

# Rescission of adoption orders

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## OPSOMMING

### Opheffing van aannemingsbevele

Die hoofdoel van die artikel is om die bepalings van die herroepe Wet op Kindersorg 74 van 1983 met die bepalings van die Kinderwet 38 van 2005 te vergelyk vir sover dit die opheffing van aannemingsbevele betref. Aangesien opheffing slegs een van die wyses is waarop aannemingsbevele tersyde gestel kan word – die ander wyses is op appèl en hersiening – moes die opheffing van aannemingsbevele ook in die breër konteks van die tersydestelling van sulke bevele oorweeg word. 'n Vergelyking van die verskillende wyses waarop aannemingsbevele tersyde gestel kan word illustreer watter prosedure die mees gepaste is in besondere omstandighede. Die artikel oorweeg ook die wyse waarop howe die beste belang van kind – standard in ag neem by die tersydestelling van aannemingsbevele. Die onlangse gerapporteerde beslissing in *AS v Vorster NO and Others* verskaf nuwe insigte in hierdie verband. Die artikel oorweeg laastens ook die praktiese effek van beslissings soos dié in die *Vorster*-saak waar die aanwending van die beste belange-standaard veroorsaak het dat andersins ongeldige aannemingsbevele bekragtig is.

## 1 Introduction

Chapter 15 of the Children's Act<sup>1</sup> (CA), containing the new provisions regulating the adoption of children in general<sup>2</sup> and the rescission of adoption orders in particular, came into operation on 1 April 2010.<sup>3</sup> This chapter repeals Chapter 4 of the Child Care Act<sup>4</sup> (CCA) that has heretofore regulated the adoption of children. Although no longer in operation, the provisions of the CCA are still important insofar as they provide a background against which the impact of the new provisions can be assessed.<sup>5</sup>

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1 38 of 2005. The Act was assented to on 6 June 2006.

2 For a discussion of the new provisions, see Louw AS "Acquisition of Parental Responsibilities and Rights" unpublished LLD thesis UP (2009) 418ff and "Adoption of Children" in Boezaart CJ (ed) *Child Law in South Africa* (2009) 133ff.

3 See *Government Gazette* 33076 dated 1 April 2010.

4 74 of 1983.

5 Although seldom as a topic on its own, rescission as part of the law on adoption in terms of the CCA has received extensive attention from various authors: Van der Vyver & Joubert *Persone-en Familiereg* (3ed) (1991) 603–605; Schäfer "Children, young persons and the Child Care Act" in Robinson (ed) *The Law of Children and Young Persons in South Africa* Butterworths (1997) 82–84; Mosikatsana "Adoption" in Van Heerden Cockrell A Keightley R (eds) *Boberg's Law of Persons and the Family* (2ed) (1999) 452–453; Human "Adoption" in Davel (ed) *Introduction to Child Law in South Africa* (2000) 111–113; Schäfer Division: "Young Persons" in Clark (ed) *Family Law Service* (2004) 106.

The topic under discussion will consequently involve a consideration of both the CCA<sup>6</sup> and the new CA.

Both the CCA and the CA make provision for the granting of an adoption order upon compliance with certain requirements.<sup>7</sup> The effect of the granting of an adoption order is basically the same under both Acts, to wit – the child is for all purposes in law, deemed to be the child of the adoptive parents and the parental responsibilities and rights previously vesting in the biological parents are terminated.<sup>8</sup> Both Acts also make provision for the rescission of an adoption order under certain circumstances.<sup>9</sup> When granted, the rescission order has the same effect under both Acts, that is, it reverses the effects of the adoption order.<sup>10</sup> The main aim of the article is to compare the provisions of the CCA regarding the rescission of adoption orders with those of the CA. Since rescission merely constitutes one of the ways in which an adoption order can be set aside – the other ways being on appeal or review to the High Court – the possibility of rescinding an adoption order also had to be considered in the broader context of the setting aside of adoption orders in general. A comparison between the various types of proceedings thus became necessary in order to determine which proceedings would be most appropriate in a given case to have the adoption order set aside.<sup>11</sup> The article furthermore looks at the way in which the best interest-standard has been applied by the judiciary in considering whether an adoption order should be set aside. The recently reported case of *AS v Vorster NO and Others*<sup>12</sup> has provided some new insights in this regard. The practical effect of judgments that have resulted in the confirmation of otherwise invalid and incompetent adoption orders due to the application of the best interest-standard, is also considered.

## 2 Rescission

The statutory provisions relating to rescission in terms of the CCA and the CA juxtaposed in the following table:

	CCA: Section 21	CA: Section 243
<b>Who can apply for rescission?</b>	Parent or Guardian	Parent or other person who had guardianship before the adoption

*continued*

6 See *AS v Vorster NO and Others* 2009 4 SA 108 (SE) 113F.

7 These provisions can be found in s 18 of the CCA & ss 239 & 240 of the CA.

8 S 20 of the CCA & s 242 of the CA.

9 S 21 of the CCA & s 243 of the CA.

10 S 21(8) of the CCA & s 244(1) of the CA. The CA has, in addition, added provisions to prevent such a child from being returned to parents who are no longer willing or able to care for the child they had already signed off for adoption. S 244(2) of the CA empowers the Court rescinding the adoption order to “(a) make an appropriate placement order in respect of the child concerned; or (b) order that the child be kept in temporary safe care until an appropriate placement order can be made”.

11 A topic that received pertinent attention by Spiro E “Remedies against null and void adoption orders” 1974 *SALJ* 168.

12 *Supra*.

	CCA: Section 21	CA: Section 243
<b>Who can apply for rescission?</b> (cont.)	Adoptive parents	Adoptive parents
	<b>Children's Court assistant</b> with consent of the Minister <sup>13</sup>	No equivalent provision
	No equivalent provision	<b>Adopted child</b> <sup>14</sup>
<b>Specific grounds</b> Only available to specified applicants	<b>Parent – No consent</b> and order should not have been made without such consent <sup>15</sup> but <b>Proviso:</b> Unless parent is unfit and it is in the <b>interest of the child</b> that the order be confirmed <sup>16</sup> Time limit: 6 months from becoming aware of adoption but not later than 2 years from date of order <sup>17</sup>	<b>Parent – Consent</b> required but <b>not obtained</b> <sup>18</sup> <b>AND</b> Rescission is in <b>best interests of child</b> <sup>19</sup> Time limit: 2 years from date of order <sup>20</sup>
	<b>Adoptive parents</b> if adoption was induced by fraud, misrepresentation, <i>justus error</i> OR child mentally ill OR child suffered from congenital disorder or injury of a serious nature at time of order <sup>21</sup> Time limit: 6 months from date on which applicant became aware of that ground <sup>22</sup>	No equivalent provision
<b>General grounds</b> Available to all applicants	<b>Adoption is to detriment</b> of child <sup>23</sup> <b>OR</b> adoptive parents <b>disqualified in terms of s 17</b> <sup>24</sup> Time limit: 2 years <sup>25</sup>	<b>Rescission is in best interests</b> of the child <sup>26</sup> <b>AND</b> adoptive parents <b>disqualified in terms of s 231</b> <sup>27</sup> Time limit: 2 years <sup>28</sup>
<b>Jurisdiction</b>	Children's Court <sup>29</sup>	Children's Court and <b>High Court</b> <sup>30</sup>

13 CCA s 21(1).

14 CA s 243(1).

15 CCA s 21(1)(a).

16 CCA s 21(7).

17 CCA s 21(2)(a).

18 CA s 243(3)(b).

19 CA s 243(3)(a).

20 CA s 243(2).

21 CCA s 21(1)(b).

22 CCA s 21(2)(b).

23 CCA s 21(1)(c).

24 CCA s 21(1)(d).

25 CCA s 21(2)(c).

26 CA s 243(2)(a).

27 CA s 243(3)(c).

28 CA s 243(2).

29 CCA s 21(1).

30 CA s 243(1).

It is evident from the table that the provisions of the respective Acts are very similar, if not in the wording then in effect. The following aspects, however, call for some comment:

- (a) The CCA made rescission possible on application by a parent or guardian.<sup>31</sup> “Guardian” in terms of this provision refers to a person other than the natural guardian of a child, who is appointed as the child’s guardian and who may apply for the rescission when the child does not have a parent. The CA, on the other hand, refers to a parent and any other person with guardianship.<sup>32</sup> The difference in wording is significant because it reflects the changed position under the CA in terms of which more than one person or parent may simultaneously hold guardianship in respect of the same child.<sup>33</sup> In a case where, for example, a mother had guardianship in respect of her child but the Court also assigned guardianship to an uncle or grandfather<sup>34</sup> of the same child that is subsequently adopted, not only the mother but also the uncle or grandfather would have *locus standi* to apply for the rescission of the adoption order. Apart from the parents of the child, the guardian of the child’s mother will in some cases also be able to apply for the rescission of the adoption order as the guardian of the child. This will be the case if the mother is still a minor child at the time of the application for rescission and the father does not have guardianship in respect of the child to be adopted.<sup>35</sup> Since the CA only regulates the acquisition of guardianship in the case of the mother being a minor, it is uncertain whether the father’s guardian would have the same right where the biological father of the child is a minor and the mother does not have guardianship. Although admittedly a remote possibility, such a scenario could arise if the mother’s guardianship has been terminated at a stage when the father of the child is still a minor.
- (b) The CA makes no provision for a Children’s Court assistant to apply for the rescission of an adoption order. The omission may at least partly be explained by the fact that since the adopted child may now, in terms of the CA, himself or herself apply for the rescission of an adoption order, there is no longer any need for the children’s Court assistant, replaced with “clerk of the Children’s Court” in the CA<sup>36</sup> to act on behalf of the adopted child as previously suggested.<sup>37</sup> Giving the child a right to apply for the rescission of the adoption order

31 CCA s 21(1).

32 CA s 243(1).

33 CA s 18(1) read with ss 18(4) & (5).

34 In terms of s 24 of the CA. A parent or person who has guardianship in respect of a child can also confer guardianship on “. . . any other person having an interest in the care, well-being and development of the child” in terms of a parental responsibilities and rights agreement: S 22 of the CA.

35 CA s 19(2).

36 CA s 1(1) “presiding officer”.

37 See Van der Vyver & Joubert 604–605.

furthermore advances the rights of adopted children in line with constitutional imperatives.<sup>38</sup>

- (c) In terms of section 21(7) of the CCA and section 243(3) of the CA, parents can apply for the rescission of the adoption order if the order was granted without their consent as required.<sup>39</sup> However, both subsections make the rescission of the adoption order in the absence of parental consent subject to the rescission (or adoption) being in the best interests of the child. Referring to these provisions the Court in *AS v Vorster NO and Others*<sup>40</sup> recently pronounced:

It is clear from these provisions that the legislature has recognised that, even where an adoption order has been irregularly obtained in the absence of parental consent, it should not be set aside unless it was in the best interests of the child to do so.

Both Acts, furthermore, prescribe a maximum period of two years from the granting of the adoption order within which the parents of an adopted child may apply for rescission.

The application of the best interest-standard in proceedings where the setting aside of an adoption order is considered will be discussed in more detail below.

- (d) The CA has omitted the specific grounds on which adoptive parents could apply for rescission in terms of the CCA. Unlike the CCA, that provided for rescission merely based on the fact that the adoption is deemed to be detrimental to the child in general,<sup>41</sup> the CA ostensibly does not allow a rescission based merely on the fact that it is contrary to the best interests of the child. This conclusion is reached because section 243(3) apparently does not make the best interests of the child the sole criterion when deciding whether an adoption order should be rescinded – in terms of the section, the rescission of the order must be in the best interests of the child *and* parental consent must be absent *or* the rescission of the order must be in the best interests of the child *and* the adoptive parents unqualified to adopt. A literal interpretation of the section would thus mean that unless the adoption was granted in the absence of parental consent or in favour of unqualified adoptive parents, rescission of the adoption order or the best interests of the child cannot be considered. As such adoptive parents who have been induced by fraud to adopt or who adopted a child with a mental illness will henceforth have to apply to the High Court for the review and setting aside of the order.

38 According to Mosikatsana & Loffell Ch 15 in *Commentary on Children's Act* 15–23 this makes the provision “child-centred” in contrast to s 21 of the CCA that was “parent-centred”.

39 The consent requirements of the respective Acts are set out in ss 18, 19 & 19A of the CCA & ss 233, 236 and 241 of the CA. For a discussion of the consent requirements under the CA, see Louw AS (2009) 418ff.

40 *Supra* 117D–E.

41 See *Davy v Douglas and Another* 1999 1 SA 1043 (N) in which the Court ordered that the child be made available for an evaluation by a clinical psychologist for purposes of determining whether the adoption was in fact detrimental to the child as alleged by the biological father.

- (e) In terms of the CCA any applicant could approach the Children's Court to rescind an adoption order based on the fact that the adoptive parents were disqualified from adopting in terms of section 17 of that Act. The CA contains a similar ground for rescission based on the disqualification of the adoptive parents in terms of section 231 of the CA but only allows for a rescission on this ground if the rescission is also in the best interests of the child. Section 231 of the CA is however not the equivalent of section 17 of the CCA in all respects. Section 231 of the CA is a combination of the provisions contained in sections 17 and 18 of the CCA. Section 17 of the CCA provided a list of persons eligible to adopt a child while section 18 described when such persons would be deemed suitable to adopt. Section 231 not only prescribes who is qualified to adopt a child but also prescribes which qualities such persons must have to qualify to adopt. In terms of this section an adoptive parent must be fit and proper, willing and able, over 18, not unsuitable to work with children and, apparently, in the case of the biological father, not be vested with the guardianship of the child.<sup>42</sup> The grounds for disqualification under this section are thus considerably extended if compared to section 17 of the CCA. Apart from heterosexual life-partners or other persons forming a permanent family unit, who in terms of section 17 of the CCA would not have been able to adopt a child jointly, it would have been very difficult to show that the adoptive parents did not qualify in terms of section 17 to adopt the child.<sup>43</sup>

### 3 Rescission as Compared to Review and Appeal

As far as the setting aside of adoption orders is concerned there are, in principle, three avenues available to an applicant –

- (a) an application for rescission if the applicant is mentioned by the relevant provision, the grounds for the application fall within those mentioned in the respective provisions,<sup>44</sup> and the time limits

<sup>42</sup> For a detailed discussion of this problematic issue, see Louw in Boezaart 139.

<sup>43</sup> The section is a remnant of previous legislative provisions (s 69 of the Children's Act 31 of 1937 and s 70(2) of the Children's Act 33 of 1960) which set certain restrictions on the adoptive parents based on their age: See *Ex Parte Commissioner for Child Welfare: In re Adoption Volczer* 1960 2 SA 312 (O). S 17 provides for the joint adoption of a child by a married heterosexual couple, single persons, natural fathers of children born out of wedlock and stepparents. S 17 has, however, been extended to provide for the joint adoption by permanent life-partners of the same sex in *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC) (also reported as 2002 10 BCLR 1006 (CC)). With the passing of the Civil Union Act 17 of 2006 and the possibility of same-sex partners concluding a valid marriage, the preferential treatment of such partners can no longer be justified. The problems created in this regard are, however, of purely academic value since the CA expressly makes provision for permanent life-partners, regardless of their sexual orientation, to adopt a child jointly.

<sup>44</sup> See eg *Ex parte Kommissaris van Kindersorg, Krugersdorp: In re JB Ex parte Kommissaris van Kindersorg, Oberholzer: In re AGF* 1973 2 SA 699 (T) in which the Court

*continued on next page*

prescribed by the provisions have not been exceeded. In terms of the CCA only a Children's Court could rescind an adoption order. Section 243(1) of the CA now allows for a rescission by the Children's Court or the High Court.

- (b) An application for a review of the proceedings based, generally speaking, on irregularities in the proceedings.<sup>45</sup> Proceedings in the Children's Court can be taken on review to the High Court on the grounds mentioned in section 19 read with section 24 of the Supreme Court Act.<sup>46</sup> These grounds include gross irregularity in the conduct of the proceedings,<sup>47</sup> the admission of inadmissible or incompetent evidence or the rejection of competent evidence. According to case law the proceedings in the Children's Court can also be taken on review on the ground that the order was obtained by fraud<sup>48</sup> and that the adoption proceedings were merged with a Children's Court inquiry.<sup>49</sup> Where the application for review is made by the Commissioner of Child Welfare,<sup>50</sup> the High Court, according to the judgment in *Ex parte Kommissaris van Kindersorg Krugersdorp: In re JB; Ex parte Kommissaris van Kindersorg Oberholzer: In re AGF*,<sup>51</sup> sits

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held that the obtaining of the adoption order by fraud (the adoptive parents fraudulently represented themselves as being married) does not constitute a ground for rescission by the Children's Court in terms of a similar provision in the Children's Act 33 of 1960. In the unusual case of *Ex parte Leask and Others* [2007] 4 All SA 1018 (D) [15] application was made to rescind the adoption of a child to allow the child to emigrate to Australia where his mother was resident. The child, who had already turned 21 at the time, would only be entitled to admission into Australia if he could show that he was the natural and legal child of his mother and that he was dependent upon her for support. It was held that the CCA does not allow an adoption order to be rescinded by agreement or once the minor attains majority. The Court (at [9]) refused to set aside the adoption order stating that "... the Child Care Act 74 of 1983 ... in terms of which the adoption order was made may only rescind that order on specified grounds, none of which are applicable in the present situation".

45 See eg *S v Kommissaris van Kindersorg en Andere* 1967 4 SA 66 (SWA) 67A-B; *C and Another v Commissioner of Child Welfare, Wynberg* 1970 2 SA 76 (C); *Ex parte Commissioner of Child Welfare: In re Bromfield* 1971 1 SA 323 (N).

46 59 of 1959. See eg *Napolitano v Commissioner of Child Welfare Johannesburg* 1965 1 SA 742 (A) 745F; *S v Kommissaris van Kindersorg, Brakpan* 1984 3 SA 818 (T) 821B.

47 See *Y v Acting Commissioner of Child Welfare, Roodepoort* 1982 4 SA 112 (T) at 117H-118A. In *Fraser v Children's Court, Pretoria North and Others* 1997 2 SA 218 (T), eg the Court held that the Commissioner had committed a gross irregularity in not affording Mr Fraser a proper hearing that warranted the setting aside of the adoption order. The decision was subsequently overturned by the SCA in *Naude and Another v Fraser* 1998 4 SA 539 (SCA).

48 See eg *Ex parte Kommissaris van Kindersorg, Oberholzer: In re AGF* 1973 2 SA 699 (T).

49 *Napolitano v Commissioner of Child Welfare Johannesburg* 1965 1 SA 742 (A).

50 As eg in the cases of *Ex parte Kommissaris van Kindersorg, Krugersdorp: In re JB Ex parte Kommissaris van Kindersorg, Oberholzer: In re AGF supra* and *Ex parte Kommissaris van Kindersorg, Boksborg: In re NL* 1979 2 SA 432 (T).

51 *Supra* at 705H.

not as a review Court but rather as upper guardian of the child.<sup>52</sup> Like Wessels AJ in *Ex parte D*,<sup>53</sup> Spiro<sup>54</sup> is doubtful whether the capacity of the High Court as upper guardian of all minors, confers on that Court powers of review “at large”. According to Spiro<sup>55</sup> an additional procedural remedy based on the capacity of the High Court as upper guardian “... would either render the existing statutory remedies superfluous or add unnecessarily to the existing complication, if not confusion, caused by the co-existence of a number of statutory remedies”. The CA does not resolve the issue by, for example, expressly giving the presiding officer the right to initiate review proceedings or apply for the rescission of an adoption order, as proposed by Spiro.<sup>56</sup>

- (c) Lastly, an appeal to the High Court against a decision of the children’s Court in cases where the merits of the decision are questioned. Section 22 of the CCA in express terms allowed for an appeal against an adoption order, the rescission of an adoption order or the refusal to rescind an adoption order. The section did not allow for an appeal against the refusal to grant an adoption order. Section 51 of the CA, however, creates a general right of appeal “... against any order made or any refusal to make an order, or against the variation, suspension or rescission of such order of the [children’s] Court”. According to Schäfer<sup>57</sup> the procedural relationship between rescission proceedings, until now exclusive to the Children’s Court, and appeal to the High Court where both avenues are potentially available is not altogether clear. The Court in *Belo v Commissioner of Child Welfare, Johannesburg: Belo v Chapelle*<sup>58</sup> suggested that the former should first be exhausted before an appeal is lodged.

Common to all three types of proceedings is the fact that, regardless of the grounds of the application, the best interests of the child, including in particular the stability in the child’s life, determines the outcome of the

52 Because the Commissioner becomes *functus officio* after granting the adoption order, the Commissioner cannot ordinarily review his or her own orders. The Court gave a detailed overview of case law dealing with the issue (at 701H–705F). Reference was made to *Ex parte Commissioner of Child Welfare: In re Smidt* 1956 4 SA 787 (T); *Ex parte D* 1958 2 SA 91 (GW); *Ex parte Commissioner for Child Welfare: In re Adoption Volczer supra*; *S v Sekalala* 1962 2 SA 105 (NC); *Ex parte Commissioner of Child Welfare: In re Adopted Child* 1966 2 SA 301 (C) and *Ex parte Commissioner of Child Welfare: In re Bromfield supra*, showing the uncertainty of the law in this regard. The Court ultimately concluded (at 709D) that of the three possible grounds justifying the commissioner’s *locus standi* in applications for review of an adoption order, *ie* (a) emergency – because there is no other way in which the incompetent order can be set aside; (b) the appointment of the Commissioner as a *curator ad litem* for the adopted child; or (c) the jurisdiction of the High Court as upper guardian, the latter was the preferred option. See also Schäfer & Division.

53 *Supra* at 93H.

54 Spiro E “Remedies against null and void adoption orders” 1974 SALJ 168 at 172.

55 *Ibid.*

56 *Idem* 171.

57 Schäfer & Division *supra* 108.

58 [2002] 3 All SA286 (W).



proceedings.<sup>59</sup> Non-compliance with certain procedural requirements, at least as far as review<sup>60</sup> and appeal proceedings<sup>61</sup> are concerned, may be condoned<sup>62</sup> provided all the parties to the proceedings have been given due notice.<sup>63</sup> No evidence could be found of a Children's Court considering or condoning an application for rescission outside the time limits prescribed by the CCA.<sup>64</sup>

If the adoption order cannot be overturned as contemplated in any of the abovementioned proceedings, the only option would be to submit an application for the adoption of the previously adopted child, provided of course the adoptive parents are willing to give their consent to such an adoption and all other requirements are met. The CA, unlike the CCA,<sup>65</sup> does not expressly provide for the adoption of a previously adopted child. The child will have to be deemed "adoptable" as outlined in section 230(3) of the CA, meaning that the child would either have to be orphaned, abandoned, abused or be in need of a permanent alternative placement.<sup>66</sup>

#### 4 Application of Best Interest-Standard in Contested Adoption Proceedings<sup>67</sup>

Earlier cases such as *Y v Acting Commissioner of Child Welfare, Roodepoort and Others*<sup>68</sup> and *Re J (an infant)*<sup>69</sup> were criticised for giving paramountcy to

59 See especially *Belo v Commissioner of Child Welfare, Johannesburg and Others: Belo v Chapelle and Another supra* at [21]; *T v C* 2003 2 SA 298 (W) at [18] and *AS v Vorster NO and Others* 2009 4 SA 108 (SE) at 120C.

60 Such as the requirement that review proceedings must be initiated by way of notice of motion: See *Ex parte Commissioner for Child Welfare: In re Adoption Volczer supra*. There are no generally prescribed time limits within which a review application must be brought. It must however be brought within a reasonable time: *Belo v Commissioner of Child Welfare, Johannesburg and Others: Belo v Chapelle and Another supra*.

61 Such as the requirement that an appeal must be lodged within 21 days of the issuing of the order: See *Napolitano v Commissioner of Child Welfare Johannesburg supra*. Holmes JA (at 7471) considered the probabilities of success on appeal in deciding whether to condone the late noting of the appeal.

62 See *Belo v Commissioner of Child Welfare, Johannesburg and Others: Belo v Chapelle and Another supra*.

63 See eg *Ex parte Commissioner for Child Welfare: In re Adoption Volczer supra*; *Ex parte Commissioner of Child Welfare, Durban: In re Kidd* 1993 4 SA 671 (N) 673H; *Belo v Commissioner of Child Welfare, Johannesburg and Others: Belo v Chapelle and Another supra* at [16] & [17]; *T v C* 2003 (2) SA 298 (W) [14] & [18].

64 Evidence would, of course, be hard to come by given the fact that proceedings in the Children's Court are not recorded.

65 See s 23 of the CCA.

66 See ss 230(3)(a) – (d) of the CA.

67 The research is based on the reported judgments of the High Court acting as a Court of review or appeal since rescission in terms of the CCA has always fallen exclusively within the jurisdiction of the Children's Courts whose proceedings are not reported.

68 1982 4 SA 112 (T).

69 1981 2 SA 330 (Z).

the parents' rights rather than the best interests of the child in applications for the setting aside of adoption orders.<sup>70</sup> The Courts in these cases had no difficulty setting aside the orders in the absence of proper notice to the mother (*Roodepoort case*) and consent by the father of the child (*Re J*), even though the adoptions seemed to be in the best interests of the child.

In *T v C*<sup>71</sup> the mother of the child deceitfully indicated the father as unknown on the child's birth registration. Based on this misrepresentation, an adoption order was granted in favour of the mother's husband, stepfather of the child, without the consent or knowledge of the biological father. The biological father applied to the Commissioner for the rescission of the adoption order in terms of section 21 of the CCA but failed. He lodged an appeal against that decision to the Witwatersrand Local Division. The Court found that the reprehensible conduct of the mother had tainted the process as a consequence of which he was denied his right to consent to the adoption for which he ostensibly qualified.<sup>72</sup> The Court then proceeded to consider whether it would be in the best interests of the child to rescind the order in terms of s 21(7). In view of the "tenuous" relationship between the father and the child, the fact that the father's sole motivation for rescinding the order was not so much to adopt the child himself but to put him in a perceived better position to gain access<sup>73</sup> (now contact) and the disruptive effect of the rescission after the elapse of almost two years since the granting of the order, the Court found that the rescission would not be in the best interests of the child.

Similarly, the biological father of a child who was also adopted by his stepfather, failed to convince the Court in *Belo v Commissioner of Child Welfare, Johannesburg and Others: Belo v Chapelle and Another*<sup>74</sup> to condone the late noting of an appeal, despite the fact that the biological father's consent was wrongly dispensed with and therefore not obtained as required. The Court<sup>75</sup> concluded in this case that the delay of seven years in noting the appeal was so inordinately long that it would not be in the best interests of the child to interfere with the adoption order now.

In *Fraser v Naude and Others*,<sup>76</sup> the biological father of a child applied for leave to appeal against a decision by the Supreme Court of Appeal<sup>77</sup> upholding and confirming an adoption order granted in February 1996 in respect of his child in favour of third parties. In this now famous case, the

70 See Sonnekus JC "Belange-afweging by aannemingsaangeleenthere" 1985 TRW 66.

71 2003 2 SA 298 (W) 302C. The case is also reported as *Talbot v Cleverly and Another* [2003] 1 All SA 640 (W). For a detailed discussion of the case, see Louw A "Adoption rights of natural fathers with reference to *T v C* 2003 2 SA 298 (W)" 2004 THRHR 102.

72 In terms of s 18(4)(d) of the CCA.

73 The Court held (with reference to *Haskins v Wildgoose* [1996] 3 All SA 446 (T) 307F-G) that contact was possible even if the child had already been adopted.

74 *Supra*.

75 At [30].

76 *Supra*.

77 *Naude and Another v Fraser supra*.

child had been in the care of the adoptive parents since birth, almost three years before the application was heard. The Court,<sup>78</sup> for much the same reasons as in *Belo*, concluded that it was not in the best interests of the child or justice to allow such an appeal even if it were established that there were reasonable prospects of success with the appeal, arguing:<sup>79</sup>

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

In the recently reported case of *AS v Vorster NO and Others*<sup>80</sup> the mother of a child adopted by strangers maintained that her consent was not lawfully obtained.<sup>81</sup> It transpired that she withdrew her consent on three different occasions, the last of which only verbally and not, as required by regulation, in writing.<sup>82</sup> Despite this shortcoming, the Court<sup>83</sup> held that to ignore the verbal withdrawal of consent "... would be to elevate form far beyond substance" and concluded that the adoption order was wrongly granted. As in *T v C*, the Court in *AS v Vorster NO and Others*<sup>84</sup> refused to set aside the adoption order on review despite the absence of parental consent, finding that it would not be in the best interests of the child to grant the rescission.

In considering the best interests of the child, the Court<sup>85</sup> not only referred to the provisions of the CCA but also invoked the provisions of section 28(2) of the Constitution and sections 6(2), 7 and 9 of the CA. In the context of determining whether the setting aside of the adoption order is in the best interests of the child the Court specifically referred to the following factors listed in section 7:

- (a) the nature of the relationship between the child and its parents;
- (b) the attitude of the parents towards the child;
- (c) the capacity of the parents to provide for the needs of the child;
- (d) the likely effect of the change in circumstances;
- (e) the child's physical and emotional security; and
- (f) avoidance or minimising of further legal proceedings in relation to the child.

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78 *Fraser v Naude and Others* [9].

79 *Ibid.*

80 *Supra*.

81 At 110F.

82 At 115F.

83 At 115D.

84 *Supra* 1221.

85 *AS v Vorster NO and Others supra* at 117F-118A.

Support for the consistent application of the principle that the best interests of the child are paramount when dealing with the rescission of an adoption order made in the absence of parental consent was found in the judgments of *T v C*, *Belo* and *Fraser*.<sup>86</sup> In the face of these authorities it was contended that since the Applicant was the natural parent of the child and the life, health or morals of the child were not endangered so as to justify an interference with the rights of the mother, her rights of control and custody should prevail.<sup>87</sup> Pickering J rejected the argument as being taken out of context from *Petersen en 'n Ander v Kruger en 'n Ander*,<sup>88</sup> a case in which babies were swapped at birth, drawing attention to the fact that the Judge in that case "... did not intend to establish a *numerus clauses* of grounds absent which a natural parent was, with nothing more, entitled to control and custody of the child".<sup>89</sup> Despite support for a "strong supposition"<sup>90</sup> that it is in the best interests of a child to be brought up by his or her natural parents and the "important consideration"<sup>91</sup> of the fact that the Applicant was the child's biological mother, Pickering J concluded –

... it cannot per se outweigh other factors which have to be considered, and it cannot, in particular, outweigh the paramount consideration of the best interests of the child. Ms Hartle's submissions, in my view, in any event, approach the matter from the wrong perspective by placing the interests of the natural mother above the interests of the child.<sup>92</sup>

Pickering J<sup>93</sup> also dismissed a contention that sought to distinguish the cases of *T v C*, *Belo* and *Fraser* on the basis that they dealt with claims by natural *fathers* and not *mothers* stating that "... there can no longer be any discrimination in such cases based on the gender of the parent whose consent was not obtained".<sup>94</sup> After careful consideration of the reports submitted by the *curator ad litem* and family counsellor, the Court finally concluded that it was in the best interests of the child to stay with the adoptive parents. The Court found that the mother's frequent changes of mind regarding the adoption raised significant doubts as to her ability to commit to her child<sup>95</sup> and considered<sup>96</sup> the possibility of her changing her mind yet again, should the child be returned to her "... a real one especially given the lack of stability in her life". In reply to a submission that it was "grossly unfair" that the mother should in effect be penalised by the lengthy delay from the time the adoption order was granted, the Court expressed its appreciation for the importance of the issue and the "...

86 At 118A–G.

87 At 119B and 120A.

88 1975 4 SA 171 (C), where the argument was successfully utilised by the natural parents to reclaim their child.

89 At 119E–F.

90 *Re M (Child's Upbringing)* [1996] 2 FCR 473 at 485, referred to at 119I.

91 *AS v Vorster NO and Others supra* at 119J.

92 At 120A.

93 At 120B.

94 At 120C.

95 At 121H.

96 *Ibid.*

strong emotions to which it has given rise". The Court<sup>97</sup> nevertheless found that the mother was not entirely blameless with regard to the lengthy delay in the matter and felt that the continued uncertainty that would necessarily result for the child if the adoption order is set aside<sup>98</sup> and the child restored to the mother's custody could not be in the interest of the child.

## 5 Practical Effect of Judgments Confirming Invalid Adoption Orders

The practical effect of judgments such as *T v C*<sup>99</sup> and *AS v Vorster NO and Others*<sup>100</sup> is that an adoption order may be upheld despite the non-compliance with certain requirements. However, this does not make compliance with such requirements redundant – concluding that an adoption order should be upheld despite, for example, the absence of a parent's consent to such an adoption based on the best interests of the child, is not the same as saying that an adoption order should be granted without parental consent. While parental rights are not expressly protected in the Constitution, the scrapping of parental consent as a precondition to the granting of an adoption order would constitute a reckless disregard of the inherent and so-called "primordial" rights of parents *vis-a-vis* their children. It is evident that in weighing up the constitutional rights of the child against those of the parents that the child's best interests will prevail. The Court is obliged to consider the effect that a reversal of the adoption order will have on the child, which may be particularly disruptive when some time has lapsed since the granting of the adoption order and the child has bonded with the adoptive parents.<sup>101</sup>

The confirmation of deficient or technically invalid adoption orders may raise yet another issue. If adoption orders that do not comply with the requirements of the Act can be confirmed, should other informal adoptions not have the potential to attract the same recognition based on the best interests of the particular child? While the Courts in *Kewana*<sup>102</sup> and *Metiso*<sup>103</sup> seemed to be willing to recognise customary law adoptions for purposes of creating a duty of support even if the said adoptions were incomplete in terms of customary law, let alone in terms of the CCA, the

97 At 122E.

98 As pointed out by the Court in *Fraser v Naude and Others* [8] and [9].

99 *Supra*.

100 *Supra*.

101 See *Fraser v Naude and Others supra* at [8] to [9]. An adoption order can, after all, not be granted unless it is considered to be in the best interests of the child – in this regard the CA is far more explicit than its predecessor (while the children's Court in terms of s 18(4)(c) of the CCA merely has to be satisfied "that the proposed adoption will serve the interests and conduce to the welfare of the child", both ss 230 & 240(2) of the CA make it clear that a child can only be adopted if the adoption is in the best interests of the child).

102 *Kewana v Santam Insurance Co Ltd* 1993 4 SA 771 (TkA).

103 *Metiso v Padongelukkefonds* 2001 3 SA 1142 (T).

Court refused to recognise a *de facto* adoption for purposes of creating rights of succession in *Flynn v Farr NO and Others*.<sup>104</sup> In view of the judgment in the *Flynn* case it is unlikely that the Courts would be willing to consider the recognition of informal adoptions outside the parameters of customary law on an *ad hoc* basis for any purpose whatsoever.<sup>105</sup> Whether the Courts would be willing to extend the recognition of *customary law adoptions* beyond the scope of the duty of support for other purposes such as the *ex post facto* acquisition of parental responsibilities and rights or rights of succession are as yet uncertain but not inconceivable. The CA seems, perhaps inadvertently, to have made allowance for such recognition by defining an adopted child as a child adopted by a person in terms of “any law”.<sup>106</sup> The *ex post facto* recognition of informal customary law adoptions may be justified on a constitutional basis as being in the best interests of the child so “adopted”. The uncertainty relating to the circumstances under which such adoptions should be confirmed or recognised, however, create a number of problems not unlike those alluded to in the case of *Flynn v Farr NO and Others*.<sup>107</sup> In the latter case the Court was referred to the following questions that could arise if factually adopted children were to be recognised as being adopted:<sup>108</sup>

- (a) What would the minimum length of time be during which the person concerned would have had to act as substitute parent?
- (b) Would all the informally adopted children have rights upon intestacy of the substitute parent?
- (c) What would the position be where the natural parents of the informally adopted child had had multiple marriages?
- (d) Would an informally adopted child retain entitlement to claim under the intestacy of his or her natural *and* substitute parent? If so, this would allow for multiple rights of inheritance known as “double dipping”<sup>109</sup> with clearly unsatisfactory consequences.

In the same case the Court<sup>110</sup> also referred to an affidavit by the Chief Director of the National Department of Social Development (DSD), providing

104 2009 1 SA 584 (C).

105 See also *Edwards v Fleming* 1909 TH 232 and *Van der Westhuizen v Van Wyk and Another* 1952 2 SA 119 (GW) in which the Courts were unwilling to recognise or enforce informal agreements purporting to bring about the adoption of the child in question.

106 In this regard it may be noted that if the proposed Reform of Customary Law of Succession and Regulation of Related Matters Bill ([B10 – 2008] as introduced in the National Assembly (proposed section 76); explanatory summary of Bill published in *Government Gazette* No 30815 of 25 February 2008) is enacted, s 1(4)(e) of the Intestate Succession Act 81 of 1987 will be amended to expressly include “. . . a child adopted in accordance with customary law”: See cl 8 and Schedule (Amendment of laws) of the Bill.

107 *Supra*.

108 *Supra* at [36].

109 *Ibid*.

110 *Idem* [46] & [47].

the following “. . . compelling reasons for the insistence upon a process of legal adoption”:<sup>111</sup>

- (a) The inability to keep track of “factual adoptions” that cannot be recorded formally and to provide a child with information regarding his or her origins should the child make enquiries later in life;
- (b) the lack of regulation of *de facto* adoptions in circumstances where rights and obligations flow from such a relationship in a manner sought by the Applicant;
- (c) the inability, for example, to monitor inter-country adoptions, both inward and outward and the difficulty of ensuring the protection of children, especially from drug and child trafficking, were this to be extended to categories of factually adopted children across the border, whereas the legal adoption within the statutory framework provides certainty to the child and provides proof that the child is indeed yours on adoption; and
- (d) the indeterminacy of the relationship between the child and the biological parents, on the one hand, and the adoptive parents, on the other.<sup>112</sup>

## 6 Conclusion

The CA has evidently simplified the rescission procedure as far as adoption orders are concerned. The question is whether the CA has gone far enough in this regard? It is not entirely clear why the section has been formulated in such a restrictive manner. Why not make the best interests of the child an independent, or, for that matter, the only ground for rescission as was the case under the CCA? As the only requirement for rescission, the best interests of the child could override any irregularity, regardless of whether it pertains to the non-compliance of a statutory requirement such as the passage of time (longer than 2 years), parental consent, the suitability of the adoptive parents or any other aspect of the adoption procedure. If this view is accepted, the somewhat blurry distinction between rescission and review could be extinguished – especially in view of the fact that the High Court now also has jurisdiction to rescind an adoption order. On the other hand, it could be argued that since the Children’s Court, a lower Court, can still rescind an adoption order, its jurisdiction should be defined and limited in express terms. The problem

111 At [46]. Bekker supports the view that customary law adoptions should comply with the relevant statutory requirements: See SALC Discussion Paper on the *Review of the Child Care Act* par 18.3.12.

112 In this regard reference is made to the possibility in terms of s 234 of the CA allowing for the continuance of contact with the biological parent *post* adoption, which “. . . in the absence of a legal adoption would place the adoptive parents in a precarious legal position and may result in them being discouraged from adopting a child in the first instance. It would also not result in the termination of the legal relationship between parent and child when it comes to matters where consent is required by a parent”.

with this argument is that, regardless of whether the adoption was granted in the absence of parental consent or the adoptive parents were unqualified to adopt, the best interests of the child must be considered. This raises a further question of whether there is any difference in the way that the Children's Court and the High Court undertake an investigation into the best interests of the child? Since proceedings in the Children's Court are not reported, it is difficult to determine the scope of such investigations embarked upon by the Children's Court in the past. Theoretically, at least, one would have to concede that while the investigation by the Children's Court would be limited to the closed list of factors mentioned in section 7 of the CA, the High Court, with its inherent jurisdiction as upper guardian, would be able to consider any factor whatsoever in determining whether the rescission is in the best interests of the child. Whether the differential application of section 7 would have any significant impact on the investigation in practice is doubtful. The limitation of the grounds upon which rescission can be considered can however only be justified if its purpose was to limit the Children's Court jurisdiction in some way. The High Court's jurisdiction can after all, not be affected by the prescribed statutory grounds for rescission – if the adoption order is contested on grounds not catered for in section 243, an applicant could simply approach the High Court, if not to rescind, then to review the adoption order.