

SW v F 1997 (1) SA 796 (O)

Headnote : Kopnota

The appellant appealed against a decision of the commissioner of child welfare after a full-scale investigation into the adoption of her illegitimate child, J, by the respondents. Except for the first four months of his life, J (who was almost six at the time of the investigation) had been in the care of the respondents uninterruptedly. The appellant had been sentenced to imprisonment for fraud when J was four months old, and J's natural father had by private arrangement placed him in the respondents' care. The appellant had become aware of this arrangement a few days after she had been lodged in prison, and she had apparently been satisfied with it. After her release 20 months later, the arrangement had continued. The appellant had obtained temporary employment, but she had been unable to take J into her care because of accommodation problems. She frequently changed employment and accommodation, and experienced transport problems. Contact with J had been difficult and irregular. In 1991 J was, in terms of a court order, placed in the foster care of the respondents with the appellant's consent. In June 1993 the foster care had been extended. When the respondents had brought the application to adopt J in October 1993, the appellant had refused to consent thereto.

Held, that the provisions of s 30 of the Constitution of the Republic of South Africa Act 200 of 1993 could not be applied in order to interpret the Child Care Act 74 of 1983. (At 802G.)

Held, further, that the provisions of s 30 of the Constitution regarding a child's right to parental care referred not only to the care of natural parents, and that such right was not a bar to an adoption order. The Child Care Act specifically protected the right to care of children in need of care by, for example, making provision for foster care or adoption in cases where the care of the natural parents was lacking or inadequate. (At 802G-H.)

Held, further, that the right of a child as provided for in s 30 of the Constitution had to enjoy the highest priority in investigations of this kind. (At 802H/I and 803B.)

Held, further, that the appellant had had sufficient opportunity since her release from prison to establish a bond with J and that it was in his interest to get finality in respect of his circumstances. In spite of the fact that her circumstances with regard to accommodation, employment and transport were not easy, the appellant had definitely not gone out of her way to try and win J's trust and affection. The commissioner had thus been perfectly justified in finding that it was improbable that the appellant, who had not been able to establish a bond with J over a period of three years, would be able to do so in the future. (At 803F-I.)

Held, further, that the commissioner had correctly found that in this case the appellant's consent to adoption could be dispensed with in terms of s 19(b)(v)

or (vi) of the Child Care Act. The appellant had not complied with the requirements which were prescribed in the Act during the time that J had been in the foster care of the respondents. She had not heeded a working agreement with the social worker. The extended foster care which was referred to in s 19(b)(v) read with s 16(2) of the Child Care Act clearly indicated that the Legislature itself considered it sufficient to dispense with the consent of the parent concerned. The extension of foster care (which had happened in this case) was an indication that the circumstances of the natural parent or parents had not improved sufficiently to place the child back in their care. (At 804F and 804I-805C.)

Held, further, that a mother who realised that she could not establish a bond with her child after three years or longer, and who also knew that that child would be extremely well cared for by the only parents he knew, acted unreasonably if she refused to consent to those 'parents' adopting the child. The commissioner had thus been correct in his decision that the appellant had unreasonably withheld her consent. (At 805C-E.)

Held, further, that the appellant had had sufficient opportunity since her release from prison to establish, with the assistance of the social worker, a bond with her child, but it had not materialised. There should be no speculation that matters would improve in the future. The interests of the child had to enjoy the highest priority and it was in the child's best interests that he be adopted by the people he knew as parents: there was no other workable alternative. (At 806I/J-807B.)

Held, further, that the commissioner's decision could not be challenged on any of the grounds of appeal or any other ground. (At 807B/C). Appeal dismissed.