

Issue 17: Rescission of Adoption and the Best Interests of the Child

The principle of the best interests of the child is one of the four pillars of the UN Convention on the Rights of the Child (CRC). Under article 3 of the CRC, the best interests of the child should be a primary consideration in all matters affecting children. In the African Charter on the Rights and Welfare of the Child, to which South African is also a party, the best interests of the child should be *the* primary consideration.¹ Some commentators argue that the usage of 'the' in the ACRWC as opposed to 'a' in the CRC indicates that the ACRWC puts stronger emphasis on the best interests of the child than the CRC. Nevertheless, it is important to note that in certain cases, such as adoption and separation from parents against their will, the CRC requires that the best interests to be the *determining factor*.²

Then what does 'best interests of the child' mean? The UN Convention on the Rights of the Child does not provide a precise definition of the term. Due to the subjectivity of the term, the Application of the principle of the best interests of the child is not often straightforward. As each child and each case is unique, the determination of the best interest of the child should be examined on an individual basis.

Recently, the Eastern Cape Division of the High Court has shed the light on the application of the best interests of the child in an adoption case in *Lisa ADA Swart v J W Worster N.O and others* case no 1220/2004. The case is no yet reported.

The facts of the case follow:

On 28 May 2003, the applicant, who was unmarried, gave birth to a daughter, A. Prior to the birth of A, the applicant contacted a social worker to give up the baby when she was born. As soon as, A was born, she was separated from applicant. However, five days later, applicant changed her mind and was reunited with A. One month later, applicant contacted the social worker again and placed Angel in the Procure. About a month later, the mother took A back and the Procure's file for adoption of A was closed again. However, the adoption application filed in the Children's Court was not formally withdrawn, as the social workers felt that applicant could change her mind again. In November, 2003, applicant contacted the social workers again and stated that she wanted A to be adopted by a couple of whose profile she approved. 12 December 2003, A was formally adopted. However, a few days later, applicant contacted the social worker and informed her that she wanted A back. The social worker advised her that the matter was now final. Applicant approached the High Court to seek the adoption order to be rescinded and argued that her consent to A's adoption was given under pressure and intimidation, and therefore, should be disregarded.

¹ Art 4 of the ACRWC.

² UNCHR Guideline on the Formal Determination of the Best Interests of the Child (2006) 6.

Justice Pickering agreed that there has been a procedural irregularity, which deprived applicant of 60-day period to revisit her consent. However, citing Section 243(3) of the Children's Act 38 of 2005, the Court argued that the legislation provides that 'even where an adoption order has been irregularly obtained in the absence of the requisite parental consent, it should not be set aside unless it was in the best interest of the child to do so.'³ Section 243(3) of the Children's Act (though not yet in operation) reflects the spirit of section 28(2) of the Constitution, which gives the best interests of the child 'paramount importance in all matters concerning a child'. He further considered the circumstance and personality of applicant and the assessments by psychologist and concluded that it is in the best interests of A to remain with her loving and stable adoptive parent.

An important factor was the amount of time that had passed since the child had been adopted. The judgment cites the case of *Fraser v Naude and Others*⁴ in which an unmarried father successfully changed the law for all other unmarried fathers regarding the requirement of their consent for adoption, but he was unable to have his own child's adoption rescinded on that basis because of the fact that four years had passed.

This case illustrates the complexity surrounding the application of the principle of the best interests of the child. There are cases in which the best interests of the child come into conflict with parental rights, as shown in the case of A. A breach of established procedural and administrative rules does not automatically lead to a rescission. As A's case demonstrates, the best interests of the child should be the *determining factor* in adoption cases.⁵

³ *Lisa ADA Swart v J W Vorster N O and others*, High Court of South Africa (Eastern Cape Division) Case no: 1220/2004, 12.

⁴ 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC)

⁵ Art 21 of the CRC reads 'states parties that recognize and/or permit the system of adoption shall ensure that the best interests of the children shall be the paramount consideration...'