

Step-Parent Adoption Gone Wrong: *GT v CT* [2015] 3 ALL SA 631 (GJ)

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Abstract

Step-parent adoption happens where a child is adopted by the spouse or civil union partner of a biological parent. This is a drastic invasion into the life of a child because (except if provided for otherwise) an adoption order terminates all parental responsibilities and rights any person had in respect of a child immediately before the adoption, and confers full parental responsibilities and rights in respect of the adopted child upon the adoptive parent. Under specific circumstances an adoption order may also be rescinded, again disrupting the life of the child dramatically. Because of the immense impact on a child, the rescission of an adoption order has to be handled with kid gloves.

In *GT v CT* [2015] 3 ALL SA 631 (GJ) two children had been legally adopted by their stepfather while the *Child Care Act* was in operation. After the implementation of the *Children's Act* 38 of 2005, however, he applied for these adoption orders to be rescinded. The court was faced with a situation where the application had been brought in contravention of the maximum two-year-period as prescribed by the *Children's Act*. Although it was argued that non-compliance with this statutory requirement prevented the court from adjudicating this matter, Mokgoatheng J focused on the best interests of the child, considered the legality of the adoption orders (why?), and ultimately concluded that the supremacy of the best interests of the child meant that he was not precluded from hearing the application. In the end he ordered the rescission of the adoption orders. The judgment cannot be supported.

Keywords

Adoption; best interests of the child; children; parental responsibilities and rights; rescission; step-parent adoption.

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1 Introduction

There could be a number of reasons why a step-parent wishes to adopt a child, including a desire to provide stability to the child, love for the child, and love for the biological parent of the child. Williams¹ highlights the following reasons why a step-parent may adopt: there may be considerable hostility and bitterness between the mother and natural father, and she may wish to have no more to do with him; the children may be emotionally disturbed by visits from their father; the stepfather may wish to have the security of an order, not only so that he feels that the children "belong" to him, but also because he would then automatically be entitled to custody of them should the mother die or become incapacitated; the mother and husband may start a new family and wish all the children to be integrated into one unit; they may wish the children to be known by the husband's surname; it may, quite simply, be very inconvenient to the mother and husband for the father to have access to the children. What makes step-parent adoption different to other forms of adoption is that there is often a biological parent, other than the one married to the step-parent, who is still involved in the child's life. Such adoption thus leads to the termination of an existing relationship, not necessarily for the right reasons. For instance, a biological father may agree to a step-parent adoption in order to avoid paying maintenance for the child.

In the matter under discussion a stepfather had adopted the two children of his spouse. However, *GT v CT*² did not deal with the adoption of the children, but with an application for the rescission of the adoption orders. This case is extremely important. There is very little authority with regard to step-parent adoption since the implementation of the *Children's Act*,³ and there is a complete lack of authority when it comes to the rescission of adoption orders. In fact, Mokgoatlheng J was quoted as saying that the case was the most difficult he had had to hear, and that he had had to conduct extensive research.⁴

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¹ Williams 1982 *U Tor LJ* 214.

² *GT v CT* 2015 3 All SA 631 (GJ) – hereafter *GT v CT*.

³ *Children's Act* 38 of 2005. Recently *Centre for Child Law v Minister of Social Development* 2014 1 SA 468 (GNP) was heard. This matter dealt with the requirements relating to a child who is adoptable. Also see Ferreira 2015 *THRHR* 148.

⁴ Mokati 2015 <http://bit.ly/1MV06F6>.

2 The case

2.1 Facts

The first and second respondents (the children's biological mother and father respectively)⁵ were married. When they divorced in 2005 they had a son, E. At the time of the divorce the mother was expecting their daughter, I. Upon the divorce the mother was awarded care (previously custody) of both children. The applicant⁶ and the mother met whilst the latter was pregnant with I, and they got married in 2006. In 2007 the stepfather adopted both children with the consent of both the mother and the biological father. The biological father continued to have contact with and also paid maintenance in respect of E, who still regarded him as his father. With regard to I, who regarded her stepfather as her father and had emotionally bonded with him, the biological father did not exercise contact. The stepfather and the mother divorced in 2008. The mother was awarded the care of children.

The stepfather alleged that the mother had not allowed him to exercise his parental responsibilities and rights towards the children during the subsistence of their marriage and after the divorce. She had undermined him, had made all the decisions and, after their separation and later their divorce, she had prevented him from having contact with the children. He further alleged that she had told him that he could not exercise any parental rights, obligations and responsibilities over the children without her consent as he was not their biological father, and that the biological father enjoyed precedence⁷ over him regarding the children's social and educational lives.⁸

After the divorce, the first and second respondents enjoyed the benefit of the parental relationship with the children but left the financial obligations in respect of their welfare and maintenance to the stepfather.⁹ The stepfather thus ceased to have any meaningful physical contact with them after his separation from the mother. He no longer wished to have any physical or emotional contact or a parent-child relationship with the children and believed that it would be in the best interests of the children if the adoption orders were rescinded. As a result he instituted an

⁵ Hereafter referred to as "mother" and "biological father".

⁶ Hereafter referred to as "stepfather".

⁷ The parental responsibilities and rights of the biological father in fact no longer existed after the adoptions by the stepfather – also see Sonnekus 2015 *TSAR* 892.

⁸ *GT v CT* paras [23]-[28].

⁹ *GT v CT* para [29].

application for the rescission of the adoption orders in 2013, more than six years after the adoption orders had been handed down.

The mother and the biological father did not oppose the application for rescission, but the third respondent, the Registrar of Adoptions,¹⁰ did. The Registrar objected on several grounds. The application had been instituted six years after the adoptions had been granted - long after the expiry of the prescription period for rescission in section 243(2) of the *Children's Act*.¹¹ The Registrar further argued that the stepfather, who still loved the children and remained a father figure to them until December 2012,¹² seemed to be motivated in his application by his unwillingness to continue paying maintenance, but that it was impermissible for the stepfather to sever "his adoptive parental responsibilities"¹³ because of financial considerations.¹⁴ The Registrar also averred that the setting aside of the adoption orders would not be in the best interests of the children, who still regarded the stepfather as their father, and that the court had a constitutional obligation to protect the children's best interests.¹⁵

2.2 Judgment

The first issue that Mokgoathheng J had to consider was that the application had been instituted in contravention of section 243(2) of the *Children's Act*, as the prescribed period of two years within which to lodge an application for the rescission of an adoption had long passed. The question was thus whether the court had jurisdiction to entertain this application at all, and the judge held that the *Constitution of the Republic of South Africa*¹⁶ must prevail over the provisions of section 243(2) of the Act.¹⁷ He stated that the court had to take into account the paramountcy of

¹⁰ Hereafter referred to as "the Registrar".

¹¹ *GT v CT* para [4]. Although the *Child Care Act 74* of 1983 was in operation at the time of the adoptions, it was subsequently repealed by the *Children's Act*. In terms of s 243(2) of the *Children's Act* an application for rescission has to be lodged within a reasonable time but not exceeding *two years from the date of the adoption*.

¹² *GT v CT* para [32].

¹³ The words chosen for this statement give the impression that the relationship between a child and an adoptive parent is different from that of a child and a biological parent. The point has to be made that there is no difference when it comes to parental responsibilities and rights between a biological parent and an adoptive parent.

¹⁴ *GT v CT* paras [32]-[33].

¹⁵ *GT v CT* para [34].

¹⁶ *Constitution of the Republic of South Africa*, 1996. Hereafter "Constitution".

¹⁷ *GT v CT* paras [15]-[18]. S 243(2), which contains the time frame for an application for the rescission of an adoption order, will be discussed under "3.2 Best interests of the children" below.

the best interests of the children,¹⁸ even if intervention by the court meant that the court acted in conflict with a statute.¹⁹ Mokgoathheng J gave quite a detailed outline of why the adoption of the children had in fact not been legal.²⁰ He also came to the conclusion that the biological father had never relinquished his parental responsibilities, rights and obligations in respect of E.²¹

The Family Advocate was requested to interview the parties and to compile a report regarding the effect, if any, the rescission of the adoption orders would have on the children. The Family Advocate's finding was that the rescission would not have "any permanent deleterious psychological and emotional effect" on the children, but that it would merely give legal effect to the *de facto* situation that had existed since the stepfather and the mother separated.²²

The court concluded that the relationship between the stepfather and the children had broken down irretrievably²³ and indicated that the stepfather was not interested in rebuilding the bond between him and the children.²⁴ It further held that the biological father enjoyed a normal parent-child relationship with both children²⁵ and that the mother and biological father should be afforded the opportunity to strengthen their already existing parent-child relationship.²⁶ Consequently, it was ordered that the adoption orders (of E and I) granted on 26 June 2007 in favour of the applicant by the Children's Court are rescinded and set aside with effect from 23 April 2015.²⁷

¹⁸ Section 28(2) of the *Constitution*.

¹⁹ *GT v CT* paras [8], [13], [14].

²⁰ He calls it a circumstantial fictional adoption (*GT v CT* para [43]) and a purported adoption (para [46]).

²¹ *GT v CT* para [48]. There are of course two children to consider.

²² *GT v CT* para [55].

²³ *GT v CT* para [57]. It is disturbing that the court used terminology that is reminiscent of divorce proceedings. You cannot divorce your children.

²⁴ *GT v CT* para [60].

²⁵ *GT v CT* para [59]. Although this seemed to be true of the relationship between the biological father and E, it certainly was not the case with I, who loved her stepfather and regarded him as her father. In fact, her biological father did not "exercise contact" with her – para [22].

²⁶ *GT v CT* para [61].

²⁷ *GT v CT* para [62[a]]. Subsequent to this decision, the Registrar of Adoptions unsuccessfully approached the Supreme Court of Appeal and the Constitutional court for permission to appeal the judgment – Wagner 2016 <http://bit.ly/1renMu8>.

3 Evaluation²⁸

3.1 Introduction

The *Child Care Act*²⁹ regulated adoption in South Africa from 1 February 1987 until 1 April 2010, when the provisions of the *Children's Act*, which currently regulates all aspects related to adoption, came into effect. Before considering the judgment any further, there are a few general remarks that need to be made, and inaccuracies and misinterpretations that need to be pointed out. These will be explored in the discussion that follows:

- Mokgoathheng J, who was also the presiding judge in *Maneli v Maneli*, another adoption matter that was severely criticised, delivered the judgment.³⁰
- The court at times cited incorrect legislation.³¹
- The court at times referred to the parties incorrectly.³²
- The court used outdated terminology.³³
- Mokgoathheng J often contradicted himself.³⁴

²⁸ Also see Sonnekus 2015 *TSAR* 886 for a discussion of this case. His views will be referred to where relevant.

²⁹ *Child Care Act* 74 of 1983.

³⁰ *Maneli v Maneli* 2010 7 *BCLR* 703 (GSJ) – hereafter "*Maneli*", which dealt with customary adoption. Many of the criticisms lodged against the present matter were also to be found in *Maneli*. See Heaton 2010 *Ann Surv S African L* 453-459.

³¹ The rescission order was quite correctly sought in terms of s 243(1)(c) of the *Children's Act*, which is currently in force. However, the *Children's Act* does not apply retrospectively and the court's application of the *Children's Act* to determine the legality of the adoption itself is faulty. The legislation in operation at the time was the *Child Care Act*. The court, however, referred to the (il)legality of the adoptions by relying on the *Children's Act*. Mokgoathheng J on several occasions referred to the supremacy of the *Constitution* as provided for in s 2, but his reference to the "section 2 constitutional principle of the supremacy of the principle of the best interests of the children in every matter concerning children" (*GT v CT* para [18]) is incorrect. The court indicated that it is "empowered by section 7 of the [*Children's*] *Act* to adjudicate this matter pursuant to the constitutional imperative of the principle of the children's best interests" (para [14]), while s 9 in fact provides for the paramountcy of the best interests of the child. S 7 contains the list of factors that must be taken into consideration when the best interests of the child standard is applied. See para [40]; also see Heaton 2010 *Ann Surv S African L* 457 for similar criticism of the judgment in *Maneli*.

³² In *GT v CT* para [22] the first respondent is referred to as the second applicant, and in para [43] she is called the first applicant.

³³ The term "parental authority" has been replaced by "parental responsibilities and rights", but on more than one occasion the court still referred to "parental authority" (*GT v CT* paras [25], [27]). Similarly, Mokgoathheng J also referred to the custody, instead of the care, of the children (paras [19], [21], [53], [61]).

³⁴ With regard to the validity of the first divorce of the mother – see *GT v CT* paras [29], [53]; with regard to the relationship between the children and stepfather, see paras

- The court made incorrect assumptions.³⁵
- The court's conclusion with regard to the effect of the adoption of the children on the parental responsibilities and rights of the mother are astounding:

At the time of the divorce the first respondent although she was the biological mother of [E] and [I], she was no longer their legal guardian because after their adoption by the applicant pursuant to *section 242(2)(a)* the full parental responsibilities and rights in respect of the children were conferred upon the applicant. Further the parental responsibilities and rights and claims to contact by the first and second respondent to the adopted children were terminated upon adoption pursuant to *section 242(1)(a)(b) and (c) of the [Children's] Act*.³⁶

3.2 **Best interests of the children**

3.2.1 *Introduction*

The standard of the best interests of a child is a constitutional imperative.³⁷ The child's best interests are of paramount importance³⁸ in every matter concerning the child. What would be in the best interests of a child in a particular case is not easily determined. It would depend on the circumstances of that case, and has to be determined for each case individually.³⁹ These interests are a contentious issue that will be debated as long as decisions about children have to be taken. Ultimately, the court is called upon to make a value judgement to determine what is in the best

[43], [58], [59]; with regard to the limitation or not of the best interests of the children, see paras [15], [36].

³⁵ With regard to parental responsibilities and rights, see *GT v CT* paras [25], [28], [45], [48], [52].

³⁶ *GT v CT* para [52]. Several aspects of this paragraph need further exploration: the mother never stopped being the legal guardian of the children; the adoption was not granted in terms of s 242(2)(a) of the *Children's Act*, and s 242(1)(a)(b) and (c) of the *Children's Act* did not terminate the parental responsibilities and rights of the mother. The court indicated that the "legality of the divorce decree settlement agreement awarding custody of [E] and [I] to the first respondent is legally untenable" (para [53]) and that custody could not have been awarded to the mother (paras [21], [53]). This interpretation by the court is mindboggling. When a child (or children) is adopted by a stepfather who is married to the mother, she does not lose her parental authority and rights over that child, either in terms of the *Child Care Act* – in terms of which the adoptions were granted - or the *Children's Act*.

³⁷ Section 28(2) of the *Constitution*.

³⁸ In *Fletcher v Fletcher* 1948 1 SA 130 (A) the Appellate Division first gave paramountcy to the standard of the best interests of the child.

³⁹ Davel and de Kock 2001 *De Jure* 274.

interests of the child, bearing all relevant considerations in mind.⁴⁰ This is the "golden thread" enshrined in section 28(2) of the *Constitution*, which runs through the fabric of our law relating to children.⁴¹

Before the implementation of the *Children's Act*, there was no statutory recognition of any factors that need to be taken into account when determining the best interests of a child,⁴² which made it very difficult to determine these interests. This lacuna was criticised, as the subjective opinions of decision makers could get in the way of objective judgment.⁴³ Once the *Children's Act* came into operation, the best interests of the child received further protection. The best interests of the child are now protected not only by section 28(2) of the *Constitution*, but also by section 9 (read with section 7) of the *Children's Act*. In terms of section 9 the standard that a child's best interest is of paramount importance in all matters concerning the care, protection and well-being of a child must be applied. Whenever this standard is applied, the list of factors in section 7 *must* now be taken into consideration where relevant.

3.2.2 Application

In his judgment Mokgoathheng J emphasised the importance of the best interests of the child, but his interpretation thereof is flawed. When deciding on the role that the best interests of the children have to play, the judge focused on section 28(2) of the *Constitution*,⁴⁴ and hardly considered sections 7 and 9 of the *Children's Act*. Mokgoathheng J mentioned section 9 only once, and only in reference to other cases where the best interests of children were at issue.⁴⁵ As for section 7,⁴⁶ the court in passing mentioned some of the factors that must be considered,⁴⁷ but there is no evidence that any of these factors were ever considered.⁴⁸ Factors that should have been considered include (but are not limited to)

⁴⁰ This is what the court held in *P v P* 2007 5 SA 94 (SCA) para [14]. In *K v M* 2007 4 All SA 883 (E) 891 judge Leach held that all relevant factors have to be taken into account to prevent a warped picture of what is in the child's best interest.

⁴¹ *Petersen v Maintenance Officer* 2004 1 All SA 117 (C) 124.

⁴² The court in 1994 in *McCall v McCall* 1994 3 SA 201 (C) 204-205 made a list of some of the most important factors that have to be taken into account and which serve as a guide to determine the best interests of a child.

⁴³ Boezaart "General Principles" 2-8.

⁴⁴ See *GT v CT* paras [36] – [38], [40].

⁴⁵ *GT v CT* para [40].

⁴⁶ Mention was made of this section only in *GT v CT* paras [14] (clearly the intention here was to refer to s 9), [36], [39], [40].

⁴⁷ *GT v CT* para [39].

⁴⁸ Not even in the request to the Family Advocate (see *GT v CT* para [3]) to compile a report was the list of factors mentioned.

the personal relationship between the stepfather and the children,⁴⁹ the capacity of the stepfather to provide for the needs of the children,⁵⁰ the likely effect on the children of any change in their circumstances,⁵¹ and the children's age, maturity and stage of development.⁵²

Furthermore, the judge failed to take into consideration the fact that there were two children, who had very different relationships with their stepfather⁵³ and whose best interests when it came to the rescission of the adoption orders seem to have been very different.

3.2.3 *Rescission*

An adoption order may be rescinded in terms of section 243 of the *Children's Act*, provided that the requirements in this section are met. The first of these requirements⁵⁴ is that the rescission of the order has to be in the best interests of the child. It was therefore pertinent to consider the best interests of E and I before anything else. This deserves further exploration. Even if the court's interpretation of the application of the best interests of the child standard, namely that it is absolute, is accepted, the facts do not support its contention that the rescission of the adoption orders would be in the best interests of the children. How did the court determine what these best interests are? There is no evidence that the children themselves were ever consulted with regard to their best interests.⁵⁵ The court relied on the evidence presented by the adults, all of whom had different agendas and requested the rescission for reasons that do not support the best interests of the children. The Family Advocate and Family Counsellor in their findings indicated that the rescission of the adoption orders would "not have any permanent deleterious psychological and emotional effect" on E and I.⁵⁶ This may be true, but that is not the same as the rescission's being in the best interests of the children. Although it seems that there was a strong bond between the biological father and E,⁵⁷ there are also numerous references to the bond between the stepfather and the children, especially I,⁵⁸ and the Registrar pointed

⁴⁹ Section 7(1)(a) of the *Children's Act*. It is clear that at least I had a very good relationship with her stepfather – *GT v CT* paras [22], [43].

⁵⁰ Section 7(1)(c) of the *Children's Act*.

⁵¹ Section 7(1)(d) of the *Children's Act*.

⁵² Section 7(1)(g)(i) of the *Children's Act*.

⁵³ *GT v CT* paras [22], [43], [48].

⁵⁴ Section 243(3)(a) of the *Children's Act*.

⁵⁵ This will be discussed in more detail under "3.5 *The voice of the child*" below.

⁵⁶ *GT v CT* para [55].

⁵⁷ *GT v CT* para [48].

⁵⁸ *GT v CT* paras [22], [43].

out that rescission would not be in the best interests of the children, as they had bonded with the applicant, whom they still regarded as their father.⁵⁹

Besides the best interests of the children, section 243(2) also contains two further requirements before an adoption order may be rescinded, one of which *has* to be met before the adoption order may be rescinded. Mokgoathheng J held that, although a court cannot generally exercise its jurisdiction in conflict with a statute, it is enjoined to take into account the paramountcy of the best interests of the child,⁶⁰ and where there is an apparent conflict between the provisions of sections of the *Children's Act* and the *Constitution*, it (the court) has to intervene.⁶¹ The judge expressed the opinion that sections 2,⁶² 28(1)⁶³ and 28(2) of the *Constitution* "trump the prescriptive peremptory injunction of section 243(2) of the Act",⁶⁴ and that these provisions in the *Constitution* must prevail over the provisions of the *Children's Act*. The fact of the matter is that adoption is regulated by the *Children's Act*, not by the *Constitution*. This is thus incorrect and contrary to his own declaration⁶⁵ that the application of the relevant sections involves "the weighing up of various competing interests and rights, and at times the limitation of the children's best interests". Although legislation may of course be declared unconstitutional and thus repealed under specific circumstances, this does not give the court *carte blanche* to decide to ignore existing legislation.⁶⁶ The court ignored section 39(2) of the *Constitution*, which provides that, when interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.⁶⁷ The best interests of the child as provided for in section 28(2) are paramount, but they are not absolute.⁶⁸ The child's best interests are more

⁵⁹ *GT v CT* para [34].

⁶⁰ *GT v CT* para [8].

⁶¹ *GT v CT* para [9].

⁶² This section confirms the supremacy of the *Constitution*.

⁶³ The right of a child to family care or parental care, or to appropriate alternative care when removed from the family environment.

⁶⁴ *GT v CT* para [14].

⁶⁵ See *GT v CT* para [36].

⁶⁶ Legislation may be declared unconstitutional if it violates a fundamental right in the Bill of Rights, or if it is in conflict with a constitutional requirement – s 172 of the *Constitution*. See Sonnekus 2015 TSAR 899. Also see *GT v CT* paras [15] - [17].

⁶⁷ Also see *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) para [21]; Botha *Statutory Interpretation* 183.

⁶⁸ *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) 429; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 1 SA 406 (CC) 432; *M v S* 2007 12 BCLR 1312 (CC) para [25]; Skelton

important than anything else, but everything else is not unimportant.⁶⁹ The best interests of the child can be limited in terms of section 36 of the *Constitution*.⁷⁰ To assume that they would trump all other rights and interests would be unpalatable,⁷¹ as it would then become pointless to even consider the rights and interests of other parties,⁷² or other legislation.

3.3 *Validity and effect of the adoptions*

3.3.1 *Validity of the adoptions*

Something the court paid much (unnecessary) attention to was the validity of the adoptions. There was never any allegation or evidence that the adoptions were not legal. Almost a quarter of the judgment was dedicated to this aspect. Mokgoathheng J's conclusions in this regard are not only unnecessary but incorrect. He firstly based his argument with regard to the validity of the adoption orders on the provisions of the *Children's Act*,⁷³ and secondly he deduced that the first respondent lost her parental responsibilities and rights when the adoption orders were granted.⁷⁴

The adoptions had been granted years before, when the *Child Care Act* was in operation.⁷⁵ Once the adoption orders had been granted the children were for all purposes regarded as the children of the adoptive parents and *vice versa*.⁷⁶ The only ways⁷⁷ in which these adoption orders

"Constitutional and International Protection of Children's Rights" 282-283. Mokgoathheng J acknowledged this himself in *GT v CT* para [8] where he said that the court "is enjoined to *take into account* the paramountcy of the best interests of the children" (my emphasis) and in para [36] where he said that "[t]he fact that the best interests of the child are paramount does not imply that the child's best interest right is absolute". He further said in para [35] that in weighing up the children's best interests in adoption matters, "the court is obliged to consider the effect the rescission of the adoption orders will have on the children, especially where a considerable period of time has elapsed since the granting of such adoption orders and the children have formed a bond with their adoptive parent".

⁶⁹ *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) para [29].

⁷⁰ Also see *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) 429; and *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 1 SA 406 (CC) 432.

⁷¹ Bonthuys 2006 *Int J Law Policy Family* 23.

⁷² Bonthuys 2006 *Int J Law Policy Family* 34.

⁷³ *GT v CT* paras [44]-[45], [47]-[50], [52].

⁷⁴ *GT v CT* para [46].

⁷⁵ The *Child Care Act* was repealed by schedule 4 of the *Children's Act* on 1 April 2010.

⁷⁶ Section 20(2) of the *Child Care Act*. Although the *Child Care Act* was later repealed by the *Children's Act*, this does not have retrospective effect.

(together with the legal relationship between the children and the parents) could have been set aside was through rescission,⁷⁸ an appeal to the competent division of the Supreme Court,⁷⁹ or a subsequent adoption.⁸⁰

In his discussion of the validity of the adoptions, Mokgoathheng J incorrectly relied on the provisions of the *Children's Act*.⁸¹ The *Children's Act* does not have retrospective effect,⁸² and the legality and effect of the adoptions were thus determined by section 20(1) of the *Child Care Act*, not by the provisions of the *Children's Act* as assumed by the judge.⁸³ The court alluded to the "purported legality of the award",⁸⁴ the "legal fiction regarding ... the legality of the efficacy of the *de jure* adoption", asked whether there was "a *bona fide* adoption ... predicated on section 239(1)(a) of the [Children's] Act",⁸⁵ and referred to the adoptions by the court as "forged on an unsound legal and moral foundation",⁸⁶ an "abstract circumstantial fictional adoption",⁸⁷ a "legal fiction",⁸⁸ an "apparent adoption"⁸⁹ and a "purported adoption".⁹⁰ These inferences are astounding, to say the least, and after deducing that there were no proper adoptions to be rescinded, the court then in its order sets aside the adoptions. Because of the irrelevance with regard to the order made, the serious mistake made by the court regarding the legality of the adoptions will not be explored any further.

3.3.2 Effect of adoptions

A critical error made by Mokgoathheng J was his interpretation of section 242(1)(a) of the *Children's Act*,⁹¹ which deals with the effect of an adoption

⁷⁷ Review was never an option, as an application for review is based on irregularities in court proceedings, which was never alleged in this matter.

⁷⁸ Section 21 of the *Child Care Act*, s 243 of the *Children's Act*.

⁷⁹ Section 22 of the *Child Care Act*, s 51 of the *Children's Act*.

⁸⁰ Section 23 of the *Child Care Act*, s 230(3) of the *Children's Act*.

⁸¹ *GT v CT* paras [49] -50].

⁸² *Malcolm v Premier, Western Cape Government* 2014 3 SA 177 (SCA) para [23]; *Minister of Public Works v Haffejee* 1996 3 SA 745 (SCA) 753B-C; *Shange v MEC for Education, Kwazulu-Natal* 2012 2 SA 519 (KZD) para [31]; Heaton "South African Law of Persons" 112; Boezaart 2008 *De Jure* 245.

⁸³ *GT v CT* paras [21], [50], [52].

⁸⁴ *GT v CT* para [21].

⁸⁵ *GT v CT* para [44].

⁸⁶ *GT v CT* para [42].

⁸⁷ *GT v CT* para [43].

⁸⁸ *GT v CT* paras [44]-[46].

⁸⁹ *GT v CT* para [45].

⁹⁰ *GT v CT* para [46].

⁹¹ Section 242(1) of the *Children's Act*. Except when provided otherwise in the order or in a post-adoption agreement confirmed by the court an adoption order terminates –

order, namely that all parental responsibilities and rights of both biological parents are terminated upon adoption.⁹² The court deduced that the mother lost her parental responsibilities and rights when the children were adopted by their stepfather.⁹³ In terms of section 20(1) of the *Child Care Act* the rights and obligations which existed between a child and any person who was his or her parent immediately before an adoption were terminated by the adoption, *except in the case of a step-parent adoption*.⁹⁴ The mother obviously did not lose her parental responsibilities and rights. The court's interpretation that she lost her parental responsibilities and rights when the children were adopted by their stepfather⁹⁵ and its assumptions of the "purported legality of the award of the custody ... to the [mother being] in conflict with the adoption orders"⁹⁶ as well as the "purported adoption" by the stepfather being a "legal fiction" because "although [the mother] had consented to the adoption of [E] and [I] by the applicant, *de facto* she never relinquished her parental rights, obligations and responsibilities and '*legal guardianship*' as the biological mother"⁹⁷ are thus completely wrong. This is so even if one accepted the court's faulty application of the provisions of the *Children's Act* to the effect of the adoptions, as the preamble of section 242(1), in terms of which an adoption order terminates all parental responsibilities and rights that any person had before an adoption contains an exception to this rule. This exception affords a discretion to the court to order that the usual consequences of an adoption order would not apply, including that a step-parent adoption would automatically terminate all parental responsibilities and rights of the parent to whom the step-parent was married.⁹⁸

(a) all parental responsibilities and rights any person, including a parent, step-parent or partner in a domestic life partnership, had in respect of the child immediately before the adoption;"

⁹² *GT v CT* paras [44]-[45].

⁹³ *GT v CT* paras [45]-[47], [52].

⁹⁴ Section 20(1) read with s 17(c) of the *Child Care Act*. The spouse of the parent of the child is an exception to the fact that "[a]n order of adoption shall terminate all the rights and obligations existing between the child and any person who was his parent ... immediately prior to such adoption".

⁹⁵ *GT v CT* paras [21] and [52], [54].

⁹⁶ *GT v CT* para [21].

⁹⁷ *GT v CT* para [46].

⁹⁸ Also see *Centre for Child Law v Minister of Social Development* 2014 1 SA 468 (GNP) para [14], where it was held that s 242 did not automatically terminate all parental responsibilities and rights of the guardian of a child when an adoption order was granted in favour of the spouse of the guardian.

3.4 Court's competence to consider rescission

3.4.1 Prescribed period

The adoptions had been granted in 2007, and the application for rescission was instituted in terms of section 243 of the *Children's Act* six years later, whereas an application for the rescission of an adoption order must be lodged within a reasonable time but not exceeding two years from the date of the adoption.⁹⁹ It is important to distinguish between a situation where the court has a discretion, such as whether or not the facts support the rescission of an adoption order, and a situation such as this one, where there is no discretion – the prescribed period has lapsed. Clearly the application should not have been entertained at all. There are several aspects of the court's interpretation of section 243 that deserve further consideration.

Counsel for the Registrar pointed out that the provisions of section 243(2) of the *Children's Act* prevented the court from considering an application for the rescission of the adoption orders,¹⁰⁰ as the prescribed maximum period of two years had lapsed long before. The Registrar also argued that "the court [cannot] exercise its inherent power in conflict with a statute"¹⁰¹ and if the court granted the rescission, it would be "usurping the role and power of the Legislature in contravention of the constitutional principle of the separation of powers".¹⁰² In *Radebe v Government of the Republic of South Africa* it was held that unreasonable delay may cause prejudice to some parties and that it is both desirable and important that finality should be reached within a reasonable time in respect of judicial and administrative decisions.¹⁰³ Once the prescribed period to apply for the rescission of an adoption order had lapsed, the matter should not have been considered. The court referred to *Belo v Commissioner of Child Welfare, Johannesburg: Belo v Chapelle*,¹⁰⁴ in which the biological father's consent to an adoption had not been obtained before the adoption was granted. It was held that a delay of seven years in noting an appeal was

⁹⁹ Section 243(2) of the *Children's Act*.

¹⁰⁰ *GT v CT* para [4].

¹⁰¹ *GT v CT* para [5].

¹⁰² *GT v CT* para [6].

¹⁰³ *Radebe v Government of the Republic of South Africa* 1995 3 SA 787 (D) 798(C).

¹⁰⁴ *Belo v Commissioner of Child Welfare, Johannesburg* 2002 3 All SA 286 (W), hereafter referred to as "*Belo*". In this matter seven years had passed before an application for the late noting of an appeal. The court held that the application was launched within a reasonable time of the applicant becoming aware of the adoption (para [23]), but that it would not be reasonable to interfere with the adoption order after such a long period – para [30].

so long that it would not be in the best interests of the child to interfere with the adoption order. Mokgoathheng J then indicated that the facts in the present matter were different from those in *Belo*, without pointing out these differences or discussing them in any way. It is true that there are several differences between the cases, but none of these differences could lead the court in this matter to believe that it could come to the decision it did.¹⁰⁵

There are ways other than rescission that may be employed to set aside the adoption orders, and the parties should have been advised to pursue these options.¹⁰⁶

3.4.2 Requirements

In terms of section 243(3) an adoption order may be rescinded only if the rescission is in the best interests of the child¹⁰⁷ and one of two further requirements is present – either the applicant is a parent of the child whose consent was required for the adoption order to be made, but whose consent was not obtained,¹⁰⁸ or at the time of making the adoption order the adoptive parent did not qualify as such in terms of section 231.¹⁰⁹ The first (but not the only) requirement that has to be met before an adoption order may be rescinded is that rescission of the order has to be in the best interests of the child.¹¹⁰ The court focused on this requirement and did not at any stage acknowledge that there are also two further requirements that have to be considered, one of which has to be present before the rescission of an adoption order is possible. It simply focused on the best interests of the child and treated this first requirement as the only one that

¹⁰⁵ In *Belo* the biological father did not consent to the adoption of his daughter, and the court held that the consent of the father could not have been dispensed with. The father lodged an appeal in terms of s 22(1) of the *Child Care Act*, but his application for late noting of the appeal was dismissed. The only noteworthy difference seems to be that the mother and the stepfather opposed the application by the biological father, whereas all the parents (the mother, the biological father and the stepfather) in this matter wanted the adoption orders rescinded. The court referred to the need for finality in litigation, which is expressed in the maxim *interest rei publicae ut sit finis litium* – paras [23]-[24].

¹⁰⁶ Although an application for the review of the adoption proceedings does not seem to have been an option, an appeal against the order could have been lodged to the High Court in terms of s 51 of the *Children's Act*, or, as a last resort, an application for the adoption of a previously adopted child could have been submitted – see Louw 2010 *De Jure* 335-336.

¹⁰⁷ Section 243(3)(a) of the *Children's Act*.

¹⁰⁸ Section 243(3)(b) of the *Children's Act*.

¹⁰⁹ Section 243(3)(c) of the *Children's Act*.

¹¹⁰ Section 243(3)(a) of the *Children's Act*. This is discussed under "3.2 Best interests of the children" above.

needed to be complied with. The impression is created that the court had made the decision that the rescission had to happen and then went about finding a way to make it a reality.

The problem is that the matter is certainly not that simple. The best interests of children cannot and do not trump everything else and all other legislation.¹¹¹ As already mentioned, relying on the best interest of the child does not pave the way for ignoring existing legislation. There are two further requirements, and one of these has to be complied with before an application for rescission can be considered, let alone granted. Subsection (b)¹¹² is not relevant to the facts, which leaves only (c)¹¹³ as an option to be considered, but the stepfather did qualify at the time of making the adoption orders as an adoptive parent in terms of section 231(1)(c) of the *Children's Act*.¹¹⁴ The requirements for rescission in section 243(3) had therefore not been complied with, further strengthening the view that this application should never have been considered in the first place.¹¹⁵

3.5 The voice of the child

Over the past few years, there has been growing recognition of the autonomy of children and their right to have a say in matters affecting their well-being.¹¹⁶ This is an area of South African law that has received much attention.¹¹⁷ Very little attention has, however, been given to child participation in the adoption process.¹¹⁸ Section 10 of the *Children's Act*,¹¹⁹

¹¹¹ See "3.2 Best interests of the children" above.

¹¹² Section 243(3)(b) of the *Children's Act*: the applicant is a parent of the child whose consent was required for the adoption order to be made, but whose consent was not obtained.

¹¹³ Section 243(3)(c) of the *Children's Act*: at the time of making the adoption order the adoptive parent did not qualify as such in terms of s 231.

¹¹⁴ Section 231(1) of the *Children's Act*: "A child may be adopted—(c) by a married person whose spouse is the parent of the child or by a person whose permanent domestic life-partner is the parent of the child."

¹¹⁵ Counsel for the Registrar also argued that the stepfather had failed to comply with these requirements and that the application had to be dismissed - *GT v CT* para [7].

¹¹⁶ This is clear from decisions such as *French v French* 1971 4 SA 298 (W); *Manning v Manning* 1975 4 SA 659 (T); and *Märtens v Märtens* 1991 4 SA 287 (T). Children must be given the opportunity to express their views in relation to a decision which will affect them - Du Toit "Legal Representation of Children" 95. Also see Sloth-Nielsen 1995 *SAJHR* 403.

¹¹⁷ Barrie 2013 *TSAR* 124; Du Toit "Legal Representation of Children" 93; Sloth-Nielsen 2008 *SAJHR* 495.

¹¹⁸ Ferreira 2014 *THRHR* 375.

¹¹⁹ Section 10 of the *Children's Act*: "Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration."

which incorporates the provisions of article 12(1) of the *United Nations Convention on the Rights of the Child* into South Africa's domestic law, thereby complying with South Africa's obligations in that regard,¹²⁰ provides that every child who is of such an age, maturity and stage of development¹²¹ as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.¹²²

There is no specific provision for child participation when it comes to adoption or the rescission of an adoption order,¹²³ but the rescission of an adoption order is most definitely a "matter concerning [the] child" and thus, in terms of section 10, E and I had a right to participate in this process and their views had to be given due consideration. Although the court requested the Family Advocate to interview all the relevant parties (including the children) and to compile a report, the instruction was not to interview the children or to consider their views in any way, but to indicate what effect, if any, rescission of the adoption orders would have on the children and to incorporate these into her findings and recommendations, taking into account the best interests of the children.¹²⁴ There is no excuse for not hearing the children and their perspectives in this matter.

4 Conclusion

Had there been a statutory requirement for the counselling of the parents by the adoptions social worker facilitating the adoptions before they were granted, the adoption might never have happened in the first place.¹²⁵

¹²⁰ Boezaart "General Principles" 2-16.

¹²¹ In terms of s 7 of the *Children's Act* the age, maturity and stage of development of the children are also factors that have to be considered. There is no indication that any of these aspects were considered, making it impossible to say whether they were mature and/or developed enough to participate, and although their ages are not given, E and I were both born from the mother's first marriage, which ended in 2005 (E being the elder child), making E older than 10 years at the time of the application for rescission, and I very close to, if not over 10 years of age.

¹²² In *SALC Review of the Child Care Act* 143-144 was of the opinion that the views of the child, where a child has the ability to express such views, must always be considered. Barrie 2013 *TSAR* 137 is of the view that it may be necessary for the South African legislature to elaborate on s 10 and spell out what is meant by "appropriate" participation and how to give "due consideration" to the views of the child in family law proceedings.

¹²³ In terms of s 243(1)(c) of the *Children's Act* a child may now apply for an adoption to be rescinded, but there is no provision for child participation if the application is made by someone other than the child.

¹²⁴ *GT v CT* para [3].

¹²⁵ The mother especially could have benefited from counselling - *GT v CT* paras [23]-[28], [45], [58].

Unfortunately at the time there was no such requirement.¹²⁶ The impression left by this judgment is that there was some kind of collusion or scheming against the stepfather when the adoptions were granted and that the court looked for a way to "right this wrong". Even if this was so and it was true that the adoptions had been "forged on an unsound legal and moral foundation"¹²⁷ and had been "engineered by the first respondent with the connivance of the second respondent and the compliance of the applicant"¹²⁸ it has no bearing on the matter, as the mind-set of the parties, or the driving force behind the applications, is not relevant or a factor for the rescission of an adoption order.¹²⁹ The requirements for the rescission of an adoption order are objective and not in any way influenced by the purpose or reason for the application.

Unfortunately the facts show that the relationships between the stepfather and the children may not have been good at the time of the application for rescission (from both the perspective of the children and the stepfather),¹³⁰ but the stepfather still seemed to love the children¹³¹ and the children him.¹³² In any parent/child relationship there will be times when the relationship goes through a bad patch, but it is not possible to "divorce" your children.¹³³ Therapy and/or the counselling of all the parties involved might have been the appropriate way to deal with the problems in the relationships. Be that as it may, the reality is that the adoption orders should not have been rescinded.

A final general remark needs to be made. Step-parent adoption could be a wonderful experience and provide a child with the love, support and family life every child deserves.¹³⁴ Unfortunately, as already suggested, it often takes place for the wrong reasons.¹³⁵ It was reported after the judgment

¹²⁶ The adoption orders were granted when the *Child Care Act* was in effect. In terms of s 233(4) of the *Children's Act* such counselling is now compulsory.

¹²⁷ *GT v CT* para [42].

¹²⁸ *GT v CT* para [50].

¹²⁹ These reasons might be grounds for an appeal.

¹³⁰ *GT v CT* paras [24]-[25], [30], [56]-[58], [60].

¹³¹ *GT v CT* para [32].

¹³² *GT v CT* paras [34], [43].

¹³³ See *GT v CT* para [57], where the relationship between the children and their stepfather is couched in terms used for a divorce, namely that it had broken down irretrievably.

¹³⁴ Some more positives of step-parent adoption are that the step-parent might truly love the child; an adoption could provide the child with emotional stability; and it might prevent problems if the biological parent who is married to the step-parent dies.

¹³⁵ Sonnekus 2015 *TSAR* 890, 902 also discusses how step-parent adoption is often not in the best interests of the child.

that the stepfather had been "free[d] of the burden of being a father".¹³⁶ There is a danger with step-parent adoption that the interests of the child are overlooked. The parent and step-parent are in love at the time of the marriage, a fact which could be the driving force behind an adoption, but very often these relationships do not last, and unfortunately the step-parent then no longer wishes to be a parent to these children, as happened in this matter. It is recommended that any step-parent adoption should be subject to intense counselling and scrutiny before it is granted. In fact, the best interests of the child would probably be better served if, instead of adoption, the step-parent was granted guardianship over the child.

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List of Abbreviations

Ann Surv S African L	Annual Survey of South African Law
Int J Law Policy Family	International Journal of Law, Policy and the Family
SAJHR	South African Journal of Human Rights

SALC	South African Law Commission
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
U Tor LJ	University of Toronto Law Journal