



## CONSTITUTIONAL COURT OF SOUTH AFRICA

**AD and Another v DW and Others**

**Case CCT 48/07  
Medium Neutral Citation [2007] ZACC 27**

**Date of Judgment: 7 December 2007**

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### **MEDIA SUMMARY**

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

Today the Constitutional Court handed down judgment in a matter concerning an application for sole custody and sole guardianship by citizens of the United States of America, who wished to adopt a South African child, Baby R. They were advised that a policy by the Department of Social Development barred citizens of the United States from adopting children in South Africa, and were encouraged to apply to the High Court for an order granting them sole custody and sole guardianship. This order would enable them to take Baby R to Virginia where they could then formally adopt her.

The High Court and the Supreme Court of Appeal (by majority) held that the matter should have been dealt with by the Children's Court.

After the parties reached an agreement in this Court in terms of which adoption proceedings were to be conducted in the Children's Court, the only questions remaining were whether the High Court had jurisdiction to hear applications for sole custody and sole guardianship which were intended as a first step towards adopting a South African child abroad; and what the constitutionally correct application was of the subsidiarity principle, which 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.

Writing for a unanimous Court, Sachs J held that only in exceptional circumstances did the High Court have jurisdiction in such matters. Because rigorous procedural mechanisms had been put in place to reduce possible abuse, the relatively autonomous effect of the subsidiarity principle was lessened. However, this principle had to be adhered to as a core factor governing inter-country adoptions, and a contextualised case-by-case enquiry had to be conducted by child protection practitioners and judicial officers versed in the principles involved. Sachs J concluded that the focus of the subsidiarity principle was on ensuring that (a) a high priority was given to finding suitable local placement wherever possible; (b) 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 would be permissible; and (c) sending and receiving States had to co-operate through appropriate public machinery to prevent abuses and to ensure adequate follow-up when inter-country adoptions took place.