



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case no: 10171/2014

In the matter between:

VR

Applicant

And

**THE MINISTER OF HOME AFFAIRS
THE DIRECTOR GENERAL OF THE
DEPARTMENT OF HOME AFFAIRS
THE MINISTER OF SOCIAL DEVELOPMENT
THE CHIEF IMMIGRATION OFFICER, CAPE TOWN
INTERNATIONAL AIRPORT**

**First Respondent
Second Respondent

Third Respondent
Fourth Respondent**

And

Case no: 11149/2014

In the matter between:

CT

First Applicant

LT

Second Applicant

And

**THE MINISTER OF HOME AFFAIRS
THE DIRECTOR GENERAL OF THE
DEPARTMENT OF HOME AFFAIRS
THE MINISTER OF SOCIAL DEVELOPMENT
THE CHIEF IMMIGRATION OFFICER, O.R. TAMBO
INTERNATIONAL AIRPORT**

**First Respondent
Second Respondent

Third Respondent
Fourth Respondent**

And

Case no: 11148/2014

In the matter between:

**SM
HM**

**First Applicant
Second Applicant**

And

**THE MINISTER OF HOME AFFAIRS
THE DIRECTOR GENERAL OF THE
DEPARTMENT OF HOME AFFAIRS
THE MINISTER OF SOCIAL DEVELOPMENT
THE CHIEF IMMIGRATION OFFICER, O.R. TAMBO
INTERNATIONAL AIRPORT**

**First Respondent
Second Respondent

Third Respondent
Fourth Respondent**

And

Case no: 12008/2014

In the matter between:

**SG
CL**

**First Applicant
Second Applicant**

And

THE MINISTER OF HOME AFFAIRS

First Respondent

**THE DIRECTOR GENERAL OF THE
DEPARTMENT OF HOME AFFAIRS**

Second Respondent

THE MINISTER OF SOCIAL DEVELOPMENT

Third Respondent

**THE CHIEF IMMIGRATION OFFICER, O.R. TAMBO
INTERNATIONAL AIRPORT**

Fourth Respondent

Date of hearing: 4 September 2014

Date of judgment: 14 November 2014

JUDGMENT

SAVAGE AJ:

Introduction

[1] Four applications are currently before this Court for determination in which the applicants, all foreign adoptive parents of children born in South Africa with special needs, initially sought *inter alia* the review of the failure by the second respondent, the Director-General of Home Affairs, within a reasonable time to record name changes and issue unabridged birth certificates for their respective adoptive children. All four applications were launched on an urgent basis and by agreement postponed for hearing to the same date.¹

[2] By the date of hearing of the applications, urgency was no longer in issue between the parties. Unabridged birth certificates had been issued in respect

¹ The third respondent, the Minister of Social Development, gave notice to abide the applications.

of all six children who are the subject of the applications, although three certificates contained certain erroneous personal details of the relevant adoptive parents; and the applicants and their adoptive children had departed from South Africa for their new countries of residence.

[3] The brief background to each application is as follows. The first applicant, VR, was granted an adoption order on 2 April 2014 in respect of MR and LR both born in South Africa, LR of a foreign mother. The adoptions were registered on 7 April 2014 by the adoption registrar and on 11 April 2014 VR applied to record both the adoptions and the change of name and surname of his adoptive children in the births register at the Department of Home Affairs ('the Department') at Wynberg. Following the launch of his urgent application on 10 June 2014 in this Court, on 12 June 2014 an unabridged birth certificate was issued in respect of MR who was born of a South African mother. The Department opposed VR's entitlement to an unabridged birth certificate in respect of LR given that his mother was foreign and disputed that the delay in issuing the unabridged birth certificate in respect of MR was unreasonable. However, subsequently the Department undertook on 11 August 2014 to issue an unabridged birth certificate by 13 August 2014 in respect of LR, which certificate was issued on 18 August 2014 after contempt proceedings had been launched.

[4] VR initially sought an order reviewing and setting aside the second respondent's failure to record within a reasonable time the adoption, and the

change of forename and surname of LR; reviewing the failure to issue an unabridged birth certificate in respect of MR and LR and directing the second respondent to issue and make available an unabridged birth certificate in respect of both children; an order that the Registrar of this Court issue and affix an Apostille to the unabridged birth certificates; an order directing that the children are authorised to leave South Africa with the applicant; and costs. By the date of hearing of the matter, revised relief was sought for an order directing that the time taken by the second respondent to issue an unabridged birth certificate for the child concerned was unreasonable; and for costs on the scale as between attorney and client, including the wasted costs of postponements (and preparation for hearing) and, where applicable, the costs of two counsel.

[5] The second applicants, CT and LT, were granted an adoption order on 20 May 2014 in respect of twins, ET and CT, born in South Africa of a South African mother. The adoptions were registered by the registrar of adoptions on 23 May 2014 in respect of CT and 30 May 2014 in respect of ET. On 2 June 2014 CT and LT applied at the Bellville office of the Department to record the adoptions and have the change of name and surname of the children amended in the births register. Their urgent application was launched on 26 June 2014 and on 15 July 2014 CT and LT applied at the Department's offices for the unabridged birth certificates and passports to be issued in respect of their adopted children. On 15 July 2014 the children's identity numbers were made available and on 16 July

2014 their passports and unabridged birth certificates were issued, but with the latter reflecting the incorrect adoptive parents. The rectified unabridged birth certificates by date of hearing of the application had not been issued.

[6] CT and LT initially sought an order reviewing and setting aside the second respondent's failure to record within a reasonable time the adoption, change of forenames and surname of the twins, and to advise the applicants thereof; directing the second respondent to issue a new identity number, a corresponding unabridged birth certificate and a temporary passport; directing that the minor children are authorised to leave South Africa with the applicants; and costs. By the date of hearing of the matter, revised relief was sought for an order directing the second respondent to issue unabridged birth certificates for the children reflecting the applicants as their parents and to do so within five (5) working days; directing that the time taken by the second respondent to issue unabridged birth certificates for the children was unreasonable; and costs on the scale as between attorney and client, including the wasted costs of postponements (and preparation for hearing) and, where applicable, the costs of two counsel.

[7] The third application was brought by SM and HM who were granted an adoption order on 28 May 2014 in respect of BM, born in South Africa of a South African mother. The adoption registrar registered the adoption on 30 May 2014 and on 4 June 2014, the adoptive parents applied at the Department of Home Affairs in Bellville to record the adoption and the change of name and surname in

the births register. An urgent application was launched on 26 June 2014. On 15 July 2014 the adoptive parents applied for the issue of an unabridged birth certificate and passport in respect of BM. On 15 July 2014 the identity number was made available, with the temporary passport issued on 16 July 2014 and the permanent passport issued on 21 July 2014. On 17 July 2014 the unabridged birth certificate was issued which recorded the incorrect date of birth in respect of the adoptive parents. The corrected unabridged birth certificate had by date of hearing of the application not been issued.

[8] The relief initially sought by SM and HM was for an order reviewing and setting aside the second respondent's failure to record within a reasonable time the adoption, change of forenames and surname of BM and to advise the applicants thereof; directing the second respondent to issue a new identity number together with a corresponding unabridged birth certificate and a temporary passport; directing that BM is authorised to leave South Africa with the applicants; and costs. By the date of hearing of the matter, a revised order was sought directing second respondent to issue an unabridged birth certificate in respect of BM, which reflects the applicants' correct dates of birth within five (5) days; directing that the time taken by the second respondent to issue an unabridged birth certificate for the child concerned was unreasonable; and costs on the scale as between attorney and client, including the wasted costs of postponements (and preparation for hearing) and, where applicable, the costs of two counsel.

[9] The fourth application was brought by SG and CL who on 6 December 2013, while permanently resident in South Africa, adopted S, a child born in South Africa of a foreign mother. The adoption was treated as a local adoption and was registered by the registrar of adoptions on 25 April 2014. On 12 May 2014 application was made to the Paarl office of the Department to record the adoption and change the names of the child in the birth register. An urgent application was launched on 9 July 2014. The stance taken by the second respondent was that the Department was precluded from issuing an unabridged birth certificate to a child born of a foreign mother, although no opposing papers were filed by the first and second respondents. On 30 June 2014 SG's contract of employment terminated in South Africa and CL obtained employment in Germany from 1 August 2014 causing the couple to return to Germany. An order was granted by agreement on 11 August 2014 that S's unabridged birth certificate would be issued by 13 August 2014. When the unabridged birth certificate was not issued, on 18 August 2014 a contempt application was launched after which the unabridged birth certificate issued on the same date.

[10] An order was initially sought reviewing and setting aside the second respondent's failure to record the adoption and S's change in forenames and surname in the birth register within a reasonable time; directing second respondent to make available an unabridged birth certificate in respect and declare S to be a South African citizen by birth in terms of section 2(2) of the Citizenship Act 88 of

1995 and register her as a South African citizen, alternatively to issue an unabridged birth certificate pending the issue of an identity number; directing the Registrar of this Court to issue and affix an Apostille to the unabridged birth certificate; confirming that S is authorised to leave South Africa with one or both applicants; and costs. By the date of hearing of the matter, a revised order was sought directing that the time taken by the second respondent to issue an unabridged birth certificate for the child was unreasonable; and for costs on the scale as between attorney and client, including the wasted costs of postponements (and preparation for hearing) and, where applicable, the costs of two counsel.

Review under PAJA

[11] Under rule 6(1) an application must be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief, disclosing the cause of action upon which the applicant relies.² The cause of action initially pleaded in this matter was a review under s 6(2)(g) of the Promotion of Administrative Justice Act (PAJA) 3 of 2000 with consequential relief sought. PAJA is the statutory embodiment of the constitutional right to just administrative action, that is, administrative action that is lawful, reasonable and procedurally fair.³ S 6(2)(g) provides that ‘(a) *court or tribunal has the power to judicially review an administrative action if - ...the action concerned consists of a failure to*

² *Mauerberger v Mauerberger* 1948 (3) SA 731 (C); *Bowman NO v De Souza Roldao* 1988 (4) SA 326 (T) at 327D-328A

³ Section 33 of the Constitution; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others* 2004 (4) SA 490 (CC) at para 22.

take a decision'. S 6(3) provides that where there is a duty to take a decision but there has been a failure to take the decision in the context of no law prescribing the period within which to do so, an applicant may '*institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision*'.

[12] In a review application brought under s 6(2)(g) an applicant is obliged to establish that the position when launching the review was that the requisite administrative application had been made and that there had been an unreasonable delay in taking the decision. If the applicant fails to do so, the review will have commenced prematurely, without establishing any ground for review and it will follow that the review application must be dismissed.⁴ Where a decision is made by the administrator after an application under s 6(3) for review has been launched, once it is apparent on the papers that the decision has been made, there is no longer a failure to take a decision within the meaning of s 6(2)(g) which is capable of review. It is therefore no longer open to the Court to review and declare unlawful the failure to make such decision.⁵

[13] S 8(1)(d) permits a court in proceedings for judicial review in terms of section 6(1) to '*grant any order that is just and equitable, including orders... declaring the rights of the parties in respect of any matter to which the administrative action relates.*' The applicants did not in their notices of motion

⁴ *Thusi v Minister of Home Affairs and another* 2011 (2) SA 561 (KZN) at 579C-D

⁵ At 579E-H

seek declaratory relief in the event of the administrative decision having been taken by the hearing of the applications (as was the approach adopted in matters such as *Mahambehlala v MEC of Welfare, Eastern Cape*).⁶ At the hearing of the matter, with the administrative decisions in question having been taken by the second respondent, the applicants sought revised relief in the form of a declaratory that the delay in determining the respective applications had been unreasonable, an order that certain erroneous details recorded on the unabridged birth certificates of three of the minor children be corrected and costs.

[14] The respondents took issue with the fact that with the administrative decisions taken, the applicants did not amend their notice of motion to seek relief that was purely declaratory in nature.⁷ I am not persuaded that it was necessary for the applicants to do so given that the proceedings before this Court remain judicial review proceedings within the meaning of s 8(1)(d), even if the underlying review ground had resolved. In principle it seems to me that the grant of declaratory relief remains permissible under s 8(1)(d) where the Court concludes that it is just and equitable on the facts to grant such relief.

[15] The Court holds a discretion as to whether to grant declaratory relief or not and may do so where such relief is considered to be appropriate in order to clarify legal and constitutional obligations on consideration of the relevant

⁶ 2002 (1) SA 342 (SE)

⁷ See in this regard *Shepherd v Mitchell Cotts Seafreight (SA) (Pty) Ltd* 1984 (3) SA 202 (T) at 205E-H; *Nedbank Ltd v Hoare* 1988 (4) SA 541 (EC) 543H; *Berg v Gossyn (1)* 1965 (3) SA 702 (O)

circumstances.⁸ A declaratory order will generally not be granted where the issue has been decided by a court, where the legal position is clearly defined by statute,⁹ or where the question raised is academic, abstract or hypothetical. Declaratory relief is by its nature essentially remedial and corrective and creates no direct legal consequences.¹⁰ It is not there for the asking and there must be good and proper

reason to grant such relief where it can have no practical purpose.¹¹ It is for this reason that courts are often cautious to grant such relief, as was the case in *MEC for the Department of Welfare v Kate*,¹² where there has been a continued departmental failure to comply with court orders.

⁸ *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at para 107; *JT Publishing (Pty) Ltd v Minister of Safety & Security* supra; *North Central Local Council & South Central Local Council v Roundabout Outdoor (Pty) Ltd* 2002 (2) SA 625 (D)

⁹ *Sex Worker Education and Advocacy Task Force v Minister for Safety and Security* 2009 (6) SA 513 (WCC) at paras 43-5

¹⁰ Bishop Remedies Constitutional Law of South Africa (2nd ed) at 9-176; Hoexter Administrative Law in South Africa, 2013 (2nd edition) at 588

¹¹ *Van der Merwe v National Director of Public Prosecutions and others* 2011 (1) SACR 94 (SCA) paras 27-34

¹² *MEC for the Department of Welfare v Kate* 2006 (4) SA 478 (SCA) at 28-29

¹³ 2011 (2) SA 561 (KZN) at 577D-G

¹⁴ *Minister of Health and others v Treatment Action Campaign and others (No 2)* 2002 (5) SA 721 (CC) at para 129

¹⁵ At 585B-D

[16] In *Thusi v Minister of Home Affairs and another*,¹³ Wallis J stated that -

*‘It seems to me that declaratory relief should only be granted in those cases where it is possible for the court to grant an order along the lines of a structured interdict¹⁴ that addresses the applicant’s problem specifically and is aimed at procuring registration of their birth and ultimately the issue of an identity document. It is unfortunate that the court is limited in this regard but it is a consequence of the constraints under which courts operate and the need to recognise the separation of powers between courts, the executive and the legislature that is fundamental to our Constitution’.*¹⁵

Expedition and adoption

[17] The 1993 Hague Convention on Protection of Children and Co-operation in respect of Inter-country Adoption South Africa establishes safeguards to protect the fundamental rights and best interests of the child in inter-country adoption.¹⁶ Under the provisions of s 256(1) of the Children’s Act 38 of 2005 the Convention has the force of law in South Africa, with it provided in s 256(2) that where there is a conflict between South African law and the Convention, the Convention prevails.

[18] Article 35 of the Convention provides that *‘(t)he competent authorities of the Contracting States shall act expeditiously in the process of*

¹⁶ The Convention was ratified by South Africa on 21 August 2003, effective from 1 December 2003

adoption'. Article 18 requires that '(t)he Central Authorities of both States shall take all necessary steps to obtain permission for the child to leave the State of origin and to enter and reside permanently in the receiving State'. In the transfer of the child to the receiving state under Article 19(2) –

'The Central Authorities of both States shall ensure that this transfer takes place in secure and appropriate circumstances and, if possible in the company of the adoptive or prospective adoptive parents'.

[19] The Guide to Good Practice on the Implementation and Operation of the Convention¹⁷ records that expeditious action is essential at all stages of the adoption process, while noting that the Convention does not set any specific time limits for particular actions:

'...The phrase "act expeditiously" in Article 35 is understood to mean 'to act as quickly as proper consideration of the issues will allow'.¹⁸ It is important to distinguish between any necessary delay, such as the time taken to find the best family for a particular child, and an unnecessary delay, such as that created by cumbersome procedures or inadequate resources. A necessary delay may also include diligence in the adoption preparations, for both the child and the prospective adoptive parents. The appropriate speed and expedition will vary from case to case...'¹⁹

[20] The Children's Act 38 of 2005 regulates both the adoption of children in South Africa as well as inter-country adoptions.²⁰ S 261(5) requires

¹⁷ Guide No. 1, 2008

¹⁸ With reference to Art. 12(6) of the 2007 Convention on the International Recovery of Child Support and Other Forms of Family Maintenance

¹⁹ Paragraph 133

²⁰ Chapters 15 and 16

that the central authority in both the receiving country and the country of origin must agree on the inter-country adoption before an adoption may be referred to the children's court for consideration²¹ and an adoption order granted. In the case of a country that is not a signatory to the convention, the competent authority of that country and the South African central authority must both agree to the adoption.²²

[21] The central authority may, under the provisions of s 261(6)(a) withdraw its consent to the adoption of the child within a period of 140 days from the date on which it consented to the adoption, if it is in the best interests of the child to do so and where it does so '*the child must be returned to the Republic forthwith in the prescribed manner*'.²³ S 261(7) provides that an inter-country adoption order takes effect only after the period of 140 days has lapsed and the central authority has not withdrawn its consent.²⁴

[22] Where the children's court approves an adoption and an adoption order is granted in terms of s 261(5) or s 262(5), the central authority '*may issue an adoption compliance certificate*'.²⁵ Following an order of adoption, the adopted child is regarded as the child of the adoptive parent(s), who are the parent(s) of the

²¹ Section 261(4)

²² Section 262

²³ In terms of s 261(6)(b). A similar provision exists in s 262(6)(a) and (b) in respect of a non-convention country adoption.

²⁴ A similar provision exists in s 262(7) in respect of a non-convention country adoption.

²⁵ Section 263

child, and in terms of s 242(2)(b) an adoption order *inter alia* ‘...confers the surname of the adoptive parent of the adoptive child...’.²⁶ S 245 provides that:²⁷

(1) *After an adoption order has been made by a children's court in respect of a child whose birth has been registered in the Republic, the adoptive parent of the child must apply in terms of the applicable law to the Director-General: Home Affairs to record the adoption and any change of surname of the child in the births register.*

(2) *An application in terms of subsection (1) must be accompanied by –*
 (a) *the relevant adoption order as registered by the adoption registrar;*
 (b) *the birth certificate of the child;*
 (c) *the prescribed birth registration form; and*
 (d) *a fee prescribed in terms of any applicable law, if any.*

[23] In terms of ss 24 and 25(2) of the Births and Deaths Registration Act 51 of 1992 adoptive parents may also apply to the Director-General to alter the forename under which a child’s birth was registered.²⁸

[24] Where a child is born of parents who are non-South African citizens and who are not permanent residents or refugees, notice of birth must be given under regulation 8(1) of the Regulations on the Registration of Births and Deaths, 2014.²⁹ The Director-General must, upon an approval of a notice of birth, in terms of regulation 8(5) issue the parents with a birth certificate in respect of the child born without an identity number and in terms of s 5(3) of the Act the child shall not be entered into the national population register.

²⁶ Section 245

²⁷ Section 27B of the Births and Deaths Registration Act echoes the provisions of s 245(1) and (2).

²⁸ Sections 16 and 17 of the Regulations echo such provisions.

²⁹ Government Gazette No. 37373, 26 February 2014

[25] With the second respondent obliged to act expeditiously in the processes relating to inter-country adoption under Article 35 of the Hague Convention, it is what constitutes expedition that is in issue between the parties.³⁰ The reasonableness or unreasonableness of a delay is entirely dependent on the applicable facts and circumstances.³¹ Unlike the consideration of what constitutes an unreasonable delay in the context of social grants, the parties before this Court have not agreed what the period is within which applications should reasonably be considered.³²

[26] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*³³ it was stated that -

‘...In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker.’

³⁰ See *Sibiya v Director-General: Home Affairs* 2009 (5) SA 145 (KZN) at para 19

³¹ *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie en 'n Ander* 1986 (2) SA 57 (A) at 86G

³² See *Mahambehlala v MEC for Welfare, Eastern Cape* 2002 (1) SA 342 (SE) at 348A; *Ngalo v South African Social Security Agency (SASSA)* 2013 2 All SA 347 (ECM) at para 21

³³ 2004 (4) SA 490 (CC) at para 48

[27] Ngcobo J in *Doctors for Life International v Speaker of the National Assembly*³⁴ stated that the principle of separation of powers –

‘...has important consequences for the way in which and the institutions by which power can be exercised. Courts must be conscious of the vital limits on judicial authority and the Constitution’s design to leave certain matters to other branches of government. They must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution’.

[28] In the respondent’s answering affidavit deposed to by its Director of Births, Deaths and Marriages, Mr Aaron Ramudumo, it was stated that an unabridged birth certificate ordinarily takes between 6 to 8 weeks to issue. The various steps involved were detailed, including verifying the information, recording the birth in the birth register, and sending the application to the Department’s head office in Pretoria for consideration by the personal amendments section where the documents and information are verified against the national population register, recording the adoption and the change of names of the adopted child registered. A new identity number is then issued for the child whereafter the application for an unabridged birth certificate may be made and the certificate issued after approval by the Department’s head office. An unabridged birth certificate for a South African child is simpler and can be issued within a day or two, whereas the process is administratively more complex and is subject to a higher level of scrutiny if it is an adoption, domestic or inter-country, to safeguard

³⁴ 2006 (6) SA 416 (CC) at para 37

and protect children and to combat child trafficking in line with the Hague Convention.

[29] The applicants contend that the delay is unacceptable and overstated given the limited number of foreign adoptions. By way of example the applicants' attorney, Ms Deborah Wybrow, stated in a supplementary affidavit filed that in the period July 2013 to March 2014 nine unabridged birth certificates were issued for children in respect of whom adoption orders had been granted to foreign adoptive parents in an average of 13 days rather than weeks.

Delay

[30] The obligation to expedite (or 'cause to happen sooner or more quickly')³⁵ cannot mean to determine in the normal course and I am satisfied must require action as quickly as a proper consideration of the issues will allow. Faced with a dispute between the parties as to what constitutes a reasonable or unreasonable delay in taking the relevant administrative decisions, this Court must, as was cautioned in *Bato Star*, be careful not to attribute to itself superior wisdom. Due weight must be given to the facts placed and policy decisions of those with special expertise and experience in the field in order for an equilibrium to be struck between an expedited process and competing considerations and interests such as to ensure adherence to the appropriate safeguards against child trafficking through the appropriate careful administrative scrutiny.

³⁵ Concise Oxford English dictionary

[31] This Court has appreciation for the fact that the adopted children in the current applications are classified as having special needs and are therefore vulnerable. It is in their best interests on adoption to be placed with their respective new adoptive family without delay in order for the appropriate bonds to form and unnecessary administrative delays should not be condoned given the statutory obligation upon the respondents to ensure administrative expedition under the Convention.

[32] However, it has not been shown on the facts before this Court that the Department's administrative procedures are cumbersome or inadequate. I accept that prior to the issue of an unabridged birth certificate, name changes are required and, in the case of children born of South African parents, amendments to the national population register effected with identity numbers issued following adoption. Given the sensitive nature of these administrative processes and the clear need to safeguard against child trafficking and other such gross violations of children's rights, quite clearly the appropriate checks and balances must be in place to prevent wrongdoing as well as the integrity of the Department's internal system. It stands to be noted that it is precisely the errors which arose in the CT and LT, as well as in the SM and HM unabridged birth certificates, issued in the course of these proceedings and under pressure by the Department, which the appropriate checks and balances must safeguard against. Without the necessary factual basis provided to show that the Department's current administrative

processes are inappropriate or inadequate, there is insufficient factual support for a conclusion that its delay in issuing the birth certificates in respect of those adoptive children who are the subject of the current applications was unreasonable.

[33] It was submitted for the applicants that the pre-adoption inter-country adoption processes are subject to high levels of scrutiny over an extended period of time, often in excess of a year, and that the Department therefore is not required to review the adoption order, or its registration, in light of such processes having been complied with. As a result, it was suggested that the administrative processes after the grant of the adoption order can be fast-tracked by the Department and that a delay in doing so is unreasonable given that the adoptive parents remain in South Africa on a limited period tourist visa with various obligations to return to in their country of origin. Furthermore, given the clear preference that newly adopted children leave South Africa with their adoptive families, such fast-tracking is both appropriate and necessary.

[34] Whilst the difficulties faced by adoptive parents in remaining in the country, or having to return given their obligations in their country of origin, should not be underestimated, determining whether a delay is unreasonable requires the competing interests and obligations of the parties to be carefully balanced, conscious of the fact that it is not for the Court to interfere in the processes of other branches of government unless to do so is mandated by the

Constitution. If the facts before the Court do not clearly make out a case for the relief sought, such relief cannot be granted.

[35] With due regard to the material placed before this Court, I am not satisfied that there is sufficient factual support before this Court to justify a conclusion on the facts that the Department's delay in determining the applications and issuing the unabridged birth certificates was unreasonable. This should not however be interpreted to mean that the Department should not take active steps to ensure adherence to its obligation to expedite administrative process in the context of inter-country adoptions, and to do so with due regard to the best interest of the children concerned. This requires a continued commitment to streamline and improve administrative procedures, whilst retaining in place the necessary checks and balances to prevent both unwarranted delay, wrongdoing and protect the integrity of the Department's internal system.

[36] It follows that with no unreasonable delay found to exist there can be no declaratory relief under s 8(1)(d) granted.

Rectification of three certificates

[37] The second respondent took issue with the relief sought in the draft order for rectification of the unabridged birth certificates issued in respect of three of the minor children who are the subject of the current applications, twins ET and CLT, as well as BM, on the grounds that no application had been made to the

Department's offices for the rectification of such certificates, nor was this relief sought in the notice of motion.

[38] Although the notice of motion was not amended to seek the relief sought in this regard, and as a general principle the requisite application is required to be made at the Department of Home Affairs to rectify an unabridged birth certificate issued where it contains erroneous details, given that the second respondent agreed within the context of the current litigation to issue such certificates, it can reasonably be assumed that it undertook to do so in a manner which recorded the correct personal details of the parents of the adopted children. Little purpose would be served in the context of this litigation to require the applicants to apply at the Department for the rectification of the birth certificates given that the issue of such certificates had been agreed. In such circumstances, I can find no reason as to why this Court should not grant the orders sought to rectify such certificates with (10) days, as opposed to the five (5) days sought by the applicants in the draft orders prepared, which constitutes a reasonable period for the respondents to do so given the facts of this matter.

Costs

[39] As already stated, it is a question of fact whether the department has delayed unreasonably in attending to the applications in question and what

constitutes a reasonable period will depend on the circumstances of the matter.³⁶ Where there has been an absence of an explanation for the delay, or no basis for the refusal to grant the relevant unabridged birth certificates, the commencement of proceedings was legitimate and there is a *prima facie* entitlement on the part of the applicant to a favourable order for costs'.³⁷

[40] I am not however persuaded that the commencement of proceedings in the CT and LT, as well as in the SM and HM applications was appropriate given that less than a month had elapsed since the date of application on 2 June 2014 and 4 June 2014. Similarly, the two months between the 11 April 2014 application made on behalf of MR and 10 June 2014 respectively was within the 8 week period specified by the respondents as the period reasonably required to issue the certificates. For the reasons stated above, the delay in issuing the unabridged birth certificates in respect of these applications has not been found to have been unreasonable.

[41] In *Motsepe v Commissioner for Inland Revenue*³⁸ it was emphasised that a cautious approach should be adopted to awarding costs against litigants who seek to enforce their constitutional right against the state. This was endorsed in

³⁶ *Evans v Smith & Another* 2011 (40 SA 742 (WCC) at para 25; *Steyn N.O. v Ronald Bobroff & Partners* 2013 (2) SA 313 (SCA) at para 28

³⁷ *Thusi* at 587F-H

³⁸ 1997 6 BCLR 692 (CC) at para 30

*Biowatch Trust v Registrar, Genetic Resources*³⁹ in which the principle was established that ordinarily, if the government wins, each party should bear its own costs as this ‘*diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights and thereby building the jurisprudence and ensure law and conduct of the state are compatible with the Constitution*’. If there is a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, then the losing non-state litigant should be shielded from the costs consequences of failure.

[42] The applicants in the CT and LT, SM and HM applications and that of VR acting in the best interests of their newly adopted minor children, approached Court to secure the administrative decisions they sought and were entitled to. Although the view this Court takes of the matter was that they were unduly hasty in doing so, I can find no reason as to why they should be ordered to pay the respondents’ costs. This is so despite the fact that I am not persuaded that the applicants have shown that the time taken by the second respondent within the context of the current matters to issue the certificates was unreasonable and in spite of the obligation to expedite such applications. I accept that the current litigation serves some purpose in emphasising that administrative applications made in the context of inter-country adoptions must be expedited and ventilates

³⁹ 2009 10 BCLR 1014 (CC) para 22

this important issue.⁴⁰ It would be inappropriate to saddle the applicants with costs in circumstances. As a result the view I take of the matters is that each party should bear its own costs, save for the applications of the two children discussed below.

[43] The applications made in respect of LR and S differ insofar as the second respondent took the position that it was not under a legal duty to issue unabridged birth certificates to both minor children in that both had been born in South Africa of non-South African parents. In due course however it was conceded by the respondents that there existed an obligation in terms of regulation 8(5), upon approval of a notice of birth, to issue non-South African parents, who are neither permanent residents nor refugees, with a birth certificate but without an identity number. As a consequence, the second respondent's concession that the Department is obliged to issue the birth certificates in accordance with the provisions of the regulation justifies the imposition of a costs order favourable to the applicants in these matters, including the costs in respect of the applications for contempt. This should include the costs of two counsel.

Order

[44] In the result an order is made in the following terms:

[1] In case number 11149/2014: the second respondent, the Director-

⁴⁰ *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*, 1996 3 SA 165 (CC) para 36

General of the Department of Home Affairs, is directed to issue unabridged birth certificates in respect of ET and CLT which reflect the applicants, CT and LT, as their parents within ten (10) days of this Order.

- [2] In case number 11148/2014: the second respondent, the Director-General of the Department of Home Affairs, is directed to issue an unabridged birth certificate in respect of BM which reflects the correct dates of birth of her parents, being the applicants, SM and HM, within ten (10) days of this Order.
- [3] In case number 10171/2014: the first and second respondents are to pay the applicant's costs insofar as they relate to that part of the application which concerns the minor child LR and are to include costs in respect of the contempt application. Such costs are to be paid on the scale as between party and party and are to include the costs of two counsel.
- [4] In case number 12008/2014: the first and second respondents are to pay the applicants' costs, inclusive of costs in respect of the contempt application, on the scale as between party and party, including the costs of two counsel.
- [5] In case number 11149/2014 and case number 11148/2014: Each

party is to bear its own costs.

[6] In case number 10171/2014: each party is to bear its own costs in respect of that part of the application which concerns the minor child MR.

KM SAVAGE
Acting Judge of the High Court

Appearances:

Applicants: J L McCurdie SC and V L A de la Hunt
Instructed by Wybrow & Oliver (in first three applications) and
Fairbridges (in fourth application)

First and Second Respondents: W Mokhari SC and T J Golden
Instructed by the State Attorney