

SOUTH AFRICA / JUDGMENT

Ndala, In re: Ndala (14/1/2-19/2010) [2012] ZAGPJHC 102; 2013 (6) SA 153 (GSJ) (18 May 2012)

[2012] ZAGPJHC 102

COURT

South Gauteng High Court, Johannesburg

BEFORE

H Saldulker, M Victor

CASE / FILE NUMBER

14/1/2-19/2010

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REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Review Case No: 14/1/2-19/2010

20 September 2011

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REVIEW JUDGMENT

SALDULKER, J:

[1] The law which governs adoption of children in South Africa, is the Children's Act 38 of 2005 (the Act). In this special review the Child Commissioner seeks clarity and direction on what must be done in the absence of a letter from the Provincial Head of Social Development recommending whether an adoption is advisable, a requirement in terms of s 239(1)(d) of the Children's Act No 38 of 2005 (the Act).

[2] The Child Commissioner has raised the following issues:

2.1 If it proves impossible to receive this letter does the Commissioner have the power to condone the non-filing of such a letter in terms of section 48?

2.2 If not, what procedure should be followed to ensure that the best interests of the child are not prejudiced because of this requirement?

2.3 Is it the prerogative of the Registrar of Adoptions to refuse to register the adoption of the child even if the court condoned non-compliance with the letter or is the Registrar effectively reviewing the decision of the Commissioner?

[3] An application for the adoption of a child must in terms of s239(1) of the Act be accompanied by a report by an adoption social worker containing, inter alia information on whether the child is adoptable and whether the adoption is in the best interests of the child. It must in terms of s 239(1)(d) of the Act “ be accompanied by a letter by the provincial head of social development recommending the adoption of the child”.

In terms of s 240(2) of the Act: “A children’s court considering an application may make an order for the adoption of a child only if:

A the adoption is in the best interests of the child;

B the prospective adoptive parent complies with section 231(2);

C subject to section 241, consent for the adoption has been given in terms of section 233;

D consent has not been withdrawn in terms of section 233(8); and...”.

Section 231 (2) provides:

‘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)”. (my underlining)

[4] In Minister of Welfare & Population Development v Fitzpatrick[1]and others Goldstone J, stated as follows:

“According to the Act, it is the children’s courts that are charged with overseeing the well-being of children, examining the qualifications of applicants for adoption and granting adoption orders. The provisions of the Act creating children’s courts and establishing overall guidelines advancing the welfare of the child offer a coherent policy of child and family welfare. If appropriately and conscientiously applied by children’s courts the main provisions of the Act would meet the most serious of the concerns of the Minister and the amicus curiae. The provisions of section 24 of the Act are designed to deter the practice of child trafficking, making the exchange of consideration in an adoption a criminal offence. Until the safeguards and standards envisaged by the Minister are introduced, children’s courts are able to prevent the feared abuses in the cases of citizens and non-citizens alike”.

- [5] In this matter, an application for the adoption of a child in terms of s 240 of the Act was made by his stepfather. The applicant who is a citizen of Trinidad, is married to the mother of the child. The applicant was properly screened by the social worker and found to be a suitable prospective adoptive parent for the child. The child in question was 10 years old and was in favour of being adopted by the applicant and to take on his surname. The child did not know his biological father and had been raised by his mother. An attempt was made to trace the biological father in order for him to consent to the adoption but to no avail. Newspaper advertisements were placed in the Star newspaper on 3 and 10 May 2010 respectively. There was no response and in these circumstances in terms of s 236(1)(b)[2] of the Act the natural father's consent was dispensed with.
- [6] The following evidence was adduced by the social worker in the adoption proceedings in terms of Regulation 22 of the Children's Act 74 of 1983. The social worker, Ms Marlene Visser, who was accredited to deliver adoption services in terms of the Social Service Professions Act 110 of 1978 stated the following in the court:– "I am the social worker that compiled the report and I have attached all the documents as requested in Section 239(1)(b) except the letter of recommendation of the Head of Department – the reason I did not obtain it is because it would incur an unnecessary delay as initially I spoke to the Department of Social Development in JHB/PTA, knows what I am referring to and told me that they are unable to comply with such a letter" (my underlining).
- [7] The Child Commissioner, Ms A Swanepoel, after considering the application for the adoption of the child in terms of s 240 of the Act, made the following order:
- "I.T.O section (48(1)a) , the court condones the non compliance of the recommendation letter as this will cause unnecessary delay and will not be in the best interests of the child. The court is satisfied that the requirements for the adoption are met and realise this is an adoption by the stepfather and as such section 261 does not apply. All parties are satisfied and do not want to add anything. Court orders the adoption i.t.o – attached order".*
- [8] In terms of S 261(5)[3] of the Act, a court may make an order for the adoption of the child if the requirements of section 231[4] regarding persons who may adopt a child are complied with. There are specific requirements in terms of s261[5] of the Act for the adoption of a child from the Republic by a person from a country that is a signatory to the Hague Convention. These requirements include an application directed to the Central Authority of the Convention country in question. However, referral to the Central Authority in terms of s 261(8)[6] of the Act does not apply to a child habitually resident in the Republic and who is to be placed for adoption outside the Republic with a family member of that child or with a person who will become an adoptive parent jointly with the child's biological parent. As the adoption in this case is being done by the stepfather, even though it is inter-country adoption, s 261 of the Act does not apply.

- [9] This application was considered in terms of s 240 of the Act, and the court was satisfied that the adoption was in the best interests of the child. However, the problem facing the Commissioner of the Children's Court at the time this application for the adoption was considered, was the absence of the letter by the Provincial Head of Social Development recommending the adoption, a requirement in terms of s 239 (1)(d) of the Act. It was evident from the social worker's testimony under oath, that a letter from the Department was not forthcoming. As the interests of the child was paramount, the Child Commissioner did not deem it "in the best interests" of the child to stay the adoption proceedings pending the resolution of the entire administrative labyrinth.
- [10] The Child Commissioner condoned the non-compliance of the s 239(1)(d) letter in terms of s 48(a)[7] of the Act and granted the adoption in the absence of the s 239(1)(d) letter, the jurisdictional basis being s45[8] of the Act. In terms of s 48 (a) the Child Commissioner has additional powers to grant interdicts and auxiliary relief in respect of any matter contemplated in s 45(1)(a). These powers include the protection and well-being of a child, the adoption of a child, including an inter-country adoption, and any other matter relating to the care, protection or well-being of a child provided for in this Act.
- [11] It appears from the record that Ms Visser "initially ..spoke to the Department of Social Development in JHB/ PTA... who informed her that they are unable to comply with such a letter". According to Ms Visser's testimony she telephonically contacted the department and they were unable to assist her. As a result she "did not obtain the letter of recommendation because it would incur an unnecessary delay" in the granting of the adoption. There is no explanation as to why the Department "was unable to comply with such a letter." It appears from the record, that the social worker, Ms Visser who investigated the suitability of the adoption, and made a favourable recommendation for the adoption, was of the view that waiting for the s 239(1)(d)letter from the Provincial Head of Social Development, would have disrupted and prolonged the finalisation of the adoption proceedings. It does not appear that the s 239(1)(d)letter was formally requested in writing from the Provincial Head of Social Development. The order for the adoption was granted by the Child Commissioner on 27January 2011 without the letter of recommendation.
- [12] This court subsequently wrote to the Child Commissioner for the transcript of the adoption proceedings and to the Department in regard to the non-compliance of the s 239(1)(d)letter. According to the Child Commissioner 'it did not seem logical to send letters to Departments who are not aware of their functions'. In her opinion ' this does not give the Court carte blanche to condone non-compliance with the Act , but if one looks at the requirements in this instance it is absurd'. Furthermore, in her opinion, the commentary in "A practical approach to the Children's Act" by Hester Bosman-Sadie and Lesley Curie suggests that this measure (the s239(1)(d)letter) was implemented for purposes of quality control, and to channel reports of social workers in private practice.

[13] In the Child Commissioner's opinion, the s 239(1)(d) letter was 'a letter of recommendation', and the 'person drafting this letter has the same information as the Commissioner of the Children's Court and as a result recommends the adoption or not'... 'Surely the Court is not bound to the letter of recommendation and may overrule it should it be necessary. As a result I fail to see why this letter should hijack the finalisation of the adoption proceedings'.

[14] It must be emphasized that in terms of s 239(1)(d) of the Act 'an application for the adoption of a child must be accompanied by a letter by the Provincial Head of Social Development recommending the adoption of the child'. The requirement of the s 239(1)(d) letter is therefore peremptory. It reaffirms and recognises the role to be played by governmental

Institutions in the protection and wellbeing of children within our borders and those leaving it. The Legislature deemed it necessary in the best interests of children to include the s 239(1)(d) letter as a formal requirement in terms of the Act, thereby involving oversight by public officials in the social worker's assessment process.[9] Clearly a commendable process. The stringent provisions of the Act encompasses protective mechanisms in regard to adoptions, which is clearly to prevent what is becoming a reality, that children are being used for human trafficking, as well as for illegal purposes and it is the duty of the courts to ensure that such practices do not result from adoptions.

[15] However, it appears that there were exceptional circumstances present in this case. The Child Commissioner found herself in an invidious position in this adoption application as a result of the testimony of the social worker, and utilised the provisions of s 48(a) of the Act to condone the non-filing of the s 239(1)(d) letter because it was clearly in the best interests of the child,[10] and the exigencies of the situation demanded that she grant the adoption. The family was relocating and any delay in the adoption

proceedings would have caused incalculable emotional distress to the family.

[16] This court addressed an epistle to the Department of Social Department to provide reasons for the non-compliance of the s 239(1)(d) letter, and a letter supporting and recommending the adoption addressed to the Children's Court by the Department

materialised, almost a year after the order for adoption was granted. It appears that had the formal requirements of the s 239(1)(d) not been dispensed with by the Child Commissioner in the circumstances, the child would have been highly

prejudiced, as he would not have accompanied his mother and the applicant to Trinidad. The adoption of the child would have been

delayed. Such a delay would clearly not have been rational or reasonable in the circumstances of this case.

[17] S (229)[11] of the Act stipulates that the purpose of adoption is to protect and nurture children by providing a safe, healthy environment with

positive support and promote the goals of permanency planning by connecting children to other safe and nurturing family relationships

intended to last a lifetime. Children's rights are further protected and entrenched in s 28(2) of the Constitution of the

Republic of South Africa 108 of 1996, which stipulates that every child has the right to family care and in this instance the child's

family milieu would be reinforced with the inclusion of a father which he never had. It is commendable that the Child Commissioner and the social worker allowed the child to participate in the process, as envisaged in s 10 of the Act: "Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration."

[18] Evidently, the Child Commissioner and the social worker were mindful of s 7(1)(a)-(n) of the Act which sets out in great detail 'the best interests of child standard'. The concept of the best interests of the child is also used by the Children's Convention as well as the OAU Charter on the Rights of the Child. Useful content is given to the best interests requirements by the relatively detailed provisions of Act 3 of the Children's Convention:[12]

"State parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the area of safety, health, in the number of suitability of their staff as well as competent supervision."

[19] However, although the best interests of the child cannot be sacrificed at the altar of formalism, if the requirement of the s239(1)(d) is not complied with, the objectives of the Children's Act, will be lost. The Children's Courts are charged with overseeing the wellbeing of children, examining the qualifications of applicants for adoption and granting adoption orders[13]. To carry out their functions effectively and conscientiously, they rely on the efficient collaboration of all stakeholders, the Department and social workers, to comply with their respective obligations in terms of the Act. Non-compliance of the provisions of the Act will delay the speedy facilitation of adoption applications, bringing the administrative processes to a halt, if not into disrepute. It should be a concern when those who are empowered by legislation to fulfil their functions appear recalcitrant, especially in matters involving the vulnerable members of our society. Nevertheless, in my view this does not give the Child Commissioner carte blanche to condone non-compliance with the provisions of the Act. This can only be done if the circumstances are exceptional and warrant it, as in this case.

[20] Whilst it is the prerogative of the Registrar of Adoptions to refuse to register the adoption, it cannot do so on an irrational basis. In this case, the adoptive parent was properly screened and the Children's Court issued an adoption order, albeit without the s 239(1)(d) letter. There were exceptional circumstances present.

[21] However, prospective adoptive parents, may not be faulted for pursuing High Court proceedings in certain matters where there has been a non compliance of the s 239(1)(d) letter. In matters of such a nature the interests of the minor children are paramount. Sachs J in AD and another v DW and Others (Centre for Child law as Amicus Curiae; Department for Social Development as Intervening Party), at para 31[14] stated as follows:

“In its capacity as upper guardian of all minor children, the High Court had not been dispossessed of its jurisdiction to make such an order, even if the ultimate objective was adoption in the United States of America. The Child Care Act should not be interpreted as creating by implication an inflexible jurisdictional bar to a High Court granting sole custody and sole guardianship orders to foreigners desirous of effecting an adoption in a foreign jurisdiction”.

And at para [34][15]:

‘I conclude therefore that from the start to finish the forum most conducive to protecting the best interests of the child has been the Children's Court. Although the jurisdiction of the High Court to hear the application for sole custody and sole guardianship had not been ousted as a matter of law, this was not one of those very exceptional cases where bypassing the Children's Court

procedure could have been justified. It follows that the question of the best interests of Baby R in relation to adoption was not one to be considered by the High Court, nor at a later stage by the Supreme Court of Appeal, but a matter to be evaluated by the Children's Court. The question was not strictly one of the High Court's jurisdiction, but of how its jurisdiction should have been exercised’.

[22] Having considered all of the foregoing, in my view , the application for the adoption of the child was evaluated carefully by the Child Commissioner, in terms of s 240 of the Act, taking into account all of the relevant factors, the profile of the adoptive parent, and the best interests of the child, the latter being consistent with s 28(2) of the Constitution. The Child Commissioner granted the order for adoption, thus bringing about a speedy and effective resolution of the matter which was imperative in the circumstances of the case. It was in the best interests of the child to do so.

H SALDULKER

JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG

I agree

M VICTOR

- [1] 2000(3) SA 422 (CC) at para 31, 2000(7) BCLR 713 (CC)
- [2] S 236 (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).....
- b) has abandoned the child, or if the whereabouts of that parent or guardian cannot be established or if the identity of that parent or guardian is unknown.
- [2] S 236 (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).....
- b) has abandoned the child, or if the whereabouts of that parent or guardian cannot be established or if the identity of that parent or guardian is unknown.
- [3] S 261 (5) The court may make an order for the adoption of the child if the requirements of section 231 regarding persons who may adopt a child are complied with, the application has been considered in terms of section 240 and the court is satisfied that the-
- (a) the adoption is in the best interests of the child;
- (b) the child is in the Republic;
- (c) the child is not prevented from leaving the Republic-
- (i) under a law of the Republic; or (ii) because of an order of a court of the Republic.
- [3] S 261 (5) The court may make an order for the adoption of the child if the requirements of section 231 regarding persons who may adopt a child are complied with, the application has been considered in terms of section 240 and the court is satisfied that the-
- (a) the adoption is in the best interests of the child;
- (b) the child is in the Republic;
- (c) the child is not prevented from leaving the Republic-
- (i) under a law of the Republic; or
- (ii) because of an order of a court of the Republic.
- [4] S 231 of the Children's Act 38 of 2005 provides: (1) A child may be adopted- (a) jointly by-
- (i) a husband and wife; (ii) partners in a permanent domestic life-partnership; or (iii) other persons sharing a common household and forming a permanent family unit; (b) by a widower, widow, divorced or unmarried person; (c) by a married person whose spouse is the parent of the child or by a person whose permanent domestic life partner is the parent of the child. (d) by the biological father of a child born out of wedlock; or (e) by the foster parent of the child.

- [4] S 231 of the Children's Act 38 of 2005 provides: (1) A child may be adopted-
- (a) jointly by-
 - (i) a husband and wife;
 - (ii) partners in a permanent domestic life-partnership; or
 - (iii) other persons sharing a common household and forming a permanent family unit;
 - (b) by a widower, widow, divorced or unmarried person;
 - (c) by a married person whose spouse is the parent of the child or by a person whose permanent domestic life partner is the parent of the child.
 - (d) by the biological father of a child born out of wedlock; or
 - (e) by the foster parent of the child.
- [5] S 261 of the Children's Act No 38 of 2005 provides: (1) A person habitually resident in a convention country who wishes to adopt a child habitually resident in the Republic must apply to the central authority of the convention country concerned. (2) If the central authority of the convention country concerned is satisfied that the applicant is fit and proper to adopt, it shall prepare a report on that person in accordance with the requirements of the Hague Convention on Inter-country Adoption and any prescribed requirements and transmit the report to the Central Authority of the Republic. (3) If an adoptable child is available for adoption, the Central Authority will prepare a report on the child in accordance with the requirements of the Hague Convention on Inter-country Adoption and any prescribed requirements and forward it to the central authority of the convention country concerned.
- (4) If the Central Authority and the central authority of the convention country concerned both agree on the adoption, the Central Authority will refer the application for adoption together with all relevant documents and the reports contemplated in subsections
- (2) and (3) to the children's court for consideration in terms of section 240.
- [5] S 261 of the Children's Act No 38 of 2005 provides: (1) A person habitually resident in a convention country who wishes to adopt a child habitually resident in the Republic must apply to the central authority of the convention country concerned.
- (2) If the central authority of the convention country concerned is satisfied that the applicant is fit and proper to adopt, it shall prepare a report on that person in accordance with the requirements of the Hague Convention on Inter-country Adoption and any prescribed requirements and transmit the report to the Central Authority of the Republic.

- (3) If an adoptable child is available for adoption, the Central Authority will prepare a report on the child in accordance with the requirements of the Hague Convention on Inter-country Adoption and any prescribed requirements and forward it to the central authority of the convention country concerned.
- (4) If the Central Authority and the central authority of the convention country concerned both agree on the adoption, the Central Authority will refer the application for adoption together with all relevant documents and the reports contemplated in subsections
- (2) and (3) to the children's court for consideration in terms of section 240.
- [6] S 261(8) of the Children's Act No 38 of 2005 provides: "This section does not apply to a child habitually resident in the Republic and who is to be placed for adoption outside the Republic with a family member of that child or with a person who will become an adoptive parent jointly with the child's biological parent.
- [7] S 48 of the Children's Act (1) A children's court may, in addition to the orders it is empowered to make in terms of this Act (a) grant interdicts and auxiliary relief in respect of any matter contemplated in section 45(1).
- [7] S 48 of the Children's Act (1) A children's court may, in addition to the orders it is empowered to make in terms of this Act
- (a) grant interdicts and auxiliary relief in respect of any matter contemplated in section 45(1).
- [8] S45 of the Children's Act 38 of 2005 (1) Subject to section 1(4), a children's court may adjudicate any matter, involving-
- (a) the protection and well-being of a child;
- (b) the care of, or contact with, a child;
- (c) paternity of a child;
- (d) support of a child... (i)the adoption of a child, including an inter-country adoption;
- [8] S45 of the Children's Act 38 of 2005 (1) Subject to section 1(4), a children's court may adjudicate any matter,
- involving-
- (a) the protection and well-being of a child;
- (b) the care of, or contact with, a child;

- (c) paternity of a child;
 - (d) support of a child...
 - (i) the adoption of a child, including an inter-country adoption;
- [9] Commentary on the Children's Act, CJ Davel, AM Skelton, Chapter 15 Adoption, S 239, at 15-19
- [10] S 240(2) of the Act, see para[4] supra
- [11] S 229 of the Children's Act 38 of 2005: The purposes of adoption are to- (a) protect and nurture children by providing a safe, healthy environment with positive support; and (b) promote the goals of permanency planning by connecting children to other safe and nurturing family relationships intended to last a lifetime.
- [11] S 229 of the Children's Act 38 of 2005: The purposes of adoption are to-
- (a) protect and nurture children by providing a safe, healthy environment with positive support; and
 - (b) promote the goals of permanency planning by connecting children to other safe and nurturing family relationships intended to last a lifetime.
- [12] I Currie & John De Waal The Bill of Rights Handbook 2005 Juta publications at Chapter 27 page 617; paragraph (i)
- [13] Minister of Welfare & Population Development v Fitzpatrick and others 2000(3) SA 422 (CC)
- [14] AD and another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)
- [2007] ZACC 27; 2008 (3) SA 183 CC
- [15] AD and another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)
- [2007] ZACC 27; 2008 (3) SA 183 CC

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