SACHS J ABRIDGED JUDGMENT

AD and Another v DW and Others

Introduction

[1] On 14 November 2004 newly-born Baby R was found abandoned in a veld in Roodepoort. She was placed in the foster care of the first and second respondents, nationals of the United States of America resident in South Africa, who were the founders and managers of a sanctuary for children in need of care. The applicants, friends and former fellow congregants of the first and second respondents, are also citizens of the United States. On visiting the first and second respondents in South Africa, they met Baby R, established a relationship with her, and resolved to adopt her, if possible. This case stems from the legal difficulties they encountered in trying to effect an inter-country adoption.

[2] On seeking legal advice on what route to follow, they were informed that current policy of those responsible for administering adoptions in South Africa would effectively bar their adopting Baby R in the country. They were accordingly encouraged to apply to the Johannesburg High Court for an order granting them sole custody and sole guardianship. This order would enable them to take Baby R to the United States of America where they could then formally adopt her.

[3] When they applied to the High Court for an order of sole custody and sole guardianship, the High Court expressed concern about the need to ensure that the best interests of the child would be protected in the absence of any opposition to the application. The High Court accordingly requested the Centre for Child Law at the University of Pretoria to assist it as amicus curiae. The Centre accepted this role and filed extensive papers which advised against granting the application. Its principal contention was that it would not be in the best interests of Baby R in particular, and of children available for adoption in general, for sole custody and sole guardianship proceedings in the High Court to be used as a mechanism for by-passing proper adoption proceedings in the Children's Court.

[4] Basing its decision largely on the submissions made by the amicus, the High Court held that it was not for it to decide what was in the best interests of the child; this was something to be done by the Children's Court in accordance with the adoption procedures of the Child Care Act. It therefore dismissed the application.

[5] The applicants were granted leave to appeal to the Supreme Court of Appeal. The Centre for Child Law applied for and was granted leave to be admitted as amicus curiae, and again provided extensive information and argument in support of its opposition to the granting of the appeal.

[6] The Supreme Court of Appeal divided sharply, and by a majority of three to two, dismissed the appeal. Four judgments were written.

[7] Theron AJA, with whom Ponnan JA and Snyders AJA concurred, held that to grant the order sought by the applicants would result in sanctioning an alternative route to inter-country adoption under the guise of a sole custody and sole guardianship application. This, she stated, was an unsavoury form of by-passing the Children's Court adoption system and jumping the queue. She held further that the appeal should in any event fail because of the principle of subsidiarity. In her view, unless it was established that suitable care could not be found in a child's country of origin, an inter-country adoption application would not lie, whatever other considerations there might be.

[8] In a separate concurring judgment, Ponnan JA held that even though the relevant provisions of the Children's Act had not yet entered into force, regard had to be had to the fact that it envisaged that all applications for sole custody and sole guardianship of minor children by foreign nationals would be treated as inter-country adoptions. Supporting the need for the matter to go to the Children's Court, he held that a court should be slow to lend its stamp to a procedure which ignored the international safeguards and standards in the 1993 Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption (the Hague Convention), even if these did not as yet form part of South African domestic law.

[9] Heher JA, with whom Hancke AJA concurred, viewed the matter quite differently. He held that as upper guardian of minors, the High Court was both empowered and obliged to enquire into all matters concerning the best interests of children. This empowers it to make an order for sole custody and sole guardianship. It therefore had jurisdiction to hear the application. In the present matter the High Court should not have opted for a formalistic approach to procedure. Instead it should have investigated what was in Baby R's best interests. In his view the papers showed that it was overwhelmingly in her best interests for the order of sole custody and sole guardianship to be granted, since there was no evidence of the existence of other prospective adoptive parents for her in South Africa.

[10] In a separate judgment concurring in the judgment of Heher JA, Hancke AJA stated that unless the setting aside of the High Court's order was likely to result in a real benefit to Baby R, her best interests were merely being held to ransom for the sake of legal niceties. This was because an adoption

in South Africa would confer no material advantage on Baby R which she could not obtain if she were adopted in the United States of America.

[11] The majority of the Supreme Court of Appeal therefore dismissed the appeal. On 22 June 2007 the applicants applied to this Court for leave to appeal. The Court set the matter down for hearing on 18 September 2007. The directions invited any interested party to apply to be admitted as amicus curiae; the Centre for Child Law did so and was admitted as amicus with the right to make both written and oral submissions. The Court requested the Johannesburg Bar to recommend a person to act as curator ad litem to represent the interests of Baby R; the Bar proposed Advocate Melanie Feinstein, who was appointed as curatrix. Finally, the Court sent a letter to the Department of Social Development (the Department) informing it of the hearing and advising that if it desired to make representations it should intervene without delay; the Department responded by submitting affidavits and briefing counsel to oppose the application. The directions laid down a tight time-frame for the lodging of reports and written submissions, the last one coming in two court days before the hearing. I summarise them in the order they were submitted.

[12] The applicants sought an order setting aside and replacing the order of the Supreme Court of Appeal with an order awarding sole custody and sole guardianship of Baby R to the applicants; declaring her to have been abandoned; discharging the foster care order placing her in the custody of the first and second respondents; and authorising the applicants to leave South Africa with her with a view to their adopting her in the United States of America. They maintained that the High Court had inherent jurisdiction in respect of applications for sole custody and sole guardianship even if these applications were made with a view to secure an adoption abroad. They acknowledged that the principle of subsidiarity provided that ordinarily a child available for adoption should be placed in circumstances as close as possible to those of his or her own culture and upbringing. They submitted, however, that the principle was not intended to create an inflexible jurisdictional hierarchy which automatically favoured placement in the child's country of origin. On the contrary, in order to comply with section 28(2) of the Constitution, the courts were obliged to adopt a flexible approach focused on what was in the best interests of the particular child in the particular situation.

[13] The Centre for Child Law maintained its stance that it was impermissible for the High Court to grant foreigners a sole custody and sole guardianship order as an alternative to an adoption order. It contended that the Children's Court had sole jurisdiction to deal with the matter, and emphasised that the granting of sole custody and sole guardianship by the High Court would not provide protection for the child equivalent to the safeguards inherent in adoption proceedings undertaken in the Children's Court. It was accordingly in Baby R's best interests, and the best interests of children generally, for the Children's Court route to be followed.

[14] In similar vein the Department contended that the procedural route followed by the applicants had been unlawful and repugnant because it contravened the provisions of the Child Care Act, the rule of law and South Africa's international obligations. It stated that the procedure was contrary to the best interests of South African children in general and those of Baby R in particular. The Department submitted that there were in fact potential South African adoptive parents for Baby R. The question therefore was whether her best interests would be served by her being adopted by the applicants as opposed to her being adopted by South Africans. It requested that a Children's Court enquiry be conducted to examine how the principle of subsidiarity should be applied to Baby R's circumstances.

[15] The curatrix submitted a comprehensive report and followed up with written submissions. In her view the circumstances of Baby R were unique. Her report stated that of the five South African couples mentioned as prospective adoptive parents by the Director-General, three were unsuitable, the suitability of another was speculative, and placement with the remaining couple was problematic, since Baby R, who was accustomed to a large foster family, would be their only child. She added that with no manifestly suitable local family placement having been identified after all this time, Baby R's chances of local adoption had become remote. Baby R was now older and more entrenched in an American culture, and it was clearly in her best interests to be placed permanently with the applicants. The curatrix submitted that giving effect to Baby R's best interests was a matter that could and should be separated from the broader legal and procedural issues raised before this Court.

[16] She accordingly recommended that the case be referred to the Children's Court, on the understanding that in substance the requirements of the Child Care Act had been fully complied with. There were three social workers' reports already before this Court, and it was neither necessary nor in Baby R's best interests that the application for adoption be started from the beginning again. The Children's Court should therefore decide the matter on the papers to be placed before it so as to secure Baby R's best interests without delay.

[17] Shortly after the hearing commenced the Chief Justice enquired from the applicants and the Department whether in the light of the curatrix's report there was a possibility of their reaching an agreement on how the matters should be resolved. The Court then adjourned and the parties later indicated that they had indeed reached agreement. As a result they asked for the following terms to be made an order of court by consent:

"1. RW is declared to have been abandoned.

2. The Children's Court for the district of Johannesburg is directed to hear on an expedited basis the application for adoption of RW by the applicants, within 30 days of today's date. The Children's Court is requested in its deliberations to consider the reports of the social workers Hanekom and Jackson

and the report to this Court by the curatrix ad litem, Advocate M Feinstein in relation to the requirements of section 18(1)(b) of the Child Care Act 74 of 1983.

3. It is recorded that given the exceptional circumstances of this case, and in the light of the evidence before this Court, the parties agree that it is in the best interests of RW to be adopted by the applicants and that the principle of subsidiarity is not a bar to the adoption.

4. The Department of Social Development and the amicus curiae record that they express no opposition to such adoption, and the Department undertakes to sign all documentation necessary to facilitate the adoption.

5. The adoption, once finalised, shall be registered by the Department.

6. The appointment of Advocate M Feinstein as curatrix to RW is extended to enable her to act on behalf of RW in the adoption proceedings."

The Court acceded to their request and made the agreement an order of court by consent. As this agreement did not resolve the underlying issues, the Court indicated that judgment on those issues would be given in due course. In dealing with these issues I will also furnish reasons why the Court made the agreement an order of court.

The application for leave to appeal

[18] Two interrelated constitutional issues are raised. The first concerns the jurisdiction of the High Court to hear an application for sole custody and sole guardianship where the ultimate purpose is for the child to be adopted in another country. The second is how section 28(2) of the Constitution should be interpreted in the context of a proposed inter-country adoption.

[19] A more difficult question is whether it is in the interests of justice for leave to appeal to be granted now that the agreement between the parties has been made an order of court. In my view, although the determination of the best interests of Baby R is no longer a live issue before this Court, there are strong reasons for dealing with other issues raised in the application for leave to appeal.

[20] In the first place, the Supreme Court of Appeal divided sharply on the question whether a High Court has jurisdiction to hear an application for sole custody and sole guardianship with a view to facilitating an adoption in a foreign country. The issue could well arise again, and it is appropriate that this Court resolve the matter. Secondly, the role of the subsidiarity principle in respect of inter-country adoptions was forcefully raised in the majority judgment in the Supreme Court of Appeal, and provided the subtext for most of the questions debated in both the High Court and Supreme Court of Appeal. It is a key concept for regulating inter-country adoption, and it is in the interests of the many children whose future will be at stake in days to come that more clarity be given on the significance of the principle for South African law.

[21] I accordingly hold that it is in the interests of justice that these issues be dealt with. Leave to appeal should therefore be granted.

[22] I will deal first with the question of the jurisdiction of the High Court to grant a sole custody and sole guardianship order as a step towards adoption in a foreign country. I will then consider the significance of the subsidiarity principle for inter-country adoption in South Africa.

The jurisdiction of the High Court

[23] Until 2000 the matter of inter-country adoption was dealt with definitively and explicitly by statute. Section 18(4)(f) of the Child Care Act stated that an adoption of a child born of any person who was a South African citizen, could only be made if the applicant, or one of the applicants, was a South African citizen resident in the Republic. The effect of this provision was that no court would be permitted to facilitate the adoption of a South African child by a person who was not a South African citizen. Then in Fitzpatrick this Court declared the provision to be unconstitutional.

[24] Dealing with the question of whether the declaration of invalidity should be suspended to allow Parliament time to remedy the defect, Goldstone J stated that Children's Courts were the sole authority with power to grant orders of adoption. The Children's Courts would oversee the well-being of children and examine the qualifications of applicants for adoption. In his view the Child Care Act established a coherent policy of child and family welfare, which, if conscientiously applied, guarded against the dangers inherent in inter-country adoption. In these circumstances no suspension of the order of invalidity was necessary.

[25] If in the present matter the Children's Court was available to handle the proposed adoption of Baby R, why did the applicants not go there directly? The answer lies in the fact that they felt that instructions issued by the Department would block them as citizens of the United States of America from adopting Baby R, independently of what her best interests might be. In particular, they were advised that the subsidiarity principle would be applied by the Children's Court in such a way that they could not become adoptive parents even if the facts showed that it was in Baby R's best interests to go to the United States with them as their adopted child.

[26] The applicants explained that their recourse to the High Court for a sole custody and sole guardianship order was not a disguised attempt to by-pass the Children's Court, but an openly-declared effort to secure the adoption by means of the only judicial mechanism open to them. They asserted that their experienced professional advisors had made numerous and varied attempts to communicate constructively with the Department, and responses from both officials in the Department and Commissioners of Child Welfare had confirmed that in practice the Children's Court route would be a cul de sac for them.

[27] Only in documents filed in this Court shortly before the hearing did it become clear that much of what had been conveyed to the applicants' attorneys was an inaccurate reflection of the true content and status of the departmental policy. The Director-General acknowledged that the Department had no right to "veto" an inter-country adoption application. Nor was a letter of no objection from the Department a jurisdictional requirement before a Children's Court could grant the order concerned. The Department is at present limited to exercising an advisory and monitoring role. The Director-General added that the Department did not have a policy prohibiting inter-country adoptions by United States nationals, and that to the extent that such a perception prevailed amongst adoption practitioners and departmental officials, it was unfortunate.

[28] These facts were regrettably not made known by the Department to the litigants or the High Court, nor were they later furnished to the Supreme Court of Appeal. Had they been communicated earlier the case might have taken a different course. The High Court undoubtedly acted correctly when it requested that the Centre for Child Law participate as amicus. Its participation ensured that the Court would receive dependable and well-researched information and hear argument on the legal and welfare context in which the application had to be considered. Yet, valuable though the participation by the Centre proved to be, on its own it was insufficient. While the Centre for Child Law was able to produce extremely helpful materials on departmental policy, there were limits to the degree to which it could act as a surrogate for the Department. In my view, then, the High Court should have invited the Department to intervene directly and clarify its position in relation to inter-country adoption.

[29] With or without the necessary information, the High Court was correct in holding that the appropriate route for the proposed inter-country adoption was to bring proceedings for adoption in the Children's Court and not to pursue a sole custody and sole guardianship order in the High Court. On the facts of this case the decision of the High Court to decline the application for sole custody and sole guardianship cannot be faulted. If after applying to the Children's Court, the applicants were later to feel that departmental policy as understood and applied by the presiding officer at the Children's Court had resulted in a violation of Baby R's best interests as protected by section 28(2) of the Constitution, their remedy would have been to take the matter on review to the High Court. In this way the departmental policy could have been challenged rather than avoided. In the event, forbidding though the prospects of a protracted legal battle might have been, the result could not have been more arduous than the forensic journey that actually was to follow.

[30] By the time the matter finally came to be dealt with in the Supreme Court of Appeal the situation had changed in one important respect. Baby R had by then passed her second birthday, and had become deeply embedded in her foster family. A factor favouring her adoption by the applicants had become stronger. In matters of this nature the interests of minor children will always be

paramount. To this extent the approach of the minority in the Supreme Court of Appeal was correct in its insistence that Baby R's best interests should not be mechanically sacrificed on the altar of jurisdictional formalism.

[31] In its capacity as upper guardian of all minor children, the High Court had not been dispossessed of its jurisdiction to make such an order, even if the ultimate objective was adoption in the United States of America. The Child Care Act should not be interpreted as creating by implication an inflexible jurisdictional bar to a High Court granting sole custody and sole guardianship orders to foreigners desirous of effecting an adoption in a foreign jurisdiction.

[32] Yet, this was not one of those exceptional cases where it could be said that to follow the Children's Court route would not have been in the child's best interests. Thus the majority of the Supreme Court of Appeal were right in deciding that the granting of a sole custody and sole guardianship order, either by the High Court or by itself, would not have been the appropriate judicial response.

[33] In the present matter it was clearly in Baby R's best interests that the process pre-figured in Fitzpatrick for inter-country adoption be followed. Referring the matter to the Children's Court would have ensured that there would be safeguards and appropriate procedures to protect her, something that a sole custody and sole guardianship order could not achieve. Furthermore, the presiding officer at the Children's Court would in all probability be well-positioned to apply the applicable law pertaining to the rights of the child. The High Court could not have provided a similar legal infrastructure, nor could it have guaranteed that the adoption order in the United States of America would have been sought and granted.

[34] I conclude therefore that from start to finish the forum most conducive to protecting the best interests of the child had been the Children's Court. Although the jurisdiction of the High Court to hear the application for sole custody and sole guardianship had not been ousted as a matter of law, this was not one of those very exceptional cases where by-passing the Children's Court procedure could have been justified. It follows that the question of the best interests of Baby R in relation to adoption was not one to be considered by the High Court, nor at a later stage by the Supreme Court of Appeal, but a matter to be evaluated by the Children's Court. The question was not strictly one of the High Court's jurisdiction, but of how its jurisdiction should have been exercised.

[35] I now consider whether the majority in the Supreme Court of Appeal was right in holding that the principle of subsidiarity without more barred the granting of an adoption order in favour of the applicant.

The principle of subsidiarity

[36] A direct consequence of the decision in Fitzpatrick was that while foreigners were not barred from adopting South African children, no clear statutory regime existed to deal with the many specific problems inherent in inter-country adoption. Thus, although the Children's Court procedures were designed to ensure proper enquiries into the suitability of all potential adoptive parents, nationals and non-nationals alike, the only guidance as far as regulating inter-country adoption was concerned came from section 40 of the Child Care Act, which required that regard be had to achieving a religious and cultural match between the child and the adoptive parents. Because of the paucity of statutory guidance, it therefore fell largely to international law, and more specifically to the principle of subsidiarity, to fill the lacuna.

[37] The subsidiarity principle in relation to inter-country adoption was first articulated internationally in article 17 of the United Nations Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally. It reads:

"If a child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the country of origin, intercountry adoption may be considered as an alternative means of providing the child with a family."

[38] The issue which dominated the litigation in this matter was how to interpret and apply this principle to Baby R's situation. In Fitzpatrick Goldstone J pointed out that the principle required that inter-country adoption should be considered strictly as an alternative to the placement of a child with adoptive parents who reside in the child's country of birth. He emphasised that regardless of the fact that it was not expressly provided for in our law, the subsidiarity principle had to be respected. It was enshrined in article 21(b) of the United Nations Convention on the Rights of the Child (the CRC), which, according to section 39(1)(b) of the Constitution had to be considered when interpreting the Bill of Rights.

[39] It is important to note that in Fitzpatrick the question of subsidiarity was raised only in relation to remedy. In the present matter, however, it has been central. It is the mediating principle for adoption across political and cultural borders which, as Volkman has vividly put it, is seen as being simultaneously "an act of love, an excruciating rupture and a generous incorporation, an appropriation of valued resources and a constitution of personal ties." The application of the subsidiarity principle to this emotion-laden subject has fluctuated with changing attitudes towards inter-country adoption over the decades.

The history of inter-country adoption

[40] Inter-country adoptions were initially spurred on by the socio-economic and welfare decrepitude caused by World War II. Many countries were left with war orphans for whom they did not have the resources to provide alternative care within the country. Witnessing this tragedy, individuals from unaffected and lesser affected countries who wished to alleviate the plight of these children did so through adoption.

[41] However, from its origins as a sequel to international political turmoil, it mutated into a measure aimed at alleviating the plight of couples unable to conceive. Thus, already during the 1980s adoption was regarded internationally as serving the interests of prospective adoptive parents rather than those of the child in question, as it is better viewed today. Combined with the effects of contraception, legalised abortion, lowering birth rates and improved social welfare benefits for single mothers in developed countries, to which can be added the effects of armed conflict and natural disasters in the developing world, this adult-centred approach led to an increased interest in inter-country adoptions.

[42] Much of the initial humanitarian optimism over inter-country adoption was shed, however, as reports of child trafficking, "child markets" and "baby farms" spawned over the last four decades. As a result some of the so-called "sending States" either prohibited or strictly regulated such adoptions. Other countries which experienced exceptional exigencies placed moratoria on inter-country adoptions pending an overhaul of national legislation in order to align it with international standards, while yet other countries did nothing at all. The global result was a disarray of national policies in sending countries, described by Van Bueren as "a confusion which often operates against the best interests of the child."

[43] For many years the broad stance of developing countries was to discourage inter-country adoptions, regarding them as "exporting" their children to developed countries, as a blemish on a country's perceived ability to care for its citizens, and as exploitation of developing countries by developed ones. A major shift came about, however, as a result of the adoption and application of the Hague Convention. It is now largely accepted that most countries from both the receiving and sending sides of the world earnestly seek only to provide good alternative family care for ill-fated children. The standardisation and universalisation of criteria and controls has produced a situation where embracing the institution of inter-country adoption is increasingly less seen as a sign of weakness or the acceptance of "international charity", or even a dereliction of a social welfare duty resting on a State. The emphasis has shifted to acknowledging that onerous duties are imposed on a sending State to apply diligently its discretion on whether an inter-country adoption would serve the best interests of the particular child involved.

The Hague Convention

[44] The history of inter-country adoption made it clear that a specialist convention was needed to regulate such adoptions specifically. Propelled by the demand for inter-country adoptions which had been proceeding on a steady upward trajectory since the 1970s, the international community filled the hiatus by concluding the Hague Convention. Its inception on 1 May 1995 heralded a nascent global approach to inter-country adoption, acknowledging that—

"the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding . . . [and that] each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin . . . [and recognise] the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children".

[45] In line with this recognition the Convention addressed various objectives. Firstly, it sought to create legally binding standards in inter-country adoption. Secondly, it introduced a system of supervision that would ensure the observation of these legal standards, including prevention of adoptions that were not in the best interests of the child, and that would protect children from adoptions that occurred through duress, fraud or for monetary reward. Thirdly, it established communication channels between authorities in sending and receiving countries. Fourthly, it furthered co-operation between sending and receiving countries to promote confidence between those countries.

[46] What is clear is that the Convention seeks to regulate inter-country adoptions, not to facilitate them. It sets out detailed legal, administrative and procedural provisions to ensure that its objects are fulfilled.

[47] Rigorous procedural mechanisms are put in place to reduce possible abuse. In these circumstances the framers appear to have felt it would be permissible to reduce the relatively autonomous effect of the subsidiarity principle as expressed in the CRC and the African Charter on the Rights and Welfare of the Child (the African Charter), and bring it into closer alignment with the best interests of the child principle. Thus, using language notably less peremptory, article 4(b) of the Convention provides:

"An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an inter-country adoption is in the child's best interests". (Emphasis added.)

[48] The Convention seems to accept the notion that "[e]nsuring that a child grows up in a loving, permanent home is the ultimate form of care a country can bestow upon a child", even if that result is achieved through an inter-country adoption. It follows that children's need for a permanent home and family can in certain circumstances be greater than their need to remain in the country of their birth.

[49] However, the intricacies consequent upon an inter-country adoption must serve as confirmation that the principle of subsidiarity should be adhered to as a core factor governing inter-country adoptions. This is not to say that the principle of subsidiarity is the ultimate governing factor in inter-country adoptions. As Fitzpatrick emphasised, our Constitution requires us in all cases, including inter-country adoption, to ensure that the best interests of the child will be paramount. Indeed, the preamble to the Hague Convention suggests that there will be circumstances in which an inter-country adoption will be preferable for a child over institutional care in the country of birth.

[50] Determining the best interests of the child cannot be circumscribed by mechanical legal formulae or through rigid hierarchical rankings of care options. As was stated in M:

"A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned."

In practice this requires that a contextualised case-by-case enquiry be conducted by child protection practitioners and judicial officers versed in the principles involved in order to find the solution best adjusted to the child, taking into account his or her individual emotional wants, and the perils innate to each potential solution.

[51] On a pragmatic level, the successful application of the principle will depend heavily on the ability of placing agencies in the country of origin to investigate adequately the viability of local placement for the child in question. It is one of the basic premises of the Hague Convention that adoption is not a private affair but a State responsibility requiring the involvement of government agencies of both sending and receiving countries. Accordingly, collaboration between the government and child welfare agencies in the country of origin is conducive to success in inter-country adoptions. Conversely, flouting the established regulatory institutions is to be discouraged. The debate has accordingly shifted away from implacable abstract positions in favour or against inter-country adoption. It now focuses more on how best to put dependable institutions in place to ensure that:

· High priority is given to finding suitable local placement wherever possible;

· where, however, it would be in the best interests of a particular child to be adopted by non-nationals, a properly-regulated inter-country adoption will be permissible; and
· sending and receiving States co-operate through appropriate public machinery to prevent abuses and to ensure adequate follow-up when inter-country adoptions take place.

Inter-country adoption in South Africa

[52] Since Fitzpatrick the Department has made significant progress towards putting in place all the necessary structures for inter-country adoptions. It has sought simultaneously to ensure that the best interests of all children are safeguarded and that the State adheres to its various obligations in terms of international law.

[53] After South Africa's accession to the Hague Convention, Chapter 16 of the Children's Act was passed to give effect to the Convention. The Act has been signed by the President, but has not yet entered into force in its entirety. In the interregnum, the Child Care Act continues to govern both national and inter-country adoptions. In order to prepare the way for bringing the Children's Act fully into force, the Department has accordingly concluded working agreements with numerous countries and established an interim Central Authority. Since Central Authorities are essential to the operation of inter-country adoption under the Hague Convention regime, it is clear that the absence of a duly incorporated Central Authority in South Africa leaves a major gap. The embryonic interim Central Authority established by the Director-General does not have the legal or structural capacity to fill the void effectively, nor can the current working agreements established between South Africa and some other countries completely fill the lacuna.

The treatment of subsidiarity by the Supreme Court of Appeal

[54] It is against the above background that I now turn to answer the question raised by the assertion in the majority judgment in the Supreme Court of Appeal that the principle of subsidiarity acted as an additional insurmountable bar to the granting by the High Court of an order of sole custody and sole guardianship in favour of the applicants. In my view, the proposition was stated in terms that were too bald. Like other questions it was a matter to be decided in all the circumstances by the Children's Court.

[55] Child law is an area that abhors maximalist legal propositions that preclude or diminish the possibilities of looking at and evaluating the specific circumstances of the case. The starting-off point and overall guiding principle must always be that there are powerful considerations favouring adopted children growing up in the country and community of their birth. At the same time the subsidiarity principle itself must be seen as subsidiary to the paramountcy principle. This means that each child must be looked at as an individual, not as an abstraction. It also means that unduly rigid adherence to technical matters such as who bears the onus of proof, should play a relatively diminished role; the

courts are essentially guarding the best interests of a child, not simply settling a dispute between litigants. In this context a particularly important role will be given to the involvement of public mechanisms created by the law to deal with inter-country adoption.

[56] In light of the above, I accordingly hold that the Supreme Court of Appeal was basically correct in deciding that even at that late stage the matter should have been pursued in the Children's Court. Yet it should not simply have dismissed the appeal, leaving Baby R in a legal limbo. Rather, in taking account of the new situation created by her being much older, the Supreme Court of Appeal should pro-actively itself have made an order, similar to the one issued in this Court, referring the matter to the Children's Court for speedy resolution. This would have enabled the question of subsidiarity to be looked at not in an isolated way by the Supreme Court of Appeal, but by the Children's Court in the overall context of determining where the best interests of Baby R lay.

[57] Before concluding this judgment it is necessary to give the reasons which led this Court to make the agreement between the parties an order of court.

Reasons for making the agreement between the parties an order of court

[58] The fact that the applicants, the Department and the curatrix had reached accord on how the interests of Baby R should best be served, could not in itself be decisive as to whether the agreement should be made an order of court. To accede to the request of the protagonists would clearly have been in keeping with growing recognition worldwide "of 'settlement' as an approved, privileged objective of civil justice" and that "courts have come to present themselves not just as agencies offering judgment but also as sponsors of negotiated agreement". Yet, as Mokgoro J pointed out in the context of confirmation proceedings in this Court:

"An offer to settle the dispute made by one litigant to the other, even if accepted, cannot cure the ensuing legal uncertainty or dispose of the confirmation proceedings. Even if the applicants had accepted the offer it would have settled the dispute only between these litigants. The impact of the settlement would have been too limited and would not resolve the unconstitutionality of the impugned provisions and the impact that they have on the broader group of permanent residents who qualify in all other respects for social grants. An important purpose of confirmation proceedings is to ensure legal certainty. If parties were permitted to reach agreements that would remove this Court's power to hear confirmation proceedings in relation to an order of invalidity, that purpose would be defeated." (Reference omitted.)

And, as Owen Fiss observed more generally, the job of the courts "is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle."

[59] In this respect this Court had to bear in mind that inter-country adoption has a strong public as well as a private dimension. Both the sending and the receiving States have an obligation to establish appropriate regulatory machinery to minimise the possibilities of abuse. It is not simply the risk of trafficking in children for nefarious purposes, or developing a trade in babies, that needs to be guarded against. The dignity of the sending country can be affected if it appears that it is failing to find appropriate resources to look after its children. Courts need at all times to be sensitive to these matters. Thus, while giving due weight to the fact that the parties had come to an agreement, the Court had to ensure that its terms were neither against Baby R's best interests nor in broad terms likely to be incompatible with the country's international obligations.

[60] It would, of course, not have been appropriate for this Court itself to have attempted to pre-judge in any way whether the applicants would be suitable adoptive parents for Baby R. This was a matter pre-eminently to be left to the Children's Court. Yet a limited but important responsibility fell to the Court, namely, to ensure that it was in Baby R's best interests to facilitate an expedited hearing in the Children's Court, while satisfying itself that there was nothing on the face of the agreement which appeared to militate against her best interests.

[61] The report of the curatrix was particularly helpful in regard to establishing the ripeness of the matter for an expedited hearing. On the correct basis that it was Baby R's current circumstances that needed to be considered, and not her hypothetical position had the matter followed a different course, she pointed out that Baby R was now almost three years old and at a particularly significant stage in her emotional, cultural and ethical development, and her ability to adapt to change. A speedy resolution was imperative and a considerable body of reliable information had been gathered for use by the Children's Court.

[62] We were satisfied, then, that the terms of the agreement were calculated to serve Baby R's best interests. Safeguards would be in place. The Department had indicated that it had no objection to the adoption on the ground of subsidiarity or otherwise, and would facilitate the administrative process. Finally, the curatrix, whose diligence and sensitivity had been of great assistance to the Court — and for whose assistance the Court is grateful — would continue to act on behalf of Baby R in the Children's Court proceedings. In the result, it would not be the High Court, nor the Supreme Court of Appeal, nor the Constitutional Court, but the Children's Court that would have the last word.