

## **Talbot v Cleverly and another [2003] 1 All SA 640 (W)**

### **Headnote : Kopnota**

The Appellant was the natural father of the child of the Second Respondent. The First Respondent was the husband of the Second Respondent. The First Respondent had been granted an adoption order in respect of the child.

The Appellant and Second Respondent had been engaged and lived together for a period of about one year. The Appellant had left the common home before the birth of the child and, aside from one attempt at reconciliation after the birth of the child, the relationship between the natural parents had become increasingly acrimonious. The Appellant had paid maintenance for a short while in terms of a maintenance order, but for the majority of the child's life had not paid maintenance. The child knew of his natural father and had had sporadic contact with him in the past, although no father-son relationship had been established.

On the birth registration certificate the Second Respondent had entered the father of the child as "Unknown" which she admitted on the papers had been incorrect.

The Appellant had first learnt of the adoption order when pursuing an application to gain access to the child. On learning of the order he had applied for rescission thereof. The Commissioner hearing the application found that the Appellant had failed in his duty in terms of section 19A(2)(a) of the Child Care Act 74 of 1983 to enter his particulars at the registration of the child and to ensure that these particulars were correct at all times. The Commissioner concluded that the Commissioner who had granted the adoption order had therefore been absolved of his duty in terms of section 19 of the Child Care Act to inform the Appellant of the adoption application, and that the Appellant's consent to the adoption had not been required. The Commissioner had also found that rescission of the order was not in the best interests of the child. The application had therefore been refused.

The Appellant appealed against the refusal of the rescission application.

The issues before the Court were:

- (i) whether the Appellant should have been notified of the adoption proceedings;
- (ii) whether section 17(c) of the Child Care Act 74 of 1983 permitted the adoption of a  
child by the spouse of the child's parent;
- (iii) whether the Appellant's consent was required prior to granting of the adoption order;  
and
- (iv) whether it was in the best interests of the child to rescind the order.

*Held* – The Court canvassed relevant provisions and history of the Child Care Act 56 of 1998 which amended the Child Care Act and the Births and Deaths Registration Act 51 of 1992.

The Court concluded that in terms of the relevant legislation, both parents of a child born out of wedlock have a right to participate in any decision regarding the adoption of a child, including granting or withholding consent. Parents are entitled to notice of any pending adoption proceedings, the responsibility for which rests with the Commissioner considering the proceedings. The Commissioner is only absolved of this duty if the whereabouts or identity of the absent natural parent cannot be established. Therefore, failure by the natural father of a child born out of wedlock to perform his duty in terms of section 19A(2)(a) of the Child Care Act does not deprive the natural father of his statutory right to notice of pending adoption proceedings.

*In casu* the natural father had received no notice of the proceedings, although both Respondents had known his identity and whereabouts. The Second Respondent had deliberately misled the Commissioner who had granted the adoption order, and had probably misled the social worker as well. This had rendered the proceedings unfair and had denied the Appellant of his right to be informed of the adoption proceedings and to grant or withhold his consent.

Turning to consider the best interests of the child, the Court noted that the adoption order had merely given legal effect to a *de facto* situation that had existed for some time. The child was emotionally stable and enjoyed a secure family life with the Respondents and their child. The order had been in existence for over two years. Rescission of the order meant that adoption proceedings would have to be heard *de novo*, with no likelihood of achieving a different result. Rescission would prolong the child's uncertainty in relation to his legal status. The Appellant had not argued that the rescission of the order would be of any benefit to the child or indicated that he wished to adopt the child himself. His sole motivation had been to improve his prospects of success in an application to gain access to the child, whereas the adoption order in fact would have no impact on such an application. Rescission would not be in the best interests of the child. Therefore, in terms of section 28(2) of the Republic of the Constitution of South Africa Act 108 of 1996, rescission by the Commissioner who had heard the rescission application would not have been competent.

Appeal dismissed with costs.