REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 20/43969

DELETE WHICHEVER IS NOT APPLICABLE	
1.REPORTABLE:	YES
2.OF INTEREST TO OTHER JUDGES:	YES
3.REVISED	YES

Judge Dippenaar

In the matter between:

TT	First Applicant
BM	Second Applicant
and	
MINISTER OF SOCIAL DEVELOPMENT	First Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR SOCIAL DEVELOPMENT, GAUTENG	Second Respondent
HEAD OF DEPARTMENT, GAUTENG DEPARTMENT OF SOCIAL DEVELOPMENT	Third Respondent

SINAH PHIRI	Fourth Respondent
LIVHUWANI MUFAMADI-MALAKA	Fifth Respondent
PEARL HLATSHWAKO	Sixth Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, GAUTENG	Seventh Respondent
EVELYN MAHLANGU	Eighth Respondent
GOITSEMANG BOTES	Ninth Respondent
SOUTH AFRICAN COUNCIL FOR SOCIAL SERVICE PROFESSIONS	Tenth Respondent
MBC	Eleventh Respondent
TLC	Twelfth Respondent
MT	Thirteenth Respondent
BAT	Fourteenth Respondent
CENTRE FOR CHILD LAW	Amicus Curiae

Summary: *Domestic* adoption – Constitution – Chapters 9 and 15 of the Children's Act 38 of 2005 – interpretation – Application for the review of National Department of Social Development's Practice Guidelines on National Adoption - Promotion of Administrative Justice Act (PAJA) – principle of legality – - Application for the review of s239(1)(d) letter of non-recommendation of BT's adoption - Conduct of the Department of Social Development and social workers and declaratory orders of unlawfulness and breaches of constitutional rights of applicants and minor children B and L - review of the Guidelines which are inconsistent with the Constitution and the Children's Act 38 of 2005 – review of non-recommendation letter of adoption of BT on various grounds - stay of review proceedings regarding adoption of L.

JUDGEMENT

Delivered: This judgement was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 14h00 on the 19th of November 2022.

DIPPENAAR J:

[1] This application raises the important issue of adoption and the plight of two minor children, BT ("B"), born in 2018 and LM ("L"), born in 2019 to respectively the first and second applicants, unmarried major students, who had been abandoned by their partners when they became pregnant. The applicants made the difficult choice to consent to the adoption of their children in the children's best interests.

[2] The application is underpinned by the stark reality that despite the passage of extensive time, their adoptions remain in limbo and have not been finalised due to bureaucratic delays and the actions of the very institutions and social workers tasked to ensure B and L's welfare.

[3] The relief sought by the applicants is extensive and wide ranging. It includes declaratory relief to retain the privacy and confidentiality of the respective parties; the review and setting aside of a letter of non-recommendation of the adoption of B issued by the Gauteng Department of Social Development in terms of s 239(1)(d) of the Children's Act[1] ("the Act") under the Promotion of Administrative Justice Act[2] ("PAJA") alternatively the doctrine of legality; the review and setting aside of the National Department of Social Development's Practice Guidelines on National Adoption ("the Guidelines") under the principle of legality and various declaratory orders pertaining to the violation of the constitutional rights of the applicants and those of B and L by the first

[1] 38 of 2005
[2] 3 of 2000

to ninth respondents. The application further concerns the interpretation of various provisions of the Act and, if found to be unconstitutional, a declaration to that effect.

[4] Only the first to third respondents (collectively referred to as "the Department") opposed the application. It sought dismissal of the application with costs. The remaining respondents did not participate in the proceedings.

[5] During argument, the Department contended that it also represented the fourth to ninth respondents. That is not however borne out by the facts. None of these respondents deposed to confirmatory or opposing affidavits and the application was only formally opposed by the Department. The fourth, fifth, sixth, eighth and ninth respondents, collectively referred to as "the social workers") are social workers who were involved in the adoptions of B and L and were cited in their personal capacities as parties to the application.

[6] The eleventh and twelfth respondents are the prospective adoptive parents of B, in whose temporary safe care B has been his whole life, other than his first four months when he was placed in a temporary care facility at the behest of the Department. B is presently four years old.

[7] The thirteenth and fourteenth respondents are the prospective adoptive parents of L, in whose temporary safe care L has been since shortly after his birth. L is presently three years old.

[8] The eleventh and twelfth respondents and the thirteenth and fourteenth respondents support the relief sought insofar as it relates to B and L respectively.

[9] The amicus curiae sought and obtained leave to intervene in the proceedings. That application was not opposed and such an order was granted pursuant to the hearing. The court is grateful for the valuable assistance rendered by the amicus.

The parties' respective cases

[10] In sum, the applicants' case is that the Department and the social workers involved have misinterpreted and misapplied the relevant provisions of the Act, which are perpetuated in the Guidelines and have frustrated, interfered with and unlawfully stalled the adoption process contrary to the best interests of B and L, thus stripping the applicants of the right to choose adoption as an option. They have also violated B and L's constitutional rights as well as the constitutional rights of the applicants, including their rights to keep the pregnancy and adoption private by informing or threatening to inform their parents about the birth of B and L and their intended adoptions, despite the applicants' clear instructions not to do so.

[11] The Department's answering papers are deposed to an employee of the first respondent, who concedes that he lacks personal knowledge of the relevant facts. The Department's case is centrally based on a report dated 4 February 2021 prepared by Ms Daphne Naidoo, designated as "Deputy director monitoring and evaluation: Social Welfare Programmes & Provincial Adoption Task Team member" relating to the reasons for the refusal to grant a letter in terms of s 239(1)(d) of the Act recommending the adoption of B. Ms Naidoo did not however provide a confirmatory affidavit. There is thus merit in the applicants' contention that the Department's answering papers substantially constitute hearsay evidence.

[12] The Department's case in sum is that it is not in the best interests of B and L that they be adopted by their prospective adoptive parents in circumstances of material contraventions of the law both by Ms Wasserman and the presiding magistrates in the Children's Courts, which render those proceedings null and void. According to the Department, it is in the best interests of L that he be removed from the care of his prospective adoptive parents, placed in the care of the Department and that the adoption proceedings commence *de novo*. In respect of B, the Department contends that his adoption by the eleventh and twelfth respondents is not in his bests interests. The

Department recommended that B be placed in foster care with the first applicant's parents.

[13] In its answering affidavit, the Department's stance is encapsulated thus:

> *"The Department is not led by emotions when making decisions that are in the best interests of the children but reach factual conclusions after investigations and careful consideration has gone into reaching the relevant decision.*
>
> *The Applicants' basis for their decisions are primarily based on their emotions and fear of what their families will say as opposed to the paramount best interests principle. The circumstances or prospects of a financially secure future do not negate the other factors for consideration such as maintaining family links…*
>
> *The reasons put forth for reaching the decision to put the children up for adoption may appear valid to the Applicants. It is whether it would be in the best interest of the children that they be adopted, and in the case at hand, it is not in the children's best interests. The Applicants chose to eliminate their parents from being considered in the equation of safe care, and adoption. The children's grand parents should be first in line for consideration and only after they have been eliminated as parents who can act in the best interests of the children would they be eliminated…*
>
> *The first to ninth respondents are obliged to perform the stipulated duties and ensure compliance with statutory defined procedure in adoptions. They are the empowered authority to regulate all adoptions and endorse all lawful adoptions by issuing the section 239(1)(d) letters of recommendation…*
>
> *The Department was at all times acting within the best interests of the children and had no mala fide intentions. The best interests of the minor children are guaranteed by lawful legal processes, performed by authorities empowered by legislative framework, and with stipulated investigations diligently carried out. An adoption with functions performed ultra vires by private workers and incomplete investigations or procedural steps, can never be in the best interests of minor children*
>
> *The provisions of section 230(3)(a) and sections 231(4) and (3) set out some of the major considerations, which the Applicants discount without explanation The maternal grandparents of B and L fit these criteria, inter alia. It is common cause that at least B's grandparents are willing to play this role and can get financial assistance in terms of section 231(5)".*

[14] The Department further contends that neither of the applicants exercised their election to put their children up for adoption independently, predicated on the involvement of a private social worker, Ms Wasserman and her alleged transgressions. The Department also mounts an indirect challenge to the adoption proceedings of B and L by

contending that the magistrates in the Krugersdorp Children's Court had acted unlawfully, thus rendering the adoption proceedings void.

[15] Significantly, although much attention was devoted to arguments surrounding alleged defects in the respective children's court proceedings, no review or appeal proceedings were ever launched by the Department and in the present application, the Department did not seek any such relief. Reliance was placed on broad and unsubstantiated allegations regarding irregular adoptions in the Province following a particular methodology. No evidence was presented that the present facts bear any resemblance to the alleged *modus operandi* in those irregular adoptions. The Department further relied on a meeting held between representatives of the Department and the presiding magistrates at the Krugersdorp Children's Court during August 2019, which resulted in numerous pending adoption proceedings, including those relating to B and L, being referred to an investigation as to whether the children involved are children in need of care and protection under Chapter 9 of the Act.

[16] The Department contended that it opposed the application "*given that the relief sought would not only be detrimental to the children but would also open up flood gates to numerous frivolous cases brought before the Court*".

The relevant facts

[17] It is necessary to set out the facts in substantial detail as the conduct of the Department and the various social workers are central to the application. These facts are not contentious and are by and large common cause. The factual circumstances of the first and second applicants are similar, but distinct.

[18] The first applicant was a 23 year old unemployed student from a low income household when she became pregnant with B. She made the decision to put up B for adoption as she could not provide for B financially or emotionally. The first applicant did

research and sought assistance from Ms Wasserman, an adoption social worker in private practice. B's father, a student, did not want any part of B's pregnancy or his life and suggested a termination of the first applicant's pregnancy. He broke all contact with the first applicant after she refused to do so and his whereabouts are unknown. The first applicant received counselling from Ms Wasserman who assisted her throughout the process and prepared the relevant reports.

[19] According to the first applicant she made the choice in the best interests of B as she wanted to ensure that he would be placed with a loving family who would be able to provide him with opportunities and a fair chance at a life she was unable to provide and did not have herself. The first applicant further decided not to inform her parents and extended family of her pregnancy or the birth of B as they were strict and conservative and she feared that she would be disowned or forced to abandon her studies.

[20] B was born prematurely during mid-2018 and had to remain at Leratong Hospital for another week after the first applicant's discharge. The eighth respondent, a social worker employed at the hospital, after interrogating the first applicant about the adoption, lodged a request for an investigation into the adoption based on her concerns that adoption procedures were not followed and that the biological father of B's wishes needed to be investigated. The first applicant was not informed of the investigation. This resulted in B not being discharged on due date as the hospital was informed not to do so and that the adoption could not continue.

[21] The first applicant formally consented to B's adoption in the prescribed manner and in front of a magistrate in the Children's Court shortly after her discharge from hospital during July 2018. It was intended that B should have been placed in the temporary care of prospective adoptive parents chosen by the first applicant upon his discharge from hospital. They however withdrew from the process some three weeks after B's birth due to the Department's interference and the uncertainty about B's whereabouts at the time.

[22] Pursuant to the investigations of the Department, B was removed to another hospital without notification to the first applicant during August 2018 and some two weeks later to a temporary care facility. B's removal was effected pursuant to an order granted by the Children's Court at the behest of the Department on the basis that he was a child in need of care and protection.

[23] After the withdrawal of the first prospective adoptive parents, the first applicant selected the eleventh and twelfth respondents as prospective adoptive parents from various candidates. Ms Wasserman prepared the necessary adoption reports. The prospective adoptive parents were approved as suitable and it was recommended that the adoption application be granted on the basis that it would be in B's best interests.

[24] B remained at the temporary care facility for some four months before being placed in the temporary care of the eleventh and twelfth respondents on 14 November 2018 pursuant to an order of the Children's Court. When B was placed in their care, B had a skin infection, oozing wound, an undetected lactose intolerance and could not latch properly, reflective of the care he received at the facility,

[25] The fourth, fifth and ninth respondents became involved in the adoption process during 2018 after the investigation called for by the eighth respondent. The fourth respondent contacted the first applicant on 31 July 2018 and advised her that she was going to inform her parents ("the parents") about B's birth and to make arrangements to have him placed in their care. According to the fourth respondent, the parents had a right to know about B and that, because they are the first applicant's legal guardians, their consent was needed to put B up for adoption. The first applicant expressly instructed the fourth respondent not to inform her parents. During August 2018, the fifth respondent became involved and also threatened to inform her parents. She advised the first applicant that she would be discarding B if she put him up for adoption. According to the applicant her interactions with the social workers were scary and threatening and she felt victimised and punished for electing adoption.

[26] During the proceedings before the Children's Court in September 2018, the Department produced a report, advising the magistrate the matter had been referred for investigation by the Department. The report was based on grounds disputed by the first applicant. The magistrate ruled that no investigation was required and that the adoption should continue. It was ruled that Ms Wasserman should continue as the adoption social worker and place an advertisement in a newspaper to attempt to trace B's biological father. This was done and a report was prepared by Ms Wasserman. The biological father could not be traced and did not respond.

[27] The adoption hearing was to proceed on 26 September 2018. The Department however persisted with its claims and various postponements ensued. The fourth respondent produced a further report in October 2018 casting aspersions on Ms Wasserman which it contended required investigation. The adoption application was postponed to 13 November 2018.

[28] On 14 November 2019, the Children's Court ordered that B be placed in the temporary care of eleventh and twelfth respondents pending finalisation of the adoption. The adoption application was postponed to February 2019 to obtain the Department's recommendation letter under s 239(1)(d) of the Act. During 2019 the application was postponed monthly to await the letter of recommendation. During August 2019 an order was granted by the Children's Court referring the matter to the Department to determine whether B was a child in need of care and protection. Neither the first applicant nor Ms Wasserman was informed of the application resulting in that order. From the Department's papers it became apparent that this order was granted pursuant to the meeting and agreement between it and the magistrates of the Krugersdorp Children's Court during August 2019.

[29] It was undisputed that B's adoption proceedings were postponed 15 times at the instance of the Department between 2018 and 2020.

[30] Despite the first applicant's express and repeated instructions to the various social workers involved not to inform her parents, the first applicant's parents were, unbeknown to the first applicant and without her consent, informed of her pregnancy, the birth of B and his proposed adoption during February 2020. Social workers visited her parents on various occasions between March and May 2020 to persuade them to take care of and raise their grandchild. According to a report prepared by the fifth respondent, the parents seemed ambivalent on the issue but were not unwilling to take care of B. The first applicant had had no contact with the social workers since 2018.

[31] As a result of these events, the first applicant's relationship with her parents has soured and there has been a breakdown in their trust relationship. The conduct of the social workers has further caused the first applicant substantial stress and trauma.

[32] After the visits by the various social workers, a report was prepared, recommending that B be placed in foster care with the first applicant's parents. The high water mark of the social worker's investigations was that the first applicant's parents "did not have any problems with B being placed with them". The report concluded that B was a child in need of care and protection in terms of section [sic Chapter] 9 of the Act and that the Guidelines require the family of origin's participation in the adoption process. The first applicant's parents were proposed as foster parents. The report further stated:

> *"According to the Children's Act 38 of 2005, it is in the best interest of the child concerned to be placed in the care of his parents, family and extended family to maintain a connection with his or her family, extended, culture or tradition in terms of s7(f)(i)(ii)".*

[33] On 7 August 2020, the Children's Court, pursuant to a hearing on 29 June 2020, declared that B was adoptable under s 230(3)(g) of the Act and that his adoption by the eleventh and twelfth respondents was in his best interests. At the hearing, the fifth respondent testified and relied heavily on the Guidelines in support of her recommendations and in contending she was entitled to approach the first applicant's parents. She advised the court that it would be in B's best interests that he be removed from the eleventh and twelfth respondents and placed with the first applicant's parents to

maintain his culture. She conceded that she had never met B or his prospective adopted parents and had conducted no investigations into B's present circumstances. She further conceded that B's maternal grandparents had never met B. The Children's Court found that the fifth respondent's recommendations against adoption were not justified and directed the Department to issue the s 239(1)(d) recommendation letter within 30 days.

[34] The Department refused to issue a recommendation letter. A letter in terms of s 239(1)(d) dated 21 July 2020 was issued on 4 September 2020, recording that the Department did not recommend B's adoption. The letter did not set out any reasons. B's adoption has still not been finalised and the Department steadfastly refuses to issue a letter of recommendation.

[35] The second applicant's circumstances are similar and she comes from a similar background. L was born to the second applicant, a 27 year old unemployed student, in 2019 from a relationship between her and a married man who denied paternity and abandoned the second applicant after she became pregnant. The second applicant decided to give L up for adoption as she could not provide for L financially or emotionally and she considered it in his best interests to ensure that he had a loving family and home with all the opportunities that she never had.

[36] The second applicant and her young daughter live with the second applicant's parents and extended family and are dependent on her father's income of some R7000 per month for support. She feared that she would not have the support of her mother, given the history between them pertaining to her earlier pregnancy during 2016 and the birth of her daughter, after which her mother evicted them from the family home and only allowed them to return some five months later. During the latter part of her pregnancy, the second applicant moved out of her home to hide the pregnancy from her parents.

[37] The second applicant sought assistance and was referred to the same private adoption social worker who assisted the first applicant, Ms Wasserman. She received counselling and formally consented to L's adoption before a Magistrate in the prescribed

manner during September 2019. On the same date, L was placed in the temporary safe care of the thirteenth and fourteenth respondents by order of the Children's Court under s 46(1)(a) of the Act, pending the finalisation of the adoption. The relevant reports were submitted to the Children's Court that L was adoptable and the thirteenth and fourteenth respondents were suitable adoptive parents. Ms Wasserman submitted a report to the Department on 17 June 2020, recommending L's adoption by the thirteenth and fourteenth respondents.

[38] When the sixth respondent became involved during September 2019, she interrogated the second applicant about the adoption who explained the facts. L was already in the temporary care of the thirteenth and fourteenth respondents. The second applicant insisted that she did not want her parents to be informed. During October 2020, the sixth respondent again contacted the second applicant and informed her that she was in possession of a court order that instructed her to advise the second applicant's parents about the adoption and that a site visit would be conducted at the home on 15 October 2020. No such order was produced as part of the R53 record. Despite second applicant's reiterations that she did not want her family to be told of L, the social worker insisted that the second applicant's parents would be notified of the intended adoption of L at the site visit.

[39] The second applicant procured pro bono legal assistance and a court order was obtained on an urgent basis from the High Court on 14 October 2020, interdicting the first to ninth respondent's from informing her parents and family members of her pregnancy, the birth of L and the proposed adoption. Despite the order, the second applicant still feared that the Department would disclose the information to her parents which would destroy their relationship and possibly result in her and her daughter's eviction from the parental home.

[40] A letter recommending the adoption of L in terms of s 239(1)(d) of the Act was issued by the Department on 23 November 2020, after the second applicant obtained the

interdictory relief. This was not brought to the second applicant's attention before the present application was launched during December 2020.

[41] In its answering papers, the Department adopted the stance that the recommendation letter under s 239(1)(d) was irregularly issued and that review proceedings were pending. That stance was adopted after the applicants pointed out the disparity in treatment between the adoptions of B and L, despite the factual similarities. The Department's view is that L should be removed from the care of the thirteenth and fourteenth respondents, placed in the care of the Department and that new adoption proceedings are to begin *de novo*.

[42] The Department, more than two months after delivering their answering affidavit during June 2021, eventually on 1 September 2021 launched the threatened review proceedings, on the basis that the letter was irregularly issued. By 12 July 2022, shortly before the hearing, that application had still not been properly served on either the second applicant or the thirteenth and fourteenth respondents and is presently still pending.

[43] L has been in the care of his prospective adoptive parents, the thirteenth and fourteenth respondents, since his birth in 2019. The second applicant selected them as prospective adoptive parents and they were involved in second applicant's pregnancy and the birth of L. His adoption remains uncertain as a consequence of the Department's review application.

The Department's setting aside application

[44] Prior to turning to the merits it is convenient to dispose of an application launched by the Department on 12 July 2022 in which it sought to set aside an affidavit delivered by Ms Wasserman on the basis that the leave of the court had not been first obtained. The application was opposed by the applicants.

[45] Ms Wasserman had delivered an affidavit, envisaged in the applicants' replying affidavits, but not available at the time of its delivery, dealing with the allegations made against her by the Department in their answering papers on 12 October 2021, some nine months before the hearing. The Department had not sought to file any affidavit in response. It had ample opportunity to do so but elected not to. In the circumstances it cannot be concluded that the Department was prejudiced, as was argued.

[46] Ms Wasserman's version corroborated that of the applicants, including that she did not influence them in making the decision to put their respective children up for adoption. It also established that she is an accredited adoption social worker as envisaged by s 1 of the Act. She further confirmed that her reports placed before the Children's Court recommended the adoptions of both B and L by their prospective adoptive parents as being in their best interests.

[47] In my view, it is in the interests of justice to allow Ms Wasserman's affidavit and to consider the application on the full facts, specifically considering that the application concerns the best interests of minor children [3]. Insofar as that affidavit was delivered late, that should be condoned. It is also in the interests of justice to afford Ms Wasserman an opportunity to respond to the allegations made by the Department, given that much of the answering affidavit was aimed at discrediting her.[4]

[48] It follows that the application falls to be dismissed. There is no reason to deviate from the normal principle that costs follow the result.

[49] The version of Ms Wasserman refutes the allegations of improper conduct on her part made by the Department. No cogent evidence was produced by the Department that Ms Wasserman was involved in an organised ring of unlawful adoptions as alleged. It is not necessary to determine the disputes between Ms Wasserman and the Department

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[3] J v J 2008 (6) SA 30 (C) paras [19]-[20] and the authorities cited therein
[4] Occupiers Berea v De Wet NO and Another 2017 (5) SA 346 (CC) para [19];

insofar as they exist on the papers. Insofar as the Department wishes to pursue their complaints against Ms Wasserman, there are alternative forums in which these disputes could and should more properly be determined. The disputes between the Department and Ms Wasserman are primarily extraneous to the actual adoptions of B and L[5].

[50] I turn to consider the merits and the various issues raised in the application.

Should the applicants be granted the privacy and confidentiality relief sought?

[51] The applicants requested the Department to retain the confidentiality of all the parties involved, including the minor children and to excise or redact their personal information from the record in order to protect their privacy. The Department had served the rule 53 record in unredacted form. The rule 53 record further included information pertaining to third parties and minor children not involved in these proceedings but involved in other adoption matters. Its answering papers also in various of its attachments disclosed the identities of the minor children and the parties involved.

[52] In the answering papers, the Department adopted the stance that the reasons advanced by the applicants for wanting to keep the identities of the parties confidential did not justify:

> *"the long term negative consequences and impact it would have on the children concerned and that it was not in the best interests of the children to grant the anonymity sought which stems more from the applicants wanting the adoption to be kept secret".*

[53] This stance was perpetuated in the Department's heads of argument, wherein the submission was made that the children may want to know their biological parents and extended families once they reach a certain age and that keeping the adoption and personal circumstances of their biological parents' secret could be detrimental to the

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[5] P Carolin & T Carolin v Provincial Head of Department: Gauteng Social Development (Johannesburg High Court) unreported further interim order and reasons case no 43586/2018 para [8]

children and leave them unwanted by their biological parents and family. In the answering affidavit, it is stated:

> *"The applicants are mistaken to think that the vulnerability of the minor children ends once the adoption process is finalised .. in fact the children will always remain vulnerable and susceptible to all risks that comes with giving your child up for adoption … the reasons given by the applicants to keep their identities and personal choices and circumstances private, are based more so on the fear of judgment and scandal that would occur if this Application becomes public knowledge"*[6].

[54] According to the Department, it would infringe on the children's rights to information, freedom and association and place would place limitations on their choices if the identities of the parties were kept confidential.

[55] The cavalier attitude adopted by the Department is open to criticism and entirely disregards its confidentiality obligations under the Act[7] and the best interests of the minor children involved[8]. Their stance is illogical and evidences a level of bias against mothers who put up their babies for adoption. That this stigma regrettably exists amongst social workers, appears from research done into adoptions and the abandonment of children[9]. The parties and the minor children involved have a clear right to have their dignity preserved and to do so, requires that their identities be preserved.

[56] At the hearing the Department, wisely in my view, adopted a different stance and did not oppose the confidentiality relief sought. Its only objection was to request more time to attend to the redactions required, given the limited capacity of the State attorney's office and the volume of work it attends to.

[57] The confidentiality relief should in my view be granted. The Department will have sufficient time to commence with the redaction process forthwith and need not delay until

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[6] Heads of argument para 180-185
[7] Including the provisions of sections 66 and 74 of the Act.
[8] Centre for Child Law v Hoërskool Fochville and Another 2016 (2) SA 21 (SCA)
[9] D Blaickie, consultant to the National Adoption Coalition "Fact Sheet on Child Abandonment Research in South Africa" (30 May 2014) http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/05/Fact-Sheet-Research-on-Child-Abandonment-in-South-Africa_Final2.pdf

judgment is delivered. In my view a period of 3 days would be more than sufficient time to complete this task, even if a supine approach has been adopted by the Department.

The legislative framework and the Department's interpretation thereof

[58] The legal matrix against which the Act must be considered is the Convention of the Rights of the Child ("the UN Convention")[10] which was adopted by the United Nations in November 1989. It is a comprehensive and binding treaty that specifically deals with the rights of the child[11]. South Africa ratified the Convention in 1995. South Africa has also adopted various other international treaties related to ensuring the promotion and protection of children's rights[12].

[59] By way of example, Article 49(1) of the African Charter on the Rights and Welfare of the Child[13] provides that *"in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration"*.

[60] It is trite that in interpreting legislation where rights are involved, they must be viewed through the prism of the Constitution[14]. In interpreting the relevant sections an

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[10] UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, treaty Series, Vol 1577, p 3 Resolution 44/25

[11] Specifically Article 2, which prohibits against discrimination; Article 3, which upholds the primacy of the best interest of the child; Article 6 which pertains to the right of the child to survival; Article 12, which deals with the right of the child to participate in decisions affecting him or her; Article 7(2) which requires state parties to ensure the implementation of the rights contained in the UN Convention in accordance with their national law and their obligations under the relevant international instruments in the field and Article 14(2) which places emphasis on the positive duty of the state to support parenthood. The state is obliged to support parents in exercising their joint responsibility for raising children.

[12] The International covenant on Political and Civil Rights, the African Charter on the Rights and Welfare of the Child, the European Social Charter, the International Covenant on Economic, Social and Cultural Rights, The African Charter on Hum and People's Rights and the American Convention on Human Rights.

[13] November 29, 1999 referred to in Bhe v Magistrate, Khayelitsha and Others 2005 (1) BCLR 1 (CC)

[14] Myatheza v Johannesburg Metropolitan Bus Services (SOC) Ltd T/A Metrobus & Others 2018 (1) SA 38 (CC); Herbst v the Presiding Officer of the Children's Court, Johannesburg Gauteng Local Division, Johannesburg (A3025/2018) (12 November 2018) ("Herbst") para [26]

interpretation must be adopted that is consistent with the Constitution wherever reasonably possible[15] under s 39(2).

[61] Section 28 of the Constitution[16] deals with the protection of children's rights in South Africa. It provides:

> *"(1) Every child has the right –*
> *(a) to a name and nationality from birth;*
> *(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;*
> *(c) to basic nutrition, shelter, basic health care services and social services;*
> *(d) to be protected from maltreatment, neglect, abuse or degradation;*
> *(e) to be protected from exploitative labour practices;*
> *(f) not to be required or permitted to perform work or provide services that –*
> *(i) are inappropriate for a person of that child's age;*
> *(ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;*
> *(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –*
> *(i) kept separately from detained persons over the age of 18 years; and*
> *(ii) treated in a manner, and kept in conditions, that take account of the child's age;*
> *(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and*
> *(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.*
>
> *(2) A child's best interests are of paramount importance in every matter concerning the child."*

[62] The Children's Act is central to this application. Chapter 15 of the Act[17] regulates local adoptions of children[18]. Chapter 9 of the Act[19] on the other hand, regulates children in need of care and protection.

[63] At the heart of the issues between the parties lies a proper interpretation of the relevant provisions of the Act. The stance of the Department and the conduct of the social workers involved are informed by their interpretation of the relevant statutory provisions

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[15] Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others. In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2000 (10) BCLR 1079 (CC) paras [21]-[26]
[16] 108 of 1996
[17] Sections 228 to 253
[18] All the relevant parties, being the prospective adoptive parents and B and L are habitually resident in South Africa, thus the local adoption process must be followed.
[19] Sections 150 to 160

of the Act and the Guidelines. It is apposite to first deal with the Department's interpretation of the relevant provisions of the Act.

[64] The contentious features of the Department's stance and interpretation are primarily contained in Ms Naidoo's report, pertaining to the adoption of B. The central contention is that it must first be determined, by a designated statutory social worker, whether a child is in need of care and protection prior to starting the adoption process and prior to a child being found adoptable. Reliance is placed on various provisions of Chapter 9 of the Act. This informs the Department's reliance on s 156, s 157(1)(ii) and s 187 of the Act pertaining to foster care and reunification services which it contends must be rendered to the child and the family prior to a court declaring a child adoptable. Its view is that after such investigation, a designated social worker may recommend to court to declare the child adoptable. At this stage the grandparents and extended family members may be given preference to adopt the child. In support of that interpretation, emphasis is placed on s 7(1)(f) and ss 231(3) to (5) of the Act as important factors to consider.

[65] In Ms Naidoo's report, B is characterised as a child who *"has a parent or caregiver but that person is unable or unsuitable to care for child",* in support of the interpretation that it must first be determined whether a child is in need of care and protection. In the Department's answering affidavit, reliance was further placed on s 230(3)(a) of the Act in characterising B and L as adoptable as *"the child is an orphan and has no guardian or caregiver who is willing to adopt the child".*

[66] In Ms Naidoo's report reference is made to an appeal process against the proceedings in the Children's Court, despite no appeal never being launched. The Department adopts the stance that it could ignore the Children's Court proceedings as they were null and void. Although it is conceded that there has been consent, the children are adoptable and the prospective adoptive parents are willing and able to undertake, exercise and maintain parental responsibilities and rights, the Department argues that the Children's Court cannot issue adoption orders without the recommendations letters under

s 239(1)(d) of the Act and the Children's Court in the case of B erred by directing that such letter be issued. The Department maintained that there are no exceptional circumstances that warrant adoption orders being granted in the presence of peremptory statutory violations, more so in the absence of their adoption recommendation letter pertaining to B.

[67] I turn to consider the relevant provisions of the Act. The golden rules of interpretation are well established and requires a purposive, contextual linguistic approach[20]. The process of local adoption proceedings, comprises three separate and distinct components: the child focused preliminary investigation; the prospective adoptive parents' preliminary investigation and the formal adoption proceedings.

[68] The preliminary child focused investigation is concerned solely with determining whether a child is adoptable. This is a factual enquiry which must be investigated and reported on by an adoption social worker as defined in in s 1 of the Act, which includes an accredited social worker in private practice who has a speciality in adoption services and is registered in terms of the Social Service Professions Act.

[69] Section 230 of the Act pertains to a child who may be adopted. It provides in relevant part:

> *"(1) Any child may be adopted if –(a) the adoption is in the best interests of the child; (b) the child is adoptable; and (c) the provisions of this Chapter [15] are complied with.*
>
> *(2) An adoption social worker must make an assessment to determine whether a child is adoptable.*
>
> *(3) A child will be 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; (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*

[20] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) paras [18]-[19] at 603E-605B

person intending to adopt; or (g) the child's parent or guardian has consented to the adoption unless consent is not required."

[70] Ms Wasserman is an accredited adoption social worker and under s 230(2) is mandated to conduct the assessment as to whether B and L are adoptable. The Department's stance that such assessment must be conducted by a designated social worker, is thus incorrect as is its contention that Ms Wasserman was not entitled to perform adoption services.

[71] The circumstances listed in s 230(3)(a) to 230(3)(e) normally follow a finding by the Children's Court that the child is in need of care and protection and that reunification with the child's parents or extended family is not possible or in the child's best interests[21]. The adoptability of the child arises due to the child being found to be in need of care and protection and not due to the child being considered adoptable[22]. Those circumstances to not apply to the facts in this matter.

[72] Where the child's parent has consented to the adoption under s 230(3)(g), as in the case of B (and L), the child is not an orphan as described in s 230(3)(a), as relied on by the Department in its answering affidavit, nor as B is characterised in Ms Naidoo's report. In failing to recognise that B and L in the present instance are children falling under s 230(3)(g), the Department's interpretation is misconceived.

[21] Section 150 read with sections 155 and 156 of the Act.
[22] Section 156(1)(c)(iii) of the Act

[73] Under s 233(1)(a)[23] as read with s 233(2) and ss 236(1) and 236(2) [24], consent by the first and second applicants as biological parents of B and L is sufficient. The consent

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[23] *"Section 233 in relevant part provides:*

(1) A child may be adopted only if consent for the adoption has been given by-

a) each parent of the child, regardless of whether the parents are married or not: Provided that, if a parent is a child, that parent is assisted by his or her guardian;

(2) Subsection (1) excludes a parent or person referred to in section 236 and a child may be adopted without the consent of such parent or person.

...

(4) Before consent for the adoption of the child is granted in terms of subsection (1), the adoption social worker facilitating the adoption of the child must counsel the parents of the child and, where applicable, the child on the decision to make the child available for adoption.

...

(6) Consent referred to in subsection (1) and given –

(a) in the Republic, must be –

(i) signed by the person consenting in the presence of a presiding officer of the children's court;

(ii) signed by the child in the presence of a presiding officer of the children's court if the consent of the child is required in terms of subsection 1(c);

(iii) verified by the presiding officer of the children's court in the prescribed manner; and

(iv) filed by the clerk of the children's court pending an application for the adoption of the child; or

...

(8) A person referred to in subsection (1) who has consented to the adoption of the child may withdraw the consent within 60 days after having signed the consent, after which the consent is final."

[24] *"Section 236 provides:*

(1) The consent of a parent or guardian of the child to the adoption of the child, is not necessary if that parent or guardian –

(a) is incompetent to give consent due to mental illness;

(b) has abandoned the child, or if the whereabouts of the parent or guardian cannot be established, or if the identity of that parent or guardian is unknown;

(c) has abused or deliberately neglected the child, or has allowed the child to be abused or deliberately neglected;

(d) has consistently failed to fulfil his or her parental responsibilities towards the child during the last 12 months;

(e) has been divested by an order of court of the right to consent to the adoption of the child; or

(f) has failed to respond to a notice of the proposed adoption referred to in section 238 within 30 days of service of the notice.

(2) Consent to the adoption of a child is not required if –

(a) the child is an orphan and has no guardian or caregiver who is willing and able to adopt the child;

(b) the court is provided with certified copies of the child's parent's or guardian's death certificate or such other documentation as may be required by the court.

(3) If the parent referred to in subsection (1) is the biological father of the child, the consent of that parent to the adoption is not necessary if –

(a) that biological father is not married to the child's mother or was not married to her at the time of conception or any anytime thereafter, and has not acknowledged himself in a manner set out in subsection (4) that he is the biological father of the child; ...

(4) A person referred to in subsection (3)(a) can for the purposes of that subsection acknowledge that he is the biological father of a child –

of their biological fathers is not required, given that they have not been involved in their lives and have either denied paternity (in the case of L) or their whereabouts are unknown (in the case of B).

[74] The circumstances stated in s 230(3)(g)[25], do not require that there is any prior process or an investigation into whether the child is in need of care and protection. The voluntary consent to adoption is regularly dealt with by adoption social workers and should *"for all practical reasons be dealt with expeditiously and without any real difficulties"*[26].

[75] As held in *National Adoption Coalition*[27]:

> *"An adoptable child is not a child in need of care as a consequence of a child's parent consenting to his or her adoption and the related provisions to a child in need of care are not an automatic consequence of a child's parent consenting to his or her adoption or of an adoption application".*

[76] It was further expressly held in *Herbst*[28], that the practice of first having a child found in need of care and protection as a prerequisite for adoption is unnecessary[29].There is moreover no provision in Chapter 15 which requires that in all adoptions there must first be an investigation whether a child is in need of care and protection.

> *(a) by giving a written acknowledgment that he is the biological father of the child either to the mother or the clerk of the children's court before the child reaches the age of six months;*
> *(b) by voluntarily paying maintenance in respect of the child;*
> *(c) by paying damages in terms of customary law; or*
> *(d) by causing particulars if himself to be entered in the registration of birth of the child in terms of section 10(1)(b) or section 11(4) of the Births and Deaths Registration Act, 1992 [Act No. 51 of 1992).*
>
> *(5) A children's court may on a balance of probabilities make a finding as to the existence of a ground on which a parent or person is excluded in terms of this section from giving consent to the adoption of a child."*

[25] And in 230(3)(f)
[26] National Adoption Coalition of South Africa v Head of Department of Social Development, for the Province of KZN and others [2020] JOL 46734 (KZD) para [24]
[27] Supra Order at para 78(5)(a)
[28] Herbst supra
[29] Para [22]

[77] The Department's stance that determining whether a child is in need of care and protection is always required before adoption proceedings can continue is thus incorrect and is not supported by the relevant statutory provisions. In the present instance, no such investigation was required. The Department's interpretation misconceives the distinction and conflates the various requirements pertaining to Chapter 9 proceedings and adoptions under Chapter 15 in various respects.

[78] Under s 230(1), compliance is only required with the provisions of Chapter 15 of the Act. The placement of a child pending finalisation of the adoption proceedings is not of itself an issue in the adoption proceedings. The Department's complaints in relation to the temporary placement of B and L in the care of the eleventh and twelfth and thirteenth and fourteenth respondents respectively, pending the finalisation of the adoption process are not issues which should impede the adoption proceedings. Any orders regarding placement are regulated by Chapter 11 of the Act. The remedies of appeal and review were available to the Department if they had sufficient grounds to do so, which they did not exercise, either timeously or at all. The Department's view that it could ignore the orders granted by the Children's Court as being null and void, is misconceived [30] and the orders granted by the Children's Court remain valid and binding.

[79] The relevant sections further do not expressly or by implication require that family members of the biological parent must be consulted or their consent obtained for a child to be deemed adoptable, as the Department contends. As both the first and second applicants were majors, they did not require consent from their parents prior to consenting to the adoption of their children as the consent requirement under s 233(1)(a) is only required if the biological mother is a minor herself and under the age of eighteen.

[80] The approach adopted by the Department that the applicants did not exercise their election independently and the requisite procedures were not followed is not supported

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[30] Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) para [26]; MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute 2014 (3) Sa 481 (CC)

by any cogent facts. The first and second applicants were majors, respectively 23 and 27 years old at the time, with autonomy to make what are very personal choices within the inner sanctum of privacy[31]. In their affidavits, the applicants both confirmed that they exercised their decisions to put up their children for adoption independently and after receiving counselling as required under s 233(4) of the Act and that they gave informed consent. As stated, they both had personal reasons to do so.

[81] Both the first and second applicants further gave written consent before a Magistrate in the Children's Court as required s 236(6) and did not withdraw such consent within the prescribed sixty-day period provided. The consent thereafter became final.

[82] Ms Wasserman conducted the assessments and prepared reports that B and L are adoptable. B and L were privately matched. Matching could also occur via the Register on Adoptable Children and Prospective Adoptive Parents. From the available candidates, the first applicant chose the eleventh and twelfth respondents as prospective adoptive parents. The second applicant chose the thirteenth and fourteenth respondents.

[83] Section 231 of the Act regulates the categories of persons entitled to adopt and the processes involved. The eleventh and twelfth respondents and the thirteenth and fourteenth respondents are respectively both married husbands and wives.

[84] Ms Wasserman conducted the assessments and concluded that the aforesaid prospective adoptive parents are fit and proper and willing and able to undertake parental responsibilities as envisaged by s 231(2)(a) and (b) of the Act.

[85] Section 231 in relevant part provides:

> *(1) A child may be adopted-(a) jointly by-(i) a husband and wife; …*

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[31] Bernstein v Bester 1996 (2) SA 751(CC) par [67]

(2) A prospective adoptive parent must be –(a) fit and proper to be entrusted with full parental responsibilities and rights in respect of the child; (b) willing and able to undertake, exercise and maintain those responsibilities and rights;(c) over the age of 18 years; and (d) properly assessed by an adoption social worker for compliance with paragraphs (a) and (b).

(3) In the assessment of a prospective adoptive parent, an adoption social worker may take the cultural and community diversity of the adoptable child and prospective adoptive parents into consideration.

(4) *A person may not be disqualified from adopting a child by virtue of his or her financial status*

(5) Any person who adopts a child may apply for means-tested social assistance where applicable.

...

(7) (a) The biological father of a child who does not have guardianship in respect of the child in terms of Chapter 3 or the foster parent of a child has the right to be considered as a prospective adoptive parent when the child becomes available for adoption. (b) A person referred to in paragraph (a) must be regarded as having elected not to apply for the adoption of the child if that person fails to apply for the adoption of the child within 30 days after a notice calling on that person to do so has been served on him or her by the Sheriff.

(8) A family member of a child who prior to the adoption has given notice to the clerk of the children's court that he or she is interested in adopting the child has the right to be considered as a prospective adoptive parent when the child becomes available for adoption".

[86] The Department complained that there was no proper matching as a designated social worker was not involved. This view is incorrect, given that Ms Wasserman is an accredited social adoption worker and is entitled to perform the assessments under s 231(3). The wording of the section does not require that such assessment be performed by a designated social worker.

[87] The Department placed reliance on ss 231(3) and 231(4) as justifying its stance that adoptive children should be placed with family and financial constraints should not be a reason not to afford them priority. It argued that the provisions of ss 231(3) and 231(4) constitute some of the major considerations involved. Reliance was further placed on s 231(5) in arguing that the first applicant's parents could obtain financial assistance to take care of B.

[88] Reading s 231(3) in context, it cannot be intended to be an overriding factor in determining the best interests of a child. Such an interpretation would undermine the scheme created by s 7 and the need to consider the factors listed therein, together with any other relevant factors, in an individualised manner pertaining to a specific child, rather than adopting a blanket approach. The section does no more than mention community and cultural diversity as factors which may be taken into account in the assessment of prospective adoptive parents.

[89] On a purposive interpretation of the provisions in context, the provisions of ss 231(3) to 231(5) do not demand that a family member should be considered, as the interpretation adopted by the Department suggests. The high water mark on the issue of family is to be found in s 231(8) which relates to a family member who has expressed interest in adopting a child. The wording of the section further does not give rise to any express obligation to inform the family of a woman who seeks to put her child up for adoption that she intends to do so, so they may possibly express an interest in adopting the child. A family member has the duty to give notice of his or her intention to adopt. There is also nothing in s 231 which gives any preference to family members to adopt an adoptable child.

[90] A willingness to foster, as relied upon by the Department in its recommendations relating to the adoption of B by the first applicant's parents, would not meet the necessary threshold.

[91] Measured against the Constitution, the wording of s 231 militates against the interpretation that a child must as a primary consideration first be placed within the biological family, specifically in circumstances such as the present, where the biological mothers have decided to put their children up for adoption and not to inform their families of their pregnancies and the birth of their respective children. Autonomy must be afforded to such biological mothers who are intimately aware of their family circumstances to make the choice which would better serve the best interests of their children. Biological mothers have the right to privacy. I further agree with the amicus that if the Constitutional rights of

mothers are undermined, it may well increase the risk of abandonment of new born babies, an issue which is already prevalent in our society.

[92] Turning to the formal adoption process, once an adoptable child is matched with a fit and proper prospective adoptive parent which meets the statutory criteria, the adoption social worker prepares the application to be submitted to the relevant Children's Court and the process is conducted in accordance with the relevant provisions of the Act, subject to the prescribed judicial oversight by the Children's Court.

[93] Section 239 of the Act provides:

> *"(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.*
>
> *(2) When an application for the adoption of a child is brought before a children's court, the clerk of the children's court must submit to the court –*
>
> *(a) any consent for the adoption of the child filed with a clerk of the children's court in terms of section 233(6);*
> *(b) any information established by a clerk of the children's court in terms of section 237(2);*
> *(c) any written responses to requests in terms of section 237(2);*
> *(d) a report on any failure to respond to those requests; and*
> *(e) any other information that may assist the court or that may be prescribed.*
>
> *(3) An applicant has no access to any documents lodged with the court by other parties except with the permission of the court."*

[94] The adoption social worker has various obligations under s 239 of the Act. A report must be provided under s 239(1)(b), dealing *inter alia* with the child's best interests. The adoption worker must provide information on whether or not the proposed adoption is in the best interests of the child. The best interests criteria is of paramount importance. It is

child centric and resolves around the particular facts and circumstances of the specific individual prospective adoptable child.[32]

[95] Section 7(1) of the Act provides a list of factors to be considered, where relevant in conjunction with the rights in s 28 of the Constitution, already referred to. These factors are:

> *"(a) the nature of the personal relationship between – (i) the child and the parents, or any specific parent; and (ii) the child and any other care-giver or person relevant in those circumstances; (b) the attitude of the parents, or any specific parent, towards – (i) the child; and (ii) the exercise of parental responsibilities and rights in respect of the child; (c) the capacity of the parents, or any specific parent, or any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs; (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from – (i) both or either of the parents; or (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living; … (f) the need for the child – (i) to remain in the care of his or her parent, family and extended family; and (ii) to maintain a connection with his or her family, extended family, culture or tradition; (g) the child's – (i) age, maturity and stage of development; (ii) gender; (iii) background; and (iv) any other relevant characteristics of the child. (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development; … (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment; … (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child".*

[96] Our courts have not given exhaustive content to the best interest criteria as it must remain flexible and individual circumstances will determine which factors secure the best interests of a particular child[33]. The Constitutional Court explained thus *S v M*[34]:

> *"… Yet this Court has recognised that it is precisely the contextual nature and inherent flexibility of section 28 that constitutes the source of its strength. Thus, in Fitzpatrick this Court held that the best interests principle has "never been given exhaustive content", but that "[i]t is necessary that the standard should be flexible as individual circumstances will determine which factors secure the best interests of a particular child." Furthermore "'(t)he list of factors competing for the core of best interests [of the child] is almost endless and will depend on each particular factual situation'." Viewed in this light, indeterminacy of outcome is not a weakness. A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the*

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[32] AD v DW 2008 (4) SA BCLR 35 (CC) para [55]
[33] S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC) para [24-25]; Minister Welfare & Population Development v Fitzpatrick and Others 2000 (3) SA 422 (CC)
[34] Supra para [24]

particular child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned."

[97] It is clear that there is thus no one decisive factor as to what will serve a child's best interests. The determination of any particular child's best interests must thus be individualised to that child's particular circumstances. The stance adopted by the Department in its interpretation and the elevation of certain factors above others and the granting of precedence to certain factors, misconceives this fundamental principle.

[98] The Department placed great emphasis on s 7(1)(f) of the Act, relating to the need for a child to remain in the care of his or her parent, family and extended family and to maintain a connection with his or her family, extended family, culture or tradition. The Department finds motivation in these provisions for its stance that the maintenance of a connection by the child to his family, culture and tradition is of primary importance. It also relies on s 231(3) to support that argument. The Department's blanket approach to elevating the factors in s 7(1)(f) to an overriding consideration, is however contrary to a contextual and purposive reading of the relevant provisions of the Act.

[99] The wording of s 7(1) does not give any paramountcy to those factors mentioned in s 7(1)(f). Whilst in our diverse society, keeping the connection with extended family, culture and tradition is a factor showing where the best interests of a child lies[35], it is but one of the factors that require consideration if it is relevant to a particular child's circumstances. It is not a paramount consideration. These factors further place no obligation on the families of a child being contacted or their views being obtained prior to dealing with an adoption application. The Department's view that the family's views must first be obtained irrespective of the circumstances is not required in terms of the relevant provisions of the Act, nor is it justifiable on a constitutional level, given the biological mothers constitutional rights to privacy and the particular facts surrounding B and L's

[35] AB and Another v Minister of Social Development 2017 (3) SA 570(CC) para [300]

adoptions[36]. This view of the Department further disregards that it is for the Children's Court, and not the Department to direct enquiries regarding the family if it considers it necessary[37].

[100] Under s 239(1)(d) of the Act, the adoption social worker must obtain a letter from the office of the third respondent, the provincial head of the Department of Social Development. The Department's refusal to issue a letter of recommendation of B's adoption, the s 239(1)(d) letter is substantially based on its interpretation of the Act.

[101] Our courts have held that the measure of a s 239(1)(d) letter was implemented for purposes of quality control and to channel reports of social workers in private practice. It is a formal requirement under the Act, thereby involving oversight by public officials in the social worker's assessment process[38].

[102] In *KHD*[39] it was held that the purpose of a s 239 letter is at least threefold. First, to ensure that the legislative prescripts are adhered to by accredited social workers within the framework of their professional ethics and responsibilities. Second, it provides for the best interests of a child by ensuring that the provincial head of social development is given an opportunity to consider factors that are specifically and particularly within her knowledge. Third, it provides statutory oversight by public officials in the employ of the department of social development to inter alia prevent human trafficking.[40]

[103] The Department, via the third respondent, is obliged to deliver a letter setting out its views on the adoption application[41], which may either recommend the adoption or not recommend it. In the latter instance, reasons should be provided to enable the Children's

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[36] As held in S v M para [19] "Foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in secure and nurturing environment free from violence, want and avoidable trauma"
[37] In terms of section 50 of the Act
[38] In re XN 2013(6) SA 153 (GSJ) para [12], [14]
[39] KHD and Another v Head of Department of Social Development, Gauteng and Others and a related matter [2021] JOL 50913(GP;
[40] Or the use of children for other illegal purposes XN supra, para [14]
[41] National Adoption Coalition supra order 4, para [14]

Court to consider them[42]. The Children's Court would still be entitled to consider the application, even if the letter does not recommend adoption. As held in *KHD*[43]:

> *"If this were not so, it would lead to the absurd conclusion that a Children's Court is bound by the decision of the third respondent and, in fact, would do violence to the separation of powers doctrine and defeat the very purpose of the Children's Court".*

[104] It is the duty of the Children's Court to ensure that untoward practices do not result from adoptions. It is also the Children's Court which is charged with the wellbeing of children, examination of the qualifications of applicants for adoption and the granting of adoption orders.[44]

[105] The Department, via the third respondent, is not entitled to enquire generally, as the Children's Court would, and to decide the issue of what is in a child's best interests. The Department must rather consider whether it has any further information omitted by the adoption social worker that may impact on the adoption social worker's conclusions and recommendations and to provide that information to the Children's Court for consideration[45]. If it has any misgivings about the adoption, the Department must provide reasons for such misgivings to the Children's Court, thereby allowing that court to fulfill its statutory functions and thereafter monitor the proceedings.

[106] It is not for the Department to assume the functions of the Children's Court and to take it upon itself to perform that function or to dictate to the Children's Court what must happen, as it seems to have arrogated to itself. As stated in *KHD*, that would violate the separation of powers doctrine.

[107] The Children's Court considers the adoption application in accordance with the provisions of s 240 of the Act. It is obliged to take into account all relevant factors,

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[42] National Adoption Coalition
[43] Para []31
[44] XN para [14] and [19]
[45] National Adoption Coalition in the context of relevant and irrelevant factors.

including those listed in s 240(1). Those factors include the religious and cultural background of the child, the parents of the child and the prospective adoptive parents, all reasonable preferences expressed by a parent and stated in the consent and the report contemplated in s 239(1)(b).

[108] The Children's Court may make an order only if the requirements set out in s 240(2) are met. These include that the adoption is in the best interests of the child, the prospective adoptive parents comply with s 231(2) and consent has been given in terms of s 233, subject to s 241 of the Act.

[109] It cannot be concluded that there is merit in the interpretations of the various sections advanced by the Department. Rather, those interpretations evidence a concerning lack of understanding of the adoption process, the relevant provisions of the Act and the relevant principles enunciated in the case law. It is concluded that the Department's interpretation of the relevant provisions is for the reasons provided, misconceived.

[110] Considering the conclusion reached, it is not necessary to consider whether any of the provisions are unconstitutional as argued in the alternative by the applicants.

Should the Practice Guidelines on National Adoption be reviewed and set aside?

[111] The Act reflects the stated purpose of adoption as being to protect and nurture children by providing a safe, healthy environment with positive support and to promote the goals of permanency planning by connecting children to other safe and nurturing family relationships intended to last a lifetime[46].

[112] The Guidelines are intended to promote adoption. As pointed out by the *amicus*, the available statistics on adoption are scant and paint a disturbing picture. There is

[46] Section 229(a) and (b)

currently a crisis in South Africa which has seen adoption figures plummet and a concerning increase in the number of children being cared for in alternative care[47], growing up without any form of permanency and family. Regrettably, the available statistics are not recent and there are no generally available and accessible statistics and reports published by the National Department of Social Development on a regular basis[48].

[113] The amicus emphasised the growing crisis to care for the growing number of children who are being abandoned, drawing into focus the need for adoption to be prioritised as a matter of urgency[49]. The impact of this is self- evidently deleterious specifically in instances where a child is placed in an institutional setting[50]. Regrettably, adoption remains sorely underutilised.[51]

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[47] Where a child has been placed in foster care, a child and youth care centre or temporary safe care.

[48] The number of children in alternative care seems to be a closely guarded secret. There are no (generally accessible and publicly available) statistics and/or reports published by the National Department of Social Development. That said, and from the sources that are publicly accessible, it is estimated that there were, approximately – * 285 000 children in foster care in 2022. This represents the number of foster care grants paid by the South African Social Security Agency. See, generally, https://www.sassa.gov.za/Pages/StatisticalReports.aspx. See also, K Hall & W Sambu 'Income poverty, unemployment and social grants' in K Hall et al (eds) South African Child Gauge 2018: Children, Families and the State: Collaboration and Contestation (2018) at 141. The publication is available at http://webcms.uct.ac.za/sites/default/files/image_tool/images/367/South%20African%20Child%20Gauge%202018%20-%20Nov%2020.pdf [accessed on 14 February 2020]. * 100 000 children being cared for in residential care facilities in 2011 (see H Malatji & N Dube 'Experiences and challenges related to residential care and the expression of cultural identity of adolescent boys at a child and youth care centre (CYCC) in Johannesburg' (2017) 53(1) Social Work/Maatskaplike Werk at 110. The article is available electronically at http://www.scielo.org.za/pdf/sw/v53n1/07.pdf . These numbers have likely increased exponentially. In a recent series of articles published in the Sowetan it is alleged that in the past two years alone "[m]ore than 1,000 children have been abandoned in SA in the past two years because of poverty and inequality". 'Poverty and inequality to blame for rise ion abandoned children' Sowetan 05 April 2022.

[49] *"Raise your hand: Please help these kids: With the number of abandoned children on the rise, there is a growing need to move those who are outgrowing care centres into foster homes but there are no takers out there"* Sowetan 05 April 2022.

[50] See, for example, K Mclean 'The impact of institutionalization on child development' (2003) 15(4) Development and Psychopathology at pgs. 853 – 884; Herbst v Presiding Officer of the Children's Court, Johannesburg (unreported) at [15]; the Bucharest early Intervention Project, http://www.bucharestearlyinterventionproject.org .

[51] In the period 2010/2011, there were a total of 2236 local adoptions. In the period 2015/2016 the number of adoptions plummeted to 978 local adoptions (see, T Mabe 'A Government perspective: An overview of developments, trends and challenges in adoptions in SA since 2010' available at, http://www.adoptioncoalitionsa.org/wp-content/uploads/2016/11/Dr-Tebogo-Mabe.pdf The National Adoption Coalition of South Africa reckon that in the period 2019/2020 there were 977 local adoptions (see, generally, http://adoptioncoalitionsa.org). This decline has, in part, been due to the bureaucracy that has become rife in the process.

[114] These concerning statistics illustrate the importance of promoting adoption rather than stifling it, as the reducing adoption statistics seem to suggest. That position will only be exacerbated by the increased risk of child abandonment if the adoption process is hampered. The importance of the Guidelines to promote adoption is thus manifest.

[115] As previously stated, the Department's stance was substantially informed by the Guidelines, which in turn is substantially informed by the Department's interpretation of the relevant provisions of the Act.

[116] The Department's case is that the Guidelines are lawful and in force and were not generated *ultra vires*, nor do they prescribe a blanket approach. According to the Department, the main objective of the Guidelines is to ensure adherence to Chapter 15 of the Act. The applicants' case on the other hand is that the Guidelines and its interpretation by the Department are *ultra vires* and are interpreted in a manner that contradicts the best interests of the child consideration and the constitutional rights of mothers.

[117] The first problem with the Department's case is that the origin and status of the Guidelines are unclear and the Department elected not to clarify this issue, either in its papers or in argument, despite it being of obvious importance to clarify its status.

[118] The Guidelines itself give no clarity on the issue. The document is headed: "Department Social Development. Practice Guidelines on National Adoption". The designated contact person is a Ms Rose Mnisi. There is no indication on the document what its status is. The Guidelines is described in the foreword as follows:

See, generally, D Blackie 'Fact Sheet on Child Abandonment Research in South Africa' available at, http://www.adoptioncoalitionsa.org/wp-content/uploads/2014/05/Fact-Sheet-Research-on-Child-Abandonment-in-South-Africa_Final2.pdf and Robyn Wolfson Vorster 'Sounding the death knell for adoption?' available at,https://www.dailymaverick.co.za/opinionista/2016-11-15-sounding-the-death-knell-for-adoption/#.WtgzCi-B3m0

> "*The Practice Guidelines on National Adoption is aimed at promoting good practice in the adoption field and capacitating adoption social workers on the proper and correct procedures that must be followed when facilitating adoption matters of children who are found to be adoptable. This document also serves as a guiding tool for the promotion and provision of quality adoption services to communities to all role-players involved, assist them to comply with the legislative mandate in relation to the placement of children in permanent homes through adoption. Furthermore the document will serve as a monitoring and evaluation tool to assess if adoption service providers are adhering to all the requirements as informed by Chapter 15 of the Children's Act, 38 of 2005 and any other relevant legislation that govern the adoption of children within the country.*"

[119] The Rule 53 record also does not clarify the issue and does not address the status of the Guidelines. In the Department's heads of argument, it is baldly stated that the Guidelines are promulgated in terms of s 160[52] of the Act[53].

[120] Section 160 however falls under Chapter 9 of the Act and not Chapter 15. How adoption guidelines can be promulgated as regulations under s 160, which deals with children in need of care and protection, is also not explained. S 160 does not grant the power to make adoption regulations or guidelines.

[121] Moreover, the submission in the heads of argument pertaining to the promulgation of the Guidelines under s160 is not substantiated by any evidence or even an averment under oath in the Department's answering papers. It thus cannot simply be accepted that the Guidelines are indeed regulations made by the Minister of Social Development ("the Minister"). If the Guidelines were properly promulgated it would have been an easy task to have provided a reference to the applicable regulations and proof of its promulgation.

[122] Given that it is s 253(h)[54] of the Act which empowers the Minister of Social Development to make regulations pertaining to adoptions, if the Guidelines were not

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[52] Section 160(d) provides: *"The Minister may make regulations prescribing generally, any other incidental or procedural matter that may be necessary to prescribe in order to facilitate the implementation or administration of this chapter" [chapter 9].*

[53] Paragraph 199

[54] Which provides: *"regarding any other ancillary or incidental administrative or procedural matter that it may be necessary to prescribe to facilitate the proper implementation or administration of this chapter" [15].*

promulgated thereunder by the Minister, the Guidelines were not promulgated under an authorising statutory provision of the Act, if they were promulgated at all. That of itself would render the Guidelines *ultra vires* and liable to be set aside. I shall nonetheless deal with the contents of the Guidelines.

[123] According to the Department, the Guidelines don't overreach but were prepared and were prepared having regard to the *"cultural and class diversity of SA society"*. It is contended that there was:

> *"a failure to consider the undesirable alienation of children from their parents and community in circumstances where their culture and class are regarded as inferior. It would also lead to resentment in future on the part of parents who play a subservient role to rich and culturally supposedly superior adoptive parents".*

[124] The Department further contends that the adoption process must be carried out with:

> *"the full consciousness of the cultural (and the class) diversity of South African society" . A failure to take these into account would lead to an undesirable alienation of children from their parents and community in circumstances where their culture and class are regarded as inferior".*

[125] No cogent argument was advanced by the Department in support of the legality of the Guidelines or to counter the arguments raised by the applicants. The Department relied on its interpretation of the relevant provisions of the Act, already referred to. The high water mark of the Department's case is that the Guidelines consist of directives to be followed by it and the social workers in its employ which must be followed when facilitating adoption matters of children who are found to be adoptable. No legal argument was advanced to sustain those contentions.

[126] In certain respects, the provisions of the Act are correctly referred to in the Guidelines. It does however contain certain elements of concern, which permeates the document as a whole. In various respects it is contradictory in what is seeks to achieve

and how it achieves it. In other respects, it is inherently contradictory. It is apposite to refer only to a few examples for the sake of illustration.

[127] In paragraph 3, the objectives of the Guidelines are stated, including, to

> *"Ensure that a high level of national adoption service is provided in the best interests of children who cannot be cared for by their biological families".*

[128] In the guiding principles under in paragraph 6, the Guidelines in paragraph 6.1 state the over-arching principles as follows:

> *"The best interests of a child, non-discrimination, child participation where applicable and the protection of a child, are paramount and must be applied at all times as they form the basis of any adoption plan. It should be noted that, the best interests of the child outweighs any other consideration, it includes the child's need for affection, right to security continuing care and long-term stability."*

[129] Despite this principle, under Key operating principles in paragraph 6.2 it is stated in relevant part:

> *"Every child has the right to grow in a permanent and stable family, efforts should be made to promote adoption for children when needed, regardless of age, gender and special needs....It is a priority that a child should have the opportunity to be cared for and be raised by his or her biological parents and or family of origin. If a child cannot be cared for by his/her biological parents or family, the responsible service provider should consider all alternatives for permanent care or adoption within the child's extended family. In respecting the subsidiarity principle in the light of the child's best interests priority must be given to adoption by the family of origin. Where this is not an option, preference should be given to other suitable options such as adoption within the community from which the child came or at least within his or her own culture, before considering adoption by family from other cultural or race group. The biological father of the child born out of wedlock and or foster parents of the child shall be given preference to adopt the child if he/she becomes available for adoption. Offering a permanent alternative care to a child through adoption or long terms foster family care when necessitated by circumstances, shall prevail over care in a CYCC. Adoption of a child may also be considered based on the foster care and residential care placement review".*

[130] Chapter 4, paragraph 10 contains guidelines on working with various key persons, biological parent/s or guardian/s. In relevant part paragraph 10.1 provides:

> *"Protection of families is one of the safeguards to protect children from abduction, sale or trafficking for the purpose of adoption. Families and children need protection from more subtle forms of*

exploitation, and protective measures as envisaged in the Children's Act, to prevent undue pressure, coercion, inducement or solicitation of birth families to relinquish a child. The biological parent/s or guardian/s decision to place a child for adoption should not be induced by payment or compensation of any kind nor be coerced into consenting to the adoption of their children."

[131] Subparagraph 10.1.1. provides in relevant part:

"The initial interview will depend on the biological parent/s or guardian/s motives for their intention to relinquish the child for adoption of the child. The purpose is to assist them to explore other options of taking care of the child before considering adoption of the child. According to the Act, it is important for the child to grow and remain within the family of origin and all the effort should be taken to assist the biological parent/s in that regard, hence, the extended family should also be involved as far as possible to take care of the child through foster care or adoption".

[132] Paragraph 11.2.4.2.3 provides:

"*Adoption of a child from another culture. Culture is a reality when adopting a child from a different culture, race or ethnic group prospective adoptive parents need to be thoroughly prepared when they choose to adopt a child from another culture. Section 7(1)(f) and (h) of the Children's Act stipulates that whenever a provision of this Act requires the best interests of the child standard to be applied like it is applied in adoption in terms of s 230 (1)(a) of the act factors such as the child's cultural development including the child's need to maintain a connection with his or her culture and tradition must be taken into consideration. Cross cultural adoption should be considered as a second option when prospective adoptive parents sharing the same culture with the adoptable child could not be found to adopt the Child. In other words, priority must be given to the same culture adoption as it resembles a natural family that adoption is intended to create for the child. Adoption social workers should therefore not discriminate against any person of a different culture/race who would like to adopt a child of another culture they should be given the opportunity to adopt any child once it is established that there are no parents sharing the same culture with the child who are willing and able to adopt the child".*

[133] The Guidelines significantly omit any reference to s 230(3)(g), where a major biological mother has taken the decision to place her child up for adoption, despite the remainder of the provision being referred to.

[134] It is further clear that the provisions and requirements of Chapter 9 and Chapter 15 are conflated in the Guidelines. No distinction is drawn between the different circumstances under which a child may be found to be in need of care and protection and those under which a child may be found to be adoptable. I have already dealt with the distinction.

[135] In the Guidelines, "family" is defined as:

> *"A family is a group of persons united by the ties of marriage, blood, adoption or cohabitation characterized by a common residence/household or not, interacting and communicating with one another in their respective family roles, maintaining a common culture and governed by family rules.*

[136] "Family member" is defined to mean:

> *" (a) A parent of a child, (b) any other person who has parental responsibilities and rights in respect of the child,(c) a grandparent, brother, sister, uncle and cousin of the child or (d) any other person with whom the child had developed a significant relationship based on psychological or emotional attachment, which resembles a family relationship".*

[137] Despite the definition of family member in (d), which accords with that definition under section 1 of the Act, the Guidelines seek to place a higher importance on biological and extended family as a better option for adoption or foster care and seems to place a limitation on the interpretation of family which is not constitutionally justifiable. As explained by Khampepe J in the minority judgment in *AB and Another v Minister of Social Development*[55]*:*

> *"The Constitution values alternative forms of family life for good reason. Because of the diversity that characterises our society, there is no one correct version of the family against which others can be assessed. Therefore, it would be presumptuous and arbitrary to define what an acceptable family entails. In a legal culture based on justification, capricious restrictions on something as important to human beings as the family cannot be countenanced. This will harm the dignity of those directly affected, as well as our society in general".*

[138] Khampepe J further stated:

> *"..by further requiring evidence of a 'genetic link' between parent and child, s294 is problematically disparaging of forms of family life that have already been constitutionally sanctioned, including adoption. Children who are adopted necessarily have no genetic of gestational link with their parents. To suggest that adopted children are inevitably worse off for this fact is to contradict this court's clear indication that families with adopted children should not be thought of or treated differently to other families. It is constitutionally impermissible to say that families with children who are not genetically connected to their parents are significantly worse off. The Constitution instead celebrated this difference, and recognises that the diversity of our society is what makes it robust."*

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[55] 2017 (3) SA 570 (CC) paras [117]-[119]

[139] To this extent the Guidelines and how the Department interpreted and applied the Guidelines is contrary to the Constitution and the provisions of the Act. The Guidelines go beyond what is legislated and is inconsistent in significant ways with the Constitution and the Act. These concepts permeate throughout the Guidelines and are not limited to isolation sections thereof.

[140] The Guidelines purport to provide for the substantive regulation of adoptions and the standard of the best interests of the child. A fundamental premise to the Guidelines is that it is paramount to maintain a connection between an adoptable child and his or her extended biological family, culture and community, despite the Act not giving priority of these factors. It also requires involvement of the biological father, despite the express provisions of s 236 of the Act, particularising the circumstances where the biological father's consent to adoption is not required.

[141] The Guidelines further effectively undermine the other factors in s 7(1) of the Act, relevant to a child's best interests. Various requirements are read into the Act, which enjoy priority which is not justified having regard to the express wording of the provisions of the relevant provisions.

[142] By way of example, s 231(7) is interpreted in a manner which undermines the provisions of s 236(3)(a) by insisting involving biological fathers on a blanket basis. The Guidelines also read into s 231(8) a right on the part of extended biological family members to be informed of a biological mother's intention to put her child up for adoption. This interpretation is used as justification for conduct which ignores a biological mother's constitutional rights and makes them subservient to other considerations. The reading in of such obligation on biological mothers who have reached the age of majority to disclose to their families their pregnancies, the birth of their children and their decision to place children up for adoption is not a duty imposed by the Act.

[143] It further appears from the Guidelines that it interprets the permissive provision in s 231(3) as a mandatory overriding factor that prioritises a commonality in the culture and

community backgrounds between an adoptable child and a prospective adoptive parent, without taking the child's best interests into account on an individualised basis. This interpretation undermines s 28(2) of the Constitution. The prioritisation of considerations of culture and community is stated in a manner that seeks to exclude the adoption of adoptable children by parents from a different culture or community to that of the child.

[144] The elevation of culture, without taking consideration of the circumstances of a particular child into account, misconceives that culture is but one of the factors which must be considered. The result of this misinterpretation is that it overrides the decisions and constitutional rights of the applicants, including their rights to dignity, privacy and bodily and psychological integrity.

[145] The Guidelines in material respects impose conditions that are not contemplated or contained in the Act. It also seeks to impose a blanket approach without individualising the needs of a particular child in his or her particular circumstances, emphasising principles that are not envisaged by the Act or in fact by the Constitution. I have already referred to how the Department has a misconceived understanding of the relevant provisions of the Act, including a misunderstanding and conflation of the various provisions of Chapter 15 of the Act with those of Chapter 9. This misunderstanding is perpetuated in the Guidelines.

[146] It is trite that a functionary may exercise no power and perform no function beyond that conferred on it by law. [56] The exercise of power beyond that conferred by law offends the principle of legality and is *ultra vires*. In exercising the power to make regulations, it is the Minister, and not any other functionary, who is empowered to do so. In doing so, the Minister would be obliged to comply with the Constitution and the empowering

[56] Fedsure Life Assurance Ltd and Others v greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC) para [58]

provisions of the Act. Any failure to do so, would result in such regulations being *ultra vires.*

[147] As explained by the Constitutional Court in *Affordable Medicines Trust and Others v Minister of Health and Others* [57]:

> *[49] The exercise of public power must therefore comply with the Constitution, which is supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the legislature and the executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.*
>
> *[50] In exercising the power to make regulations, the Minister had to comply with the Constitution, which is the supreme law and the empowering provisions of the Medicines Act. If, in making the regulations the Minister exceeded the powers conferred by the empowering provisions of the Medicines Act, the Minister acts ultra vires (beyond the powers) and in breach of the doctrine of legality. The finding that the Minster acted ultra vires is in effect a finding that the Minister acted in a manner that is inconsistent with the Constitution and his or her conduct is invalid. … The question, therefore, is whether the Minister acted ultra vires in making regulations …….. The answer to this question must be found in the empowering provisions",*

[148] The Act and the Constitution provides sufficient guidelines as to the kind of policy guidelines that may be included in regulations, including the Guidelines. There is nothing in the Act that empowers the Minister (or the drafter) of the Guidelines to purport to develop a policy or guidelines that would impose additional requirements not envisaged by the Constitution or the Act or to develop Guidelines that are inconsistent with the Constitution.

[149] In the Guidelines, substantive law has been sought to be created and additional requirements for adoption prescribed in circumstances where there is no empowerment to do so and in circumvention of the democratic procedures that accompany the legislative process.

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[57] 2006 (3) SA 247 (CC) paras [49]-[50]

[150] Whoever was responsible for the Guidelines was not empowered to include in the Guidelines provisions that do not comply with the Act and undermines certain rights in the Constitution. In doing so, it was *ultra vires* and in breach of the principle of legality. That is exacerbated by the fact that it cannot be concluded and was not established by the Department that it was indeed the Minister who is responsible for the Guidelines.

[151] Under s 172(1)(a) of the Constitution, when deciding a constitutional matter, a court must declare any law or act that is inconsistent with the Constitution invalid. S 172(1)(b) empowers a court, in respect of an order of invalidity, to make any order that is just and equitable. The power to grant an appropriate remedy applies in review proceedings, whether under the principle of legality or in terms of the provisions of the PAJA. [58] It is a wide discretionary power granted to the court to make any order.[59]

[152] The only relief proposed was the review and setting aside of the Guidelines in its totality. It was not argued on behalf of the Department that there was any other just and equitable remedy available or that an opportunity should be afforded to amend the Guidelines or that any declaration of invalidity should be suspended if the Guidelines were found to breach the doctrine of legality. It was further not argued that any portion of the Guidelines should survive if it were found to be invalid.

[153] Considering the facts, it is not apposite to suspend the declaration of invalidity in order to provide an opportunity to remedy the defects, given that it is unclear who was responsible for the Guidelines in the first place.

[154] I conclude that the Guidelines are to be declared invalid and are to be reviewed and set aside. It would be appropriate to set aside the Guidelines in their totality due to the pervasive nature of the objectionable provisions thereof.

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[58] Central Energy Find SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others [2022] ZASCA 54
[59] Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others 2011 (4) SA 113 (CC) para [84]

Was the conduct of the Department and the social workers involved unlawful interference in the adoptions of B and L and did their conduct breach the constitutional rights of the applicants, and those of B and L?

(i) Lawfulness of the Department's and the social workers' conduct and interference with the adoptions of B and L

[155] I have already dealt with the misconceptions in the Department's interpretation of the relevant provisions of the Act and the perpetuation thereof in the Guidelines. It is not necessary to repeat the reasons for reaching these conclusions. The conduct of the Department and the social workers involved, insofar as it is not sanctioned by the Act, was unlawful.

[156] The Department's stance that the applicants did not exercise their election to put up their children for adoption independently and that the requisite procedures were not followed is not supported by any cogent facts. The applicants were both majors, respectively 23 and 27 years old at the time, with autonomy to make what are very personal choices within the inner sanctum of privacy[60]. The undisputed facts established that the applicants exercised their decisions to put up their children for adoption independently and after receiving counselling. The requisite procedures were followed and the applicants consented to the adoptions of B and L in terms of s 230(3)(g) of the Act. In those circumstances, there was no lawful basis for the Department and the social workers involved to interfere with the adoption process and to harass and stigmatise the applicants and try to influence their choices. It was unconscionable for the social workers to harass the first and second applicants and cause them further trauma in what was already a very traumatic experience for them.

[157] It was further not lawful for the Department to obtain, without the first applicant's knowledge or consent, an order in the Children's Court based on B being a child in need

[60] Bernstein v Bester 1996 (2) SA 751(CC) par [67]

of care and protection, resulting in him being removed from Leratong Hospital to another hospital and thereafter being placed in a temporary care facility for some fourth months. The evidence available at the time clearly indicated that the first applicant had consented to his adoption and that the consent was given in accordance with the requirements of the Act. It was further clearly not in B's best interests to have him removed to a temporary care facility, given his poor physical condition when he was eventually placed in the temporary care of the eleventh and twelfth respondents.

[158] There was further no lawful basis on which the social workers threatened to inform and, in the case of the first applicant, informed the applicants' parents of B and L contrary to the applicants' express instructions. In the case of the first applicant, this conduct was exacerbated by the social workers, deliberately and fully aware of her instructions, advising her parents behind her back and embarking on a process to influence them to agree to act as foster parents for B. [61]That conduct was unlawful and is not sanctioned by the Act.

[159] There was further no lawful basis on which the Department and the social workers delayed the finalisation of B's adoption process, by seeking multiple postponements over an extended period of time to conduct investigations and provide reports and recommendations, which were not required and were not based on applicable requirements of the Act. Their conduct in this regard was unlawful and disregarded B's best interests.

[160] The delays in the finalisation of L's adoption proceedings are similarly attributable to the Department. Its version is that L's adoption was identified as problematic based on its allegations of irregularities and the involvement of Ms Wasserman. It was one of the cases referred to by the Department in its meeting with the magistrates of the Krugersdorp Children's Court during August 2019. A report was provided pursuant to an investigation by one of the Department's social workers during January 2020. The manager had

[61] The interdictory relief obtained by the second applicant prevented further harassment and interference by the Department.

concerns with the report as it had been provided to Ms Wasserman, she questioned the objectivity of the report considering email exchanges between Ms Wasserman and the social worker and the report did not reflect whether L was a child in need of care and protection. That prompted the Department to again investigate the matter, resulting in the second applicant being contacted on 13 October 2020.

[161] According to the Department, a panel meeting was convened on 16 October 2020, where it was decided that the Department would not insist on further investigation and that a letter under section 239(1)(d) should be issued, recommending L's adoption. The panel agreed that the report did not meet the standard investigations to determine whether L was a child in need of care and protection. The report was already in the possession of Ms Wasserman and indicated that adoption was endorsed. It was further agreed that L had been in the care of the prospective adoptive parents since birth. In its answering papers, the Department's stance was that the recommendation letter was thus issued for reasons that could not be legally sustained, resulting in the review proceedings being launched. The threat and belated review application has delayed the finalisation of L's adoption substantially.

[162] The Department's allegations of irregularity supporting its review raised in its answering papers, are underpinned by the same flawed reasoning and conflation of the requirements of Chapter 9 and Chapter 15 of the Act. For the reasons already provided, it was not first necessary to determine whether L was a child in need of care and protection in the circumstances and the involvement of Ms Wasserman takes the matter no further. That recommendation letter was the only document required for the finalisation of L's adoption. L has been found to be adoptable and the thirteenth and fourteenth respondents have been found to be suitable adoptive parents, pursuant to Ms Wasserman's assessments and reports.

[163] I have already concluded that the irregularities relied on by the Department has no merit, its interpretation of the Act is misconceived and the Guidelines fall to be reviewed and set aside. The Department's review application was launched, only after the

applicants pointed out in their founding papers that there was no legitimate basis on which the Department refused to recommend B's adoption but issued a letter of recommendation of the adoption of L's and that there was a disparity of treatment in the two adoptions.

[164] Despite being referred to in the Department's answering papers as a "pending review", the application was only launched on 1 September 2021, more than two months after the belated delivery of the Department's answering papers. Some ten months later proper service of the application was still not effected on the respondents, the second applicant and L's prospective adoptive parents.

[165] It is trite that a court is entitled to protect itself and others against an abuse of its process, an issue to be determined by the circumstances of each case. [62] As held in *Hudson v Hudson and Another:* [63]

> *"When a Court finds an attempt made to use for ulterior purpose machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse""*

[166] Given the circumstances in which the review was launched and the flawed basis on which reliance is placed by the Department on the recommendation letter being "irregularly issued", it can reasonably be inferred that the review proceedings were launched with an ulterior purpose. The present review proceedings in my view, constitutes such an abuse. All it has achieved is a substantial delay in the finalisation of L's adoption, with concomitant trauma to all involved. I return later to what is to be done about this abuse.

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[62] Beinash v Wixley 1997 (3) SA 721 (SCA) at 734D-H and the authorities cited therein.
[63] 1927 AD 259 at 268, quoted with approval in Beinash supra, 734D-F

[167] The delays in the finalisation of the adoption proceedings pertaining to both B and L are untenable[64]. As stated by Victor J in *Herbst*[65] :

> *"bureaucratic and unnecessary delays in the adoption procedure should play no part in impeding a child's right to his or her own forever family".*

[168] The manner in which the Department and the social workers conducted themselves was substantially inconsistent with the procedures envisaged in the Act. Their high handed approach entirely frustrated the essential need for adoptions to be completed swiftly and without bureaucratic delays and entirely negated that it could never be in a child's best interests to have their futures left uncertain and in limbo whilst forming close bonds with their prospective adoptive parents[66] .

[169] The Department's stance in relation to the section 239(1)(d) recommendation letter of B's adoption and its persistent refusal to provide it, disregarded the ruling of the Children's Court on 7 August 2020 that B was adoptable and that his adoption by the eleventh and twelfth respondents was in his best interests. That ruling was made after the fifth respondent presented her report recommending that B was to be placed in the foster care of the first applicant's parents and after she testified extensively. An egregious omission in the Department's investigations was that B and his present circumstances whilst living in the care of the eleventh and twelfth respondents was not investigated.

[170] It was not open for the Department to simply ignore the Children's Court ruling because it considered it "null and void" and its stance was patently misconceived and unlawful. It is well established that until an administrative decision is set aside by a court in proceedings for judicial review it exists in fact and has legal consequences that cannot be ignored[67]. The Department at no stage sought to launch review proceedings, or appeal

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[64] Ndala, In re: Ndala 2013(6) SA 153 (GSJ) para [19]
[65] Para [2]
[66] P Carolin & T Carolin v Provincial Head of Department, Gauteng Social Development (Johannesburg High Court) unreported interim order under case no 43586/2018 para [18]
[67] Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) para [26]; MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) ltd t/a Eye & Lazer Institute 2014 (3) SA 481(CC)

proceedings against the various orders made by the Children's Courts, either timeously or at all. Moreover, the best interests of the children would outweigh any procedural grounds [68] for setting aside the temporary care orders, even if any such grounds may have existed.

[171] The Department also chose to ignore the order of the Children's Court directing that a letter of recommendation be issued by the third respondent. The letter refusing to recommend B's adoption, although dated 21 July 2020, was only issued on 4 September 2020, causing yet another delay. Despite the obligation to provide reasons for refusal, that simply was not provided.

[172] Regrettably the unlawful conduct of the Department and the social workers was not limited to the adoptions of B and L. The Department has sought to interfere with not only their adoptions, but also with the adoptions of other vulnerable children, not part of the present proceedings. It was not disputed that the Department has adopted a pattern of conduct that has a profound impact on the applicants and those other individuals who find themselves in a similar position.

[173] This issue arises from the Department's version that a meeting was held on 15 August 2019 between it and the magistrates presiding in the Krugersdorp Children's Court at the Department's request, wherein the magistrates were presented with a list of cases highlighting "some serious transgressions by some social workers and magistrates in the application of the Act and legislation to the detriment of children". The list included the adoptions of B and L. At the end of the meeting, the magistrates concurred and it was decided that all adoption cases[69] irrespective of what stage the proceedings were at, were to be "converted" into Chapter 9[70] investigations by the Department[71]. Seven other adoptions were involved and delays occurred as a result of the Department's interference

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[68] Fraser v Naude and Others 1998 (11) BCLR 1357 (CC)
[69] Seven other adoptions in which are involved
[70] Erroneously referred to as "section 9"
[71] In respect of B a form 9 section 50(1) order was issued on 29 August 2019 to investigate whether B was a child in need of care and protection

and investigations. Ultimately, the Children's Court granted all those adoption applications in the best interests of the children involved.

[174] The high handed approach adopted by the Department is concerning. More importantly, it is patently unlawful. It was entirely inappropriate for the Department to seek to influence the Children's Court and seek an agreement that those adoption proceedings would be converted into care and protection proceedings, irrespective of the facts of each particular case.

[175] The Act contains no empowering provision that authorises the Department to make such a blanket request or demand from the Children's Court. The agreement reached is patently *ultra vires* and unlawful. The conduct of the Department illustrates a grave misunderstanding of the separation of powers doctrine.

[176] From the perspective of the Children's Court, it too acted *ultra vires* in concluding the agreement with the Department. The Children's Court is a creature of statute and has no general power to conclude an agreement with the Department nor the inherent power to simply convert proceedings into care and protection proceedings on a blanket basis[72]. In terms of s 50 of the Act, a Children's Court may order that there be an investigation to assist it in deciding a matter in the judicial exercise of its discretion, having regard to the peculiar facts and circumstances of a given matter pertaining to a specific child[73]. A blanket conversion of adoption proceedings in to proceedings relating to whether a child is in need of care and protection, is improper.

[177] A blanket stay of the adoption proceedings of the vulnerable children involved, can moreover never be in the best interests of the minor children affected by the agreement,

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[72] Section 155(1) of the Act provides: *"A children's court must decide the question of whether a child who was the subject of proceedings in terms of section 47, 151, 152, 152A or 154 is in need of care and protection"*
[73] Section 50(1) of the Act

given the need to determine each case based on an examination of the real life situation of the particular child involved.[74]

(ii) Breaches of the applicants' constitutional rights

[178] Not only is the Department's refusal to take account of the first and second applicant's unequivocal instructions not to inform their parents of their pregnancies and B and L unlawful, given that the Act does not require them to be informed, it undermines various of the applicants' constitutional rights[75], including their rights under ss 10[76], 12(2) and 14 of the Constitution to dignity, bodily and psychological integrity and privacy[77].

[179] Whilst the Department conceded that the applicants are at liberty to make an informed decision to consent to the adoption of their children, the conduct of the Department negated those very rights.

[180] Under s 12(2)(a) of the Constitution, the right to bodily and psychological integrity includes the right to make decisions concerning reproduction. Section 12(2)(b) of the Constitution grants a person the right to security in and control over their body. Our courts have held that these rights guarantee the right of every woman to determine the fate of her pregnancy and the right to choose whether or not to terminate her pregnancy.[78]

[181] The right to freedom of choice under s 12(2)(a) and (b) is reinforced by the right to equality and protection against discrimination on the grounds of gender, sex and

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[74] S v M para 24
[75] Sections 10, 12, 14 of the Constitution
[76] Section 10 grants the right to everyone to inherent dignity and the right to have their dignity respected and protected
[77] National Adoption Coalition supra order in para 78(2)
[78] Christian Lawyers Association v Minister of Health and Others (Reproductive Health Alliance as amicus curiae) 2005 (1) SA 509 (T) 526A-527D, referred to with approval in AB para [312]

pregnancy (s9), the inherent right to dignity and to have her dignity respected and protected (s10) and the right to privacy (s14)[79].

[182] The Constitutional Court has held that the right to make autonomous decisions in respect of intensely significant aspects of one's personal life falls within the ambit of the right to privacy but declined to posit an independent right to autonomy.[80]

[183] A woman's right to decide on the fate of her pregnancy is not limited to decide whether or not to terminate the pregnancy. It would by necessity extend to the decisions made consequent upon the decision not to terminate, including a decision to consent to her child's adoption. This recognises a woman's right to autonomy and freedom. As stated by Khampepe J in *AB and Another v Minister of Social Development*[81] *("AB"):*

> *"Autonomy is a necessary, but socially embedded, part of the value of freedom. What animates the value of freedom is the recognition of each person's distinctive aptitude to understand and act on their own desires and beliefs. The value recognises the inherent worth of our capacity to assess our own socially-rooted situations, and make decisions on this basis"*

[184] Khampepe J further explained[82]:

> *"Section 12(2) thus protects the "right to bodily and psychological integrity. There is a close connection between the freedoms protected by our Constitution and 'integrity'. The Constitution enjoins us to actively turn away from indifference and move towards respect, empathy and compassion. The protection section 12(2) provides is grounded in these ideals…..The importance of protecting bodily and psychological integrity has long formed part of our law, and is not buttressed by the Constitution. This right is especially important for women who may, for instance, decide to terminate a pregnancy in appropriate circumstances. Section 12(2) is not however, limited to preserving abortion rights: section 12(2)(c) further protects against medical or scientific experiments without informed consent. This suggests that section 12(2) should be interpreted generously to cover all instances where the bodily or psychological integrity of a person is harmed. These infringements can take a number of guises, but should be interpreted within the general rubric of "freedom and security of the person". The emphasis in section 12(2) is thus on whether a law or conduct deprives a person of freedom or security, broadly understood. This general guiding*

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[79] Christina Lawyers Association supra 526I-527A
[80] AB majority judgment para [323] and the authorities cited therein.
[81] 2017 (3) SA 570 (CC) minority judgment of Khampepe J paras [49]-[52]
[82] AB minority judgment para [65]-[65]

principle is necessarily wider than the 'freedom and security of the person' protected by section 12(1), incorporating, as it must, considerations of bodily and psychological integrity"..

[185] As held by the Constitutional Court in *H*[83], cited with approval by Khampepe J in *AB*:

> *"[t]oday, having regard to the fundamental right of everyone to make decisions concerning reproduction …the harm may simply be seen as an infringement of the right of the parents to exercise a free and informed choice in relation to these interests."*

[186] Such right would also in my view include the right whether or not to disclose her pregnancy in circumstances such as the present where there is no statutory obligation on a woman to do so. Like other constitutional rights, this right is not absolute. Any limitation to the right would however be valid only to the extent that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom under s 36 of the Constitution[84].

[187] Our courts have further recognised the need to protect the privacy and confidentiality of medical information[85], *inter alia* on the basis that it "reflects delicate decisions and choices relating to issues pertaining to bodily and psychological integrity". In *AB*, Khampepe J referred to the harm that emerges from the psychological stress caused by the removal of the applicant's choice to disclose medical information, with subsequent damaging effects. She stated that this harm to autonomy would occur:

> *"even if the disclosure is ostensibly for the public good. A stifling of the ability to make a decision can therefore be a violation of psychological integrity, provided the consequences are of an invidious nature[86]".*

[188] According to the first applicant she has suffered severe trauma and stress due to the disclosure of her pregnancy and decisions, which has ruined her relationship with her

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[83] H v Fetal Assessment Centre [2014] ZACC 34 para [59]. Quoted by Khampepe J in AB, para [78]
[84] Christian Lawyers Association 528F-H
[85] NM and Others v Smith and Others (Freedom of Expression Institute as amicus curiae) 2007 (5) SA 250 (CC) para [40]
[86] AB supra para [69]

parents and destroyed all trust between them. At some point she even contemplated suicide and has lost confidence in herself due to the undermining of her dignity and independence by the social workers involved.

[189] Despite the second applicant having escaped the consequences of disclosure of her pregnancy by the social workers involved, it was only because she could obtain legal assistance and an urgent order in the High Court to interdict disclosure. Despite the existence of the court order, she still fears that the social workers will disclose her position to her parents and has remained anxious. According to the second applicant, the treatment she received at the hands of the social workers and the interference with her autonomy, made her feel like a child herself.

[190] In the circumstances, the consequences of the Department's conduct in disclosing or threatening to disclose the pregnancies of the first and second applicants and the births of B and L to their parents, are harmful and invidious and disregarded the applicants' rights to dignity[87] and privacy. The conduct of the Department and the social workers further materially disregarded their statutory obligations under the Act pertaining to confidentiality.

[191] The Department did not advance any case for the limitation of the rights relied on by the applicants under s 36 of the Constitution. In its answering papers, the Department did not meaningfully engage on these issues at all. It baldly justified its conduct on the basis of the alleged irregularities in the adoption process already referred to. I have already found these views of the Department to be without merit. In my view the conduct of the Department and the social workers involved can and should not be countenanced.

[192] I conclude that the applicants have established a breach by the Department and the social workers involved of the applicant's rights to bodily and psychological integrity

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[87] Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minster of home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC) para [35]

under s 12 of the Constitution as well as the related rights of dignity and privacy under ss 10 and 14 of the Constitution.

(iii) The constitutional rights of B and L

[193] The rights of children are enshrined in s 28 of the Constitution. Under s 28(1)(b), every child has a right to family care, parental care or where appropriate, alternative care when removed from the family environment.[88] The section recognises that family life is important to the wellbeing of children[89]. It sets a standard against which to test provisions of conduct which affect children in general and acts as a guiding principle in each case to deal with a particular child.[90]. That right can be employed to oppose any executive administrative action which would interfere with the delivery of parental care or would seek to separate children from their parents.

[194] It is well established that: *"s 28(1)(b) is aimed at the preservation of a healthy parent child relationship in the family environment against unwarranted executive, administrative and legislative acts. It is to be viewed against a background of a history of disintegrated family structures caused by government policies."*[91]

[195] It is also trite that the Children's Act, in accordance with s 28(2) of the Constitution, seeks to promote the best interests of the child, which includes preventing the child from being psychologically harmed.[92]

[196] The Department, relying on *S v M*[93], in its heads of argument contended in broad terms that the paramountcy of the best interests of the child does not mean that the rights

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[88] Coughlin NO v Road Accident Fund (Centre for Child Law as Amicus Curiae) 2015 (6) BCLR 676 (CC)
[89] Du Toit v Minister of Welfare & Population Development 2001 (12) BCLR 125 (T) para [18]
[90] Teddybear Clinic v Minister of Justice 2013 (12) BCLR 1429 (CC)
[91] Jooste v Botha 2000 (2) Sa 187 (T)
[92] AB minority judgment of Khampepe J para [169]
[93] S v M 2008 (3) SA 232 (CC) para [14], [92]; Sonderup v Tondelii and Another 2001 (1) SA 1171 (CC) para [29]

under s 28(2) are absolute and may require that their ambit be justifiably limited under s 36 of the Constitution. The Department, being the party bearing the onus to establish a limitation, did not however address this issue in its papers, nor did it address any submissions to sustain this contention or address the factors in s 36(1)[94], which could serve to limit the rights under s 28(2).

[197] B and L have the right to equality under s 9(1) of the Constitution. This right includes the right not to be discriminated against either directly or indirectly on the basis, inter alia, of race, gender, ethnic or social origin or birth. B and L further have the guarantee of dignity and the right to have such dignity respected and protected under s 10 of the Constitution. They further have the right to administrative action that is lawful, reasonable and procedurally fair under s 33(1) of the Constitution.

[198] The Department's conduct has undermined these rights. The approach adopted by the Department fails to recognise that both B and L are individuals with a distinct personality and their own dignity[95]. At the instance of the Department, B was placed in a temporary care facility for four months without any need to do so and without considering his best interests. The first applicant was not even timeously informed and B nearly lost his opportunity at adoption. The Department further fundamentally failed to recognise the bonds which B and L have formed with their prospective adoptive parents and that they are a family. The Department's entire disregard for B and L's rights and best interest's is best illustrated by the unintelligible failure to even meet or visit either B or L or their prospective adoptive parents. Moreover, the stance adopted by the Department, *"results in serious long-terms psychological trauma both for consenting parents and the child in question"*[96].

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[94] *"36(1)The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose'".*

[95] AD and Another v DW and Others 2008 (3) SA 183 (CC) para [59]; S v M supra para [18]

[96] National Adoption Coalition para [69]

[199] In the process, the Department also manifestly failed to have regard to the constitutional rights of the prospective adoptive parents and their other minor children, the siblings of B and L. They are also severely impacted and traumatised by their conduct in relation to the adoptions of B and L. This constitutes a significant failure on the part of the Department and the social workers involved to comply with their statutory obligations.

[200] Both sets of prospective adoptive parents delivered substantive affidavits setting out their experiences and explaining the present circumstances of respectively B and L. They were legally represented at the hearing and made submissions in argument. No relief was however sought by them in relation to their constitutional rights.

[201] The Department and the social workers involved, unfathomably never investigated the present circumstances of B and L, despite them being the most important people in the adoption process and their best interests being at the heart of the enquiry. From the undisputed evidence it is clear that the eleventh and twelfth respondents and their daughter is the only family B has ever known. B has been in their care for nearly 4 years. The siblings have established bonds. He is integral part of an emotionally and financially stable family and extended family and is thriving. The ongoing uncertainty regarding B's adoption has taken a strong emotional toll on the eleventh and twelfth respondents. It is clear that the removal of B from their care will have devastating long term effects on the entire family.

[202] L's position is similar. He has been in the care of the thirteenth and fourteenth respondents from shortly after his birth and for more than three years. He has formed bonds with their two biological children and extended family. The thirteenth respondent is of the same cultural decent as the second applicant and is preserving L's connections to his culture and tradition. As in the case of B, L is an integral part of the family and his removal will have devastating long term effects on all involved. The thirteenth and fourteenth respondents live in constant uncertainty and anxiety as a result of the pending review launched by the Department, given its expressed stance that L must be removed

from their care, placed in the care of the Department and that his adoption must commence *de novo*.

[203] Both B and L remain vulnerable whilst their adoptions are not finalised and there is a threat of their removal from their prospective adoptive parents. A substantial flaw in the Department's approach is their narrow interpretation of the concept of family, being limited to a genetic connection.

[204] There is no basis to draw a distinction between a child's biological family and a child's adoptive family. Such a distinction would violate a child's right to family life, a component of the right to dignity. Once it has been established that a child's best interests favour adoption, and once a child is placed with an adoptive family, any distinction in value between the biological family and the adoptive family would amount to discrimination, striking at the right to dignity and thus unlawful[97]. It would be artificial and overly technical to define an adoptive family only as one where an adoption order has been granted, given the factual circumstances of B and L.

[205] As held by Khampepe J in *AB*:

> *[117] The Constitution values alternative forms of family life for good reason. Because of the diversity that characterises our society there is no one correct version of the family against which others can be assessed. Therefore it would be presumptuous and arbitrary to define what an acceptable family entails. In a legal culture based on justification, capricious restrictions on something as important to human beings as the family cannot be countenanced. This will harm the dignity of those directly affected, as well as our society in general.*
>
> *[118] ...Children who are adopted necessarily have no genetic or gestational link with their parents. To suggest that adopted children are inevitably worse off for this fact is to contradict this Court's clear indication that families with adopted children should not be thought of or treated differently to other families.*
>
> *[119] That adopted children have already been born does not change this fact. It is constitutionally impermissible to say that families with children who are not genetically connected wo their parents*

[97] Minister of Home Affairs v Fourie ("Fourie") 2006 (1) SA 524 (CC) para [59]

re significantly worse off. The Constitution instead celebrates this difference, and recognises that the diversity of our society is what makes it robust".

[206] The same sentiment was expressed *Fourie* [98]*:*

"South Africa has a multitude of family formations that are evolving rapidly as our society develops, so that it is inappropriate to entrench any particular form as the only socially and legally acceptable one:

[207] The Department's stance disregards that family member as defined in the Act is not limited to genetic family but also includes[99]:

"any other person with whom the child had developed a significant relationship based on psychological or emotional attachment, which resembles a family relationship".

[208] Similarly, parental care is not limited to genetic family. The removal of a child from the reach of his family constitutes a limitation of his right to family care and parental care as envisaged by s 28(1)(b) of the Constitution.[100]

[209] Such removal is what the Department seeks to do in contending that it is not in the best interests of B and L that they be adopted by their prospective adoptive parents. In the case of B, the Department's stance is that it is in his best interests to be removed from the care of the eleventh and twelfth respondents and placed with the first applicant's parents in foster care, persons he has never met. In the case of L, the Department contends that he should be removed from the care of the thirteenth and fourteenth respondents, placed in the care of the Department and his adoption process should commence de novo.

[210] This approach is simply unconscionable and illustrates a significant lack of empathy and compassion for B and L. it is trite that *"Each child must be treated as a*

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[98] Para [59]. Quoted with approval by Khampepe J in AB, para [96]
[99] Section 1 definition "family member" (d) of the Act
[100] C v Department of Health and Social Development 2012 (4) BCLR 329 (CC)

unique and valuable human being with his/her individual needs, wishes and feelings respected. Children must be treated with dignity and compassion"[101].

[211] The stance adopted by the Department lacks adherence to this principle and smacks of an entire disregard for the most important persons in the entire adoption process, that of B and L. Not only is the Department's attitude towards the interests of the children who remain in limbo cavalier, as pointed out by the *amicus*, it is far worse. The attitude cruelly disregards the best interests of the children involved who, if their recommendations are followed, stand to be ripped from the only families they have ever known and made to endure an unsafe future. In my view, the Department's stance *"results in serious long-terms psychological trauma both for consenting parents and the child in question"*[102]. The same can be said for the impact on the prospective adoptive parents and their families.

[212] I have already concluded that the pending review proceedings pertaining to L's adoption constitute an abuse of process. The pending review proceedings in my view further undermines L's constitutional rights under s 28(2) and places him at risk of being psychologically harmed were his adoption to be delayed or frustrated thereby. Although the review proceedings are currently pending, there are no real prospects of those review proceedings being successful. The facts pertaining to L's adoption have been fully traversed in the application papers by the second applicant. The Department did not present any countervailing evidence. In terms of the High Court's common law power as upper guardian of minor children a court has the duty and power to make an appropriate order in order to safeguard the best interests of L.

[213] It is well established that although our courts do not have a discretion to stay proceedings on general equity grounds, courts do have the discretion to prevent an abuse of its processes. Such power will be exercised sparingly and only in exceptional

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[101] Former DCJ Ngcobo in DPP Transvaal v Minister for Justice and Constitutional Development 2009 (7) 637 (CC)
[102] National Adoption Coalition para [69]

circumstances, with great caution and only in clear cases. It is apposite to refer to *Belmont House v Gore NNO*[103] , wherein the Full Court enunciated the relevant principles thus:

> *"Proceedings will be stayed when they are vexatious or frivolous or when their continuance, on all the circumstances of the case, is, or may prove to be, an injustice or serious embarrassment to one or other of the parties…"*

[214] This is one of those clear cases. Considering L's best interests, his rights under s 28(2) of the Constitution, the flawed basis on which the Department relies for launching the review proceedings and the abusive nature of those proceedings, a continuation of the review proceedings will only result in L remaining in a state of limbo whilst his adoption is again substantially delayed. L's best interests are of paramount importance and, given the cumulative circumstances, outweighs the rights of the Department to pursue the review proceedings. The circumstances in the present matter are exceptional, given L's constitutional rights and his best interests which dictate that his adoption by the thirteenth and fourteenth respondents must be finalised. L's removal from the only family he has ever known is cruel and manifestly prejudicial to him[104]. As upper guardian of L, a court is constrained to make an order protecting his best interests. That can in my view best be achieved by directing a permanent stay of the review proceedings.

(iv) Conclusions

[215] The Department did not consider the interests of B and L at all but rather got embroiled in bureaucratic red tape to defend what is ultimately an indefensible position not based on law or fact. In seeking to derail the adoptions of B and L and ignoring all other considerations in favour of their blanket priority of placing children with extended biological families (including the reports of the adoption social worker and the findings in respect of B in the Children's Court) they undermined the best interests of B and L in breach of s 28(2) of the Constitution. Sacrificing the needs and interests of vulnerable

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[103] 2011 (6) SA 173 (WCC) paras [17]-[18]
[104] National Adoption Coalition para [78]

children at the altar of expedience is indefensible[105]. It is cruel and inimical to the best interests of the children involved and smacks of a lack of insight and compassion into the reality of the situation.

[216] At best, the attitude adopted by the Department and the social workers can be described as an obnoxious disregard to the pain and trauma caused by them. At worst, their attitude can be described as a deliberate stratagem to discriminate against and punish women who seek to have their babies put up for adoption. In either event, their attitude is intolerable.

[217] The conduct of the Department and the social workers involved, being the fourth, fifth, sixth, eighth and ninth respondents is unlawful and breached the constitutional rights of the first and second applicants in breach of ss 10, 12, 14 and 28(2) of the Constitution and the constitutional rights of B and L. The applicants are entitled to the declaratory relief sought under s 172(1)(a) of the Constitution.

[218] For reasons already provided, an order for the permanent stay of the review proceedings launched by the Department to review the letter of recommendation of L's adoption dated 23 November 2020 is to be granted.

Should the Department's letter of non-recommendation of the adoption of B dated 21 July 2020 reviewed and set aside?

[219] The first applicant relies on PAJA and in the alternative on the doctrine of legality. It is argued that the Department's decision to issue the letter of non- recommendation is reviewable under various[106] of the grounds advanced under s 6(2) of PAJA.

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[105] Herbst supra
[106] Reliance is placed on s 6(2)(d), s 6(2)(e)(ii); s 6(2)(e)(iii), s 6(2)(e)(iv), s 6(2)(e)(v); s 6(2)(e)(vi), s 6(2)(f)(ii)(bb), s 6(2)(f)(ii)(dd) and s 6(2)(h) of PAJA.

[220] It is undisputed that the decision and issue of the letter of non-recommendation ("the decision") constitutes administrative action under PAJA. The grounds of review relied on by the first applicant should be seen in context of the findings already made in this judgment, which apply equally to this issue. The Department and the social workers involved, not only failed to understand their constitutional obligations in relation to adoptions, but misunderstood and misapplied the constitutional rights of B, those of the first applicant and the relevant provisions of the Act. Regrettably, this is not the first time our courts have had to express criticism on this issue[107].

[221] The Department did not in its letter provide express reasons for not recommending B's adoption. In terms of the minutes of the Department's panel discussion meeting of 21 July 2020, the Department's decision was predicated on the following:

> "*The adoption social worker's conclusion and recommendations in terms of permanency planning for the child concerned, without considering and providing the appropriate statutory information, Concerns raised at the external panel discussions, was the child's right to origin, culture and family as first alternative placements if the biological parents are not able to care for the child. This was not explored or clarified prior to the statutory social workers report dated 2020.06.25. The statutory social worker concluded that the child can be seen as a child in need of care and protection and alternative care and placement options were considered. The maternal grandparents were screened and are recommended as appropriate foster parents. The panel noted that in spite of the biological mother providing consent and the absence of the biological father and paternal family, the child's rights are of paramount importance and therefore supersedes the biological mother's wishes not to involve her family also noting that the maternal family should be considered and be taken into account. The child concerned has been in the care of the prospective adoptive parents as from 2018.11.13. the child is currently 2 years old and in the C's care for the past 20 months. The panel acknowledge that the integration of the child into the biological family, will be disruptive for the child as well as the adoptive parents. The biological family will also need to adapt to the new member of their family, taking into account the differences in their culture, language, environment etc. the panel also takes cognicance of the abovementioned and agreed that although reintegration with the biological family will not be without challenges the long-term placement of the child concerned needs to be taken into account. Adoption is a final long-terms placement, which do (sic) not provide the child concerned with any opportunity to be re-integrated with his family of origin.*"

[222] The views of the Department and its panel relied upon the reports pertaining to B's adoption prepared by the social workers, including the fifth respondent. Ms Naidoo's report was only prepared months later and is dated 4 February 2021. From the minutes it is clear that the emphasis was on maintaining a cultural connection and the prioritisation

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[107] National Adoption Coalition supra, para 2

of placing B with family. Although referred to, B's present circumstances were not properly taken into consideration, nor was proper consideration given to the implications of the disruptive consequences of the approach adopted by the Department.

[223] The callous attitude of the Department is best epitomised by the following interchange between the fifth respondent and counsel during the proceedings in the Children's Court during June 2020:

"MS MAKHAPELA: Do you know the whereabouts of the child right now?

MS MUFAMADI-MALAKA: [Inaudible]… in Randburg but I do not know where exactly.

MS MAKHAPELA: So if we assume that the child has been living in Randburg for two years, that would mean that the child has grown up and known whoever is taking care of them 10 in Randburg for two years?

MS MUFAMADI-MALAKA: Yes.

MS MAKHAPELA: And in your assessment the best interest of that child is to be removed from Randburg and placed with his birth mother and her family?

MS MUFAMADI-MALAKA: [Inaudible]…

MS MAKHAPELA: Do you not think that this would be traumatic for the child?

MS MUFAMADI-MALAKA: the child is still …young but he can adjust, the child can adjust."

[224] Both Ms Wasserman and the Children's court found that B's adoption by the eleventh and twelfth respondents would be in his best interests. The letter of non-recommendation of B's adoption under s 239(1)(d) is at variance with those conclusions

[225] The failure of the social workers to meet or assess B and the eleventh and twelfth respondents is a material omission resulting in material facts not being taken into account by the Department in making its decision. The Department thus did not properly assess whether B's adoption by the eleventh and twelfth respondents would be in his best

interests in accordance with the various factors listed in s 7(1) of the Act. This constitutes a material consideration which was not taken into account. It also appears that the Department did not take into account the assessment reports prepared by the adoption social worker, Ms Wasserman. The Department's decision was also based on an entire disregard of the first applicant's autonomy and her constitutional rights to bodily integrity, privacy and dignity.

[226] Instead the Department focused on its flawed interpretation of the relevant provisions of the Act, already dealt with, including its view that B was a child in need of care and protection in terms of Chapter 9 of the Act and need to give preference to B's maternal grandparents. In doing so, the Department not only took irrelevant considerations into account, but also relied on material errors of law.

[227] Despite acknowledging that B had already at the time been in the temporary care of the eleventh and twelfth respondents for some twenty months at the time, this factor was not rationally taken into consideration, given the Department's acknowledgement that placing B with his maternal grandparents would be disruptive.

[228] I conclude that the reasoning adopted by the Department in refusing issue a letter of recommendation of B's adoption under s 239(1)(d) of the Act, was fatally flawed and reviewable on various grounds. Relevant considerations were ignored, irrelevant considerations were taken into account and the Department's reasoning was based on a flawed interpretation of the Act. The decision was further not rationally connected to the information before the Department and was materially influenced by errors of law. The most important issue which was overlooked and not properly considered was the present circumstances of B and his best interests.

[229] Flowing from the findings already made, I further conclude that the Department's decision to issue the letter of non-recommendation of the adoption of B is reviewable and that the decision and its letter in terms of s 239(1)(d) of the Act, dated 20 July 2020 falls to be reviewed and set aside.

[230] Considering the history of the matter and the Department's resistance to B's adoption there are in my view exceptional circumstances present not to refer the matter back to the Department for a new decision to be taken. These circumstances are sufficient to warrant the substitution of the decision of the Department by a decision of the court recommending B's adoption.

[231] Significantly, B has no connection with the biological or extended families of the first applicant. The impact on B's life if he is removed from his present family, the eleventh and twelfth respondents, will be devastating.

[232] All the available facts have been placed before the court, which overwhelmingly establishes that it would be in B's best interest that an adoption order should be granted and that his adoption by the eleventh and twelfth respondents should be recommended.

Should the conduct of the social workers be referred to the tenth respondent?

[233] During argument, the *amicus* urged me to refer of the conduct of the fourth, fifth, sixth, eighth and ninth respondents to the tenth respondent. The tenth respondent is a statutory body established in terms of s 2 of the Social Service Professions Act[108]. Under s 3 of that Act, the Council is obliged to *inter alia* exercise effective control over the professional conduct of the social workers involved. The applicants supported the referral and argue that the referral flows from the relief sought in their notice of motion.

[234] I agree with the applicants that the conduct of the social workers involved were inconsistent with the Constitution and amounted to a violation of the applicants' rights entrenched in the Bill of Rights. The conduct of the various social workers was not even in accordance with the Guidelines, flawed as they are, in various respects. Their failure

[108] 110 of 1978

to comply with the confidentiality requirements expressly referred to in the Guidelines[109], is but one example.

[235] The Department delivered submissions opposing the referral, purportedly on behalf of the social workers involved. As already pointed out, the Department does not represent them. In the case of the eighth respondent, she is not even employed by the Department. The Department argued that such a referral would prejudice the social workers and violate their right to a fair hearing. I do not agree. The Council will exercise its statutory oversight and elect how to do so. The social workers will be afforded an opportunity to state their case before the Council, thus affording them a fair hearing. They will thus not be deprived of that opportunity as the Department sought to argue.

[236] Given the facts, a referral of the conduct of the various social workers to the tenth respondent would be an appropriate remedy in the circumstances[110]. In my view it would be just and equitable to bring the conduct of the social workers to the attention of the Council to enable it to exercise its statutory duties and oversight function. Considering that they are working with the most vulnerable members of our society, there must be accountability.

[237] It would also be appropriate to bring this judgment to the attention of the Magistrates in the Krugersdorp Children's Court, given their involvement in the matter.

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[109] Paragraph 6.2 :*"All parties to the adoption have the right to confidentiality and privacy. All documentation, procedures and communication on adoption should be guided by the principle of confidentiality. Adoption service providers must treat all adoption cases and records as confidential information. Access to any adoption records by any party shall be in accordance with the provisions of the Children's Act."*

[110] Under s172(1) of the Constitution

Costs

[238] Costs are a discretionary matter which must be exercised judicially having regard to all the relevant considerations. The normal principle is that costs follow the result. The applicants' counsel placed on record that counsel are acting on a pro bono basis and requested the court to apply the so-called *Biowatch*[111] principle. That principle in broad terms entails that if a party is successful in proceedings against the state, costs should follow. The applicants are substantially successful and should be entitled to their costs. The conduct of the Department in relation to this application, also justifies the granting of an adverse costs order against it. There is no reason to deprive the applicants of their costs. Insofar as certain legal services were rendered on a pro bono basis, an adverse costs order would not prejudice the Department.

[239] I conclude that in all the circumstances of this case, the Department should be held liable for the costs. No legal basis was established for such liability to be on a joint and several basis.

[240] *Order*

[241] I grant the following order:

[1] The court file is declared to be confidential and the anonymity of the applicants, the minor children BT and LM, and the eleventh, twelfth, thirteenth and fourteenth respondents are to be maintained throughout these proceedings and thereafter by the use of initials to identify the parties rather than their full names and by the redaction of any of their personal details.

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[111] Biowatch Trust v Registrar Genetic Resources and Others 2009 (10) BCLR 1014 (CC); [2009] JOL 23693 (CC) paras [43] and [56]

[2] The first to third respondents are directed to, within three days from the date of this order, remove from CaseLines any notices, affidavits, annexures, heads of argument and other documents filed in these proceedings and replace them with redacted copies of all documents in which the personal details identifying the applicants, the minor children, the eleventh to fourteenth respondents and all third parties have been removed.

[3] By consent, the eleventh and twelfth respondents are directed to, within three days from the date of this order, remove from CaseLines any notices, affidavits, annexures, heads of argument and other documents filed in these proceedings and replace them with redacted copies of all documents in which the personal details identifying the applicants, the minor children, the eleventh to fourteenth respondents and all third parties have been removed.

[4] The applicants, the respondents and all persons employed by the respondents are directed to keep the application papers and all documents pertaining to the adoptions of BT and LM confidential and are interdicted and prohibited from allowing the identities of the applicants, BT and LM and the eleventh to fourteenth respondents, to be published or disclosed to the public and from disclosing or publishing the application papers and documents to third parties or to allow them to come into the public domain.

[5] The first, second and third respondents, in accordance with their undertaking, are directed not to take any steps to remove the minor children BT and LM from the care of the eleventh and twelfth respondents and the thirteenth and fourteenth respondents respectively, or to seek to have them placed, on a temporary or permanent basis, with any other person, pending the final determination of these proceedings.

[6] The letter of non-recommendation issued by the Gauteng Department of Social Development in terms of section 239(1)(d) of the Children's Act 38 of 2005 on 21 July 2020 in respect of the application for the adoption of BT is reviewed and set aside and is substituted with a decision recommending BT's adoption by the eleventh and twelfth respondents;

[7] The pending review proceedings launched by the first, second and third respondents under case number 2021/41955 to review its decision and the issuing of a letter of recommendation of the adoption of L under section 239(1)(d) of the Children's Act, dated 23 November 2020, are permanently stayed.

[8] The Department of Social Development's Practice Guidelines on National Adoption are declared to be inconsistent with the Constitution of the Republic of South Africa, 1996 and the Children's Act, 38 of 2005 and therefore invalid and are reviewed and set aside;

[9] The conduct of the first, second and third respondents and the relevant social workers in their employ and the relevant social workers in the employ of the Gauteng Department of Health, in relation to the application for the adoption of BT and the circumstances surrounding that application, is declared to be in breach of the first applicant's rights in terms of sections 10, 12 and 14 of the Constitution of the Republic of South Africa, 1996 and in breach of BT's rights in terms of section 28(2) of the Constitution;

[10] The conduct of the first, second and third respondents and the relevant social workers in their employ in relation to the application for the adoption of LM and the circumstances surrounding that application, is declared to be in breach of the second applicants' rights in terms of sections 10, 12 and 14 of the Constitution of the Republic of South Africa, 1996 and in breach of LM's rights in terms of section 28(2) of the Constitution.

[11] This judgment and the conduct of the fourth, fifth, sixth, eighth and ninth respondents are to be brought to the attention of and referred to the tenth respondent, the South African Council for Social Service Professions.

[12] A copy of this judgment is to be provided to the presiding magistrates in the Krugersdorp Children's Court.

[13] The costs of the application, including the costs of the setting aside application, are to be borne by the first, second and third respondents.

EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	: 21-22 July 2022
DATE OF JUDGMENT	: 19 November 2022
APPLICANTS' COUNSEL	: Adv. M Feinstein : Adv. N Muvangua : Adv. N Stein
APPLICANTS' ATTORNEYS	: Womens Legal Centre
1ST- 3RD RESPONDENTS' COUNSEL	: Adv. C Georgiades SC : Adv. A Mofokeng : Adv. J Daniels
1ST - 3RD RESPONDENTS' ATTORNEYS	: State Attorney
11TH & 12TH RESPONDENTS' COUNSEL	: Adv. L De Wet
11TH & 12TH RESPONDENTS' ATTORNEYS	: Schuler Heerschop Pienaar Attorneys

13TH & 14TH RESPONDENTS COUNSEL	: Adv. L. Makapela
13TH & 14TH RESPONDENT ATTORNEYS	: Clarks Attorneys
AMICUS CURIAE	: Centre for Child Law
AMICUS CURIAE COUNSEL	: Adv. RM Courtenay