REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2184/18

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

DATE **SIGNATURE OF JUDGE**

In the matter between:

N, S First Applicant

N, J Second Applicant

M, M Third Applicant

and

PRESIDING OFFICER OF THE CHILDREN'S COURT

JOHANNESBURG Respondent

Summary *– urgent application – review and setting aside decision of the presiding officer of the children's court decision that the children's court has no jurisdiction to hear this matter as minor child is Zimbabwean national. Decision set aside – s44 of Children's Act 38 of 2005 would have jurisdiction in matter if child concerned is ordinarily resident within its jurisdiction – this would include a child who is a foreign national residing within its jurisdiction – irrelevant for purposes of establishing jurisdiction of children's court whether child is legally or illegally in the country.*

JUDGMENT

KATHREE – SETILOANE, J

[1] This is an urgent application to review and set aside the decision of the Presiding Officer of the Children's Court: Johannesburg (per F Ismail) declining to entertain an adoption application on the basis that the Children's Court has no jurisdiction to do so, because the minor child is a Zimbabwean national.

[2] The first and second applicants are married to each other. The first applicant wishes to adopt the third applicant, who is the biological son of the second applicant. The third applicant's sister was born on 20 March 1997. She is 20 years old. The third applicant was born on 8 March 2000. He is 17 years old. The applicants reside as a family at […] V. Street, Albertsville, Randburg.

[3] In 1999, the third applicant's biological father abandoned the second applicant who was several months pregnant with the third applicant. Since their birth, the children have had no contact with their biological father who has since passed on.

[4] In 2001 the second applicant and her father came to South Africa to seek a better life. Uncertain as to what South Africa might hold for her children, she left them in the care of her mother in Zimbabwe. She, nevertheless, made frequent trips to Zimbabwe to visit the children.

[5] In 2005, the first and second applicants met through mutual friends. They fell in love and later that year the first applicant asked the second applicant to live with him at his home. Their relationship was a strong and blissful one. They discussed marriage and bringing the children to South Africa to live with them.

[6] In January 2008, the second applicant brought the children to South Africa to live with them. The children were enrolled at Greenside Primary School where they completed their primary education.

[7] The first applicant began to develop a very close bond with both children and their relationship organically morphed, over time, from the second applicant's partner to the children's parent.

[8] In 2009, the first applicant proposed marriage to the second applicant and they married on 11 July 2009. In early 2012, they began discussing the possibility of the first applicant adopting the two children. Since the first applicant fulfilled the role of a father to both children, he felt that by adopting them they would be reassured of his commitment to them. The first and second applicants discussed adoption with the children and they consented. The first and second applicants subsequently put the adoption process into motion.

[9] On approaching a social worker later that year, she advised them that the adoption would cost them in the region of R10 000,00. But between paying school fees, living expenses and miscellaneous expenses, the first and second applicants simply could not afford it. On the advice of the social worker they ultimately made a down payment in 2015 and began saving up for the balance. Unfortunately, by this

stage, the second applicant's daughter had already turned 18 and was no longer eligible to be adopted by the first applicant.

[10] Despite this setback, the first applicant decided to proceed with the third applicant's adoption. Having no biological children of his own, the first applicant felt it necessary to formalise his relationship with the third applicant, who had over the years become incredibly close to him; looked to him as a father and called him "Dad".

[11] The third applicant is a Zimbabwean national and is in South Africa on a visitor's visa. His visa, however, expired in 4 March 2017. The first and second applicants are afraid that the day may come when the third applicant is refused a visitor's visa and deported to Zimbabwe where he has no family and no home as his grandparents have also relocated permanently to South Africa.

[12] In order to avoid the trauma of a separation, the first and second applicants started the adoption process. They obtained the necessary approvals from the relevant government departments in South Africa. They also obtained the official documentation from the Zimbabwean Consulate. They submitted themselves to police clearance checks, and medical tests. They then made application, on 11 February 2017, to the Children's Court for the third applicant's adoption. The adoption is recommended by the Department of Social Development and Dr Marie Kruger, a social worker, in terms of section 239 (1)(d) and 240 of the Children's Act 38 of 2005, respectively.

[13] The application for his adoption was enrolled for hearing in the Children's Court for 17 October 2017. On that day, the Presiding Officer removed the matter from the roll on the basis that the Children's Court had no jurisdiction to hear the adoption application because the:

'MINOR CHILD IS A ZIMBABWEAN CITIZEN. CURRENTLY HE IS ON A VISITOR'S VISA IN THE COUNTRY. THEREFORE COURT HAS NO JURISDICTION TO HEAR THIS

MATTER OF A FOREIGN CHILD – VISA OF CHILD SEEMS TO HAVE FURTHER EXPIRED ON 04/03/2017…'

[14] On 22 November 2017, the Centre for Child Law, which represented the applicants in this application sought reasons from the Presiding Officer for her decision. She furnished reasons on 8 January 2017. They read as follows:

'1. …

2. The minor child in question is a Zimbabwean citizen. According to the passport copy and the birth certificate provided, the minor child was born on 8 March 2000.

3. The foreign minor child entered the country on the 11th of February 2017 on a port of entry visa which was valid until 4th March 2017. Such visa expired on the 4th March 2017 and the minor child's status is that of illegal since the 5th March 2017.

4. In terms of the Immigration Act 13 of 2002 (as amended) the following definitions appear as follows:
"foreigner" – An individual who is not a citizen; and
"*illegal foreigner" – Foreigner in the Republic in contravention of the Act.*

5. Furthermore, in terms of Section 44 of the Children's Act 38 of 2005 (as amended) it states:
"*The Children's Court that has jurisdiction in a particular matter is*
(a) *The court of the area in which the child involved in the matter was ordinarily resident."*
The child in question according to the papers filed cannot be ordinarily resident in the Republic of South Africa as his visa expired.
...

6. Should the applicant be treated as an inter-country adoption then the following in terms of Section 264 of the Children's Act 38 of 2005 (as amended) will apply:
Section 264 – **ADOPTION OF CHILD FROM CONVENTION COUNTRY BY PERSON IN THE REPUBLIC**

(1) *A person habitually resident in the Republic who wishes to adopt a child habitually resident in a convention country must apply to the Central Authority:*

(2) *If the Central Authority is satisfied that the Applicant is fit and proper to adopt, it shall prepare a report on that person in accordance with the requirements of the Hague Convention and Inter- Country Adoption and any prescribed requirements and transmit the report to the central authority of the convention country concerned.*

(3) If an adoptable child is available for adoption, the central authority of the convention country concerned shall prepare a report on the child in accordance with the requirements of the Hague Convention on Inter-Country Adoption and transmit it to the Central Authority.

(4) *If the Central Authority and the central authority of the convention country concerned both agree to the adoption, the central authority in that country will refer the application for adoption for the necessary consent in that country.*

In light of the above, particular cognisance must be given to Section 264(4) in respect of the applicant before court.

7. Chapter 2, Subsection 6(2)(a) relating to General Principles of the Children's Act specifically states that:

"*All proceedings, actions or decisions in a matter concerning a child must-*

(a) *Respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interest of the child standard set out in Section 7 and the rights and principles set out in this Act,* ***subject to any lawful limitations (emphasis)***.

8. …

9. The Court is therefore of the view that it has no jurisdiction and/or locus standi to hear the matter and the matter was thus removed from the roll.'

[15] As correctly contended on behalf of the applicants, the decision of the Presiding Officer is materially flawed and constitutes a grave misdirection as the Children's Act does not exclude foreign nationals (whether legally of illegally in the country) from its ambit. Nor does it exclude them from the jurisdiction of the Children's Court.

[16] Section 44 of the Children's Act entitled "Geographic area of jurisdiction of the Children's Court" provides:

'(1) The children's court that has jurisdiction in a particular matter is –

(a) The court of the area in which the child involved in the matter is ordinarily resident; or
(b) If more than one child is involved in the matter, the court of the area in which any of those children is ordinarily resident.

(2) Where it is unclear which court has jurisdiction in a particular matter, the children's court before which the child is brought has jurisdiction in the matter.'

[17] The Children's Court would have jurisdiction in a matter if the child concerned is "ordinarily resident" within its jurisdiction. The provisions of section 44 of the Children's Act relate solely to the territorial jurisdiction of the Children's Court. Section 44 of the Children's Act should not be construed to exclude the legal jurisdiction of the Children's Court to entertain a matter concerning a child who is a foreign national.

[18] The determination of whether a child is ordinarily resident in the area of the Children's Court is a factual question. The word "resides" has been interpreted by our courts in the context of establishing jurisdiction under the Children's Act of 1937 and 1960 respectively, to mean "the place where the child eats, drinks, or sleeps or where his family eats, sleeps and drinks".[1]

[19] The words "resides" or "resident" connotes something broader than "ordinarily resident",[2] which on a proper construction would mean "something more

[1] *Philips v Commissioner of Child Welfare, Bellville* 1956 (2) SA 330(C) at 334. *Gold v Commissioner of Child Welfare, Durban, and Another* 1978 (2) NPD 305 A.
[2] *CIR v Kuttel* 1992 (3) SA 242 (A) at 247.

prolonged than a mere temporary stay"[3]. It need not, however, be permanent. In the context of tax law, our courts have interpreted "ordinarily resident" to be a person's "home or one of his homes",[4] and "the country to which he would naturally as a matter of course return from his wanderings".[5]

[20] Properly construed, the words "ordinarily resident" in section 44 of the Children's Act connotes, in more contemporary terms, the place or area where the child resides or his/her family resides. In the event of uncertainty in relation to where the child concerned is ordinarily residing, then section 44(2) Children's Act confers jurisdiction on the court before which the child is brought.

[21] There is no requirement in section 44 of the Children's Act that the child must be a South African citizen or a permanent resident. A child's immigration status is, therefore, irrelevant to the question of whether the Children's Court has jurisdiction in a particular matter.

[22] Lawrence Schäfer in his commentary on section 44 of the Children's Act writes:[6]

> 'A broad reading of the children's court's jurisdiction is necessary to give effect to South Africa's obligation as a State Party to the International Covenant on Civil and Political Rights (1966) and Convention on the Rights of the Child (1989). Article 2(1) of the Covenant requires a State Party to 'respect and to ensure to all individuals within its territory and subject to its jurisdiction' the rights protected by the Covenant. Article 2 of the 1989 Convention is almost identical: State Parties must 'respect and ensure the rights set forth in the present Convention to each child within their jurisdiction'. The latter article was interpreted by the Belgian Court of Appeals as requiring the extension of Belgium's child protection jurisdiction even to the 'troubled' child of a diplomat, notwithstanding the immunity that she otherwise enjoyed under the Vienna Convention on Diplomatic Relations (1961). Although controversial, this

[3] *Philips* at 334G-H
[4] *Robinson v Commissioner of Taxes* 1917 TPD 542-548.
[5] *Cohen v CIR* 1946 AD 174 at 185H.
[6] *Child Law in South Africa: Domestic and International Perspectives* (2011) p 220.

> decision should be commended to South African courts on account of the priority – comparable to that enjoined in South African law by section 28(2) of the Bill of Rights – it gives to the protection of children's rights and best interests'

[23] Thus for purposes of establishing the jurisdiction of the Children's Court, it is irrelevant whether the child is legally or illegally in the country. Any contrary interpretation of the words "ordinarily resident" in section 44 of the Children's Act would mean that foreign children who are in the country illegally (regardless of their situation and vulnerability) would be excluded from the protection of the Children's Act. Such a construction of the words "ordinarily resident" would constitute a violation of their rights to access to court, and their rights to have their best interests considered of paramount importance.

[24] The third applicant is ordinarily resident in South Africa and within the jurisdiction of the Children's Court: Johannesburg - and has been so for an interrupted period of at least 10 years. He has not returned to Zimbabwe and nor could he, as his extended family have permanently relocated to South Africa. He has grown up a South African and has completed his primary and secondary education in South Africa. According to the first and second applicants, the only life that the third applicant has known is in South Africa. His friends and family reside here. He ordinarily resides in Johannesburg and has no intention of leaving.

[25] The Presiding Officer in the Children's Court seems to suggest that the adoption of the third applicant must be treated as an inter-country adoption under section 264 of the Children's Act. She is mistaken for the reasons set out below.

[26] Chapter 16 of the Children's Act deals with inter-country adoptions. There are four different contexts for inter-country adoptions. These are:

(a) The adoption of a child habitually resident in South Africa by adopters who are habitually resident in another Contracting State[7];

[7] Section 261 of the Children's Act

(b) The adoption of a child from a non-convention country by persons in the country[8];
(c) The adoption of a child from in the Republic by persons in non-convention country[9];
(d) The adoption of a child habitually resident in a foreign contracting State by habitual residents of South Africa[10].

[27] Section 264 of the Children's Act deals specifically with the adoption of a child from a Convention country by a person in the Republic. Section 264(1) provides that a person habitually resident in the Republic who wishes to adopt a child habitually resident in a Convention country must apply to the Central Authority of South Africa.[11]

[28] Section 264 of the Children's Act has no application to the adoption of the third applicant because he is not habitually resident in a Contracting State. The adoption of the third applicant is, accordingly, not an adoption form a Convention country by a person in the Republic but rather a local adoption to be concluded in terms of Chapter 15 of the Children's Act and not Chapter 16 as it is a local adoption and not an inter-country adoption, primarily because the third applicant is habitually or ordinarily resident in the Republic and so are the first and second applicants. His immigration status is immaterial to the application.

[29] Accordingly, I find that the Presiding Officer misdirected herself on a matter of law. Her decision accordingly falls to be set aside.

[30] I found this matter to be urgent because the third applicant will turn 18 on 8 March 2018. Had this Court not dealt with the applicants' review application as one of urgency, then the third applicant would have been denied the prospects of ever

[8] Section 265 of the Children's Act
[9] Section 262 of the Children's Act
[10] Section 264 of the Children's Act
[11] In terms of section 257(1) of the Children's Act "Central Authority" in relation to South Africa means the Director-General.

being adopted by the first applicant before his 18th birthday, and could therefore not have been afforded substantial redress in due course. The prevailing urgency in this application justifies an expedited hearing of the adoption application in the Children's Court.

[31] The Presiding Officer opposed the application on inter alia the basis that the third applicant is a foreign national who is in the country illegally, hence the Children's Court has no jurisdiction. As indicated, the immigration status of the third application is irrelevant to the question of whether the Children's Court has jurisdiction to consider his adoption application. Accordingly, the award of costs must follow the result.

[32] In the result, I make the following order:

1. The decision of the respondent to remove the adoption application from the roll is reviewed and set aside.

2. It is declared that the third applicant's immigration status is irrelevant for purposes of determining whether the Children's Court, Johannesburg, has jurisdiction in terms of section 44 of the Children's Act 38 of 2005.

3. It is declared that the third applicant is ordinarily resident within the jurisdiction of the Children's Court, Johannesburg.

4. It is declared that the first applicant's application to adopt the third applicant ("the adoption application") is a local adoption and must be determined in terms of chapter 15 of the Children's Act.

5. The Children's Court, for the district of Johannesburg, is directed to conclude the adoption application on or before 26 February 2018.

6. The applicants are granted leave to apply on the same papers, duly supplemented, for any order necessary to ensure that the adoption application is concluded timeously and without undue delay.

7. The respondent is ordered to pay the costs of this application.

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F KATHREE-SETILOANE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Council for the Applicants: Adv Courtney

Instructed by: Centre of Child Law

Council for the Respondents: Adv Nharmuravate

Instructed by: State Attorneys

Date of hearing: 31 January 2018

Date of Judgment: 6 February 2018