REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF JUSTICE

IN THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 13040/2013

REPORTABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

…….. ……..

In the matter between:

TURNER IAIN GRANT	**Applicant**
TURNER JUNE CARMELITA	**First Respondent**
LAMBAARD JOHAN	**Second Respondent**
THE REGISTRAR OF ADOPTIONS	**Third Respondent**

JUDGMENT

MOKGOATLHENG J

INTRODUCTION

[1] The applicant in terms of ***section 243(1)(c) of The Children's Act No 38 of 2005 ('The Act")*** seeks the rescission of the adoption orders granted in his favour in respect of the children Ethan and Indigo Turner at the Alberton Children's Court on 26 June 2007.

[2] The first and second respondents who as the biological parents of Ethan and Indigo consented to their adoption in terms of ***section 233(1)(a) of The Act*** are not opposing this application. The Registrar of Adoptions designated as such by the Director-General pursuant to ***section 247(1) of The Act*** who represents the interests of Ethan and Indigo as the adopted children opposes the relief sought by the applicant.

[3] Prior to the hearing of this matter, the court issued an order requesting the Family Advocate to interview the applicant, the first and second respondents and the adopted children Ethan and Indigo Turner. The Family Advocate was requested pursuant thereto, to compile a report incorporating the consequence, if any regarding the effect of rescinding the adoption orders, and to thereafter to make her findings and recommendations, taking into account the best interests of the children.

The Jurisdictional Issue

[4] The third respondent's opposition is premised on the ground that this application was instituted after the expiry of the prescription period of two years in contravention of ***section 243(2) of The Act*** which provides that:

"An application in terms of subsection (1) must be lodged within a reasonable time but not exceeding two years from the date of the adoption."

[5] The third respondent's counsel argued that because the adoption orders sought to be rescinded were granted on 26 June 2007, six (6) years prior to this application, the court was precluded from adjudicating this application because the peremptory provisions of ***section 243(2) of The Act*** do not expressly or by necessary implication provide for the condonation of the prescription period by judicial decree or any other legal mechanism.

[6] Counsel also argued that pursuant to ***section 243(2) of The Act*** this court does not have the competence to grant the relief sought *"because a court's inherent power to regulate its own processes is not unlimited and its inherent power pursuant to* ***section 173 of The Constitution*** *does not extend to the assumption of jurisdiction which it does not otherwise have and further that its inherent power does not extend to the assumption of jurisdiction not conferred upon it by statute",* and further the court cannot exercise its inherent jurisdiction in conflict with a statute. See ***National Union of Mine Workers of South Africa and Others v Fry's Metal (Pty) Ltd 2005 (5) SA 433 (SCA); Oosthuizen v Road Accident Fund 2011 (6) SA 311 (SCA) para 17***.

[7] Counsel further contended that it was impermissible for the court to grant the relief sought because by so doing the court would be usurping the role and power of the Legislature in contravention of the constitutional principle of the separation of powers.

[8] Counsel's final contention was that pursuant to ***section 243 (2) of The Act***, the rescission of an adoption order may only be granted if it is in the best interests of the child, further, that in addition it is a prerequisite that the applicant should also comply with the provisions of ***section 243 (3)(c) of The Act*** by alleging that at the time of making the adoption orders he did not qualify to be an adoptive parent as envisaged in terms of ***section 231 of The Act***. Because of the applicant's failure to do so, counsel's submission was that the applicant had failed to comply with the jurisdictional prerequisites antecedent to the rescission of the adoption orders, consequently, the application was susceptible to be dismissed. I demur.

[9] Generally a court's inherent jurisdiction cannot be exercised in conflict with a statute. In accordance to the dictates of the rule of law and the supremacy of the Constitution the source from which this court derives its inherent power is ***section 173 of The Constitution*** pursuant to which this court has the inherent power to regulate its own processes taking into account the interests of justice. In this particular case because it concerns the rescission of adoption orders, this court is enjoined to take into account the paramountcy of the best interests of the children in terms of ***section 28(2) of The Constitution*** which provides that: *"[a] child's best interests are of paramount importance in every matter concerning the child."*

[10] Pursuant to ***section 173 of The Constitution*** this court has the inherent power to regulate its own processes taking into account the interests of justice. In this particular case because it concerns the rescission of adoption orders, this court is also enjoined to take

into account the paramountcy of the best interests of the children in any matter concerning the children in terms of ***section 28(2) of The Constitution*** which provides that:

"[a} child's best interests are of paramount importance in every matter concerning the child."

[11] Further this court as the upper guardian of children is enjoined to intervene where there is an apparent conflict between the provisions of ***section 243(2) of The Act and section 28(1)*** read with ***section 28(2) of The Constitution.***

[12] ***Section 28(2)*** read with ***section 28(1) of The Constitution*** embrace and set out the legal framework pertaining to the children's rights that courts are obliged to enforce within reasonable limits. The spirit, ambit and purport of the Constitution which encapsulates the provisions of ***sections 28(1) and 28(2)*** enjoin the courts to interpreted provisions of these sections purposively in the furtherance of protecting and advancing the best interests of the children. In the new constitutional order the scope of the best interests of the children principle has been greatly enlarged. See ***Brandt v S [2005] 2 All SA 1 (SCA) at paras 15-6.***

[13] Justice Goldstone pointed out in ***Minister of Welfare and Population Development v Fitzpatrick and Others 2000 (3) SA422 (CC) at para 17*** that ***section 28(1)*** which provides a list of enforceable substantive rights… is not exhaustive of children's rights; because **"*section 28(2)*** *requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of* ***section 28(2)*** *cannot be limited to the rights enumerated in*

section 28(1) and 28(2). *These sections must be interpreted to extend beyond those provisions." It was with reference to this purposive interpretation that the Constitutional Court in* ***Sonderup v Tondelli 2001 (1) SA 1171 (CC) para 29F*** *referred to* ***section 28(2)*** *as… "an expansive guarantee" that a child's best interests will be paramount in every matter concerning that child."*

[14] Justice Albie Sachs in ***S v M (Centre For Child Law as Amicus Curiae) 2007 (2) SACR 539 (CC) para 25 D-F*** observed that "*the far-reaching phrase "in every matter concerning the child", …taken literally, it would cover virtually all laws and all forms of public action, since very few measures would not have a direct or indirect impact on children, and thereby which concern the children. Similarly, a vast range of private actions will have some consequences for children. This does not mean that the direct or indirect impact of a measure or action on children must in all cases oust or override all other considerations. If the paramountcy principle is spread too thin it risks being transformed from an effective instrument of child protection into an empty rhetorical phrase of weak application, thereby defeating rather than promoting the objective of* ***section 28(2).*** *The paramountcy principle must be applied in a meaningful way without unduly obliterating other valuable and constitutionally-protected interests.*

…This Court has held that ***section 28(2),*** *like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with* ***section 36 of The Constitution."***

[15] In ***S v M supra at para 15 D*** the Court cited with approval Prof J Sloth-Nielsen who wrote:

"[T]he inclusion of a general standard ("the best interest of a child) for the protection of children's rights in the Constitution can become a benchmark for review of all proceedings in which decisions are taken regarding children. Courts and administrative authorities are constitutionally bound to give consideration to the effect their decisions will have on children's lives."

[16] This court by exercising its inherent power to regulate its process which it derives from ***section 173 of The Constitution*** is complying with the constitutional imperative of the supremacy of the best interests of children in all matters concerning their welfare as decreed by ***sections 28(1) and 28(2) of The Constitution***.

[17] The court is further empowered by ***sections 7 of The Act*** to adjudicate this matter pursuant to the constitutional imperative of the principle of the children's best interests as decreed ***by section 2 of The Constitution*** despite the peremptory prescriptive injunction of ***section 243 (2) of the Act.*** Considered from this perspective it is trite that ***sections 2, 28(1) and 28(2) of The Constitution*** trump the prescriptive peremptory injunction of ***section 243 (2) of The Act.***

[18] Despite the fact that there appears to be an apparent inconsistency between the peremptory prescriptions of ***section 243(2) of The Act and sections 2, 28(1) and 28(2) of The Constitution*** which conjunctively read espouse the supremacy of the Constitution and the paramountcy of the best interests of the children, in my view there is no conflict between the provisions of

these respective sections which precludes this court from adjudicating this matter pursuant to the constitutional imperative of the paramountcy of the principle of the children's best interests because despite the peremptory prescription of ***section 243(2) of The Act*** the constitutional provisions must prevail because ***sections 2, 28(1) and 28(2) of The Constitution*** trump ***section 243 (2) of The Act***.

[19] Although ***section 243(3)(a) of The Act***, requires that in addition to the best interest principle, that the applicant should fall within the ambit of ***section 243(3)(c) of The Act***, this court is not precluded from adjudicating the granting of the adoption orders because neither the prescriptive provisions of ***section 243(2) of The Act*** nor the normative prerequisites of ***section 243(3)(c)*** can pre-empt the constitutional pre-eminent prerogative of the principle of the best interest of the children in adoption matters because the provisions of ***sections 243(2) and 243(3)(c) of The Act*** are superseded by and subservient to the provisions of ***sections 2, 28(1) and 28(2) of The Constitution.***

[20] Further in my view the paramountcy of the children's best interest rights are constitutionally justifiable in terms of ***section 36 of The Constitution.*** Consequently the best interests of the child principle overrides the applicant's non-compliance with the respective prescripts of ***sections 243(2) and 243(3)(c) of The Act.***

[21] Having regard to the preceding legal discourse, it can be cogently argued that in enacting ***section 243(2) of The Act,*** the Legislature was not prescribing that the two year prescriptive period within which to institute the rescission of adoption orders should override

the fundamental constitutional principle of the paramount supremacy of the principle of the best interests of the children. Considered from the aforegoing analysis ***section 243(2) of The Act*** is not inconsistent with the provisions of ***section 28(2)*** read with ***section 28(1) of The Constitution*** which provide an expansive guarantee regarding the supremacy of a child's best interest in every matter concerning the child, consequently, ***sections 2, 28(1) 28(2) of The Constitution*** must prevail over the applicant's non-compliance with ***sections 243(2) and 243(3)(c)*** respectively.

The Factual Matrix

[22] I now turn to the peculiar factual matrix which distinguishes this matter despite the apparent inordinate delay of over six years in launching this application. The first and second respondents who were formerly married divorced in 2005. The first respondent was awarded custody of Ethan and Indigo. The applicant and the first respondent married on 14 June 2006.

[23] The applicant adopted the Ethan and Indigo on 26 June 2007. The first and second respondents consented to the adoption but factually the motivation of the first respondent's consent was predicated on the fact that after her marriage to the applicant she wanted him to be a parental father figure to Ethan and Indigo.

[24] The applicant and the first respondent divorced on 23 October 2008. The first respondent was awarded the custody of Ethan and Indigo. The purported legality of the award of the custody of Ethan and Indigo to the first respondent in conflict with the adoption orders is an issue addressed later in this judgment.

[25] After the adoption of Ethan and Indigo, the second respondent continued having contact with Ethan who still regarded him as a father figure. As a consequence of such constant contact, the applicant and the second respondent concluded an oral agreement in terms whereof the second respondent would be responsible for the maintenance of Ethan. The second applicant did not exercise contact with Indigo because she had emotionally bonded with the applicant prior to the applicant's marriage to the first respondent Indigo regarded the applicant as a father figure.

[26] The first and second respondents often quarrelled about the latter's exercise of contact with Ethan and his erratic maintenance payments. The applicant was barred by the first respondent from expressing his opinion regarding this issue. The first respondent made all the decisions pertaining to the welfare of Ethan and Indigo and did not allow the applicant to exercise any meaningful parental rights, obligations and responsibilities as the adoptive parent of the children pursuant to ***section 242 (2)(a) of The Act***.

[27] The marital relationship between the applicant and the first respondent irretrievably broke down in March 2008. Around this time the first respondent told the applicant in no uncertain terms that he was not the biological father of her children, and could not exercise any parental rights, obligations and responsibilities over the children without her consent. Subsequent to these utterances the applicant's parent-child relationship with Ethan and Indigo deteriorated more especially that as a result of the first respondent's negative influence the children did not respect him as their adoptive father.

[28] When Ethan or Indigo behaved rudely towards and the applicant, and he tried to reprimand or discipline them, the first respondent sided with the children. The first respondent constantly undermined and humiliated the applicant in the presence of the children with the consequence that the applicant's and undermined parental authority over the children was emasculated.

[29] In June 2008 the first respondent and the applicant separated The first respondent left the common with Ethan and Indigo to live with her parents. Subsequent to the separation, the first respondent prevented the applicant from having contact with the children and cut him off completely out of their lives and from communicating with them without her consent.

[30] The first respondent informed the applicant that she no longer wanted the applicant to exercise parental authority over the children. She refused to allow the children to visit the applicant or to sleep at his house over weekends or during school holidays in breach of the purported divorce settlement agreement which purportedly entitled the applicant to have contact with the children.

[31] The first respondent informed the applicant that the biological father of her children was the second respondent, that the latter enjoyed precedence over the applicant regarding the children's social and educational lives. The applicant was no longer invited to the children's birthday parties and was excluded from their school and social activities.

[32] The applicant was not allowed to see the children over Christmas holidays because the first respondent had allegedly "*made other arrangements*" for them. The applicant was, however, allowed to

hand over the 2012 Christmas gifts he had purchased for the children. During the handing over of the gifts the children were unresponsive towards him.

[33] The applicant was belatedly informed of such activities but was never invited to participate in same although he was requested to contributed financially in respect of same. The first and second respondents enjoy the benefit of a parental relationship with the children but left the financial obligations in respect of the maintenance to the applicant.

[34] The applicant no longer had any parental rights in the upbringing and welfare of his adopted children because he was prevented from interacting the children by the first respondent. In an e-mail dated 9 October 2014 the first respondent requested the applicant's permission to change the surname of the children from Turner to Dixon (her maiden name), but still wanted him to remain as their legal guardian and to continue maintaining them.

[35] Physically Ethan and Indigo ceased to have any meaningful contact with the applicant after his separation from the first respondent in June 2008. The applicant does not want resuscitate any physical or emotional contact with Ethan and Indigo nor does he desire to resuscitate or revive the parent-child relationship between himself and them because of the intrusion by the first respondent in preventing the applicant form exercising his parental obligations and responsibilities as an adoptive parent of Ethan and Indigo.

[36] The situation has become intolerable and untenable to the applicant who believes it will be in the interests of the children that

the adoption orders be rescinded to enable the first and second respondents to assume their lawful role as the parents and legal guardians of the children as envisaged in section ***244(1) (b) of The Act***.

The Third Respondent's Case

[37] The third respondent contends that the application seems to be motivated by the applicant's unwillingness to continue paying maintenance in respect of both children, despite the fact that he still harbours love and affection for the children. The third respondent argues that although the applicant separated from the children in June 2008, he remained a father figure in their lives even after his divorce on 23 October 2008 and subsequent thereto until December 2012 when he ceased contact with them.

[38] The third respondent contends that applicant's difficulty in paying for the maintenance of someone else's children is understandable but that is a consequence the applicant should have been alive to when he adopted the children. It is impermissible for the applicant to sever his adoptive parental responsibilities in respect of the children purely because of financial considerations.

[39] Further the third respondent states that the setting aside of the adoption orders would not be in the best interest of the children because the children have physically and emotionally bonded with the applicant whom they regard as their father figure. The third respondent's counsel further pointed out that the court had a constitutional obligation to protect the children's best interests and emphasised the applicability of ***section 28(1)*** read with ***section 28(2) of The Constitution*** which provide amongst others that

every child has a right to family and parental care or appropriate alternative parental care when removed from the family environment.

[40] Fact of the matter is the adoption of Ethan and Indigo was in essence an abstract circumstantial fictional adoption predicated on the first applicant's need that Ethan and Indigo must have a father figure after her divorce from the second respondent. The adoption was also predicated on the emotional convenience to accommodate the applicant's emotional bond to Indigo because he regarded himself as her father as a result of having provided emotional and psychological support to the first respondent during her pregnancy with Indigo, and because he was present at her birth and was the first person to hold her. The bond between the applicant and Indigo was cemented during the applicant's pre-marital co-habitation with her biological mother. As a consequence of this emotional bond Indigo regarded the applicant as her father.

The Legal Framework

[41] In weighing up the children's best interests in adoption matters, the court is obliged to consider the effect the rescission of the adoption orders will have on the children, especially where such rescission would particularly be disruptive when a considerable period has elapsed since the granting of such adoption orders and where the children have formed a bond with their adoptive parent.

[42] The application of ***sections 28(2) and 28(1) of The Constitution and section 7(1) of The Act*** involve the weighing up of various competing interests and rights and at time the limitation of the child's best interest rights. The fact that the best interest of the

child are paramount does not imply that the child's best interest right is absolute. At times the best interests of the child as incongruous as this may sound, may limit a child's best interests (see ***Skelton "Constitutional Protection of Children's Rights" 282-283; Friedman, Pantazis and Skelton "Children's Rights" 47, 40-46; Sonderrup v Tondelli 2001 1 SA 1171 (CC); Harris v Minister of Education 2001 4 SA 1297(CC).***

[43] In ***S v M (supra)*** Justice Sachs observed that: "**Section 28(2)** *read with* ***section 28(1)*** *establishes a set of children's rights that courts are obliged to enforce. The question is not whether* ***section 28*** *creates enforceable legal rules, which it clearly does, but what reasonable limits can be imposed on their application. The ambit of the provisions is undoubtedly wide. The comprehensive and emphatic language of* ***section 28*** *indicates that the provisions must be interpreted in a manner which favours protecting and advancing the interests of children. Further the courts must function in a manner which at all times shows due respect for children's rights."*

[44] ***Section 28(1)*** read with the best interest principle in ***section 28(2)*** requires the court to make the best possible effort to avoid where possible any breakdown of family or parental care that may place the children's best interests at risk. ***Section 28(1)(b) of The Constitution*** guarantees a child's rights to adoptive care by providing for the child's right to alternative care when removed from the family environmental.

[45] ***Section 7(1) of The Children's Act 38 of 2005*** sets out a lengthy list of factors for courts to consider when determining a child's best

interests under ***The Act and The Constitution***. Such factors include, but are not limited to, the nature of the personal relationship between the child and the parents; the child's physical and emotional security; the need for a child to be brought up within a stable family; and the relevant characteristics of the child.

[46] In considering the best interests of the child, the court in ***Fraser v Naude and Others 1999 (1) SA (CC)*** and also in ***AS v Vorster NO and Others supra at 117F-118A*** not only referred to the provisions of the *Child Care Act* but also invoked the provisions of ***section 28(2) of The Constitution and sections 6(2), 7 and 9 of The Children's Act.*** In the context of determining whether the setting aside of the adoption order was in the best interest of the child the Court specifically referred to the factors listed in ***section 7(1) of The Act.***

[47] In ***Belo v Commissioner of Child Welfare, Johannesburg and Others: Belo v Chapelle and Another (supra)*** The biological father of a child who was adopted by his stepfather failed to convince the court 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 concluded that the delay of seven years in noting the appeal was so inordinately long that it would not be in the best interest of the child to interfere with the adoption order. The facts in the present matter are distinguishable from the ***Belo case (supra)***.

The *De Jure* Adoption Fiction

[48] In the present matter the circumstances predicating the application for the rescission of the adoption orders are extraordinarily peculiar

and exceptional. The adoption of Ethan and Indigo was forged on an unsound legal and moral foundation as this analysis of the dichotomy of the purported lawful adoption indicates.

[49] In the adjudication of this matter it is crucial to establish whether one is confronted with a legal fiction regarding:

(i) the legality of the efficacy of the *de jure* adoption orders granted in respect of Ethan and Indigo;

(ii) the *de facto* non-recognition by the first respondent of the legal consequences of the effect of consenting to an adoption pursuant to ***section 233 (1)(a) of the Act;***

(iii) the legal effect of an adoption order pursuant to which ***section 242(1)(a)*** terminates the first and second respondents parental responsibilities; and

(iv) rights to the children and ***section 242(2)(a)*** which confers full parental responsibilities and rights in respect of the children to the applicant in order to establish whether in law objectively speaking there was a *bona fide* adoption of Ethan and Indigo predicated on ***section 239(1)(a) of The Act.***

[50] It is crucial to factually accept the objective reality that one is confronted with a legal fiction regarding the legal efficacy of the *de jure* adoption of Ethan and Indigo, because the *de facto* the objective reality is that the first respondent did not recognise or accept the legal effect and consequences of the adoption of her children that in law after such adoption she no longer had any

parental rights and responsibility pertaining to the lives of Ethan and Indigo pursuant to ***section 242(2) of The Act***.

[51] It must be borne in mind that we are dealing here with the adoption of children, who although their biological parents consented to their adoption by the applicant pursuant to ***section 233 of The Act,*** there was never an absolute classical clean break and severance of nucleus of the family unit between the adopted children and their biological parents.

[52] The biological mother of Ethan and Indigo after marrying the applicant who subsequently adopted Ethan and Indigo always resided with the adopted children. Firstly as a consequence of the exigency of her marriage to the applicant, but secondly even after her separation and divorce from the applicant, the first respondent still continued residing with Ethan and Indigo up to the present time.

[53] Objectively speaking although *de jure* the applicant adopted Ethan and Indigo on 26 June 2007, *de facto* this purported adoption was a legal fiction because the first respondent although she had consented to the adoption of Ethan and Indigo by applicant, *de facto* she never relinquished her parental rights, obligations and responsibilities and "*the legal guardianship*" as the biological mother of Ethan and Indigo.

[54] *De jure* although the second respondent consented to the adoption of Ethan and Indigo by the applicant *de facto* he never relinquished his parental rights, obligations and responsibilities to Ethan as decreed by ***section 242(2)(a) of The Act***. After his divorce from the first respondent in July 2005 the second respondent has

always had contact with Ethan, but critically Ethan still regarded the second respondent as his real father to the detriment and exclusion of the applicant despite the act that the full rights and responsibilities in respect of Ethan were conferred on the applicant upon the adoption of Ethan.

[55] The adoption of Ethan and Indigo was not predicated on any of the statutory legal requirements prescribed by ***section 230(3) of The Act*** in respect of the adoption of children. Further prior to the adoption, the first and second respondents did not abuse or neglect their children. Further financial status of the first and second respondent's prior to the adoption of Ethan and Indigo did not fall within the provision of ***section 230 of The Act*** in order to render their biological children Ethan and Indigo as lawful candidates for adoption.

[56] The adoption of Ethan and Indigo was not predicated on the statutory prescripts of ***section 231 of The Act*** but was engineered by the first respondent with the connivance of the second respondent and the compliance of the applicant because the first respondent after marrying the applicant, wanted a father figure for Ethan and Indigo and as result she persuaded the applicant to adopt the children. Prior to the adoption of Ethan and Indigo the first and second respondents were not financially destitute nor mentally or physically incapable of looking after Ethan and Indigo.

[57] The gravamen of the matter is that after the divorce of the applicant and the first respondent, the family unit consisting of the applicant, the first respondent, Ethan and Indigo effectively ceased in June 2008 when consortium between the applicant and the first

respondent ceased. But more pertinently after separating and thereafter being divorced from the applicant. The first respondent created a new family unit consisting of herself, Ethan and Indigo.

[58] It is patent that the applicant and the first respondent in respect of their divorce they fraudulently represented that Ethan and Indigo were born of their marriage, although both knew the applicant had adopted both Ethan and Indigo. One would have expected that because Ethan and Indigo were not born of the marriage between the applicant and the first respondent and because Ethan and Indigo were adopted by the applicant with the consent of the first and second respondents in terms of ***section 233 of The Act,*** the decree of divorce incorporating the settlement agreement would not to have declared that custody of Ethan and Indigo awarded to the first respondent, because the adoption of Ethan and Indigo by the applicant had divested the first respondent of any rights and responsibilities and legal guardianship in respect of the children.

[59] It is patent that the applicant and the first respondent committed a fraud on the Central Divorce Court by not appraising the court of the fact that Ethan and Indigo were not children born of their marriage. At the time of the divorce the first respondent was only the biological mother of Ethan and Indigo, but was no longer their legal guardian because after their adoption by the applicant pursuant to ***section 242(2)(a)*** the full parental responsibilities and rights in respect of the children were conferred upon the applicant. Further the parental responsibilities and rights and claims to contact by the first and second respondent to the adopted children were terminated upon adoption pursuant to ***section 242(1)(a)(b) and (c) of The Act***.

[60] Consequently, the legality of the divorce decree settlement agreement awarding the custody of Ethan and Indigo to the first respondent is legally untenable, in fact such custody award is a nullity as the existence of the adoption orders in respect of Ethan and Indigo were legally still extant, valid and binding until rescinded.

Family Advocate's Report

[61] The Family Advocate states that the purpose of the interview was explained to the children and the impact the rescission of the adoption orders would have on them. The children appeared to be confident well-adjusted and did not appear to be intimidated by the interview process. The children are progressing well at school. Present at such meeting were the first and second respondents, the two children, the Family Advocate, the Family Counsellor and a Social Worker. The first and second respondents' indicated that they had no objection to the setting aside of the adoption orders.

[62] The Family Advocate and Family Counsellor's findings are that the rescission of the adoption orders will not have any permanent deleterious psychological and emotional effect on Ethan and Indigo and hold that in actual fact the rescission of the adoption orders will merely give legal effect to the *de facto* situation which has existed since June 2008 when the applicant and the first respondent separated.

The Family Advocate Findings

[63] The applicant no longer exercises his parental rights, responsibilities and obligations except for the financial contribution he makes towards the children's maintenance. The children's

perception of the applicant is not that of a father figure but it is influenced by the material gains they derive from the applicant's continued financial involvement in their lives should the adoption orders be rescinded. The children need a father figure to provide emotional and psychological support in their lives. The applicant has decided not be a part of the children's lives any more.

[64] The relationship between the children and the applicant has irretrievably broken down. The applicant and the children no longer enjoy a meaningful parent-child relationship. The erratic contact the applicant experienced with the children between July 2008 and December 2012 is not sufficient to have formed a permanent emotional and psychological bond of attachment between him and the children.

[65] The objective situation is that the applicant as the adoptive father is in fact rejecting his adopted children who have since birth never being separated in the sense of a clean break as a family unit from their biological parents. It is unconscionable to impose the applicant on the adopted children when he is prevented by the biological mother who has permanently resided with the children prior to their divorce and subsequent thereto purportedly because she was awarded custody of the children.

[66] According to the Social Worker there is the probability of rejection if the applicant is forced to carry on interacting with the children. The children's biological father is enjoying a normal child-parent relationship with both children. There is no possibility under these circumstances of the restoration of parent-child emotional and

psychological trust required between the applicant, Ethan and Indigo.

[67] The applicant has stated in no uncertain terms that he is not interested in rebuilding the bond between him and the children neither does he intend continuing a his parent-child relationship with the children. The children's psychological circumstances and their physical and emotional security will not necessarily change in light of the fact that the applicant has not been a vital part of their lives since June 2008. The first respondent is a teacher and the second respondent is an electrician and both biological parents possess the financial capacity to adequately maintain and educate the children.

[68] The Family Advocate, the Family Counsellor and the Social Worker share the view that the adoption orders should be rescinded and in reaching this conclusion they were aware that the rescission application was launched outside the two years statutory period prescribed by ***section 243 (2) of The Act***, but despite that they considered that it was in the best interests of the children that the adoption orders should be set aside, because of the overriding basis that the parental rights, obligations and responsibilities which the biological parents exercised in respect of their children be lawfully restored to them.

[69] The Family Advocate, Family Counsellor and Social Worker's evaluation is that there is nothing good the children will benefit from any form of interaction or contact with the applicant. The formality of setting aside the adoption orders will afford the first and second respondents and the children an opportunity to

strengthen their already existing parent-child relationship, because the first respondent has *de facto* always had the custody of the children whilst regarding the second respondent his legal guardianship over the children will be restored, further the de facto family unit existing between the children and their biological parents will be lawfully formalised.

[70] The Family Counsellor also considered the situation extensively and her evaluation is that "*there is nothing good the minor children will benefit from any form of interaction and or contact with the applicant. "The formality of setting aside the adoption orders will give both the second respondent and the minor children an opportunity to strengthen their already existing relationship,* because the first respondent has always had the custody of the minor children with her, and the second respondent, their biological father is now being reunited with the minor children, in circumstances where he already had contact and access rights, parental duties and obligations, and the *de facto* family unit existing between the children and their biological parents will be lawfully formalised.

The Order

[71]

[a] the adoption orders of the minor children Ethan and Indigo Turner made on the 26 June 2007 in regard to both minor children respectively in favour of the applicant by the Children's Court under Case Number 14/1/2-19/06 Registrar's reference Number 52/4-12/12/6/2 Adoption Register Number 48729/07 and 48730/07 date of registration

10 July 2007 are hereby rescinded and set aside with effect from the 23 April 2015;

[b] *paragraphs 1.2, 1.3.1.1, 1.3.2, 2.1, 3.1 and 3.2 of the Memorandum Agreement* made and order of the Central Divorce Court under Case Number 10199/08 pursuant to the decree of divorce granted on 23 October 2008 are hereby rescinded and set aside;

[c] the third respondent is ordered to endorse the records of the Adoption Register regarding the rescission and setting aside of the minor children's adoption orders; and

[d] there is no order as to costs.

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MOKGOATLHENG J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG, LOCAL DIVISION, JOHANNESBURG

APPEARANCES:

COUNSEL FOR THE APPLICANT: K FOULKES-JONES SC

INSTRUCTED BY: BEDER-FRIEDLAND INC

COUNSEL FOR THE THIRD RESPONDENT: N CASSIM SC

ASSITED BY MANAKA

INSTRUCTED BY: STATE ATTORNEY-JOHANNESBURG

DATE OFHEARING:

DATE OF DELIVERY OF THE JUDGMENT: 19 JUNE 2015