
SOUTH AFRICA / JUDGMENT

Centre for Child Law v NN and Others (32053/2014) [2017] ZAGPPHC 682 (25 October 2017) [2017] ZAGPPHC 682

COURT

North Gauteng High Court, Pretoria

BEFORE

Janse van Nieuwenhuizen

CASE / FILE NUMBER

32053/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

REPUBLIC

OF SOUTH AFRICA

CASE

NUMBER: 32053/2014

25/10/2017

REPORTABLE

OF

INTEREST TO OTHER JUDGES

REVISED.

In

the matter between:

CENTRE
FOR CHILD
LAW Applicant
And
NN First
Respondent
NS Second
Respondent
PRESIDING
OFFICER, CHILDREN'S COURT,
DISTRICT
BOKSBURG Third
Respondent
MEC
OF HEALTH, GAUTENG
THE
CHIEF EXECUTIVE
OFFICER Fourth
Respondent
TAMBO
MEMORIAL
HOSPITAL Fifth
Respondent
LZ Sixth
Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] On 16 November 2015 the Court granted an order in the following terms:

"1. Full parental responsibilities and rights in respect of M have been acquired by NS with retrospective and prospective effect through the operation of the principle of de facto adoption, and that all responsibilities are to be applied as if she is the adoptive parent of the child.

2. Full parental responsibilities and rights in respect of M have been acquired by DL with retrospective and prospective effect through the operation of the principle of de facto adoption, and that all responsibilities and rights are to be applied as if he is the adoptive parent of the child.
3. The parental rights and responsibilities that NS has in respect of Z are terminated.
4. No parental responsibilities and rights have been acquired by DL in respect of Z
5. NS is granted the right to have reasonable contact with Z
6. DL is granted the right to have reasonable contact with Z

7. Full parental responsibilities and rights in respect of Z have been acquired by NN with retrospective and prospective effect through the operation of the principle of de facto adoption, and that all responsibilities and rights are to be applied as if she is the adoptive parent of the child.
8. Full parental responsibilities and rights in respect of Z have been acquired by LZ with retrospective and prospective effect through the operation of the principle of de facto adoption, and that all responsibilities and rights are to be applied as if he is the adoptive parent of the child.
9. The parental rights and responsibilities that NN has in respect of M are terminated.
10. No parental responsibilities and rights have been acquired by LZ in respect of M
11. NN is granted the right to have reasonable contact with M
12. LZ is granted the right to have reasonable contact with M
13. These exercise of contact referred to in paragraphs 5,6, 11 and 12 of this order will be managed by a parenting co-ordinator, appointed in terms of paragraph 15 of this order.
14. The therapeutic support and integration programme being provided by the Child and Adolescent Family Unit shall continue until the parties agree that the service is no longer required.
15. A parenting co-ordinator is to be appointed in the following manner.

1.1 The parties shall agree upon a suitably qualified person within 30 days of the order of this court, and shall submit the name of such person to this court for inclusion in the court file.

1.2 The payment of fees of the parenting co-ordinator shall be met by the 4th Respondent at a tariff to be agreed upon between the 4th Respondent and the parenting. co-ordinator, until such time as any court provides otherwise.

1.3 The powers and duties of the parenting co-ordinator include to:

1.3.1.1. Evaluate the processes being carried out by CAFU in order to decide when the children are ready for the introduction of a parental plan;

1.3.1.2. Co-ordinate the development of a parenting plan by the parents;

1.3.1.3 Resolve any possible conflicts that may arise through a facilitation process, and where such facilitation efforts fail, formulate directives to resolve the dispute, which will be binding on the parties until such time as a court directs otherwise or until the parties jointly agree otherwise. "

[2] Due to the importance of the matter to the parties, the Court indicated that its reasons for the order will follow. The reasons for the order appear from the judgment infra.

INTRODUCTION

- [3] On 2 August 2010, a boy ("Z") and a girl ("M") were born at Tambo Memorial Hospital ("the hospital") in Boksburg, Gauteng. NS ("the mother") and DL ("the father") took M home and NN ("the mother") and LZ ("the father") took Z home.
- [4] During 2003 it transpired that Z and M were switched at birth, resulting in NS and DL being the biological parents of Z, whereas NN and LZ are the biological parents of M.
- [5] This matter concerns the best interest of these minor children and more specifically examines the best possible way forward for the parents and the children.

BACKGROUND

- [6] The parents who cared for the child from his/her birth are referred to herein as the psychological parents.
- [7] During 2003 NN instituted maintenance proceedings against LZ who is the biological father of her eldest child and whom she considered to be the father of Z. LZ disputed paternity in respect of Z and paternity tests were done. The test results indicated that neither NN nor LZ was the biological parent of Z.
- [8] An investigation was launched by the hospital and it was determined that the children were switched at birth. Despite the hospital providing therapy for the mothers, NN became unhappy with the process and brought an application in the Children's Court, Boksburg to have M placed in her care and Z in the care of NS.
- [9] The Presiding Officer of the Children's Court, Boksburg informed Ms Visser, the Director of Child Welfare, Boksburg of the rather unusual circumstances pertaining to the application launched in the Children's Court by NN.
- [10] Ms Visser, in turn, brought the matter to the attention of Ms du Toit of the Centre for Child Law. The Centre for Child Law was established by the University of Pretoria to promote child law and to uphold the rights of children in the Republic.
- [11] In view of the complexity of the issues involved, the Centre for Child Law deemed it in the best interest of the children to launch an application for the appointment of a curator ad /item for the children.
- [12] On 26 May 2014, Advocate Ann Skelton was appointed by the Court as curator ad /item ("the curator") for the children..In terms of the court order, the curator was given wide powers to investigate all issues pertaining to the best interest of the children.

PROCEEDINGS

- [13] The biological fathers of the minor children were initially not cited as parties in the application. LZ, however, launched an application to be joined as a party and an order facilitating his participation In the application was granted on 23 March 2015.
- [14] I pause to mention that NN, NS and LZ, had legal representation at the hearing of the matter. NN was represented by Advocate Strydom, NS by Advocate Nathan SC and LZ by Advocate Kabelo.

Report of curator ad litem

- [15] In compiling her report, the curator consulted Professor Cora Smith, the Chief Clinical Psychologist at the Child, Adolescent and Family Unit ("CAFU") at Charlotte Maxeke Johannesburg Academic Hospital.
- [16] Professor Smith had established a team of experts consisting of a psychiatrist, several psychologists and two senior psychiatric nurses ("the CAFU team"), which team had been providing therapy to the mothers and children for some time prior to the appointment of the curator.
- [17] During an interview with NN, NN informed the curator that subsequent to giving birth, she was shown a baby girl, M. In hospital she fed and cared for M and upon their discharge registered M under DL's surname. The registration of the birth reflects NS as the mother of M and DL as the father.
- [18] During August 2013 NS was contacted by the hospital and informed of the possibility that M might not be her child. Blood tests were done and on 6 August 2013 NS was told that M is not her child. She reacted with utmost shock and had to be admitted to hospital for treatment.
- [19] During the initial consultation, NS indicated that she did not believe that the DNA tests are conclusive proof that M is not her daughter. She became tearful during the consultation and it was clear that she was under a tremendous amount of stress. She indicated that she is very concerned about her son from a previous relationship, who deems M to be his sister. Her son picked up on her emotional state and his school work had started to deteriorate as a result.
- [20] During the curator's meeting with NN, it transpired that NN recalled being shown a baby girl immediately after she gave birth. She was naturally somewhat confused when she discovered that her child was a boy. She immediately confronted the sister in charge. The sister did not take her serious and insisted that Z is her child. NN accepted that she had made a mistake and acknowledged Z as her child. Upon discharge she registered Z under her surname.
- [21] Upon being told that Z was not her child, she was very shocked. She was in such a state of shock that she was almost hit by two cars on her way home. She became miserable and depressed.

- [22] LZ is the biological father of NN's older son. The two boys get on very well and love playing together.
- [23] DL was also interviewed by the curator. DL explained that his situation is rather complex. Although he is in a relationship with NS, he is married to someone else. He has been married for a long time and no children were born of the marriage. Subsequent to M's birth and through delicate family negotiations, M was accepted by his family as his child. DL named M after his mother and traditional ceremonies were carried out to welcome M into his family.
- [24] During the interview, it transpired that DL had been labouring under significant stress since being informed that M is not his child. DL still believed that M, with whom he has a very close relationship, is his child. He sees M on a weekly basis and she is always excited to see her "Dad". DL further indicated that he could not see himself going back on the traditional and family arrangements that had already taken place.
- [25] The news that M is not his child has had a devastating effect on DL. He informed the curator that he feels as if he has lost all his limbs.
- [26] The curator had a telephonic interview with LZ. LZ indicated that during the conception of Z, he was spending a lot of time with NN and that he regarded Z as his child. This only changed when he broke up with NN. After their break-up he started questioning his paternity of Z.
- [27] Notwithstanding the fact that he is not Z's biological father, he loves Z very much and does not want to lose him. He was worried at the impact Z's removal would have on his older boy as they know each other as siblings and he does not want to witness the pain of tearing them apart.
- [28] LZ would like to keep Z, but did express an interest in getting to know M and her family.
- [29] On 8 October 2014, the curator had a follow up meeting with the CAFU team. The curator was told that, although the children have been gradually introduced to their biological mothers, it has become increasingly apparent that the bonding with their psychological mothers is very strong.
- [30] The following appears, inter alia, in the curator's report in respect of the assessment of M:
- "103.1 M is securely attached to NS. She identifies NS as her primary attachment figure and seeks her out when she is anxious or distressed.*
- 103.2 NS identifies with M as her daughter and is closely attached to her. She wishes to continue to care for M and is devastated at the thought of losing a child she considers her own.

103.3 NS has struggled to deal with the trauma of discovering that her biological child was switched at birth. She feels the health system has failed her. She has struggled to accept the authenticity of the DNA results.

103.4 M's recent assessment indicates that her anxiety levels have risen since her first assessment which is likely due to the stress and anxiety being suffered by NS.

103.5 M has some developmental delays and requires some developmental inputs.

103.6 NS has also indicated that, even if the children are to stay where they are, there may be a need for further traditional rituals.

103.7 It is recommended that M remain in the care of and residing with NS, with regular and reasonable contact with her biological mother and family. A change in the care of the child will be detrimental to her attachment relationship and sense of a secure base with NS. DL is involved with M and he also wishes to 'keep her'.

[31] In respect of Z, the following appears from his assessment:

"105.1 Z is 'anxiously attached' to NN. He identifies with her as his primary attachment but is insecure and constantly seeks reassurance

from her.

105.2 NN identifies Z as her son but has been aware that she may have to 'give him up' which has caused some ambivalence in her attachment.

105.3 NN expected a more immediate result and she feels 'betrayed' by the health system that has let her down and frustrated with the process of facilitation and integration.

105.4 Z's anxiety levels have risen since his first assessment, most likely due him picking up on his mother's anxieties.

105.5 Z's development is above average and he is progressing well

105.6 NN has originally desired to have care of her biological child and that the child should reside with her, but she has changed her mind due to her observation that M is very bonded to NS, and she does not want to cause distress to the child. She has therefore adjusted her expectations, and accepts that the children will stay where they are, provided she is permitted regular and reasonable contact with her biological child. She also requires NS and family to be co-operative in repeating certain traditional rituals that are necessary in each child's cultural belief system:

15.7 It is thus recommended that Z remain in the care of NN, with regular and reasonable contact with his biological family, as a change in the care and residence would be detrimental to Z's attachment relationship."

[32] In view of the aforesaid findings, the curator deemed it in the children's best interest to remain in the care of their psychological

parents.

[33] As alluded to supra, LZ was joined as a party to the proceedings on 25 March 2015. LZ's biggest concern in regard to the recommendation of the curator was the fact that customary law and cultural considerations were not properly considered.

[34] The matter was postponed and the curator obtained a report from T Nhlapo, an Emeritus Professor at the University of Cape Town that specialises in cultural traditions.

Customary law and traditions

[35] Professor Nhlapo emphasised the importance of the extended family in African social systems. According to Professor Nhlapo, the interests of children is best served in the communal value system by making sure that a child "belongs" and consequently mechanisms for ensuring that every child has a home are considered sacrosanct. The aforesaid principle underlines a definite preference for a socially constituted family over a biological family.

[36] Both children have been accepted by their extended families and in this regard the communal value system has been fulfilled. Professor Nhlapo refers to the children as being the social child of their psychological parents, which concept is deeply entrenched in African culture and does not impinge on customary law or traditions.

[37] Professor Nhlapo indicated that it is still possible to perform the necessary ceremonies and rituals on the children and proposed that any order granted by this court should take the aforesaid into account.

Psychological bonding

[38] LZ obtained a report from M L Yodaiken, a clinical psychologist and family and commercial mediator and facilitator. The report is instructive and explains the attachment a child forms with its parents. Explaining that the attachment process commences in utero and becomes actualized at birth, Mr Yodaiken reaches the following conclusions:

"9. For these reasons it is unlikely that a child of four years of age who has been living with psychological parents since birth and has obvious attachments to their respective parents and siblings, would be able to attach to, in this case, the biological parent in the same way that they have attached to the psychological parents. While I understand that the Child, Adolescent and Family Unit are attempting, through a therapeutic process, to forge attachment between the two children in question and their biological parents, it is my opinion that whatever attachment or bond is formed, will not be as significant or as deep as the attachments which the children have forged with their psychological parents, and particularly with their psychological mothers.

10. The literature indicates that there attachments configurations are disrupted and disrupted over extended periods of Ume, the

consequences for children can be extremely severe, even to the point of them developing psychiatric illnesses or personality disorders.

11. For these reasons I concur with the Curator ad Litem and the therapeutic team of the Child, Adolescent and Family Unit that the children should remain with their psychological parents.
12. It is important to note that there has already been some disruption to Z's attachments in that the nature of this case and the threat that she may lose her child has resulted in a great deal of ambivalence and anxiety in NN. As would be expected, when a mother becomes ambivalent in this way, a child of four years of age will react with anxiety to even nuanced changes in the mother's emotional

availability to the child. The evaluation of Z as indicated that he is a highly functioning child and this would suggest, considering the scores on the Griffiths, that he has had great deal of input from the mother figure as well as other caretakers such as his aunt. Any shifts in the availability of these caretakers, even if slight, will affect a highly sensitive and intelligent child Ike Z."

[39] Pursuant to the report of Mr Yodiaken being filed, Professor Smith and Mr Yodaiken compiled a joint minute of which the following points of agreement are significant:

"3. A speedy legal resolution to this situation should be found. It is not in the best interests of the children as a result of the stress imposed on the parents that this matter is not resolved.

4. The experts were in agreement that the children should remain with their psychological parents.
5. The psychological parents should be provided with full responsibilities and rights in respect of the children which they have been raising and a de facto adoption should take place with immediate effect"

BEST INTERESTS OF THE CHILDREN

[40] The negligence of the staff at the hospital has caused unimaginable pain and suffering to the parents involved. This in tum has had a negative impact on the emotional well-being of M, Z and their siblings. Similarly the extended families of the children have to deal with the reality that the children they have accepted into their families do not have a biological bond with the family.

[41] The problem is further compounded by the fact that African traditions and rituals are compromised, which causes, in particular for LZ, emotional distress.

- [42] From the report of Professor Nhlapo it does, however, appear that these difficulties is capable of being resolved. Save for LZ, the parents concerned expressed the wish to keep the children they have raised since birth. Although LZ was initially against the idea, he did indicate that he will abide by a decision that is in the best interest of the children.
- [43] Having regard to the expert opinions and the wishes of the parents, I am satisfied that it will be in the best interest of the children to stay with their psychological parents. The experts have suggested on-going therapy for all the parties involved and that contact rights be faced in at an age appropriate stage. The order granted herein made provision for the recommendations of the experts.

LEGAL FRAMEWORK

- [44] Having determined that it is in the best interests of the children to stay with their psychological parents, the legal ramifications of the aforesaid decision needs to be examined.
- [45] All the counsel involved is ad item that an adoption of the children by their psychological parents would satisfactorily address the legal consequences of the children being raised by their non-biological parents.
- [46] To find a suitable legal solution is, however, problematic. Section 280 (3) of the Children's Act 38 of 2005, determines that a child may only be adopted in certain defined situations. The section reads as follows:

- "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 parents or guardian cannot be established;
- c) the child has been abandoned;
- d) the child's parents or guardian has abused or deliberately neglected the child, or has allowed the child to be abused or deliberately

neglected; or

- e) the child is in need of a permanent alternative placement."

(own emphasis)

- [47] None of the aforesaid criteria apply in the prevailing circumstances. In the premises, legislation in its present form does not provide a legal remedy to the legal rights and responsibilities of the children and their psychological children.

De facto adoption: legal recognition

- [48] The curator, advocate Strydom and advocate Nathan SC proposed that an order of de facto adoption be granted.

- [49] The concept of de facto adoption was never part of the Roman Dutch Law and as a result does not form part of the South African Common Law.
- [50] Notwithstanding the aforesaid, the curator and counsel for the first and second respondents referred to two recently decided matters in which the concept of de facto adoption was considered.
- [51] In *Flynn v Fan- NO and Others* 2009 (1) SA 584 C, Davis J considered the concept of de facto adoption against the backdrop of the Law of Succession. The Intestate Succession Act, Act 81 of 1987, provides that a legally adopted child may inherit by way of intestacy from the estate of the adoptive parent. The matter concerned a child who was raised by his step-father and although for all intents and purposes was considered as the step-father's own child, was never legally adopted by the step-father.
- [52] Without considering the legal origin of the concept of de facto adoption, the court considered the following two questions at para [19]:

"The legal question

- [19] I turn now to deal with the legal question, a positive determination for applicant which is crucial to his case. The legal issues can be defined thus:
1. Are the words 'adopted child' as employed in s 4 (e) of the Act broad enough to include what Mr Hopkins categorised as de facto and de lege adoptions?
 2. If the words 'adopted child' as they are used in the Act are intended to refer only to legal adoptions (de lege) and not to factual adoptions (de facto) does such a distinction render the provisions in the Act inconsistent with the equality protection as enshrined in s 9 of the Constitution which provides, inter-alia, that everyone is equal before the law and that the law may not unfairly discriminate against any person."
- [53] The court found that the Act only referred to legal adoptions, but that the distinction between legal adoptions and de facto adoptions did not unfairly discriminate against the stepson.
- [54] In *MB v NB* 2010 (3) SA 220 GSJ, Brassey AJ considered the question of de facto adoption and with reference to *Flynn v Faff NO*, supra remarked as follows at para [23]:

"Were it necessary for me to make this finding in order to conclude that the defendant is bound to look after SB, I should have little

hesitation in doing so. As the decision in Flynn v Farr NO and Others 2009 (1) SA 584 (C) shows, courts do recognise de facto adoptions and treat them, at least for some purposes, as the equivalent of legal adoptions."

- [55] MB v NB, supra was a divorce matter and the issue that had to be decided was whether, in the particular circumstances of the matter, the step-father of the minor boy, who was not legally adopted by him, had a duty to pay his school fees. The court held that such duty arose as the result of a representation to the effect made by the step-father.

SOURCES OF THE LAW

- [56] It is trite that the South African Legal System has three sources, the common law, legislation and most importantly the Constitution of the Republic of South Africa 2006 which is the supreme law. Consequently rules of the common law and statutory provisions are obliged to 'promote the spirit, purport and objects of the Bill of Rights'. [See: S v Thebus [2003] ZACC 12; 2003 (6) SA 505 CC p 524 C]
- [57] The right in question is to be found in Section 28 (2) of the Constitution which provides that a child's best interests are of paramount importance in every matter concerning the child.
- [58] The need to give legal recognition to the de facto position of the children in the present circumstances is without doubt in their best interests. Is the fact that de facto adoptions do not form part of our common law a stumble block in granting the relief?
- [59] Section 173 of the Constitution confers an inherent power on the court to, having regard to the interests of justice, develop the common law.
- [60] Section 39 (2) of the Constitution enjoins the court "to apply and, if necessary, to develop the common law in order to give effect to a protected right, provided that any limitation is in accordance with section 36." [See: S v Thebus; supra]
- [61] The question then arises whether the common law should be developed to include de facto adoptions. In discussing the different instances in which the common law might be developed to promote the spirit, purport and objects of the Bill of Rights, Moseneke J (as he then was) in S v Thebus, supra at 525 E-F remarked as follows:
- "The second possibility arises even when a role of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects."*
- [62] In this instance there is no common law rule in respect of adoptions. As alluded to supra adoptions are regulated by The Children's Act.

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