

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

17/6/2021
DATE

[Signature]
SIGNATURE

Case Number: 30205/2019

In the application of:

KHD

First Applicant

DTD

Second Applicant

and

HEAD OF DEPARTMENT OF SOCIAL DEVELOPMENT,
GAUTENG

First Respondent

MEMBER OF THE EXECUTIVE COUNSEL FOR
SOCIAL DEVELOPMENT, GAUTENG

Second Respondent

MINISTER OF SOCIAL DEVELOPMENT

Third Respondent

and

Case Number: 55642/2019

In the application of:

MPS	First Applicant
LPK	Second Applicant
and	
HEAD OF DEPARTMENT OF SOCIAL DEVELOPMENT GAUTENG	First Respondent
MEMBER OF THE EXECUTIVE COUNSEL FOR SOCIAL DEVELOPMENT, GAUTENG	Second Applicant
MINISTER OF SOCIAL DEVELOPMENT	Third Respondent

Delivered. This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 10h00 on 17 June 2021.

JUDGMENT

RANCHOD J

Introduction

[1] The issues and the relief sought in these two matters are identical. They were therefore heard together by direction of the Acting Deputy Judge President. The respondents in both matters are the same. The applicants in the two matters are the prospective adoptive parents of the minor children 'J' and 'L' respectively.

[2] Both matters relate to the proper interpretation of section 239(1)(d)¹ of the Children's Act 38 of 2005 (the Children's Act) to recommend an adoption. The applicants are of the view that such a letter (recommending an adoption) is not a peremptory requirement and should be interpreted to include a letter not recommending an appointment. They accordingly seek, *inter alia*, a declaratory order from this court to the effect that:

- 2.1 the letter contemplated in s239(1)(d) of the Children's Act includes a letter not recommending the adoption (a letter of non-recommendation); and
- 2.2 the letter, whether it recommends, does not recommend, or is even absent, does not oust the jurisdiction of the Children's Court to consider, adjudicate and pronounce on an adoption application.

[3] The respondents initially opposed both the applications but, by the time of the hearing, they first abandoned their opposition in the KHD matter and later, in MPS as well. The applicants were therefore free to seek the declaratory orders on an unopposed basis. However, counsel for the applicants, Mr Courtenay,

¹ 239 Application for adoption order

- (1) An application for the adoption of a child must-
 - (a) be made to a Children's Court in the prescribed manner;
 - (b) be accompanied by a report, in the prescribed format, by an adoption social worker containing-
 - (i) information on whether the child is adoptable as contemplated in section 230(3);
 - (ii) information on whether the adoption is in the best interests of the child; and
 - (iii) prescribed medical information in relation to the child.
 - (c) be accompanied by an assessment referred to in section 231(2)(d);
 - (d) be accompanied by a letter by the provincial head of social development recommending the adoption of the child; and
 - (e) contain such prescribed particulars. (My underlining.)

informed me that the parties wished to make brief oral submissions (the respondents did not file heads of argument while the applicants did) and that it would be preferable that a detailed written judgment be handed down. The reason is that several Children's Courts in different magisterial districts have interpreted the provisions of s239(1) differently and a judgment of a High Court would provide clarity to (and be binding on) the Children's Courts. I deemed it important to hear oral submissions (even though the matter was unopposed) and ruled accordingly.

[4] I should mention at this juncture that when the KHD matter initially came before Tuchten J, the learned judge requested the presiding magistrate in the Children's Court to provide comment on the applicants' interpretation of s239(1)(d) of the Children's Act. Magistrate NAJ van Niekerk (Assistant Presiding Officer) duly provided his views for which I am grateful. The learned magistrate says he agrees with the applicants' interpretation of s239(1)(d), albeit for slightly different reasons, regarding the recommendation, non-recommendation and absence of the letter of recommendation.

Brief factual backgrounds

The MPS matter

[5] The child 'L' was born on 19 June 2017 at the Chris Hani Baragwanath Hospital. His biological mother, IM, told the nursing staff that she did not want the child and wished to give it up for adoption. On 20 June 2017 accompanied by the

applicants, IM approached Ms Catharina Eaton ("Eaton") the social worker that had been assisting the applicants. Ms Eaton is an accredited adoption social worker as contemplated in section 251 of the Children's Act.

[6] On their arrival, IM yet again reiterated her desire to have L put up for adoption and for him to be adopted by the applicants. IM was counselled by Eaton on the ramification of her decision to have L put up for adoption.

[7] About a month later, Eaton contacted IM, in order to ascertain whether (or not) she wanted to proceed with her decision to have L put up for adoption. IM confirmed that she did and on 12 July 2017 they met up so that the necessary consent could be signed. The consent was signed by IM before a magistrate at the Roodepoort Magistrate's Court.

[8] On 24 July 2017, Eaton approached the Roodepoort Children's Court and filed a 'Notice of Adoption' and a 'Statement in support of the application for adoption'. A report was also prepared and submitted to the first respondent on 27 November 2017. The report, concludes as follows:

"Based on the foregoing it is evident that [L] is an adoptable child as envisaged in the Children's Act as his mother signed consent for him to be adopted. She did not know his biological father.

The applicants have been screened and qualify to adopt [L] in terms of section 251 of the same Act as:

- They are fit and proper to be entrusted with the full parental responsibilities and rights in respect of the child;*

- *They are willing and able to undertake, exercise and maintain those responsibilities and rights;*
- *They are over the age of eighteen years;*
- *They were properly assessed by an adoption social worker for compliance with the requirements of the Act;*
- *The biological mother signed consent for him to be adopted by the applicants;*
- *The biological father is unknown.*

...

It is recommended that the application for adoption of [L] by the applicants be decided in their favour. That the surname of [S] is bestowed on him.”²

[9] The first respondent raised certain queries and ultimately decided not to recommend the adoption. It was not entirely clear in the reasons that accompanied the letter of (non-)recommendation the precise basis of the rejection. It is simply recorded that IM was a Lesotho National and, consequently, her child L was also a Lesotho National. (There is no clear indication what bearing, if any, this had on the decision-making process.) Further, that the family of IM had to be consulted and that, absent their input the adoption could not proceed. Finally, that the panel set up by the first respondent to consider the matter stated that “... *the main purpose of the Children’s Act (best interests of the child) ... supersedes the mother’s rights.*”

² Founding Affidavit, annexure “LE7”, 001-45, para 15-6.

[10] On 21 February 2018 Ms Eaton received an email from the Department of Social Development (DSD) advising her that the prospective adoption had '*elements of inter-country adoption.*'

[11] Ms Eaton was of the view that the absence of a positive letter of recommendation from the first respondent would stifle any adoption application. She therefore approached the Centre for Child Law, which assisted the applicants to institute the present application.

KHD matter

[12] The minor child 'J', was about two years old when this application was launched. His biological parents are 'RM' and 'MS'. When J was born his mother informed the hospital staff that she did not wish to keep him and wanted to put him up for adoption. A social worker employed by the Department of Health, Gauteng referred the matter to ABBA Specialist Adoption and Social Services (ABBA). Ms J.H Theron, an accredited adoption social worker, is the designated person who has been dealing with the matter. She has deposed to the founding affidavit in this matter.

[13] Ms Theron is assisting the prospective adoptive parents KHD and DTD in their adoption of J. She says J has been in the prospective adoptive parents' care since he was about eight months old and he knows them as his only 'parents'. He was placed in their care pending finalization of his adoption

proceedings by the prospective adoptive parents. After a comprehensive investigation, Ms Theron filed a report in terms of section 230 of the Children's Act with the Tembisa Children's Court recommending the adoption.

[14] As in the MPS matter, they too received a letter from the first respondent, on 21 February 2018, not recommending the adoption on the basis, *inter alia*, that J did not have a birth certificate and that his mother was originally from Mozambique and therefore it was regarded as an inter-country adoption. The present application before me followed and, as I said, the same relief is sought as in the MPS matter.

Consequence of the letters of non-recommendation

[15] Consequently, the Children's Court is uncertain whether it may adjudicate the matter absent a review of the decision of the first respondent.

[16] It would be apposite to briefly set out the legislative scheme relating to adoptions.

The relevant legislative scheme

[17] The Children's Act was enacted, *inter alia*, to give effect to certain rights of children as contained in section 28 of the Constitution³ and, 'to make new provision for the adoption of children'.⁴ It makes detailed provisions relating to

³ Constitution of the Republic of South Africa 1996.

⁴ Explanatory paragraph at the beginning of the Children's Act.

adoption of children. Importantly, for present purposes, section 28(2) of the Constitution provides:

- ‘(2) A child’s best interests are of paramount importance in every matter concerning the child.’

This is echoed in section 2 of the Children’s Act, which provides:

- (a) ...
 (b) To give effect to the following constitutional rights of children, namely-
 ...
 (iv) that the best interests of the child are of paramount importance in every matter concerning the child.’
 ...’

[18] Chapter 15 of the Children’s Act deals in detail with the requirements in relation to the adoption of a child. It is not necessary to set out these provisions in any detail in this judgment- in view of the narrow issue that this court must deal with, namely, the meaning to be attributed to s239(1)(d) in the context of the two matters before me:

- ‘239(1) An application for the adoption of a child must –
 ...
 (d) be accompanied by a letter by the provincial head of social development recommending the adoption of the child. ...’⁵

[19] Section 230 provides as follows:

- ‘(1) Any child may be adopted if –
 (a) the adoption is in the best interests of the child;
 (b) the child is adoptable;
 (c) the provisions of this Chapter are complied with.

⁵ This requirement has been held to be peremptory. See *JGB and Another v The Presiding Officer, Children’s Court, Wynberg, N.O. and 9 Others* [2012] All SA 167 (WCC).

- (2) An adoption social worker must make an assessment to determine whether a child is adoptable.
- (3) A child is adoptable if –
 - (a) the child is an orphan and has no guardian or caregiver who is willing to adopt the child;
 - (b) the whereabouts of the child's parent or guardian cannot be established;
 - (c) the child has been abandoned;⁶
 - (d) the child's parent or guardian has abused or deliberately neglected the child, or has allowed the child to be abused or deliberately neglected;
 - (e) the child is in need of a permanent alternative placement;
 - (f) the child is the stepchild of the person intending to adopt; or
 - (g) the child's parent or guardian has consented to the adoption unless consent is not required. (My underlining.)

The proper approach to statutory interpretation

[20] The declaratory orders sought involve, principally, the (constitutionally compliant) interpretation of the impugned provision. It is therefore useful to repeat the most relevant principles.

[21] The first and perhaps foremost principle of interpretation is the court's duty to interpret statutes in such a way as to best give effect to the spirit, purport and objects of the Bill of Rights.⁷ This duty is one in respect of which "*no court has a discretion*"⁸ and must "*always be borne in mind*".⁹

⁶ The term "abandoned" in relation to a child means a child who-

"(a) has obviously been deserted by the parent, guardian or care-giver; or
 (b) has, for no apparent reason, had no contact with the parent, guardian, or caregiver for a period of at least three months".

⁷ S39(2) of the Constitution.

⁸ *Phumelela Gaming & Leisure Ltd v Grundlingh* 2007 (6) SA 350 (CC) at 26-7.

⁹ *Ibid.*

[22] This duty has two sub-components:

22.1 First, the so-called *Hyundai* obligation.¹⁰ This component requires a court to interpret a statute through the prism of the Bill of Rights. If a court is faced with two interpretations – one of which is constitutionally valid and one of which is not – the court must adopt the constitutionally valid interpretation provided that to do so would not unduly strain the language concerned.

22.2 Second, the so-called *Wary* obligation.¹¹ This component requires a court in instances where a provision is reasonably capable of two interpretations – both of which are constitutionally valid – to adopt the interpretation that “*better*” promotes the spirit, purport and objects of the Bill of Rights.

[23] The second principle that ought to inform a court’s interpretation of a statute is that it must be interpreted **purposively**.¹²

[24] The third principle of interpretation was articulated best in the now often cited judgment of *Natal Joint Municipal Pension Fund v Endumeni Municipality* as follows:

“[T]he proper approach ... is from the outset to read the words used in the context of the document as a whole and in light of all relevant circumstances. That is how

¹⁰ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motors Distributors (Pty) Ltd v Smit* N.O 2001 (1) SA 545 (CC) (“*Hyundai*”) at para 22-3.

¹¹ *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 (1) SA 337 (CC) at 46, 84 & 107.

¹² See, generally, *Cool Ideas 1186 CC v Hubbard* 2014 (8) BCLR 869 (CC) at 28.

people use and understand language and it is sensible, more transparent and conduces to greater clarity about the task of interpretation for courts to do the same."¹³

and

"[C]onsideration must be given to the language used in light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. ... The 'inevitable' point of departure is the language of the provisions itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."¹⁴ (My underlining.)

[25] In addition to these 'general principles' our courts have also had the opportunity to further refine the interpretive exercise when the statutory provision relates to children. The Constitutional Court has held that:

"While section 28 undoubtedly serves as a general guideline to the courts, its normative force does not stop there. On the contrary, as this court held in De Reuck, Sonderup and Fitzpatrick, section 28(2), read with section 28(1), establishes a set of children's rights that the courts are obliged to enforce ... The ambit of the provision is undoubtedly wide. The comprehensive and emphatic language of section 28 indicates that just as law enforcement must always be gender-sensitive, so must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children and that courts must function in a manner which at all times shows due respect for children's rights."¹⁵

Further, it has also held that also held that, where possible, statutes must be:

¹³ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA) at 24.

¹⁴ *Ibid* at 18.

¹⁵ *S v M (Centre for Child Law Amicus Curiae)* 2007 (12) BCLR 1312 (CC) at 83.

“interpreted so as to exclude a construction that would be inconsistent with the principle of the best interests of the child”.¹⁶

[26] In my view, if these principles are applied to the issues in the matters before me, the interpretations sought by the applicants (and encapsulated in their respective notices of motion) are correct.

The section 239(1)(d) letter

[27] The question that arises for determination is whether the word “recommending” in section 239(1)(d) also includes a letter “not recommending”. The applicants (so too, belatedly, the respondents) suggest that it does. There are, at least, three reasons why the position adopted by the parties appears to me to be correct.

[28] The first reason relates to the legislative purpose of the impugned provision. It has been held that the legislative purpose of the impugned provision is, at least, three-fold: One, it ensures that the legislative prescripts are adhered to by accredited social workers within the framework of their professional ethics and responsibilities.¹⁷ Two, it provides for the best interests of the child by ensuring that first respondent (and her counterparts in other provinces) is given an opportunity to consider factors that are specifically and particularly within her own knowledge.¹⁸ Three, it provides statutory oversight by public officials in the

¹⁶ *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (7) BCLR 637 (CC) at 84.

¹⁷ *National Adoption Coalition of South Africa v Head of Department of Social Development, for the Province of KZN and 3 Others* 2020 (4) SA 284 (KZD) at Order 4(b)(i).

¹⁸ *Ibid* at 4(b)(ii).

employ of the first respondent (and her counterparts in other provinces) in order to, *inter alia*, prevent human trafficking.

[29] A letter “not recommending” the adoption of a child achieves these self-same things: It provides the Children’s Court with the first respondent’s (and her counterparts in other provinces) views on whether the statutory prescripts have been adhered to by the accredited social worker. It further provides the Children’s Court with their views on facts that are within their “*peculiar knowledge*”¹⁹ and its impact (if any) on an assessment of best interest. Lastly, it provides the first respondent (and her counterparts in other provinces) with an opportunity to fulfil their oversight function and report to the Children’s Court on any findings and concerns he or she may harbor. It follows that the legislative purpose of the letter is achieved, regardless of the nature of the response.²⁰

[30] The second reason relates essentially to the jurisdiction of the Children’s Court to hear adoption applications. The purpose of the letter implicitly recognizes that it is the Children’s Court that must make a decision on the evidence before it on whether or not to grant an adoption. The Children’s Court would, logically, consider the letter either recommending or not recommending

¹⁹ The court in *National Adoption Coalition of South Africa* was at pains to distinguish between relevant facts. The gist, as I see it, of the judgment on this score is that the first respondent is not entitled to enquire, generally, as the court would, and to ‘decide’ the issue on this basis; rather it must consider whether it has any further information omitted by the accredited social worker that may impact on the accredited social worker’s conclusions and/or recommendations.

²⁰ Cf. with instances where no letter is received. See, generally, *In re XN* and *JGB supra*.

the adoption in its assessment of, *inter alia*, 'best interests'.²¹ I am fortified in this view if regard is had to instances where there is no letter of recommendation. A Children's Court is not absolutely barred from hearing an application but rather may, in exceptional circumstances, condone that failure.²² In *XN* the court held:

"[19] However, although the best interests of the child cannot be sacrificed at the altar of formalism, if the requirement of the s 239(1)(d) is not complied with, the objectives of the Children's Act will be lost. The Children's Courts are charged with overseeing the wellbeing of children, examining the qualifications of applicants for adoption and granting adoption orders. To carry out their functions effectively and conscientiously they rely on the efficient collaboration of all stakeholders, the department and social workers to comply with their respective obligations in terms of the Act. Non-compliance with the provisions of the Act will delay the speedy facilitation of adoption applications, bringing the administrative processes to a halt, if not into disrepute. It should be a concern when those who are empowered by legislation to fulfil their functions appear recalcitrant, especially in matters involving the vulnerable members of our society. Nevertheless, in my view this does not give the child commissioner *carte blanche* to condone non-compliance with the provisions of the Act. This can only be done if the circumstances are exceptional and warranted, as in this case."²³ (My underlining.)

[31] It must then follow that a Children's Court that is in possession of a letter – *albeit* a letter not recommending the adoption – would still be entitled to consider the adoption application. If this were not so, it would lead to the absurd conclusion that a Children's Court is bound by the decision of the first respondent

²¹ S240 of the Children's Act sets out a list of factors that must be considered. The letter mentioned in s239(1)(b) of the Children's Act is not listed but, it seems, would logically form part of the record of proceedings.

²² See, generally, *In re XN* and *JGN supra*.

²³ *In re XN* at para 19.

correct and, in fact, would do violence to the separation of powers doctrine and defeat the very purpose of the Children's Court.²⁴

[32] The third reason is that a converse finding would not only run contrary to the spirit and purport of the Children's Act but would also violate several fundamental rights of children including: firstly, the purpose of the Children's Act as articulated in its Preamble²⁵; secondly, the objectives of the Children's Act, generally,²⁶ and the objectives of adoption, specifically²⁷; thirdly, a child's right to 'family life'²⁸; fourthly, the child's right to appropriate alternative care²⁹; and fifthly,

²⁴ See, generally, *AD and DD v DW and Others, The Centre for Child Law (Amicus Curiae) and The Department of Social Development (Intervening Party)* 2008 (4) BCLR 359 (CC) and, particularly, para 34 where the Constitutional Court expressly said that –

"From start to finish the forum most conducive to protecting the best interests of the child has 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 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."

²⁵ The most important of these purposes, being "to give effect to certain rights of children as contained in the Constitution" and "to make new provisions for the adoption of children". The latter purpose was necessary to remedy all the constitutional defects contained in the Child Care Act. See, generally, T Mosikatsana & J Loffel 'Adoption' in T Davel and A Skelton *Commentary on the Children's Act* RS 5 (2012) 15-2.

²⁶ See, generally, s2 of the Children's Act.

²⁷ The aim of adoption law is to provide a permanent, secure and healthy family life for children whose biological parents have died or are unable to provide them with the care and the affection they require. See, in this regard, *Mosikatsana & Loffel* op cit n 100 at 15-2 and Children's Act, s229.

²⁸ The correlation between the "to right to family life" and adoption was articulated in *Du Toit v Minister of Population Development* 2002 (10) BCLR 1006 (CC) at para 18 as follows:

"Recognition of the fact that many children are not brought up by their biological parents is embodied in section 28(1)(b) of our Constitution which guarantees a child's right to 'family or parental care'. Family care includes by the extended family of a child, which is an important feature of South African family life. It is clear from section 28(1)(b) that the Constitution recognizes that family life is important to the well-being of all children. Adoption is a valuable way of affording children the benefits of family life which might not otherwise be available to them."

On the importance of "family life", generally, see *C v Department of Health and Social Development* 2012 (4) BCLR 329 (CC) at para 30 where the Constitutional Court held that:

a child's right to have his or her best interests considered of paramount importance, particularly insofar as it deprives a child to 'family life' and leads to undue delay.³⁰

[33] I am of the view that for the reasons stated the applications should succeed.

Costs

[34] Mr Courtenay informed this court that if the applicants are successful they will no longer be persisting with a costs order. An order that each party pays its own costs would accordingly be appropriate.

[35] In all the circumstances I make the following orders:

In the MPS matter:

1. It is declared that the letter contemplated in section 239(1)(d) of the Children's Act 38 of 2005 includes a letter not recommending the adoption of the child.

"Children's rights, and the right to family life, bears tremendous importance in a caring constitutional democracy. It is for this reason that:

'section 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk. Similarly, in situations where rupture of the family becomes inevitable, the State is obliged to minimize the consequent negative effect on children as far as it can.'

In Du Toit, this Court held that '[i]t is clear from section 28(1)(b) that the Constitution recognizes that family life is important to the well-being of all children' and in S v M, it emphasized 'the importance- of maintaining the integrity of family care.'."

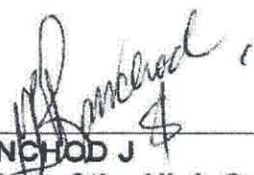
²⁹ See, s28(1)(b) of the Constitution. Adoption is, moreover, an essential component of South Africa's formal child-care and protection system. A detailed discussion may be found in *Mosikatsana & Loffel* op cit n 100 at 15-2.

³⁰ See, in respect of delay, *National Adoption Coalition of South Africa* paras 48 – 52 and *Herbst v Presiding Officer of the Children's Court, Johannesburg* (case no. A3025/18) (unreported).

2. The letter of recommendation, whether it recommends, does not recommend or is even absent, does not oust the jurisdiction of the Children's Court to consider and adjudicate upon an adoption application.
3. The Children's Court for the district of Roodepoort is directed to hear the adoption application of the minor child L.
4. There is no order as to costs.

In the KHD matter:

1. It is declared that the letter contemplated in section 239(1)(d) of the Children's Act 38 of 2005 includes a letter not recommending the adoption of the child.
2. The letter of recommendation, whether it recommends, does not recommend or is even absent, does not oust the jurisdiction of the Children's Court to consider and adjudicate upon an adoption application.
3. The Children's Court for the district of Tembisa is directed to hear the adoption application of the minor child J.
4. There is no order as to costs.



RANCHOD J
Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 01 February 2021

Date of judgment: 17 June 2021

Appearances:

For First and Second applicants in both matters:

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