Africa.

iii) Matters of public interest

[42] Goldblatt J quoted the views of the *amicus curiae in extenso* with approval and a minimum of comment. I think it necessary to examine them in closer detail.

South Africa's international treaty obligations

[43] The *amicus* submitted that the grant of the order would be in conflict with or at least circumvent such obligations.

[44] Relevant to this aspect are ss 39(1), 231(2) and (4) and 233 of the Constitution. The correct approach is that formulated by the Constitutional Court in *S v Makwanyane* 1995 (3) SA 391 (CC) at 413-4:

'[35] Customary international law and the ratification and accession to international agreements is dealt with in s 231 of the Constitution, which sets the requirements for such law to be binding within South Africa. In the context of s 35(1), public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which chap 3 can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights and, in appropriate cases, reports of specialized agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of chap 3.'

[45] South Africa has adopted the Convention on the Rights of the Child. Art 3 affirms the best interests of the child as 'a primary consideration' in all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.

[46] Art 21 provides:

'States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

[47] South Africa has adopted but not yet made part of its municipal law the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993 ('the Hague Convention'). In this regard The Children's Act 38 of 2005 has been passed by Parliament. The Act proposes inter alia to provide for inter-country adoptions and to give effect to the Hague Convention. The legislation has been some time in the preparation but even so there is no immediate prospect of it

being brought into force. I am prepared to assume that sooner rather than later a date will be fixed for its operation.

[48] The relevant provisions of the Hague Convention are the following:

'*Article 4*

An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin-

a) have established that the child is adoptable;

b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests;

c) have ensured that

(1) the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin,

(2) such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing,

(3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and

(4) the consent of the mother, where required, has been given only after the birth of the child; and

(d) have ensured, having regard to the age and degree of maturity of the child, that

(1) he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required.

(2) consideration has been given to the child's wishes and opinions,

(3) the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and

(4) such consent has not been induced by payment or compensation of any kind.'

'*Article 5*

An adoption within the scope of the Convention shall take place only if the competent authorities of the receiving State-

a) have determined that the prospective adoptive parents are eligible and suited to adopt;

b) have ensured that the prospective adoptive parents have been counselled as may be necessary; and

c) have determined that the child is or will be authorized to enter and reside permanently in that State.'

Every principle of the Hague Convention which is relevant to this application (and its spirit) has been satisfied by the evidence presented to the court *a quo* in so far as that was practicable.

[49] In terms of Art 6 of the Hague Convention a contracting state is to designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities. Chapter IV of the Convention sets up the procedural requirements for inter-country adoptions. The procedure is initiated in the state of the proposed adoptive parents and carried on between the respective Central Authorities who are responsible for the prescribed investigations and reports. Art 21 ensures protection for a child after transfer to the receiving state and before adoption. Art 29 places limits on contact between the prospective adoptive parents and the child's parents or any other person who has care of the child prior to satisfaction of certain requirements of the Convention. Art 30 provides for preservation of information concerning the child's origin, parents and medical history.

[50] Art 4(b) quoted above recognizes and gives effect to the principle of subsidiarity. Goldstone J in *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) (at para 23 *fn* 13) described subsidiarity as 'the principle that intercountry adoption should be considered strictly as an alternative to the placement of a child with adoptive parents who reside in the child's country of birth'. The principle is also referred to in paras 27, 32 of that judgment. To the last-mentioned paragraph Goldstone J added the following footnote, (33 at p 433):

'Although no express provision is made for the principle of subsidiarity in our law, courts would nevertheless be obliged to take the principle into account when assessing the "best interests of the child", as it is enshrined in international law, and specifically art 21 *(b)* of the Constitution that

"(w)hen interpreting the Bill of Rights, a court, tribunal or forum . . . must consider international law'.

Of particular importance in this context are the remarks of the learned justice in para 32 of the judgment:

'The concerns that underlie the principle of subsidiarity are met by the requirement in s 40 of the Act [the Child Care Act 74 of 1983] that courts are to take into consideration the religious and cultural background of the child, on the one hand, and the adoptive parents, on the other.'

As I shall attempt to show (in paragraphs 62 to 68 below) all the underlying concerns to which the learned justice referred have indeed been answered by the applicants.

[51] In my view any recognition of the 'Interim Central Authority' or the children's court as an implementer of inter-country adoptions in relation to the present application would be inappropriate. The law must be applied as it is, not as it may become, however probable the prospect. There are of course no regulations in place to regulate inter-country adoptions because there is, at the present time, no statute which authorizes the content or making of such regulations. The furthest this Court should go is to give appropriate weight to the content of the prospective law and the views expressed by the representatives of the Department and the Society and to recognize the eventual objectives that they are striving to achieve, all in the context of determining what is in the best interest of the child R W. Both the applicants and the child are entitled to the full benefit of the law as it is. An attempt to superimpose the inchoate legislation on the application would be unfair to the child and the applicants, against her best interest (in so far as it puts a damper on an application by prospective adoptive parents in or from the United States) and would subject consideration of the substance of the application to unnecessary delay without the prospect of achieving a concomitant benefit for the child. It is not without relevance that the applicants have indicated, while the proceedings in the High Court were under way, that their financial ability to pursue further litigation in South Africa was in serious doubt.[30] Nor do I regard it as fair to the child that her future should depend upon the determination of

[30]In para 3 of the affidavit of their attorney Ms Wybrow dated 27 February 2006.

wholly unnecessary legal battles to determine the form of an application which is to place her in the applicants' care.

[52] Before I consider the relationship between the case made by the applicants and the legal considerations, it is necessary to refer to the interaction between the Hague Convention and the content of the Children's Act. It was common cause in the application and on appeal that the Department of Social Welfare was in the process of setting up the structures which the Convention contemplates on an interim basis pending the operation of the legislation. It was however also clear that these structures are incomplete and that, in the particular case of proposed adoptions by citizens of the United States, not yet adequate to serve the demands of the Convention. Section 24(1) of the Children's Act preserves sole jurisdiction in granting orders of guardianship to a high court. However s 25 proposes that an application for guardianship by a non-South African citizen is to be regarded as an inter-country adoption for the purposes of the Hague Convention and Chapter 16 (which legislates for such adoptions). In terms of the proposals in that Chapter adoptions between countries are to be initiated between the Central Authorities of Hague Convention countries or between the competent authority of a non-convention country and the Central Authority of the Republic. The intention appears to be that the Central Authority will accredit child protection organizations in the Republic to act on its behalf in investigating and reporting on any such application for adoption. To further this purpose such an accredited organization may enter into working agreements with accredited adoption agencies in other countries.

[53] The implementation of the procedure cannot be divorced from the creation of adequate structures to cope with inter-country adoptions. The reality at the time that this application was launched (as it still is today) is that-

1) both South Africa and the United States have not passed laws which incorporate the Convention in their domestic law;

2) neither country has created a Central Authority which is empowered by law to exercise the functions which the Convention contemplates (and for which, in South Africa, the Children's Act will provide the legal framework);

3) 'accredited' South African agencies, such as the Johannesburg Child Welfare Society, have established no working agreements with adoption agencies in the United States.

[54] I disagree strongly with Theron AJA that the grant of the application would 'sanction an adoption procedure which is in conflict with international treaties which South Africa has ratified'.

[55] The substance of the Hague Convention is the achieving of the child's best interest through the formal structures which are to be provided by the adopting states. In the overall conclusion which I have reached I am satisfied by the totality of the evidence presented by the applicants that in this case, the goal has been reached despite the structural shortcomings (which should not be laid at the door of the applicants or be allowed to prejudice the child).

The policy of the Department and the agency

[56] The *amicus* informed us that the Johannesburg Child Welfare Society ('the Society') is accredited by the Department as a body authorized to exercise powers on its behalf under the Child Care Act and in its capacity as Interim Central Authority. Ms Pamela Wilson deposed to an affidavit on its behalf in opposition to the application. She said:

'15. As an agency, we have an adoption policy in place where it is stated that we will only negotiate with approved and recognized adoption agencies in overseas countries. . .'

[57] Dr Maria Mabetoa, the Chief Director: Children, Youth and Families in the Department, deposed as follows:

'*Only organizations/private social workers that have registered a speciality in adoptions, who have a working agreement in place with a foreign accredited organization, can do intercountry adoptions. Organizations and social workers do therefore not work randomly with any country, but with a country they know well and where procedures were spelt out in the working agreement. . . Most of the working agreements currently in place are with other Hague countries that have also ratified the convention. The only exception is a working agreement between Johannesburg Child Welfare and Botswana*. This agreement was supported by the Department of Social Development for the following reason: Although the culture of the population in Botswana differs from the population in South Africa, it is not as radical as other countries. . . *This Department is of the opinion that when working with a non-Hague country, such as the United States of America, one must be careful with procedures and responsibilities as the Convention does not apply and therefore the necessary safeguards do not exist*.'

(The emphasis is mine.)

[58] I understand the quoted passages to say that because the Society and the Department do not have working agreements in place with the United States an agency such as the Society cannot negotiate adoptions involving United States citizens, or, at best, will only do so in rare cases. In an affidavit in reply filed by the applicants' attorney on their behalf it was made clear that my understanding is, if anything, a generous interpretation of a restrictive policy. Ms Wybrow deposed as follows:

'11. In addition and pursuant to my discussions with the *Amicus* on the refusal of the Department of Social Development to allow placements to the United States of America in particular, I forwarded to the *Amicus* via email on 7 December 2005, the email I had previously submitted in the Reid matter before this Honourable Court (Case No. 05/27085), wherein the American Applicants were advised by the Department of Social Development that they would not be allowed to adopt South African children, (despite the provisions of Fitzpatrick).

12. I annex hereto and marked "DLW4" a copy of the abovementioned email.

13. I also telephoned Mrs Raath, the Commissioner of Child Welfare, Johannesburg Children's Court, on 24 January 2006 and was advised that a policy decision had been taken not to allow Inter-Country adoptions to the United States of America.

14. I advised the *Amicus* of this in an email dated 24 January 2006, a copy of which is annexed hereto and marked "DLW5".

15. Mrs Raath suggested I telephone Mrs Marike Bloem of the "Interim Central Authority", which I then did on 25 January 2006. Mrs Bloem confirmed that the stance of her Department remained as per Annexure "DLW4", in that they would not allow adoptions to the United States of America. I was advised by Mrs Bloem that the only exception would be if it were an "in-family" placement. The reason given to me was that no one in South Africa had "experience" in dealing with the United States of America.

16. Despite receiving the Applicants' Heads of Argument, the Memorandum of Advocate Skinner S.C., the Memorandum from Advocate Julyan S.C., and the documentation and emails referred to in Paragraphs 6 to 11 above, the *Amicus* has not seen fit to make any mention of these facts in her submission to this Honourable Court.'

[59] The *amicus* has also not seen fit to seek leave to rebut any of these averments. As they merely serve to confirm the statements of policy to which I have referred in the affidavits of Wilson and Mabetoa I have no hesitation in accepting them at face value. They tell me that the policy which the Department, its agency and the Johannesburg Children's court has adopted is not one which is likely to support or assist a United States citizen in the adoption of a South African child, to state the matter at its lowest. Moreover they make it clear that the Department and the agency do not regard themselves as properly equipped to handle such applications by reason of the lack of contact between the social welfare agencies of the respective countries. It is, in the circumstances, hardly surprising that the applicants followed the route of a high court application. But it is astonishing that the main submission of the *amicus* (accepted by Goldblatt J) was and is that the children's court is the forum best-equipped to deal with the application in the particular circumstances of this case.

[60] The *amicus* also submitted that if the children's court shows itself fettered by policy against an adoption by the applicants they would have every right to review its decision. That may be so, but it is hardly an approach which favours the interest of the

child in obtaining an appropriate hearing as soon as reasonably practicable and while the applicants are still willing and able to pursue the matter. I think the applicants were well-advised in the circumstances to pursue the route which they did.

vi) The concerns of the *amicus curiae*

[61] In amplification of her submission that the children's court is the proper and appropriate forum the *amicus* referred to certain matters which, she submitted, would better and more appropriately be investigated and decided by a children's court. (I do not ignore Ms Julyan's disturbing submission on behalf of the applicants that in the normal course of events no such investigation is carried out in the children's court for reasons of lack of capacity, lack of expertise, inertia or sheer indifference. I find it sufficient to test Ms Skelton's submissions at face value.) Those matters are:

i) subsidiarity;

ii) potential exploitation for monetary or other reasons;

iii) adequate compliance with the adoption procedures and safeguards laid down in the Child Care Act.

[62] As to subsidiarity, the principle is one recognized in the interest of children, in order that, wherever possible, a child shall enjoy its parental upbringing in a culture which is familiar to him or her and comparable to that from which he or she would have benefited as a sharer in the opportunities open to most other children in the country of his or her birth with normal parental care. The applicants in presenting their case made the following averments in this regard:

a) that since birth the child has been cared for by Mr and Mrs W and has been given their surname;

b) no other potential parents have expressed an interest in having the child placed permanently with them;

c) the Third Respondent, the Roodepoort Child and Family Welfare Society does not have any prospective parents for the child;

d) the applicants are of African descent and have been interested in African culture throughout their lives; they have done extensive research on and study in South African history, people, culture and art.

e) the applicant's own children have been raised 'with a real sense of what it means to be an African-American', believing that each child should be imbued with a sense of pride as to who they are and where they come from;

f) the applicants intend to raise R 'with an in-depth knowledge of her roots and her history, and to travel back to South Africa with her in future so that she can develop an intimate knowledge of her country of origin'.

[63] In her submissions to the court *a quo* the *amicus* conceded that 'there is no clear system relating to establishing whether there are any prospective South African adopters . . . and it is evident that the Department of Social Development will need to establish clear procedures in this regard'. She suggested that, in order to comply with the subsidiarity principle, 'substantial efforts' to place the child in foster care or adoption in South Africa must be made. She was not able to suggest in argument on appeal how such efforts were to be made.

[64] In her affidavit Ms Wilson deposed that

'6. Johannesburg Child Welfare Society has prospective local adoptive parents on the waiting list for female babies between the ages of birth – 5 years old. The majority of our adoptive parents are black and most of them prefer to adopt a girl. There are certain cultural beliefs behind the demand for girls rather than boys. There is therefore always a greater demand for girls and the adoptive parents will wait much longer if they especially want a girl. Over the past few years there has been an encouraging increase in the number of local black adopters approaching the agency and we always have people on the waiting list. We also have local applicants wishing to adopt trans-racially. It is for this reason that we usually only consider our older black boys (from 1 year upwards) for inter-country adoption. Johannesburg Child Welfare Society always has prospective adopters on its adoption waiting list, waiting for girls of all ages. There is no acceptable reason why a female baby should be placed out of the country when there is such a demand within the country.

7. With regard to this particular case, our agency has not received any requests for a local family for this baby.'

[65] She does not suggest that the Society, with its list of prospective adopters, has been able to effect a single introduction between such persons and the child. The proof of the pudding must be in the eating.

[66] As to what may be the reasonable processes after the exhaustion of which the subsidiarity principle may be deemed to be fulfilled, Dr Mabetoa said

'A national register of children available for adoption and prospective adoptive parents (RACAP) will have to be established by the Department of Social Development. No child can be considered for an inter-country adoption unless the child has been on the register for 60 days and no fit and proper parents could be found within the country.'

[67] Three inferences arises from this: first, that the ability and means to test the availability of prospective parents is regarded as a national responsibility; second, the dissemination of information about the availability of a child for adoption is a matter to be carried out through the instrumentality of a comprehensive list known by all persons desirous of adoption to be available for perusal; third, in those circumstances an unrewarded period of 60 days will be deemed to satisfy the principle of subsidiarity. It is immediately apparent that such standards have no relevance at all to the present case; in the absence of appropriate structures, they set an impossible level of compliance for the private citizen. In my view the court must deal with the evidence before it. The degree of interest shown in the child until now – which is non-existent – must be regarded as the closest proof to the likelihood that prospective parents will emerge after this case is concluded.

[68] There is a further aspect of importance in this regard. The subsidiarity principle does not exist in a vacuum. Goldstone J, as I have earlier noted, regarded s 40 of the

Child Care Act as embodying 'the concerns that underlie the principle of subsidiarity'. Section 18(3) of the Act provides that in considering an application for adoption 'the children's court shall have regard to the matters mentioned in section 40'. Those matters are 'the religious and cultural background of the child concerned and of his parents as against that of the person in and to whose custody he is to be placed or transferred'. But the circumstances of R are not those of an ordinary child from a broken home. She was abandoned at birth. She has no experience of a religious or cultural background other than such as Mr and Mrs W have provided for her. Their religious and cultural background is essentially that of the applicants themselves. It seems to me that, in the peculiar circumstances of this case, the subsidiarity principle is very largely reduced in importance by reason of these uncontested facts. In so far as regard should still be had to that inherent and perhaps dormant cultural heritage which is conferred by the fact of being born in a particular environment or background, I have already pointed out that the applicants have undertaken to respect and promote that awareness. It seems to me, as a probability, that the cultural alienation of R, should she be taken by the applicants to the United States and there adopted, will be little different from that of any other young South African child who is taken by his parents to a foreign country. Such children are notoriously adaptable, the more so while very young.

[69] The *amicus* highlighted four possible aspects of exploitation: the grasping adoptive 'parent' who seeks to make money out of the child with no bona fide intention to adopt or care for the child; the exploitative and conscienceless adoption agency which will prepare reports to suit its client; the undesirability of contact between 'adoptive parent' and the child before adoption other than through or under the supervision of an independent social worker; the inability of a South African court to oversee the continuing care of a child removed under the pretext of an order for custody and guardianship. As to the first two possibilities the evidence presented by the applicants should be approached with care. But, doing so, it clearly and

satisfactorily establishes the good faith of both the applicants and Autumn Adoptions Inc. Moreover the Society and the Department to whom it was open to make enquiries through official or private channels have not produced a tittle of evidence which casts doubt or suspicion on either. As to the third consideration it is no doubt desirable that the prospective parents, the reporting social welfare worker and the child should be at arms length during the adoption procedures both to ensure the integrity of the investigation and reports and to avoid the potential of emotional turmoil in the child if the application for adoption fails or is abandoned. In the present instance the applicants employed a South African private social worker of 30 years experience in the field of adoptions, Ms Hanekom, to prepare a report for submission to the High Court. Neither Ms Hanekom nor her report was the subject of any criticism by the professional bodies involved in the matter. In the circumstances it seems to me that the criticism of conflict with good social work practice inherent in that employment is sufficiently met by the acceptable manner in which she in fact carried out her mandate.

[70] Lastly, it is true that the court which grants an order in the terms sought by the applicant places itself beyond the possibility of continuing to oversee the welfare of the child. But that, of course, applies to any child lawfully removed from South Africa at the instance of a custodian. The more important question is the integrity and reliability of the custodian and that is on the papers convincingly answered in favour of the applicants. In the present instance the case for removal is visibly strengthened by an affidavit produced by the applicants from Ms Karen Law, an attorney practicing in the State of Virginia of more than 20 years appropriate experience who practices in family law. She speaks to ‘a foreign child’s immigration status upon entry to the United States and to the oversight provided by the United States Citizenship and Immigration Services (‘USCIS’) and the Commonwealth of Virginia from entry until the child’s adoption is finalised’.

[71] It is unnecessary to enter upon the detail. The following passages from her affidavit are highly relevant (and indicative of her thoroughness):

'17. After submitting the Immigration documentation, I continued to monitor the progress of the DG application to USCIS. The DG family received final approval to adopt two orphans from South Africa on the twentieth (20) September 2005. A copy of their approval notice is attached. This approval indicates that the family has satisfied USCIS that they will provide a good home for up to two orphans from South Africa.'

and

'28. Prior to the finalization of the adoption, R Joy's welfare would be overseen by the Virginia Court system, the Commissioner of Social Services, and Autumn Adoptions, Inc. If there were any mistreatment, Social Services would have jurisdiction to immediately address that in Juvenile and Domestic Relations Court under Section 63.2-1517 of the Virginia Code, 1950 Edition, as amended. In addition, Autumn Adoptions, Inc. is required by Virginia Code Section 63.2-1509, 1950 Edition, as amended, to report any suspicion of child abuse to Social Services. Virginia laws to protect the best interest of the child are very strict with regard to abuse and neglect, and the Juvenile and Domestic Relations Court has the authority to remove a child from home temporarily or permanently where abuse or neglect is suspected.

'29. In addition, for six months after R Joy entered the U.S., the family would be in a probationary period, pursuant to Virginia Code, Section 63.2-1210, 1950 Edition, as amended. During this period, Virginia law requires that the family be visited by a licensed child-placing agency three times with at least ninety days between the first and last visit. Autumn Adoption Agency, Inc. has made a commitment to conduct the three required post-placement visits (See attached). The purpose of the visits is to ensure the well-being of the child in the adoptive family.

30. At the end of the probationary period, the Agency is directed to furnish a full report to the Commissioner of Social Services for review under Virginia Code, Section 63.2-1212, 1950 Edition, as amended. If the Commissioner is concerned about the welfare of the child, he has the authority to refuse to approve the finalization of the adoption.

31. When the six-month probationary period has ended, the adoptive family can file a Petition in Circuit Court to finalize the adoption, pursuant to Virginia Code, ection 63.2-1227-1228, 1950 Edition, as amended. The Petition is then forwarded to the Agency that conducted the post-placement visits during the probationary period. The Agency has ninety days to write a report of Investigation, which is then forwarded to the Commissioner of Social Services for review. If the Commissioner is satisfied with the report and the Circuit Court that has jurisdiction over the

prospective adoptive family is satisfied that all other legal requirements have been met, the Court will issue a Final Order of Adoption. Typically, it takes about ten (10) months from the time the family returns home with the orphan until the family is awarded the Final Order of Adoption.

32. I am experienced in handling adoption finalizations and the DGs have included enough funds in my retainer to cover that process, which I will begin when the required six-month probationary period has elapsed.

33. Once the family has been awarded a Final Order of Adoption, the child automatically becomes a U.S. citizen under the Child Citizenship Act of 2000, because the final requirement for citizenship is satisfied. However, to obtain proof of citizenship, the family files an application for a Certificate of Citizenship with USCIS. The DGs understand the necessity of applying for a Certificate of Citizenship and I am experienced in assisting families with these types of applications.

34. Because South Africa is a country with whom the United States has diplomatic relations, Virginia gives full faith and credit to the order of the South African court awarding sole custody and sole guardianship to the DGs. This means that the DGs would be considered the legal guardian of R Joy in Virginia with the same rights and privileges as if a Virginia court had awarded guardianship. There is no separate procedure in Virginia law to mirror the guardianship order of the South African high court, because the Virginia courts recognize the authority of the South African High Court order.'

In the report of Ms Hanekom, confirmed on oath, she stated

'It must be said that the United States of America has one of the best adoption After-care Systems in the world. Everything possible will be done to make sure that the children's best interests are served. By law there are mandatory follow-ups done on the family for a period of two years and a multitude of services are rendered for adopted children and their families.'

[72] No aspect of the evidence of Ms Law or Ms Hanekom was placed in dispute. The possibility of exploitation through lack of supervision is in the circumstances excluded on any reasonable basis and is entirely speculative. I am satisfied that the practices, laws and procedures of the State of Virginia are designed for the best interests of children generally and that R will not be prejudiced by committing her care to the trusteeship of the authorities of that State. The difference in status to which Theron AJA refers in para 14 is of no consequence given what Ms Law says in paras

29 to 33 of her affidavit and the assurance that the applicants will expeditiously pursue the route of an adoption under Virginian law.

vii) The procedures and requirements of the Child Care Act

[73] The *amicus* placed reliance on the judgment in *Minister of Social Welfare and Development v Fitzpatrick*. She submitted that the inference to be drawn from it was that the children's court alone through its oversight of the operation of the Act was the appropriate forum to bring an adoption application or one which in substance sought to adopt a child. That judgment certainly held that the procedures of the Act applied, were properly and appropriately sufficient to protect a child in cases of adoption. It did not, because it was not necessary to do so, decide that applications for sole custody and guardianship at the instance of a foreign citizen must be brought in the form of an adoption application to a children's court. I am prepared to accept that in the exercise of its duty as upper guardian in applications like the present a proper exercise of its protective function requires a high court to consider whether the substance of the requirements laid down by the Act for an adoption has been met and I shall do so. In doing so it is also proper to acknowledge the *bona fide* intentions of the applicants to submit the final determination of the adoption issue to a competent and well-equipped adjudication in a foreign jurisdiction. I do not accept the submission that the children's court possesses by virtue of training, skills, experience or the facilities available to it for investigation any advantages over a high court. Of course there are exceptions in both courts and on both sides of the line but there is no acceptable basis for such a generalized proposition.

[74] Section 18(4) of the Child Care Act prohibits the making of an order for adoption unless the court is satisfied as to certain matters. Specifically, on the facts of this case-

(a) both applicants are qualified to adopt the child as contemplated by s 17(a) of the Act, and are possessed of adequate means to maintain and educate the child;

(b) both applicants are of good repute and fit and proper to be entrusted with the custody of the child;

(c) the proposed order and the eventual adoption in the United States will serve the interests and conduce to the welfare of the child;

(d) thee are no known parents to give consent;

(e) the foster parents have stated in writing that they do not wish to adopt the child;

(f) the requirements of s 40 have for the reasons discussed at length earlier in this judgment, been satisfied.

[75] The applicants placed before the High Court at least as much as (and according to counsel for the applicants, far more than) would have been required of them in a children's court application. This is not, in my view, a case where any necessary safeguards or protections, whether arising from local or international law, have been left unexplored or can reasonably be strengthened by an application to the children's court.

[76] It was submitted that the granting of this order would be the thin end of the wedge, enabling foreigners to take advantage of a loophole not open to South African citizens. I do not regard such an order as anything of the sort. Any South African who is able to make out a case for sole custody and guardianship is at liberty to approach a high court for such an order and thereafter to remove the child from the country without the need to disclose that intention at the time of applying for the order. Nor will he necessarily find his application scrutinized according to the standards which apply to an adoption. I would also point out that the present application presents a total and unique picture which justifies the order which is finally made. Whether any other applicants can satisfy the onus on them will depend entirely on the facts peculiar to that application. In another case the facts may justify the conclusion that the best interests of the child require that he or she be formally adopted in South Africa before

being removed from the country. The weight of evidence lies heavily against it in present instance.

Conclusion

[77] Having attempted to identify the arguments for and against the granting of the order it becomes necessary to decide whether the benefits and advantages to the child in this case outweigh those on the opposite side of the scale to the extent that the level of the child's best interest is reached in the overall evaluation. I have no doubt that that level is comfortably exceeded. The substantial value to R of a stable, happy and potentially prosperous future with the applicants in the United States and the enormity of the deprivation and prejudice which she will suffer if no adoptive parent should come forward far outweighs the sum of formal compliance with the Child Care Act, the speculative possibility of remotely comparable parents coming to her rescue in South Africa, the preservation of her cultural and religious identity, the maintenance of a rigid and unyielding policy on intercountry adoptions, and the avoidance of the possibility of an undesirable precedent. At the same I remain wholly unpersuaded that an inflexible insistence on strict compliance with every procedural aspect laid down for a formal adoption according to the supervision of a children's court would have strengthened or weakened the applicants' case in any material respect.

[78] For all these reasons I am left in no doubt that the appeal should succeed.

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J A HEHER
JUDGE OF APPEAL

PONNAN JA

[79] I have had the benefit of reading the judgments of Heher JA and Theron AJA and for the reasons that follow I am in agreement with the conclusion reached by my learned Sister.

[80] The success of a litigant's claim is often dependent upon the path chosen to press that claim. A claim should not be decided in splendid isolation but rather within the context of the form chosen to stake the claim. Not infrequently an asserted claim, with at first blush an aura of invincibility, falters because the chosen legal vehicle proves inappropriate for the challenges of the legal journey.

[81] The real issue in this matter, to my mind, relates to the procedure adopted by the appellants and the form chosen to press their claim. For it seems to me that the form chosen carries with it its own failure. What the appellants ultimately sought was in effect an inter-country adoption. How they hoped to achieve that was through the guise of some other application.

[82] It has been suggested that it was permissible for the high court to be approached in its capacity as the upper guardian of the minor child for the relief sought. There can be no question that the high court has jurisdiction to grant a sole custody and guardianship order. But that was not all that it was being asked to do in this case. That order was no more than a precursor to the authority solicited for the removal of the child to the United States where an adoption order was to be sought from the appropriate court. The High Court was therefore being asked in effect to grant an adoption order to foreign nationals. That it could not do.

[83] South African nationals seeking an adoption order are obliged to approach the children's court which has the sole authority and power to grant orders of adoption. I can conceive of no basis on which foreign nationals should escape that stricture. The burden for South African citizens desirous of adopting is quite rightly an onerous one. The Child Care Act offers what the Constitutional Court (*Fitzpatrick* para 31) describes as a coherent policy of child and family welfare at the heart of which is the children's court. It is the first port of call for citizens seeking to adopt and should likewise be such for non-citizens as well. In terms of s 18(1)(*b*) of the Act no adoption may be made before consideration of a prescribed report from a social worker. Needless to add the social worker must be an independent social worker with no ties - particularly financial - to the prospective adoptive parents. The children's courts are charged with examining the qualifications of the prospective adoptive parents and granting adoption orders. Importantly, a children's court may not grant an adoption order unless it is satisfied that the requirements contained in s 18(4) of the Act have been met.

[84] Article 21(*c*) of the UNCRC states that State Parties are required to ensure that a child concerned by an inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoptions. In my view, those safeguards and standards clearly apply to both the procedures employed before an order is made and the status of the child following upon the making of an order.

[85] Where a child's existing family no longer functions to meet her needs, article 20 of the UNCRC requires the state to provide special protection and assistance to such a child and 'to ensure alternative care' for her. That alternative care may include adoption. Article 21 requires those states which recognise adoption to ensure that 'the best interests of the child shall be the paramount consideration'. Article 21(*b*) of the UNCRC articulates the principle that inter-country adoption, as an alternative form of child care, may only be considered if there is no suitable alternative for the child in

her country of origin. This principle finds expression in article 4(*b*) of the Hague Convention which provides that the competent authorities of the state of origin must 'have determined after possibilities for placement of the child within the state of origin have been given due consideration, that an inter-country adoption is in the child's best interests'. The African Charter is even more emphatic. It provides that inter-country adoption may, as a last resort, be considered as an alternative means of child care if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin.

[86] These international instruments promise a more child-centred approach to inter-country adoptions. This approach seeks to eliminate various abuses that have hitherto been associated with the movement of children from one country to another, such as profiteering, bribery, falsification of birth documents, coercion of biological parents, the intervention of unqualified or paid intermediaries and the sale and abduction of children.

[87] One of the most important objectives of the Hague Convention is to secure the automatic recognition in all contracting states of adoptions made in accordance with the Convention and thus avoid the legal limbo of non-recognition which has in the past plagued many children who have been the subject of inter-country adoptions.

[88] The detailed legal, administrative and procedural provisions of the Hague Convention informed the thinking of the Constitutional Court in *Fitzpatrick*. That at a stage when this country had neither ratified the Convention nor indicated an intent to do so. Since then not only have we ratified the Convention, but in addition we have gone some way to incorporating it into domestic law.

[89] During 1997 the South African Law Commission was tasked by the Ministers for Welfare and Population Development (now Social Development) and Justice to investigate legislative reform proposals in the Child Law sphere. A project committee was appointed and an issue paper was published for general information and comment in May 1998. The issue paper was followed by an extensive process of consultation with all the relevant stake-holders including a large array of NGO's working in this sphere. The ultimate consequence of all of this was a final three volume report and draft Children's Bill which was released in 2002 by the Commission at the conclusion of that process.

[90] The Children's Bill was introduced into Parliament during 2003. The Bill covered areas of both national and provincial constitutional competence. The composite legislative enactment produced by the Commission thus came to be split into what became known as the s 75 Bill and the s 76 Bill (a reference to the constitutional provisions which outline parliamentary procedure for national and provincial Bills respectively). A decision was taken to deal with the s 75 Bill first. It is envisaged that the sections eliminated from the composite Bill will be enacted as an amendment to the principal Act, perhaps during 2008. The s 75 Bill which evolved into the Children's Act No 38 of 2005 was ultimately passed by Parliament on 14 December 2005 and signed into law by the President on 8 June 2006. Once the Act comes into operation, the provisions of the Hague Convention which are contained in Chapter 16 will be incorporated into domestic law. That does not mean, however, that the provisions of the Convention can be safely ignored until then. The Act itself represents the culmination of a protracted legislative process. Notwithstanding the Convention not yet having been incorporated into domestic law, the Department of Social Development has put in place interim arrangements to give effect to this country's international convention obligations.

[91] Both the passage of the Act and the implementation of the interim arrangements are a firm and considered statement of governmental policy in regard to inter-country adoptions. Section 273 of the Children's Act is unequivocal in stating that no person may process or facilitate an inter-country adoption otherwise than in terms of Chapter 16.

[92] The policy framework underpinning the Children's Act is the clearest signal from the South African state that it intends to honour its international legal obligations in regard to the protection of children who are to be the subject of inter-country adoption. Courts should accordingly not sanction a procedure that flies in the face of this country's treaty obligations. Furthermore, in choosing between two possible procedural options a court should, it seems to me, rather plump for the one that is compatible with this country's international legal obligations than the one that is not.

[93] Section 24(1) of the Children's Act provides:

'Any person having an interest in the care, well-being and development of a child may apply to the High Court for an order granting guardianship of the child to the applicant.'

That, however, is qualified by s 25 which reads:

'When application is made in terms of section 24 by a non-South African citizen for guardianship of a child, the application must be regarded as an inter-country adoption for the purposes of the Hague Convention on Inter-country Adoption and Chapter 16 of this Act.'

The procedure adopted by the appellants will thus be expressly proscribed once the Act comes into force. Until that occurrence, which is just a matter of time, this Court should be slow to lend its *imprimatur* to a procedure that ignores the internationally recognised safeguards and standards to be found in the Hague Convention. For a court to permit what is sought in this case, would, I dare say, be akin to embarking upon a law-making function inconsistent with what has already been ordained by the Legislature. This course of conduct would obviously be constitutionally inappropriate.

[94] The essential premise of the international instruments is the paramountcy of the criterion of the best interests of the child. Paradoxically we are being asked to jettison all of the procedural and structural safeguards that seek to achieve that end in the context of inter-country adoptions ostensibly because it is in the best interests of this particular child to do so. As interesting as that esoteric debate may be, it is perhaps unnecessary to embark upon it for the tr is that the route chosen by the appellants precluded a proper ventilation of that issue.

[95] The safeguards essential to the enquiry, such as independent experts and an inquisitorial procedure of the nature envisaged in the Child Care Act during adoption proceedings, are absent in the procedure chosen by the appellants. Moreover, it is quite inexplicable that in an application of the kind encountered here a *curator ad litem* had not been appointed to represent the interests of the minor child. Once underway there may well have been a divergence of interests between the minor child and all the other parties, not anticipated at the inception of the application. To my mind a *curator ad litem* was thus indispensable. Although cited as respondents the foster parents made common cause with the appellants and the Roodepoort Child and Family Welfare Society adopted what can only be described as a supine attitude. In that, in my view, the Roodepoort Child and Family Welfare Society failed the child. The role of the *amicus curiae* was defined by its brief from Goldblatt J. Despite Ms Skelton's commendable industry for which we are indebted, she was obviously constrained by a rather limited remit. The absence of a *curator*, as also other independent evidence, is a telling deficiency. It denied the most important role player - *the minor child* - a voice in those proceedings.

[96] An evaluation of the best interests of this child must of necessity entail an enquiry into both her long-term and short-term best interests and the interplay between the two. Undoubtedly a difficulty in applying the standard is the

impossibility of predicting whether certain decisions will in the long term benefit a particular child. It is so that the child has been languishing in foster care since birth. It may well be that little if any interest has been shown in her by prospective adoptive parents locally. Why that is so does not emerge satisfactorily on the papers. The immediate allure of her being placed with the appellants is seductively appealing. But to succumb to that allure is, with respect, to distort the enquiry and to subvert the long-term interests of the child to the immediate gratification that a placement with the appellants provides. The instinctive joy that is felt upon learning that a family has been secured for a foundling and the natural reticence to deny such a child the rich opportunities that a placement of that kind will provide, is understandable. Those temptations must however be tempered by the important consideration that an inter-country adoption is an alternative means of child care foundational to which is the principle of subsidiarity.

[97] The evidence on behalf of the appellants that the child's prospects of being placed with adoptive parents who reside in this country are slim, is rather perfunctory. With that must be contrasted the evidence solicited by the *amicus* which is far more cogent. That exercise impels me to the conclusion that the evidence, such as it is, falls far short of establishing that there is an absence of prospective parents in this country for the child, much less that an inter-country adoption would be in her best interests.

[98] I pause to record that the evidential and procedural lacunae to which I have alluded would either not have arisen or could have been remedied by the inquisitorial procedure available had the route of the children's court been followed. On that score I hasten to add that nothing in this judgment should be construed as a criticism of the appellants. They appear to be philanthropic people who obviously acted on advice in launching the high court application. The appellants are not remediless. They are still free to approach the children's court, an avenue that, in any event, was open to them after their lack of success in the High Court instead of their pursuing this appeal. Had

the appropriate forum been approached with the proper application and had all the requirements been met, an order for adoption would have issued in this country prior to the departure of the appellants and the child to the United States. Instead the High Court was asked in consequence of the grant of the order sought to sanction the removal of the child to the United States in the expectation that an adoption order would be granted there. Until the order is granted there — and there is no guarantee that it will be — the child will be in a state of legal limbo. The security which comes with an adoption order is what the Hague Convention requires and the best interests of the child demands. To fashion relief that is less than that accorded to her by the Convention is, to my mind, the very antithesis of the best interests of the minor child.

V M PONNAN
JUDGE OF APPEAL

HANCKE AJA:

[99] The legal process has been fiddling for more than 18 months while the child's prospects are consumed by the delay. The majority of the Court adopts a non-possumus attitude. They seem to be content that the fires be stoked for some while longer. For what? Unless the setting aside of the court order is likely to result in a real benefit to the child, her best interests are merely being held to ransom for the sake of legal niceties. If that is so I want no part of it. An examination of whether such a benefit is likely to flow from the rejection of this appeal results in what follows hereunder.

[100] In the circumstances of this case an adoption in South Africa will confer no material advantage on the child, which she could not obtain by adoption in the State of Virginia.

[101] The applicants produced evidence sufficient to satisfy the requirements of the law of adoption in South Africa and the Hague Convention on Inter-Country Adoption. There is no advantage to the child in having them rehash the evidence in the children's court.

[102] The applicants cannot reasonably be expected to make a better case in the children's court than they have done here.

[103] There is no real prospect that the applicants will proceed with the adoption, if they are obliged to pursue it in the children's court. They have not said that they are willing to do so. Their resources are at an end. They must be disillusioned by the South African legal process. The application for adoption will clearly be a gamble given (*i*) that this Court would have found that the case presented to it was insufficient; (*ii*) the seeming reluctance of the Department, the Society and the children's court itself to grapple with adoptions by residents of the United States.[31]

[104] If the application for adoption is not pursued or is pursued and is unsuccessful the possibility of another good Samaritan appearing to rescue the child is purely speculative. If the possibility of adoption by South Africans is a reasonable one I would have expected the Department, the society or the *amicus curiae* to have produced evidence to the High Court. On the contrary the Department has admitted that the procedures to identify prospective adoptive parents are not yet in place.

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[31]In this regard it is important to note what Dr Mabetoa, Chief Director: Children Youth and Family said in respect of the procedures that will have to be implemented *once the bill comes into operation*, namely:
'When an application is made for guardianship by a non-South African citizen for guardianship of the child, the application must be regarded an intercountry adoption for the purpose of the Convention.'

[105] All the aforegoing features persuade me that the best interests of the child are served by relying on the case presented by the applicants and not by deferring a decision on the merits.

[106] There is one further matter. The suggestion that the child was not represented in the application or the appeal seems to me to be almost frivolous given the involvement of the foster parents, the social worker, the Roodepoort Child Welfare Society, the State and its accredited agency, the Society and the *amicus curiae*. All are agreed that the applicants established at least *prima facie* that the best interests of the child lie in the eventual adoption by them. The only issue raised in opposition is whether that *prima facie* case could and would be rebutted by using the procedures and standards of the Child Care Act, the Convention and the Children's Act. All these matters have been thoroughly canvassed. It is in the highest degree unlikely that separate representation for the child would have cast any new light on the application. Neither counsel nor the Court *a quo* thought that a curator was necessary.

[107] I agree with the judgment of Heher JA. I would uphold the appeal.

S P HANCKE
ACTING JUDGE OF APPEAL