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REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 2022/17006
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED

In the matter between:

T A B K

First Applicant

L S K

Second Applicant

and

L V K

First Respondent

**THE ACTING DIRECTOR GENERAL, DEPARTMENT
OF SOCIAL DEVELOPMENT**

Second Respondent

**BABALWA MENEMENE, SOCIAL WORKER,
VAAL TRIANGLE MENTAL HEALTH SOCIETY,
SEBOKENG**

Third Respondent

**THE LOVE OF CHRIST MINISTRIES CHILDREN
AND YOUTH CARE CENTRE ("TLC")**

Fourth Respondent

THE HEAD OF DEPARTMENT, THE DEPARTMENT
OF SOCIAL DEVELOPMENT, GAUTENG

Fifth Respondent

THE PRESIDING OFFICER, THE CHILDREN'S COURT,
SEBOKENG

Sixth Respondent

JUDGMENT

WENTZEL AJ

INTRODUCTION AND BACKGROUND FACTS

- [1] This application involves the adoptability of a minor child by the applicants, who are Polish nationals. I will refer to the minor child as 'E' to protect his identity. The application is opposed by the second respondent, the Acting Director-General ('DG') of the Department of Social Development ('DSD'), who is of the view that E is not "*adoptable*" and must be placed with the first respondent. The first respondent, L V K, is a maternal great aunt of E. The affidavit deposed to on behalf of the DG of the DSD was deposed to by the Chief Director: Legal Services in the employ of the DSD. For convenience, I will refer to the second respondent as '*the DSD*'. Significantly, the fifth respondent, the Head of the Department of the DSD, has not opposed this application.
- [2] E was born on 26 October 2016 and is today going to be seven years old. In December 2016, when E was only two months old, he was deemed to be a child in need of care after it was reported that he was being neglected and abused by his mother, B J K; she had been diagnosed with bipolar disorder and had a history of alcohol abuse. On 21 December 2016, E was placed at the Love of Christ Ministries Children and Youth Care Centre ("*TLC*") (the fourth respondent), which has been designated as a place of safety, with a view to being reunited with his mother once she was able to properly care for him. The third respondent (Babalwa Menemene), a social worker employed at the Vaal Triangle Mental Health Society, Sebokeng, was assigned to care for both E's mother and E. It is pointed out that although Ms. Menemene operates under the supervision of the DSD, she is not an accredited '*adoption social worker*' and is not empowered to make a decision on the '*adoptability*' of E.
- [3] The applicants were married in December 1990 and have three adult children, two self-supporting girls and a son who is still studying. The

applicants' contact with E arose after one of the applicant's adult daughters and son had been volunteering at the TLC during the Christmas period in December 2016. With the TLC being short staffed during this time, the TLC requested the applicants' daughter whether she could possibly take E to the applicants' home and look after him until their full staff contingent returned to the TLC after the Christmas period, to which she agreed. During the period that E remained with the applicants, the family formed a strong attachment to him and continued seek access to him on a regular basis after he was returned to the TLC. This was facilitated through regular permissions for leaves of absences granted by the TLC to E. This allowed the applicants to have E with them over most weekends, and often from a Thursday until the following Monday, when he would be returned to the TLC.

- [4] During October 2018, the applicants were successfully screened by a social worker to enable E to spend longer periods with them. Although the screening performed was said to determine whether the applicants were suitable foster parents of E, in reality the screening was to determine whether lengthy leaves of absence could be given to E, as being foreigners without permanent residence, the applicants were not able to act as foster parents to E. The result of this screening was that the applicants were considered suitable candidates to enable E to spend extended periods of time and holidays with the applicants. This arrangement between the applicants and the TLC who afforded them extended periods of access to E, persisted until they left South Africa during January 2020.
- [5] This has meant that since E was a baby of only two months, and until the applicants left South Africa, he has spent a substantial amount of time in the care of the applicants' family, who provided him with a loving family environment and assumed responsibility for E's schooling, clothing and medical needs. The photographs annexed to the founding papers are testimony to the close relationship between the applicants' family and E.
- [6] Since leaving South Africa, the applicants have remained in regular contact with E via phone and video calls, have rented accommodation close to the TLC and have returned to South Africa every two to three months to visit E and enable him to spend time with them, be it for school holidays or over extended weekends. They have continued to pay his expenses and attend to his needs.
- [7] During the period that the applicants had access to E, they had contact with his birth mother, who was determined to be reunited with him and did

not wish to give him up for adoption. His birth mother, however, was happy with the arrangement made by the TLC with the applicants as she knew that they loved him and were able to provide for E. During this time, the applicants encouraged and facilitated contact between E and his mother, who it seems never once missed his birthday.

- [8] On 1 February 2019, contact was made by social workers with Ms. K as a possible placement for E. On 29 March 2019, a background report was prepared by a social worker from Engo Family Care in Heilbron ("*Engo*"), where Ms. K resides, concerning the suitability of Ms. K as a foster parent to E. This was a superficial report which indicated that Ms. K was prepared to take care of E. Following this approach, Ms. K made no further inquiries regarding E and made no attempt to visit or make contact with E. It would also seem that following this report, no further steps were taken by Engo to appoint Ms. K as a foster parent to E. This may have been because E's mother had not regarded Ms. K as a suitable placement for E.
- [9] During October 2019, attempts were made to find other suitable foster parents for E, which were not ultimately successful. On 25 October 2019, E's mother wrote a note expressing her desire that the applicants foster E as she did not feel that Ms. K was particularly interested in E. On 18 November 2019, an unrelated foster parent for E was screened and approved. However, this placement also fell through, and E remained at the TLC and continued to have contact with the applicants' family.
- [10] At the beginning of January 2020, after the second applicants' contract expired, the applicants left South Africa and ultimately returned to Poland (after a short period in Rwanda).
- [11] On 18 February 2020 the applicants returned to South Africa to have a meeting at the TLC with E's mother, Ms Menemene, Joanna Jones, the Head of the TLC and the applicants' lawyer to discuss the possibility of E being adopted. E's mother was against this and preferred that a suitable foster placement be arranged for E. In March 2020, E's mother sent a text message to the first applicant requesting that when they returned to South Africa again, they "*take*" E.
- [12] On 19 April 2020, E's mother died. At this time, E was only three years old. The death of E's mother rendered him an orphan which prompted the applicants to investigate whether it would be possible for them to adopt E. On returning to Poland from Rwanda, the applicant's approached the Polish adoption authorities for assistance in facilitating an intercountry adoption of E.

- [13] After E's mother's death, Ms. Menemene contacted Ms. K again during May 2020, regarding the possible placement of E with her, to which she agreed. She indicated that the K family, which are E's mother's family, had "*resolved*" that Ms. K was the "*suitable person to take care [of] and raise the child.*"
- [14] During or about June 2020, formal steps were taken by the applicants to adopt E and correspondence was exchanged between the Polish Central Authority tasked with intercountry adoptions and their counterpart in South Africa, the DSD. During July 2020, the applicants submitted documents to the Polish authorities to be considered as suitable parents for the adoption of E and hereafter underwent screening and training as required by the Polish adoption authorities.
- [15] However, the accredited intercountry adoption agencies they approached in South Africa indicated that they would not be regarded as suitable prospective adoptive parents of E: first, as their prior contact with him contravened the local and international rules and guidelines precluding "*pre-identification*" of a child, where prospective adoptive parents "*pre-identify*" or choose a child sought to be adopted by them (also referred to as "*baby shopping*"); and second, because E was not "*adoptable*" as a suitable local extended family member, namely Ms. K, had agreed to care of E.
- [16] This is the approach set out in the DSD's Guidelines, which it has maintained in the application before me. It bears mentioning at this stage, however, that the relevant legislative provisions make it plain that had the applicants' contact with E been as foster parents, this would have accorded them preference in any application to adopt him. This is plainly because the prior relationship between foster parents and a child who then becomes available to adoption makes them eminently best suited to adopt the child. However, because they are foreigners, the applicants' prior contact with E as now, in the eyes of the DSD, served to exclude them as prospective adoptive parents of E. It is, however, readily apparent from the facts of this matter that the applicants' so-called "*pre-identification*" of E had not been as prospective adoptive parents as, until E's mother died, the applicants had not had any intention to adopt E; indeed, his mother had entirely ruled out this as a possibility.
- [17] Moreover, and perhaps more importantly, it makes no sense whatsoever to exclude the applicants as prospective adoptive parents of E simply because there is a local placement for E as Ms. K has now agreed to take

care of E. This is particularly so as prior to the death of E's mother, the K family had no contact with E, despite knowing that he was in an institution; as indicated above, Ms. K had been approached by a social worker from Engo in Heilbron between February 2019 and March 2019 to determine whether she would be prepared to take care of E while his mother was still alive. No steps were thereafter taken by her or any member of the family to even seek to visit E. E's mother, herself, did not wish Ms. K to foster E as in her view, Ms. K had expressed no interest in E.

- [18] This has been confirmed by Ms Jones, the Head of the TLC, who deposed to an affidavit in these proceedings in which she explained that Ms. K had hitherto not expressed any interests or particular concern for E. She stressed that-

"Ms V Kubheka (E's great-aunt), despite being aware that E was in care, and professing to desire reunification from the time he came into care, never telephoned or inquired about E to date. TLC offered a number of times to bring E to visit her at her home, or to meet her half-way between her home and TLC, however she always gave reasons why this was not possible."

- [19] Ms. K is a 57-year-old lady who lives in a three-bedroom house in Heilbron with her daughter and disabled grandson, which the Heilbron social workers have reported is clean and well-kept and there is plenty of room for E. Ms. K works as a domestic worker and earns a meagre salary of R2200.00 per month. Her daughter, however, assists her in buying groceries.

- [20] The DSD has expressed the view that the placement of E with Ms. K will be a "*suitable*" placement for E, primarily it seems, because Ms. K is part of E's extended family. It is the DSD's stated policy that what is known as the '*subsidiary principle*' should be adhered to which requires children should first and foremost be placed with family or their extended family and/or within their own community where their culture, traditions and language will be respected. The point needs to be made, however, that E only speaks English, Ms. K is Zulu speaking and the major language spoken in Heilbron is Sesotho. E has grown up catholic as the TLC is a catholic institution. It is thus apparent that the family environment which Ms. K can offer to E is entirely foreign to that offered to him by the applicants and the TLC.

- [21] This notwithstanding, the DSD has been intent on preventing the applicants from even being considered as suitable adoptive parents to E

and have instead, taken steps to ensure the placement of E with Ms. K, without any consideration of what may, in the particular circumstances of E's case, be in the best interests of E. This is evident from the chronology of events following the applicants' attempts to adopt E.

- [22] During October 2020, the applicants returned to South Africa to see E. At the same time, arrangements were made for Ms. K to visit E at the TLC, which she did, coincidentally, on his fourth birthday on 26 October 2020. During this visit, Ms. K did not interact much with E. It was suspected that this may have been due to a language barrier as E only spoke English. A further visit was arranged on 9 November 2020. During this visit Ms. K was accompanied by her niece, Deliwe, who appeared to interact well with E. Both visits took place at the request of the social workers who arranged for Ms. K's transport to visit E.
- [23] Following these visits, no further inquiries were made by Ms. K concerning E and she made no attempt to visit him of her own accord. However, to be fair to Ms. K, she states that she had been expecting E to be placed in her care since December 2020 as appears from the report prepared by another social worker from Engo, Mr Mmabatho Mamokabe dealt with shortly.
- [24] During December 2020, the applicants again returned to South Africa to see E and he was granted a leave of absence to stay with them for the Christmas holidays.
- [25] On 26 February 2021, a second, more detailed report concerning the placement of E with Ms. K was prepared by Mr Mamokabe, which was co-signed by his supervisor, Ms. Helmi Beyers-Jacobs. It records that the Ms. K *"is longing to have E to stay with the family. She also understands that, she is the only person that the child has. She cannot wait to see her grandchild . Ms. Kubeka reported that she even bought clothes for the child in December 2020 she was hoping to spend Christmas with him."* Ms. Mamokabe expressed the view that the *"placement will be good for the child and will also give the child a sense of belonging"*. He made the point that E was *"only four years old, children his age adapt easily"*. Mr. Mamokabe recommended that E be transferred into the care of Ms. K and *"be reunited with his maternal family"*. Mr. Mamokabe, however, failed to consider E's specific needs and circumstances and made no attempt to meet E, discuss his case with his case social worker, Ms. Menemene, Ms. Jones at the TLC or the applicants with whom E had by this stage established a bond, and had taken steps to try and adopt E.

- [26] During March 2021 and again in May 2021, the applicants returned to South Africa to see E. On 7 May 2021, the applicants were approved as prospective adoptive parents for E by the Polish adoption authority, who made contact with the DSD regarding the possibility of the applicants adopting E. During August 2021, the applicants again returned to South Africa to visit E. During September 2021, the applicants attorney met with members of the DSD to discuss the adoption of E. In October 2021, the applicants again returned to South Africa to visit E. Unfortunately, the applicants scheduled visit during December 2021 had to be cancelled due to the outbreak of the Omnicron Covid-19 variant in South Africa.
- [27] On 8 February 2022 the applicants' attorney addressed a letter to Ms Menemene. The letter outlined the long-standing relationship between E and the applicants' family, and their interest in his welfare. The applicant's attorneys expressed concern that the question of E's placement had still not been finalised, notwithstanding that E had by that stage been orphaned for nearly two years and had been institutionalised almost his entire life. She inquired whether E had yet been declared "*adoptable*" and if any decision had been made concerning his placement. The correspondence was also copied to the DSD and the Presiding Officer of the Children's Court (the sixth respondent).
- [28] It would seem that the letter from the applicants' attorney may have prompted Ms. Menemene to arrange a further visit between Ms. K and E at the TLC on 4 March 2022. During this visit, Ms. K was accompanied by her daughter, Thokozane. Ms. K and Thokozane arrived late and had to leave after only an hour in order to catch a taxi. It was reported that again, Ms. K hardly engaged with E, and it was Thokozane who interacted more with E.
- [29] Hereafter, a home visit was arranged for E to stay with Ms. K in Heilbron between 6 May 2022 to 8 May 2022. After this visit E was debriefed by Ms. Jones, who prepared a report dated 10 May 2022. I would like to quote this report in full as it demonstrates the effect this visit had on E, who felt betrayed and abandoned by the first applicant because he felt that she had made him go and stay with Ms. K. Ms. Jones also expressed concern about the lack of supervision of E, who was allowed to walk to the shops unaccompanied by an adult. (I have replaced the minor child's name where it appears in this report with "*E*". I have similarly done so in the further reports and correspondence quoted in this judgment referring to the minor child.):

"Debrief -10 May 2022

Notes from Debrief with E after visit to Vhangile (6 — 8 May 2022)

Events discussed in this report are purely E's reflections on his visit and his perceptions of what took place. No effort has been made to verify anything reported.

I sat with E on Tuesday afternoon so that he could tell me about "all his adventures on the weekend."

I sat on the couch in the TV lounge and E sat on the carpet paging through a book. Nobody else was present.

E told me that he had gone to visit his aunty on the weekend. It was far away, his aunty has a small little house. His family are nice but it was very boring there. There wasn't much to do or play and they didn't go to church.

He was excited to tell me that he did go to the shops with the neighbour to play on the "TV games". You had to put money in the games and then you could play. On my enquiring who he went to the shop with he said it was just him and the neighbour. I asked how old the neighbour was and he told me the neighbour is nine years old. I also asked how far it was to the shops but E was not clear about this, though he did say that they had walked there.

E also said that though it was "OK" with his aunt, he had cried in the night because he wanted to be at TLC. He said he missed his friends and wanted to be with them.

E said he was "super-super" angry with T because she had "made him go to his aunt". Even though E knew that by the time he returned from his visit to his aunt, T and L would have returned to Poland, he was still sad and disappointed that they were not there when he came back. When asked by one of the caregivers how he was feeling, E said "I am SOO Confused!" E refused to speak to T on the phone for the first two days after he returned.

We spoke for a while about how sometimes we have to do something even though we don't really want to; That getting to know people in your family is important; And that even though people may sometimes expect you to do things you don't want to do, that doesn't mean that they no longer love you.

On the 11th May E sent T a picture of a drawing he had done, and the relationship between E and T seems to be recovering.

**If, in fact, E did visit the shop, supervised only by the nine year old neighbour, this causes me some concern. If he was accompanied by an adult, but was not cognisant of the fact, this is also somewhat concerning. It would seem his family showed a lack of regard or concern for E and the situation he was in.*

- This was E's first visit to his aunt. E had only met his aunt a few times, and it had been some length of time since the last time he had seen her. He was in an unfamiliar place, surrounded by unfamiliar people.

- A nine year old should not be given the responsibility for safeguarding another child (Particularly one he doesn't know, outside of the home environment)

- E is still too young to have a firm grasp on rules of the road, the dangers of child trafficking and exploitation that are rampant in South African society.

- E could have been involved in any number of scenarios which would have led to him being unable to find his way back to his aunt's home."

[30] Hereafter, a longer visit was arranged between 8 July 2022 and 13 July 2022. E was transported to and from Heilbron by social workers. The feedback received by the social workers in Heilbron after E's stay with Ms. K was positive and it was stated that the relationship between E and Ms. K "was improving". In addition, it was reported by Ms. Menemene in her report dated 8 September 2022 (prepared after this application was launched and attached to the DSD's answering affidavit)) that, after E's visit with Ms. K during July 2022 that E had indicated to her that he had enjoyed the longer visit, but he "was just sad that he did not go to church like he does at TLC. Upon asking him how he would feel if he were to stay in Heilbron permanently, he responded that he would not want to stay permanently but can visit for school holidays."

[31] In her report Ms. Menemene stated that she had been hesitant to continue with the proposed placement of E with Ms. K in view of the allegations

made by the Hlatshwayo family against Ms. K. Despite these concerns (which she only elucidated in her later report dealt with below), Ms. Menemene stated that Ms. Dolo and Ms. Ngqaza “*suggested that [they] continue with the transfer and inform the Heilbron Social worker about the allegations.*” Ms. Menemene further recorded that “[a]ccording to the confirmation letter received from Engo welfare, V is still willing and capable of taking care of E”. She also stated that E had been “*prepared by both social workers for the possibility of the transfer to the K family.*” Ms. Menemene thus recommended that in terms of section 171(1) of the Children’s Act 38 of 2005 (“*the Act*”), E be transferred into the foster care of Ms. K.¹

[32] Ms. Menemene pointed out that the applicants were interested in adopting E but had not been able to do so as E is not deemed ‘*adoptable*’ “*because there is a maternal grandmother availing herself to care for the child.*” It was stressed that the social worker of Engo welfare in Heilbron, had expressed the view that Ms. K “*takes the child’s best interests seriously and is willing to give him stability, love and protection.*” There was no analysis or consideration given as to whether, as an alternative option, the permanent placement of E with the applicants may be in his best interests.

[33] The Engo report referred to by Ms. Menemene was prepared by Mr Mamokabe on 7 September 2022. After indicating that the visit between E and Ms. K had gone well and that there was sufficient space in Ms. K’s home for E, Mr. Mamokabe made it clear that the clear policy of the DSD was satisfied by the placement of E with Ms K-

“She is willing to take the child in her care, and she has the support of the family members. E had an opportunity to meet his maternal family, which gave him a sense of belonging. Child now knows his roots and has an opportunity to learn about is culture. Ms. K is capable of taking care of the child on a physical and psychological level. She is also able to provide for the child’s basic needs. The maternal grandmother takes the child’s best interests very seriously and she is willing to give the child stability, protection, guidance and love.”

¹ The relevant provisions of section 171 of the Children’s Act 38 of 2005 (‘the Children’s Act’ or ‘the Act’) provides:

“171 Transfer of child in alternative care

- (1) The provincial head of social development in the relevant province may, subject to subsection (5), transfer in writing a child in alternative care from one form of alternative care to another.
- (2) ..
- (3) ...
- (4)

[34] Five days after preparing this report, Ms. Menemene prepared a further report dated 13 September 2022. This report was also attached to the DSD's answering affidavit and is titled, "*FEEDBACK REPORT ON HOD/MEC OFFICE REFERRALS*." In this report Ms. Menemene expands upon her earlier report and states that on 10 May 2022, as they were preparing to go to court, they received a call from one of the deceased's uncles, Daniel Hlatshwayo, who had found out that they were planning on transferring E to Ms. K's care. Mr Hlatshwayo expressed concern about E's well-being should he be placed with Ms. K's care. He indicated that he had visited E at Ms. K's house on 6 May 2022 during E's visit there.

[35] Ms. Menemene reported Mr. Hlatshwayo's concerns as being -

35.1. Ms. K is only interested in receiving a foster care grant should she look after E.

35.2. Ms. K will not be able to give E the love and care that he deserves.

35.3. Ms. K is not interested in E's well-being as she had distanced herself from E's mother when she was still alive and needed her the most. He said that if the K family truly cared for E, he would not have grown up in a children's home. He further reported that even when E's mother gave birth to E, he was the one who fetched her from hospital in Kroonstad and took her to Evaton, as nobody else was willing to help. He maintained that the K family regarded E as a burden.

35.4. The lifestyle that the child is living and is used to will be hard for Ms. K to maintain, especially his education.

[36] In this report, Ms. Menemene stated that she had received the notes from Ms. Jones concerning E's visit to Ms. K from 6 May 2022 to 8 May 2022 in which Ms. Jones had expressed serious concerns about the suitability of Ms. K as a possible placement for E. Ms. Menemene explained that on 8 July 2022, they had granted a leave of absence to E to visit Ms. K "*for them to get to know each other more and to continue their relationship, the K family fetched the child from TLC on 8 July 2022 and brought him back to the TLC on 13.07.2022.*" Ms. Menemene further explained that on 31 August 2022 they had sent an email to Engo to confirm that Ms. K was still interested in taking E into her foster care. Ms. Menemene explained that the affirmative response received from Engo enabled her to complete her section 171(1) report regarding the transfer of E from the TLC to alternative placement in the care of Ms. K.

[37] In her evaluation Ms. Menemene explained-

- *We are now ready to transfer E to foster care of Ms. V L K.*
- *After the allegations made by Mr Hlatshwayo and the court application by the K's attorney [referring to the current application], we were hesitant to continue with a transfer and we are of the opinion that further investigations/ background checks be conducted to ensure a safe and suitable placement for the child. Our main concern was that what if something bad happens to the child and Mr Hlatshway says "I told you so". We always want to put first the child's best interest. We discuss this matter with Ms Dolo and Ms Ngqaza of Department of Social Development and they suggested that we continue with the transfer and inform the new social worker Heilbron about the allegations so that we can follow up on them.*
- *It seems that the Hlatshwayo (maternal family of the B K)[E's mother] is not supportive of the child being put into the care of the K family*
- *According to the confirmation letter received from Engo Welfare, V is still willing and capable to take care of E.*
- *It seems that E is not adoptable as the K family is willing to take him into their care.*" (emphasis added).

[38] Ms. Menemene thus recommended that E be transferred to the foster care of Ms. K.

[39] It is plain from the papers that both Simon and Daniel Hlatshwayo are of the view that E would be better off permanently placed with the applicants, who they believe will be able to afford to provide him with a better life. The DSD is quick to point out that this is not a consideration in the placement of a child; nor should it be. What is of paramount importance is the best interests of E.

[40] In view of the conflict between the DSD and the K family, on the one hand, and the applicants and the Hlatshwayo family, on the other, as to the suitable placement of E, as Upper Guardian of E, I requested that I have a meeting with E. He was brought to my chambers holding the first applicant's hand, who he referred to as "Mum T" during the discussion I

had alone with him. He informed me that he is happy at the TLC and has three friends there who are roughly his age, one of eight years, one of seven years and one who is four years old.

[41] I discussed with E how he had found the visit arranged by the social workers for him to spend five days with Ms. K between 8 July 2022 and 13 July 2022. I asked him if he knew the family's names, but he did not and said he called them "*sister*" and "*brother*" and "grandmother". He explained that his sister was 20 years-old and his brother was 10 years-old. He told me that his grandmother and his sister could speak English but not his brother as he had not been able to go to school to learn English. He said he had a nice time there, but he missed his friends at the TLC. I asked what he had done while he was there, and he told me he played in the yard and did colouring-in. It was clear that this was a strange environment for him, but he did not say anything bad about his time he spent with Ms. K or any member of the K family.

[42] I also discussed with E where he would like to live, and he unequivocally indicated that he wished to live with the applicants. I explained to him that were this to happen, he would need to leave South Africa and his friends at the TLC and his classmates and live in Poland where everybody speaks Polish. He indicated that he understood this, and although I was impressed by his level of maturity, I am mindful that he is very young, has never left South Africa and cannot possibly have any real appreciation what his separation from his friends at TLC and the absence of contact with his newly found biological family would mean. The views expressed by E as to his future care are but one of many factors which should be taken into account by the Children's Court in deciding the best interests of E. His views, however, are a factor that I have taken into account in deciding whether the relief sought by the applicants which would enable the applicants to bring an application to the Children's Court for the adoption of E should be granted in the best interests of E.

[43] Whilst the issue of E's placement is being determined, the Order placing E in the care of the TLC has been extended until May 2024.

THE RELIEF SOUGHT

[44] The formulation of the relief sought at the hearing of this matter, set out in an amended draft order attached to the applicants' counsel's heads of argument, was different to that set out in the notice of motion.

[45] In their amended draft order, the applicants seek to be able to bring an application for the adoption of E to the Children's Court. To facilitate this relief, they seek declaratory relief to prevent the application of the subsidiary and pre-identification principles which they have been told preclude their adoption of E. Pending the outcome of the applicants' application to the Children's Court, the applicants seek an order interdicting the Head of the DSD (the fifth respondent) and Ms. Menemene from removing E from the TLC and placing him with Ms. K or elsewhere.

[46] Should it be found that E is to be placed with Ms. K, the applicants seek an order that this placement only take place after a proper integration program has been carried out in order to protect the best interests of E.

[47] In the event that the applicants are found to be suitable adoptive parents of E, they seek that the provisions in the Act requiring that his name be placed on RACAP be waived and that the DSD take all necessary steps to give effect to any Order made for their adoption of E. The applicants also seek that a post-adoption agreement be considered by the Children's Court to regulate the future contact between E and his biological family in the best interests of E.

[48] In terms of the amended draft order, the relief now sought by the applicants is as follows:

1. *The fifth and third respondents are hereby interdicted from moving E from the care of the fourth respondent without an Order of the Children's Court, alternatively this Court.*
2. *It is declared that for purposes of determining the best interests of E:*
 - 2.1. *the specific circumstances in which the applicants' relationship with E developed does not fall within the definition or "pre-identification";*
 - 2.2. *the relationship established between the applicants and E, established without the intention of finding a child to adopt, does not fall into the category of "baby shopping";*
 - 2.3. *the pre-existing relationship shall not be considered a hindrance in the consideration of their adoption of E by the Children's Court; and*

- 2.4. *the subsidiarity principle is not the overriding principle and shall not prevent his adoption by the applicants contrary to the best interests of the child.*
3. *The following steps required in the advancing a determination of E's best interest are hereby authorised:*
 - 3.1. *A suitably qualified and approved adoption social worker is hereby authorized to initiate an enquiry as to whether E is adoptable; and*
 - 3.2. *Any one of the listed authorised intercountry adoption agencies is hereby authorised to commence the process of an adoption application to be brought before the sixth respondent;*
 - 3.3. *These investigations and subsequent reports, together with the adoption application, are to be presented to the sixth respondent for consideration and filed with this Court.*
4. *The issue of the adoption of E is referred to the sixth respondent, the Children's Court, to determine the best interests of E giving consideration to the option of the adoption of E by the applicants.*
5. *That in event that it is held by the Children's Court that it is in the best interests of E to be placed with the first respondent, that E may only be placed in the care of the first respondent following a proper assessment and integration program.*
6. *That in event that it is held by the Children's Court that it is in the best interests of E to be placed with the applicants that:*
 - 6.1. *It is directed that the requirements of section 232 of the Children's Act, 38 of 2005, that E be registered on RACAP - the Register on Adoptable Children and Prospective Adoptive Parents, be waived in the circumstances; and*
 - 6.2. *Directing that the second and fifth respondents to take all steps necessary give effect to the decision of the Children's Court.*

6.3. *That in granting an Order of Adoption, if such order is granted, the sixth respondent is requested to consider the issue of a post adoption order between the applicants and the first respondent, as envisaged in section 253 of the Act, if in the best interests of E.*

[53] The essential differences between the relief sought in the notice of motion and the amended draft Order are as follows:

53.1. The applicants seek that both the fifth and third respondents be interdicted from removing E from the TLC without an Order of Court. This is no longer said to be pending the finalisation of this application and thus amounts to a final interdict, ceasing only by an Order of Court.

53.2. The declaratory relief is now sought “*for the purposes of determining the best interests*” of E.

53.3. The declaratory relief is no longer limited to declaring that the applicants’ relationship of E does not constitute ‘*pre-identification*’ or ‘*baby shopping*’ and now extends to declaring that the ‘*subsidiarity principle*’ is not the overriding principle and shall not prevent E’s adoption by the applicants.

53.4. The applicants also now seek by way of declaratory relief to bind the Children’s Court not to consider the pre-existing relationship between the applicants and E (their pre-identification of E) as a hindrance in the consideration of their application to adopt E.

53.5. The applicants no longer seek-

53.5.1. the appointment of a *curator ad litem* to act in the interests of E to ensure that his voice is heard during the adoption proceedings; the applicants state that they are satisfied that should an adoption social worker be appointed to determine the ‘*adoptability*’ of E and to report to the Children’s Court on the best interests of E, E’s interests will be sufficiently safeguarded in any future adoption proceedings.

53.5.2. an Order declaring that the requirements of section 232 of the Act requiring that E be registered on RACAP be waived.

53.5.3. to compel the DSD to enter into a working agreement with the Polish adoption authorities, alternatively to declare that no such agreement is required for them to be considered as prospective adoptive parents of E. Instead, they seek only that the second and fifth respondents take all necessary steps to give effect to the Order of the Children's Court.

THE ISSUES TO BE DECIDED

[54] The applicant's argue that they are the *de facto* family of E and that it is in E's best interests that they be considered as prospective adoptive parents to E.

[55] There is some support for the applicant's stance found in the definition of a "*family member*" in section 1 of the Children's Act 38 of 2005 (*'the Children's Act or the Act'*). Section 1 of the Act defines a "*family member*" as follows:

"*family member*", in relation to a child, means-

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

[56] The applicants would qualify as "*family members*" within the meaning of sub-paragraph (d).

[57] The DSD contends -

57.1. First, this application is a disguised application for adoption and this Court lacks the jurisdiction to consider such an application as in terms of section 239 of the Children's Act, the Children's Court has exclusive jurisdiction to decide issues relating to the adoption of E.

- 57.2. Second, E is not '*adoptable*' by any foreign prospective adoptive parents as the principle of '*subsidiarity*' applies to the exclusion of all other considerations. The '*subsidiary principle*' dictates that foreign prospective parents may only adopt a local South African child if there is no available local placement for the child; in this case, the DSD states there is an alternative local placement for E as Ms. K has agreed to act as a foster parent to E. (This she did in writing shortly after the DSD filed its answering affidavit.) In this regard, the DSD relies on the report of Ms. Menemene who, relying on the report from Engo in Heilbron, has declared that, "*it seems that E is not adoptable*" as a local placement has been found for E.
- 57.3. Third, it is in E's best interests that E be placed with Ms. K as this will enable him to remain within his own ethnic group and culture. This would similarly apply to any prospective foreign nationals who wished to adopt E.
- 57.4. Fourth, even if E were to be declared '*adoptable*', the applicants would be precluded from being considered as prospective foreign adoptive parents of E because of their prior relationship with him. It is argued that this constitutes '*pre-identification*' which is prohibited in international adoptions. The purpose of this rule, the DSD explains, is to prevent '*baby-shopping*' where a foreign national comes to South Africa to find a baby that best suits their needs. This is contrary to the prescribed child-centric system in place which requires that the name of a child who has been found to be '*adoptable*,' be placed on the Register of Adoptable Children and Prospective Adoptive Parents ('*RACAP*') after which, that child will then be matched, after a thorough investigation, with the prospective adoptive parents appearing on the list who it is found would best suit the particular child's needs.
- 57.5. Finally, this Court cannot dictate to the Children's Court how it should deal with an application for adoption before it by way of declaratory orders made by this Court; in particular, this Court does not have the power to prescribe or declare that the application of the '*subsidiary*' and '*pre-identification*' principles need not be followed in the current instance as sought by the applicants.

[58] Further technical arguments raised by the DSD are -

- 58.1. As E is not 'adoptable', his name cannot be placed on RACAP and without being placed on RACAP, the Children's Court is not empowered to consider an application for the adoption of E. Moreover, the Children's Court is not empowered to grant an Order for the adoption of E unless his name has appeared on RACAP for a period of 60 days and no other party has sought to adopt E.
- 58.2. There is no '*working agreement*' between South Africa and Poland to facilitate and regulate the applicants' adoption of E and the doctrine of the separation of powers precludes the Court ordering the DSD or the President of the Republic to enter into such an agreement with Poland as had originally been sought by the applicants in the notice of motion. Without a working agreement between the two countries, any adoption order granted by the Children's Court would not be effective.
- 58.3. The purported Consent obtained from the Hlatwayo family and Ms Jones from the TLC to the adoption of E by the applicants contravenes Article 29 of the Hague Convention as the applicants have had contact with the Hlatwayo family and Ms. Jones and thus, may have influenced their stated consent to E's adoption by the applicant.

[59] The applicants, on the other hand, point out that-

- 59.1. Neither Ms. Mamokabe nor Ms. Menemene are accredited '*adoption social workers*' as required by the Act and are thus not empowered declare that E is not '*adoptable*'; in all likelihood aware of this, Ms. Menemene chose her words when stating: "*It seems that E is not adoptable*".
- 59.2. The decisions taken by Ms. Menemene to place E with Ms. K were taken without any consideration for the best interests of E and without any regard to the close bond that has developed between E and the applicants and the trauma which it would cause E should he be placed in the foster care of Ms. K, with whom he has no real relationship.
- 59.3. They (the applicants) did not choose E but rather, the bond developed between them as they were requested by the TLC to take care of E when he was only two months old and they

continued to do so for several years, with the blessing of E's mother and the consent of the TLC . The applicants thus argue that the rule against '*pre-identification*' or '*baby-shopping*' do not apply in the present instance and their close bond to E, and his to them, makes them eminently best suited to take care of E.

[60] The applicant's counsel was at pains to point out that this is not an application for the adoption E, which the applicants understand can only be brought in the Children's Court. The applicants, however, state that they find themselves in a catch-22 situation as, because E has not been declared '*adoptable*', they are unable to bring an application to the Children's Court to seek to adopt E; because of their prior contact with E, they have been told by accredited intercountry local adoption agencies that even if E were to be declared '*adoptable*', they would be precluded from consideration as prospective adoptive parents of E. The applicants thus argue that what they call "*bureaucratic obstacles*" currently deny them access to the Children's Court to bring an application for the adoption of E in breach of their right to have their dispute as to who is best placed to adopt E decided before a court of law as guaranteed in section 34 of the Constitution.

[61] Section 34 of the Constitution provides:

"34. Access to courts

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

[62] The applicants thus seek the intervention of this Court, as the Upper Guardian of E, to allow them to approach the Children's Court so that they might be considered as a possible permanent placement for E, which they maintain, would be in the best interests of E.

[63] I now propose to deal with the defences raised by the DSD to the relief sought as well as the counter-arguments raised by the applicants.²

² I wish to place on record that the applicants raised a preliminary issue concerning the late filing of the second respondent's answering affidavit, for which condonation was not sought. The applicant's applied to strike out this affidavit and for a punitive cost order to be made should condonation be granted. I requested the applicants to put these technical issues aside so that the real issues could be decided in the best interests of E. The applicant's counsel agreed to this.

THE JURISDICTION OF THE HIGH COURT TO CONSIDER THE PRESENT APPLICATION

[64] The preliminary objection raised by the DSD was to the jurisdiction of this Court to hear the current application, which the DSD maintains ought properly to have been brought in the Children's Court. The DSD does not accept that the applicants would, without the intervention of this Court, be precluded from approaching the Children's Court.

[65] The respondent's argue that under Section 18(4)(f) of the prior Child Care Act the applicants would have been prohibited from adopting a South African child. They point out that since the decision of the CC in **Fitzpatrick**³ and the enactment of Chapter 16 of the Children's Act, the applicants are not excluded from consideration as the prospective adoptive parents of E; the DSD maintains that the applicants simply ought to follow the procedure provided for in the relevant sections of Children's Act.

[66] To counter this, the applicants argue that "*legal bureaucracies*" prevent the applicants from making an application for the adoption of E in the Children's Court as:

66.1. E has not been declared '*adoptable*' as required in terms of section 230(1)(b) of Act because of the DSD's Guidelines require compliance with the subsidiary principle which means that because a local placement has been found for E, no intercountry adoption may be considered by the Children's Court.⁴

66.2. As there has been prior contact between the applicants and E, the prohibition against pre-identification applied by the DSD in intercountry adoptions would preclude an adoption social worker from recommending the adoption of E by the applicants.

[67] The applicants thus insist that this Court's intervention is required to refer the applicants' proposed application for E's adoption to the Children's Court as otherwise, they would not be able to approach the Children's

³ **Minister of Welfare and Population Development v Fitzpatrick** 2000 (3) SA 422 (CC).

⁴ In terms of section 239(1)(b)(i) of the Children's Act, an application to the Children's Court may only be made if an accredited adoption social worker has prepared a report containing information whether the child is '*adoptable*.' Section 240 (1)(c) in turn provides that the report by an adoption social worker in terms of section 239(1)(b)(i) is one of the factors that must be considered by the Children's Court in considering an application for an adoption of a child.

Court to bring an application for the adoption of E. The applicants point out that, as this Court is the Upper Guardian of all minor children, it has the inherent jurisdiction to hear any application concerning the best interests of E.⁵ They argue that the Children's Court, on the other hand, is a creature of statute and as such, does not have the statutory or inherent common law jurisdiction to act as the Upper Guardian of E and would not be able to make the declaratory orders precluding the application of the subsidiary and '*pre-identification*' principles sought from this Court.

[68] The question of the jurisdiction of the High Court to hear adoption related matters was dealt with by the Constitutional Court ('CC') in **AD**.⁶ The facts of that case and the findings of the Constitutional Court are apposite to the facts of the present matter.

[69] The applicants, who were American citizens, applied for sole custody and guardianship of a South African boy, who had been abandoned at birth, with the intention of applying for his adoption in America. The child was placed in the foster care of the first and second respondents who were the founders and managers of a sanctuary for children in need of care in South Africa. Like the applicants in the present matter, during this time they had formed a close bond with the child.

[70] Again like the applicants in the present matter, the respondents experienced several legal difficulties in trying to effect an intercountry adoption of the child concerned, who was referred to in the papers as "*Baby R*". On seeking legal advice on what route to follow, the respondents were informed that the current policy of those responsible for administering adoptions in South Africa required strict adherence to the subsidiary principle which effectively barred their adopting the child in South Africa. They were accordingly encouraged to apply to the South Gauteng High Court for an order granting them sole custody and sole guardianship which would enable them to take the child with them to the United States of America where they could then formally adopt the child.⁷

[71] The Centre for Child Law at the University of Pretoria was asked by the High Court to assist it as *amicus curiae*. The Centre advised against granting the application as it felt that it would not be in the best interests of

⁵ See **Girdwood v Girdwood** 1995(4)SA698C at 708J-709A.

⁶ **AD & another v DW & others; Centre for Child Law (amicus curiae); Dept of Social Development (Intervening)** 2008 (3) SA 183 (CC)

⁷ The Children's Act ultimately closed the loophole allowing foreigners to apply for sole custody and guardianship and made it clear that all applications for sole custody and sole guardianship of minor children by foreign nationals would be treated as intercountry adoptions. The facts and findings of the CC in **AD** nevertheless remain relevant to the current matter.

the child and other children available for adoption for sole custody and sole guardianship proceedings in the High Court to be used as a mechanism for bypassing proper adoption proceedings in the Children's Court. The High Court agreed and found that it was not for it to decide what was in the best interests of the child, which was the domain of the Children's Court in accordance with the adoption procedures set out in the then applicable Child Care Act.

[72] The Supreme Court of Appeal ('SCA') was divided on the issue and dismissed the appeal by a majority of three to two. Like the DSD in this matter, the majority viewed the application as a disguised application for adoption and an attempt to get around the otherwise insurmountable obstacles which the applicants would face should they have brought an application before the Children's Court. Theron AJA, with whom Ponnau JA and Snyders AJA concurred, held that to grant the order sought by the applicants would result in sanctioning an alternative route to intercountry adoption under the guise of a sole custody and sole guardianship application. This, she stated, was an unsavoury form of bypassing the Children's Court adoption system.

[73] Heher JA, with whom Hancke AJA concurred, took the approach which the applicants in this matter seek this Court to take. He held that as Upper Guardian of minors, the High Court was both empowered and obliged to enquire into all matters concerning the best interests of children, including an order for sole custody and sole guardianship. He criticised the High Court for adopting a formalistic approach and found that it should instead have concerned itself with what was in the child's best interests. In his view, it was overwhelmingly in the child's best interests for the order of sole custody and sole guardianship to be granted, since there was no evidence of the existence of other prospective adoptive parents for the child in South Africa. In a separate concurring judgment, Hancke AJA stated that the child's best interests were "*being held to ransom for the sake of legal niceties*".

[74] Although the matter was settled by the parties and a draft Order of Court was made by consent before the matter could be heard by CC, the CC nevertheless deemed it prudent to deal with the issues that had been raised before it because of their importance. Dealing with the question of the High Court's jurisdiction it was held that the High Court was correct on the facts before it to refer the matter to the Children's Court. It was felt by Sachs J, who delivered the unanimous judgment of the CC, that the applicants ought properly to have first approached the Children's Court

and should not have sought to avoid the DSD's policies by approaching the High Court instead of the Children's Court. Sachs J stated:

“[29] ...If after applying to the Children's Court, the applicants were later to feel that departmental policy as understood and applied by the presiding officer at the Children's Court had resulted in a violation of Baby R's best interests as protected by s 28(2) of the Constitution, their remedy would have been to take the matter on review to the High Court. In this way the departmental policy could have been challenged rather than avoided...” (emphasis added)

[75] Sachs J emphasised that although the High Court would in appropriate circumstances have jurisdiction to protect the best interests of children, in matters relating to adoption, bypassing the Children's Court procedure would only be justified in very exceptional circumstances. However, where such exceptional cases existed, Sachs J found that the High Court had jurisdiction to make a sole custody and guardianship order, even if the ultimate objective was adoption of E by foreigners in a foreign jurisdiction. Sachs J explained:

“[30] In matters of this nature the interests of minor children will always be paramount. To this extent the approach of the minority in the Supreme Court of Appeal was correct in its insistence that Baby R's best interests should not be mechanically sacrificed on the altar of jurisdictional formalism.

[31] 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.

[76] By the time the matter had come before the Supreme Court of Appeal, the child was more than two years old, and had become, in the words of Sachs J “*deeply embedded in her foster family*”. Sachs J appreciated that this fact may have tipped the scales in favour of the respondent's adoption of the child. He, however, held that despite this, the matter before the CC was not one of the exceptional cases where the best interests of baby R justified the intervention of the High Court or demanded that the Children's

Court route could be jettisoned. Sachs J found that the High Court had been correct in referring the matter to the Children's Court which was much better placed than the High Court to consider the best interests of the child as it was able to grant the necessary protections contained in the Child Care Act to children who were adopted by foreigners than could be provided by the High Court in granting sole custody and guardianship to the respondents. Sachs J concluded:

[34] *I conclude therefore that from start to finish the forum most conducive to protecting the best interests of the child had 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."*

[77] This notwithstanding, Sachs J stated that the SCA ought not to have dismissed the appeal but rather ought to have fashioned an appropriate remedy referring the matter to the Children's Court-

"[56] In light of the above, I accordingly hold that the Supreme Court of Appeal was basically correct in deciding that even at that late stage the matter should have been pursued in the Children's Court. Yet it should not simply have dismissed the appeal, leaving Baby R in a legal limbo. Rather, in taking account of the new situation created by her being much older, the Supreme Court of Appeal should proactively itself have made an order, similar to the one issued in this court, referring the matter to the Children's Court for speedy resolution. This would have enabled the question of subsidiarity to be looked at not in an isolated way by the Supreme Court of Appeal, but by the Children's Court in the overall context of determining where the best interests of Baby R lay."

[78] Sachs J,, however, warned the High Court or any higher court from prejudging the suitability of prospective adoptive parents to adopt the child:

“[60] It would, of course, not have been appropriate for this court itself to have attempted to prejudge in any way whether the applicants would be suitable adoptive parents for Baby R. This was a matter pre-eminently to be left to the Children's Court. Yet a limited but important responsibility fell to the court, namely, to ensure that it was in Baby R's best interests to facilitate an expedited hearing in the Children's Court, while satisfying itself that there was nothing on the face of the agreement which appeared to militate against her best interests.”

[79] He stressed that it is the Children's Court that ultimately must have the last word on issues of adoption:

“In the result, it would not be the High Court, nor the Supreme Court of Appeal, nor the Constitutional Court, but the Children's Court that would have the last word.”

[80] Sachs J thus referred the matter to the Children's Court on an expedited basis.

[81] In the present matter, exceptional circumstances exist for this Court's intervention as without it, the applicants would not be able to bring an application to the Children's Court for the adoption of E. This is because the policies and Guidelines adopted by the DSD dealt with fully below, would preclude an accredited adoption social worker declaring E to be 'adoptable' as a local placement has been found for E with extended family. The provisions of the Children's Act dealt with below make it clear that a declaration by an adoption social worker that E is 'adoptable' is a jurisdictional fact, without which the Children's Court could neither hear an application by the applicants for the adoption of E or make an Order for his adoption by the applicants, despite this being found that this was in his best interests. It is thus necessary that this Court intervene as Upper Guardian of E to consider, and if found appropriate, declare that the application of the subsidiary principles do not preclude the adoption of E by the applicants. Similarly, without the intervention of this Court, the rule against 'pre-identification' contained in the DSD's Guidelines would preclude any adoption agency facilitating an adoption of E by the applicants. Thus without the declaratory relief sought by the applicants from this Court, the applicants would be denied access to Children's Court to have their application for the adoption of E considered in breach of section 34 of the Constitution.

[82] In this respect, the present matter is distinguishable from **AD**. Although the Guidelines applied by the Department (the DSD) in **AD** were said to constitute a stumbling block to an application by the respondents for the adoption of baby R to the Children's Court, Sachs J indicated that should this prove to be the case, the remedy was to then bring an application to the High Court to challenge the Guidelines. Such an approach would not be feasible in the present matter and would be an exercise in futility as the present applicants would not be able to bring an application to the Children's Court for the adoption of E as-

82.1. The Guidelines require strict adherence to the subsidiary principle and thus because a local placement has been found for E, he would not be declared '*adoptable*', which a jurisdictional fact, without which the applicants cannot bring an application to the Children's Court to adopt E.

82.2. Even were the applicants conceivably able to bring an application to the Children's Court-

82.2.1. The Children's Court would not be empowered to declare the application of the subsidiary principle not applicable in the case of E.

82.2.2. The application of the Guidelines prohibiting the pre-identification of E by the applicants would be fatal to their application.

82.2.3. The Children's Court would not be empowered to declare that pre-identification rules set out by the DSD in its Guidelines should not be applied in order to protect the best interests of E.

[83] Should this be attempted-

83.1. The applicants' application would be doomed to failure and would require that further costs be incurred in bringing an application to this Court to review and set aside the decision of the Children's Court, delaying the placement of E. This is contrary to the provisions of section 7(1)(n) of the Children's Act which requires that in considering the best interests of a minor child, consideration must be given to "*which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.*"

83.2. This would also be contrary to the provisions of the DSD's own Guidelines which dictate that decisions regarding the placement of children should be taken expeditiously in the best interests of the child.

[84] In any event, the Guidelines applied by the DSD have recently been set aside in their entirety by Dippenaar J in **TT**⁸ as being unconstitutional in that first, they fail to respect the best interests of minor children enshrined in section 28(2) the Constitution and second, because they purport to impose requirements for adoption not stipulated in the Children's Act. Although leave to appeal has been granted to the SCA on the Constitutionality of the Guidelines, **TT** remains precedent allowing this Court, as Upper Guardian of minors, to fashion a remedy to preclude the application of the subsidiary and pre-identification principles set out in the Guidelines in the present instance as they are both contrary to the best interests of E and impose restrictions on adoption not stipulated in the Children's Act.

[85] Although I am not equipped, nor do I intend, to prejudge the question whether it would be in the best interests of E to be placed with the applicants or Ms. K, which needs to be properly assessed by an adoption social worker and decided by the Children's Court after hearing all of the evidence, what should not be permitted to happen is for the people *prima facie* best placed to provide a permanent home for E being excluded from consideration as an alternative placement for E, without proper regard to his best interests. Should this court not intervene, this is precisely what will happen, notwithstanding that this may not be in the best interests of E.

[86] This is particularly so as it will be demonstrated below that the Guidelines requiring adherence to the subsidiary principle in all instances where a local placement for a child is found and precluding an adoption by persons who have had prior contact with the child are contrary to the Constitution, the Hague Convention and provisions of the Children's Act itself. As such, these Guidelines are unlawful and unconstitutional and their application would unjustifiably preclude the applicants from bringing an application to the Children's Court and being considered as prospective adoptive parents of E. To permit this to occur would be to unlawfully deny the applicants access to the Children's Court in breach of their rights guaranteed in section 34 of the Constitution.

⁸ **TT and Another v Minister of Social Development and Others** 2023 (2) SA 565 (GJ).

[87] I thus unequivocally find that this Court has jurisdiction to entertain the current application.

THE APPLICATION OF THE SUBSIDIARY AND PRE-IDENTIFICATION PRINCIPLES IN THE RELEVANT INTERCOUNTRY ADOPTION CONVENTIONS

[88] On the face of it, there is nothing in the Children's Act which would preclude a declaration being made that E is 'adoptable'. For its stance, the DSD relies on subsidiary principle referred to and applied in various international conventions on intercountry adoptions and in its Guidelines outlined below.

[89] There is similarly nothing in the Children's Act which would preclude the adoption of E by the applicants because of their prior association with him; neither is there any proscription against pre-identification in the international conventions on intercountry adoptions dealt with below. It is only in the DSD's Guidelines that it is stated that pre-identification is prohibited.

[90] The DSD's reliance on its Guidelines to support its opposition to the applicants' adoption of E based on the subsidiary principle and the proscription against pre-identification are themselves questionable and have been set aside and declared unconstitutional in the recent case of **TT**⁹ dealt with fully below.

The applicable international conventions on intercountry adoptions

[91] Intercountry adoptions are dealt with in a number of international conventions.

[92] The principle of 'subsidiarity' referred to in the various conventions means that an intercountry adoption must be regarded as subsidiary to appropriate local care options. It is rooted in the premise that preservation of a child's ethnic, religious, cultural, traditional and linguistic background will generally be in their best interests¹⁰.

[93] The principle of subsidiarity is enshrined in three international conventions to which South Africa is a party. These are:

⁹ *supra*

¹⁰ Van Bueren, *The International Law of the Rights of the Child* (1998) 102

- 93.1. the 1989 United Nations Convention on the Rights of the Child ('UNCRC'),
- 93.2. the 1990 African Convention on the Rights and Welfare of the Child ('AC'); and
- 93.3. the 1993 Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoptions ('the Hague Convention')

The United Nations Convention on the Rights of the Child

- [94] Article 3(1) of the UNCRC states that the best interests of the child shall be a 'primary' (not 'paramount' consideration):

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

- [95] Article 20(3) of the UNCRC states that when a child is deprived of parental care the state should provide alternative care which may include *"foster placement, kafalah of Islamic law, adoption or if necessary, placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background."*

- [96] Article 21(b) of the UNCRC dealing specifically with adoption specifies that:

"States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall recognise that intercountry adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin".

- [97] This implies that all appropriate forms of national care have priority over intercountry adoption. However, the best interests of the child criterion in cases of adoption is worded more strongly in Article 21(b) than in other cases involving children set out in Article 3(1) and makes it clear that the best interests of the child shall be the 'paramount' consideration in matters of adoption and requires that a child-centred approach be taken.

[98] Article 12 recognises that a child's voice should be heard and reads:

- “1. *States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
2. *For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”*

[99] Where an intercountry adoption is considered, Article 21(c) of the UNCRC requires states to ensure that the child concerned enjoys safeguards and standards equivalent to those existing in the case of national adoption. This is referred to as the principle of “*non-discrimination*,” which the DSD states makes the conclusion of working agreements between the sending and receiving countries crucial in intercountry adoption

The African Charter on the Rights and Welfare of the Child

[100] On 11 July 1990, less than year after the adoption of the UNCRC by the United Nations, the Organisation of African Unity Assembly (“AC”) (as it then was) adopted a regional Convention on the Rights of the Child, which was ultimately named the African Charter on the Rights and Welfare of the Child and came into force on 29 November 1999 ,after being ratified by 15 African States, including South Africa.

[101] There were both political and legal reasons for the adoption of the AC: From a political point of view, African countries felt marginalised during the process of the drafting of the UNCRC. It was also felt that there was a need for a regional instrument that would deal with issues relevant to children in Africa that had been omitted in the UNCRC. One such issue was that the UNCRC negated the role of the family (also in its extended sense) in the upbringing of an African child in matters of adoption and fostering.

[102] Article 4 of the AC deals with the best interests of the child generally and like article 2(1)(c) of the UNCRC emphasises that the best interests of the child shall be the ‘primary’ (and not ‘paramount’) consideration:

- “1. *In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.*
2. *In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.” (Emphasis added).*

[103] However, like article 21 of the UNCRC, article 24 of the AC provides that in the case of adoption the best interests of the child shall be the ‘*paramount*’ consideration. This seems to suggest that the emphasis on the best interests of a child is greater in matters involving adoption than in relation to other matters concerning children.

[104] Article 24(2) of the AC characterises intercountry adoption as a last resort, less preferable than national adoption, foster care, or other domestic alternatives. It provides:

[105] Article 24 deals generally with adoptions and provides:

“States Parties which recognize the system of adoption shall ensure that the best interest of the child shall be the paramount consideration and they shall:

1. *Establish competent authorities to determine matters of adoption and ensure that the adoption is carried out in conformity with applicable laws and procedures and on the basis of all relevant and reliable information, that the adoption is permissible in view of the child’s status concerning parents, relatives and guardians and that, if necessary, the appropriate persons concerned have given their informed consent to the adoption on the basis of appropriate counselling;*
2. *Recognize that intercountry adoption in those States who have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, as the last resort, be considered as an alternative means of child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin;*
3. *Ensure that the child affected by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;*

4. *Take all appropriate measures to ensure that, in intercountry adoption, the placement does not result in trafficking or improper financial gain for those who try to adopt a child;*
5. *Promote, where appropriate, the objectives of this Article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework to ensure that the placement of the child in another country is carried out by competent authorities or organs;*
6. *Establish a machinery to monitor the well-being of the adopted child.*” (Emphasis added)

[106] Article 25 (3) provides:

- “3. *When considering alternative family care of the child and the best interests of the child, due regard shall be paid to the desirability of continuity in a child’s up-bringing and to the child’s ethnic, religious or linguistic background.*”

The Hague Convention on Intercountry Adoptions

- [107] The Hague Convention goes much further than either the UNCRD or AC in setting out clear procedures for intercountry adoption. In contrast to the CRC and AC, the Hague Convention seems to prioritise all permanent family solutions equally, regardless of their national or international character. Its Preamble at paragraph 1 recognizes that “*for the full and harmonious development of his or her personality*” every child “*should grow up in a family environment, in an atmosphere of happiness, love and understanding*”.
- [108] Paragraph 2 of the Preamble provides that “*each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin.*” However, Paragraph 3 gives unqualified support to intercountry adoptions, stating that they “*may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin*”.
- [109] Article 4 deals with intercountry adoptions and the subsidiary principle and provides in relevant part:

“An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin -

- a) have established that the child is adoptable;*
- b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests;*
...
- d) have ensured, having regard to the age and degree of maturity of the child, that*
 - (1) he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required,*
 - (2) consideration has been given to the child's wishes and opinions”*

[110] The wording of art 4(b), however, appears to reduce the ability of individual signatory countries to independently and autonomously determine that a local placement is always preferable and in this way, reduces the effect of the subsidiarity principle as expressed in the CRC and the AC. In so doing, it has been said that the Hague Convention brings the subsidiary principle into closer alignment with the best interests of the child.

[111] This is reflected in the Hague Convention Guide to Good Practice, which states:

111.1. *“Permanent care by an extended family member may be preferable, but not if the carers are wrongly motivated, unsuitable, or unable to meet the needs (including the medical needs) of the particular child.”*

111.2. *“National adoption or other permanent family care is generally preferable, but if there is a lack of suitable national adoptive families or carers, it is, as a general rule, not preferable to keep children waiting in institutions when the possibility exists of a suitable permanent family placement abroad. [Institutionalisation as an option for permanent care, while appropriate in special circumstances, is not as a general rule in the best interests of the child.]”*

111.3. *“Finding a home for a child in the country of origin is a positive step, but a temporary home in the country of origin in most cases is not preferable to a permanent home elsewhere.”*¹¹

[112] Since the Hague Convention prioritizes all permanent family solutions it has been interpreted as preferring intercountry adoption over national foster care and institutionalisation.¹²

[113] This has been supported by the *Permanent Bureau of the Hague Conference* which declared:

*“It is sometimes said that the correct interpretation of ‘subsidiarity’ is that intercountry adoption should be seen as ‘a last resort’. This is not the aim of the Convention. National solutions for children such as remaining permanently in an institution, or having many temporary foster homes, cannot, in the majority of cases, be considered as preferred solutions ahead of intercountry adoption. In this context, institutionalisation is considered as “a last resort”.*¹³

[114] This is contrary to the principles of the UNCRC and the AC which prioritise national forms of care, including foster care and institutionalization, over intercountry adoptions. In the Hague Convention, the primacy of domestic placement is reduced as it requires so that ‘*due consideration*’ be given to adoption within the state of origin. This poses a difficulty as South Africa is a party to all three conventions. However, the Hague Convention clearly has precedence as South Africa has explicitly adopted the Hague Convention in its national legislation; indeed, the Children’s Act was enacted to give effect to the Hague Convention.

[115] It is noteworthy that other than requiring member states to prevent the trafficking of children, none of the international conventions expressly deal with the prohibition against “*pre-identification*.”

The application of the subsidiary principle prior to the implementation of the Children’s Act

¹¹ Hague Conference on International Private Law (2008). The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice, Guide No. 1. Bristol: Family Law, Chapter 2.1.1., para. 51; Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoptions of 29 May 1993

¹² Pfund “The Developing Jurisprudence of the Rights of the Child – the Contributions of the Hague Conference on Private International Law” 1997 3 ILSA Journal of International and Comparative Law 665 670; and Wallace “International Adoption: The Most Logical Solution to the Disparity Between the Number of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?” 2003 20 Arizona Journal of International and Comparative Law 689 702. See also Intercountry Adoption and The Subsidiarity Principle: A PROPOSAL FOR A VIA MEDIA, Meda Couzens, Lecturer, Faculty of Law University of KwaZulu-Natal, Durban and Noel Zaal, Professor, Faculty of Law University of KwaZulu-Natal, Durban; Hague Conference on International Private Law (2008). The Implementation and Operation of the 1993.

¹³ Hague Conference on Private International Law, Permanent Bureau (2008) Guide to Good Practices para 47 and para 53;

- [116] Before 2000, section 18(4)(f) of the Child Care Act 74 of 1983 prohibited non-South African citizens from adopting any child born to a South African.¹⁴ In this sense, the Child Care Act rendered the subsidiary principle absolute in South African law. Alternative care for South African children was thus limited to national alternatives. Intercountry adoption only received acceptance following a constitutional challenge in **Fitzpatrick** in the year 2000.¹⁵ **Fitzpatrick** concerned two British citizens resident in South Africa, who wished to adopt a child, who they had fostered for more than two years, but were prevented from adopting by the provisions of section 18(4)(f) of the Child Care Act. The High Court held that this provision was inconsistent with the Constitution of South Africa Act, 1996 and ruled that section 18(4)(f) was invalid to the extent that it constituted an “*absolute proscription*” on adoption by a non-South African citizen or person who had not applied for citizenship. However, it suspended its order of invalidity and ordered Parliament to revise section 18(4)(f) within two years.
- [117] Confirming the invalidity order made by the High Court in **Fitzpatrick** in terms of section 167(5) of the Constitution, the CC, per Goldstone J, found that section 18(4)(f) of the Child Care Act was in conflict with section 28(2) of the Constitution which directs that “*a child’s best interest are of paramount importance in every matter concerning the child,*” because of its “*blunt and all-embracing*” prohibition of adoptions by foreign nationals which prevented application of the “*best interests of the child principle*”.¹⁶ It held that section 18(4)(f) deprived courts of the flexibility needed to assess what was in the best interests of individual children because it prejudged that adoptions by foreigners can never satisfy those interests.¹⁷
- [118] At the CC hearing of **Fitzpatrick**, the Minister of Social Development requested a suspension of the invalidity order. It was argued on behalf of the Minister that, pending a legislative replacement for section 18(4)(f), its order provided “*inadequate provision to give effect to the principle of subsidiarity.*” Although the Goldstone J rejected this, he conceded that, notwithstanding that the principle of subsidiarity was not expressly provided for in South African law, it remained applicable because of the obligation set out in section 39(1)(b) of the Constitution to

¹⁴ This applied unless the child was of the other spouse, or the prospective adoptive parent was in the process of becoming a South African citizen.

¹⁵ **Minister of Welfare and Population Development v Fitzpatrick and Others** 2000 (3) SA 422 (CC).

¹⁶ 2000 7 BCLR 713 (CC) 719 par 16

¹⁷ at paras 20-21

consider international law and, in particular, the provisions of article 21(b) of the UNCRC, in interpreting the Bill of Rights. He thus stressed that the “*courts would nevertheless be obliged to take the principle into account when assessing the ‘best interests of the child’, as it is enshrined in international law, and specifically article 21(b) of the Children’s Convention*”¹⁸.

[119] Despite this, Goldstone J found that section 40 of the Child Care Act guaranteed consideration of the religious and cultural background of an adoptee and adopters, which he stated sufficiently satisfied the principle of subsidiarity. Thus he found that a continuance of section 18(4)(f) was not necessary for maintenance of the principle and declined to suspend the Order of the CC.

[120] In **AD**,¹⁹ the majority of the SCA held that apart from the difficulty with jurisdiction, the appeal should in any event fail because of the principle of subsidiarity. In Theron AJA’s view, unless it was established that suitable care could not be found in a child’s country of origin, an intercountry adoption ²⁰application would not lie, whatever other considerations there might be. Hanckje AJA, however, stressed that the child’s best interests should not be *held to ransom for the sake of legal niceties*”, which he wanted no part of.

[121] Sachs J, giving the judgment of the CC, dealt with the purpose of the Hague Convention and its effect upon the subsidiary principle. By comparison with the CRC and the AC, Sachs J pointed out that the Hague Convention had sought to bring the subsidiary principle closer into alignment with the best interests of the child principle. He indicated that he had chosen to follow the approach taken by the Hague Convention as its protections reduced the “*relatively autonomous effect*” of the subsidiarity principle as described in the UNCRC and the AC. He held that the subsidiarity principle was not the ultimate governing factor in intercountry adoptions, since the best interests of the child were paramount. This meant that there could be situations in which intercountry adoption would supersede an available national placement. He stressed the importance of maintaining flexibility in order to achieve what is in the best interests of a particular child and advocated a contextualised case - by - case approach. Such an approach requires that each child must be looked at as an individual and ultimately that child’s best interests would determine

¹⁸ supra at 724 fn 33

¹⁹ supra

²⁰ supra at para 99

whether a local placement or an alternative intercountry adoption was more suitable for the particular child.

[122] Sachs J' set out his approach as follows:

“[47] Rigorous procedural mechanisms are put in place to reduce possible abuse. In these circumstances the framers appear to have felt it would be permissible to reduce the relatively autonomous effect of the subsidiarity principle as expressed in the CRC and the African Charter on the Rights and Welfare of the Child (the African Charter), and bring it into closer alignment with the best interests of the child principle. Thus, using language notably less peremptory, art 4(b) of the Convention provides:

“An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests.” [emphasis added]

[48] The Convention seems to accept the notion that '(e)nsuring that a child grows up in a loving, permanent home is the ultimate form of care a country can bestow upon a child', even if that result is achieved through an intercountry adoption. It follows that children's need for a permanent home and family can in certain circumstances be greater than their need to remain in the country of their birth.

[49] However, the intricacies consequent upon an intercountry adoption must serve as confirmation that the principle of subsidiarity should be adhered to as a core factor governing intercountry adoptions. This is not to say that the principle of subsidiarity is the ultimate governing factor in intercountry adoptions. As Fitzpatrick emphasised our Constitution requires us in all cases, including intercountry adoption to ensure that the best interests of the child will be paramount. Indeed, the preamble to the Hague Convention suggests that there will be circumstances in which an intercountry adoption will be preferable for a child over institutional care in the country of birth.

[50] *Determining the best interests of the child cannot be circumscribed by mechanical legal formulae or through rigid hierarchical rankings of care options. As was stated in M: A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a predetermined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.*

In practice this requires that a contextualised case-by-case enquiry be conducted by child protection practitioners and judicial officers versed in the principles involved in order to find the solution best adjusted to the child, taking into account his or her individual emotional wants, and the perils innate to each potential solution.

[51] *On a pragmatic level, the successful application of the principle will depend heavily on the ability of placing agencies in the country of origin to investigate adequately the viability of local placement for the child in question. It is one of the basic premises of the Hague Convention that adoption is not a private affair but a State responsibility requiring the involvement of government agencies of both sending and receiving countries. Accordingly, collaboration between the government and child welfare agencies in the country of origin is conducive to success in intercountry adoptions. Conversely, flouting established regulatory institutions is to be discouraged. The debate has accordingly shifted away from implacable abstract positions in favour of or against intercountry adoption. It now focuses more on how best to put dependable institutions in place to ensure that:*

- High priority is given to finding suitable local placement wherever possible;*

- where, however, it would be in the best interests of a particular child to be adopted by non-nationals, a properly regulated intercountry adoption will be permissible; and*

•sending and receiving States cooperate through appropriate public machinery to prevent abuses and to ensure adequate follow-up when intercountry adoptions take place.”

- [123] Sachs J then dealt with the decision of the majority of the SCA regarding the subsidiary principle which had found its application to be an insurmountable bar to the granting of a sole custody and guardianship order to the respondents. He emphasised that the application of the subsidiary principle was always subject to the particular circumstances of the case and the best interests of the child, which were paramount. In this respect, he stressed that the subsidiary principle would always be subsidiary itself to the ‘paramountcy’ principle. He stated:

“[54] It is against the above background that I now turn to answer the question raised by the assertion in the majority judgment in the Supreme Court of Appeal that the principle of subsidiarity acted as an additional insurmountable bar to the granting by the High Court of an order of sole custody and sole guardianship in favour of the applicants. In my view, the proposition was stated in terms that were too bald. Like other questions it was a matter to be decided in all the circumstances by the Children's Court.

[55] Child law is an area that abhors maximalist legal propositions that preclude or diminish the possibilities of looking at and evaluating the specific circumstances of the case. The starting-off point and overall guiding principle must always be that there are powerful considerations favouring adopted children growing up in the country and community of their birth. At the same time the subsidiarity principle itself must be seen as subsidiary to the paramountcy principle. This means that each child must be looked at as an individual, not as an abstraction. It also means that unduly rigid adherence to technical matters, such as who bears the onus of proof, should play a relatively diminished role; the courts are essentially guarding the best interests of a child, not simply settling a dispute between litigants. In this context a particularly important role will be given to the involvement of public mechanisms created by the law to deal with intercountry adoption.” (emphasis added)

- [124] In insisting that the subsidiary principle be adhered to in all circumstances, the DSD has failed to heed the constitutional imperative of the best interests of the child and has ignored the child-centred, case by case

approach the Constitutional Court has prescribed should be adopted in considering international adoptions.

THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

[125] The starting point in considering intercountry adoptions in South African domestic law must always be the Constitution. It makes it clear that the overriding consideration in matters of this nature is always the best interests of a child. Section 28(2) of the Constitution provides:

“2. A child's best interests are of paramount importance in every matter concerning the child.”

THE CHILDREN'S ACT

[126] The Children's Act was published on 19 June 2006 but only commenced on 1 April 2010. It was stated to have been enacted in order, *inter alia*, to give effect to the Hague Convention²¹. It deals with national adoptions in Chapter 15 and intercountry adoptions in Chapter 16. The rules pertaining to local adoptions set out in Chapter 15 of the Act remain relevant to considering intercountry adoptions as they are incorporated by reference in a number of sections contained in Chapter 16.

[127] The purposes of adoption is said in the Act to be as follows:

“229 Purposes of adoption

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.”*

The criterion for determining the ‘adoptability’ of a child and the eligibility of persons seeking to adopt such child

[128] Section 230(1) sets out which children may be adopted: It provides:

“Child who may be adopted

- (1) Any child may be adopted if-*
 - (a) the adoption is in the best interests of the child;*

²¹ Section 254(a)

- (b) the child is adoptable; and
 - (c) the provisions of this Chapter are complied with."
- (emphasis added)

[129] A child is said to be “*adoptable*” where the provisions of Section 230(3) have been satisfied. Section 230(3) reads in relevant part:

- “(3) A child is adoptable if-
- (a) the child is an orphan and has no guardian or caregiver who is willing to adopt the child; (emphasis added)
 - (b) the whereabouts of the child's parent or guardian cannot be established;
 - (c) ...
 - (d) ...
 - (e) the child is in need of a permanent alternative placement;
 - (f) ...; or
 - (g) the child's parent or guardian has consented to the adoption unless consent is not required.

[130] Sub-paragraph (a) means that a child is ‘*adoptable*’ if the child is an orphan and if there is no guardian or caregiver willing to adopt the child. An orphan is thus not adoptable by a prospective adopted parent (who is not a guardian or caregiver to the minor child) where there is a guardian or caregiver who is willing to adopt the child. The section thus recognises that it would be in the best interests of a child to be placed permanently with those with whom he/she has established a connection through guardianship or a fostering or other caregiving arrangement; it is plainly the intention of the legislature to allow guardians, foster parents and other caregivers who have *de facto* cared for the child to have the first option of adopting a local child.

[131] For present purposes, it is only the definition of ‘*caregiver*’ that is relevant. A ‘*caregiver*’ is defined in section 1 of the Act and reads:

- “‘**care-giver**’ means any person other than a parent or guardian, who factually cares for a child and includes-
- (a) a foster parent;
 - (b) a person who cares for a child with the implied or express consent of a parent or guardian of the child;
 - (c) a person who cares for a child whilst the child is in temporary safe care;
 - (d) the person at the head of a child and youth care centre where a child has been placed;

- (e) *the person at the head of a shelter;*
- (f) *a child and youth care worker who cares for a child who is without appropriate family care in the community; and*
- (g) *the child at the head of a child-headed household.”*

[132] Ms. K is neither a *de facto* caregiver of E; nor has she stated, or has it been suggested by the DSD, that she willing to adopt the minor child. E is in need of alternative permanent placement. There is thus nothing in section 230 of the Act or in the definition of ‘*caregiver*’ which would preclude E being declared ‘*adoptable*’.

[133] On a proper reading of section 230(3) together with the definition of ‘*caregiver*’ in section 1, had the applicants remained in South Africa, the role that the applicants played in factually caring for E whilst he was in temporary safe care, would have accorded them preference to adopt E. The same preference would have been accorded them had they been permanent residents of South Africa and had been appointed as foster parents to E. In addition, prior to E’s mother’s death, the applicants cared for E with the consent of his mother. The applicants have continued to care for E when they return to South Africa with the consent of the TLC. It is only because the applicants are foreign nationals that they pre-association with E has, according to the DSD, precluded them from being eligible to adopt E.

[134] Of equal importance is that there is nothing in section 231 which would preclude the applicants being considered eligible to adopt E. On the contrary, section 231 accords similar preference to foster parents and caregivers in prescribing the persons eligible to adopt a child, patently because of their connection to the minor child . This section reads:

“231. *Persons who may adopt child*

- (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.*
- (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 parent into consideration.(bold added)*
- (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.*
- (6) *A person unsuitable to work with children is not a fit and proper person to adopt a child.*
- (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."*

- [135] It is readily apparent from these provisions that preference will always be given to persons who have taken care of the child, whether as step-fathers, foster parents or other caregivers when a child becomes available for a national adoption. This is because it is plainly in the best interest of a child to be placed with those with whom he/she already has a relationship. However, when it comes to intercountry adoptions, the DSD maintains that the exact opposite is true and those who have a prior relationship with the child are excluded from the adoption process.
- [136] There is nothing in the Act to support this. Although it is stated in section 231(3) that in the assessment of prospective adoptive parents, an adoption social worker may take the cultural and community diversity of the adoptable child and the adoptive parents into consideration, this is not obligatory and can in no way be elevated to a prohibition against placing children with adoptive parents from other cultures. Cultural diversity is but one of the factors that may be taken into account. It is only in the DSD's Guidelines dealt with below that it is prescribed that prospective adoptive parents who have '*pre-identified*' a child will be precluded from adopting that child. These Guidelines are applied in all circumstances, irrespective of whether the prior relationship between the foreign prospective adoptive parents and the child makes them eminently best suited to adopt the child as it would be in the best interests of the child to be placed in their care.
- [137] The DSD explained in its answering affidavit that these rules were designed to prevent child trafficking and '*baby shopping*'. However, they make absolutely no sense in the present context where there can be no question at all that the applicants will traffic E and their prior relationship can never be regarded as their having pre-identified him as a suitable baby to adopt as it arose at a time when they had no intention at all of adopting E.
- [138] It is important to note that foster care is generally intended to be temporary with an aim that the child will be reunited with his/her family. The purpose is set out in section 181 of the Act and is said to be:

"The purposes of foster care are to-

- (a) protect and nurture children by providing a safe, healthy environment with positive support;*
- (b) promote the goals of permanency planning, first towards family reunification, or by connecting children to other safe and nurturing family relationships intended to last a lifetime; and*

- (c) *respect the individual and family by demonstrating a respect for cultural, ethnic and community diversity."*

[139] On the other hand, adoption offers permanent care and creates lifelong bonds between the adopted child and his/her adoptive family, carrying with it the duty of support and the benefit of possible succession. Adoption must in virtually all circumstances be preferable to foster care where there is no prospect of the child being later reunited with his biological parent/s. Foster care may have made sense for E when his mother was alive, but now that he has been orphaned, a permanent placement should be sought for E.

The persons qualified to make an assessment as to the 'adoptability' of a child

[140] In terms of section 230(2), only an '*adoption social worker*' can make an assessment to determine whether a child is "*adoptable*". To be an '*adoption social worker*', the social worker must be an accredited social worker in private practice who specialises in adoption services, a social worker in the employ of a child protection agency who is accredited to provide adoption services or an accredited social worker in the employ of the DSD or a provincial office of the DSD, who has a speciality in providing adoption services.

[141] In section 1 of the Act, an '*adoption social worker*' is defined as-

- (a) *a social worker in private practice-*
 - (i) *who has a speciality in adoption services and is registered in terms of the Social Service Professions Act, 1978 (Act 110 of 1978); and*
 - (ii) *who is accredited in terms of section 251 to provide adoption services;*
- (b) *a social worker in Employ of a child protection organisation which is accredited in terms of section 251 to provide adoption services; or*
- (c) *a social worker in Employ of the Department or a provincial department of social development, including a social worker employed as such on a part-time or contract basis, who has a specialty in adoption services and is registered in terms of the Social Services Professions Act, 1978 (Act 110 of 1978);"*

[142] An '*adoption service*' includes-

- “(a) counselling of the parent of the child and, where applicable, the child;
- (b) an assessment of a child by an adoption social worker in terms of section 230 (2);
- (c) an assessment of a prospective adoptive parent by an adoption social worker in terms of section 231(2);
- (d) the gathering of information for proposed adoptions as contemplated in section 237; and
- (e) a report contemplated in section 239 (1) (b);” (emphasis added)

[143] Accordingly, only an accredited adoption social worker may make an assessment of a child’s adoptability as contemplated in section 230(2). Moreover, it is only the report of an accredited adoption social worker as to the adoptability of a child that may be relied upon in support of an adoption application. Section 239 of the Act provides:

239 Application for adoption order

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

[144] Counsel for the applicants informed me that most children placed in a child protection agency are placed by DSD social workers. However, the DSD has no adoption social workers in its employ as the law, as it currently stands, permits the DSD to accredit adoption social workers but not to carry out these services itself.

[145] The definition of an ‘*adoption social worker*’ was amended by the Children’s Amendment Act 18 of 2016, which came into effect on 26 January 2018 (as per GN 49 in GG 41399 of 26 January 2018) to include DSD social workers in the definition of an ‘*adoption social worker*’. However, section 251 remains unchanged. This provides that only a social worker in private practice (section 251(1)(a)) or employed by a child protection organisation (section 251(1)(b)) can be accredited to perform adoption services. The amendment has thus not changed the position that only a social worker in private practice or one employed by a child protection organisation may be accredited as an adoption social worker. This is clearly a lacuna in the Act that needs to be addressed.

[146] Although Ms. Menemene has been assigned as E’s case worker and is not employed by the DSD, she is not employed by the TLC, a child protection organisation, but is employed by the Vaal Triangle Mental Health Facility. She is thus not ‘*an adoption social worker*’ in terms of the Act and is unable to determine whether E is ‘*adoptable*’ or to make recommendations as to who is best placed to adopt E. The DSD has thus incorrectly relied on the report of Ms. Menemene that “*it seems that E is not adoptable*” in arguing on the basis of the provisions of section 239(b)(i) that the applicants are precluded from applying to adopt E. Moreover, Ms Menemene has no experience regarding child placements as she is a Mental Health social worker and not an adoption social worker.

The preference for local placement with family or extended family in intercountry adoptions and the relevance of culture, tradition and religion

[147] The DSD argues that it is in the best interests of E that he be placed where he can maintain his African heritage and culture. This is a point

emphasised by the DSD in support of its view that E cannot be declared 'adoptable' as a local placement has been found for him.

[148] It is apparent from the provisions of section 181(c) of the Act that the purpose of foster care is to "*respect the individual and family by demonstrating a respect for cultural, ethnic and community diversity*", and thus on placing the child in foster care within his culture and community. Section 184 of the Act further emphasised the importance of culture in placing a child in foster care and provides-

- "(1) *Before a children's court places a child in foster care by court order in terms of section 156, the court must consider a report by a designated social worker about-*
 - (a) *the cultural, religious and linguistic background of the child; and*
 - (b) *the availability of a suitable person with a similar background to that of the child who is willing and able to provide foster care to the child.*
- (2) *A child may be placed in the foster care of a person from a different cultural, religious and linguistic background to that of the child, but only if-*
 - (a) *there is an existing bond between that person and the child; or*
 - (b) *a suitable and willing person with a similar background is not readily available to provide foster care to the child."*

[149] These sections which emphasise the cultural, linguistic and religious background of the child in the case of foster care were inserted by Act 41 of 2007 with effect from 1 April 2010.

[150] However, in the case of adoption, the need to place a child within his cultural, linguistic and religious background is not all encompassing and is but one of the factors to take into account. As indicated above, subsection 231(3) provides only that:

"(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 parent into consideration." (emphasis added).

[151] However, subsection (4) makes it clear that the financial circumstances of the prospective adoptive parents should not be taken into account.

[152] Although TT²² did not concern an intercountry adoption, relevant to the facts before me are Dippenaar J's findings regarding the DSD's stance that adoptive children should be placed with family and financial constraints should not preclude this general rule from applying:

"[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) – (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, ...(Emphasis added)

²² supra

[153] It is important to note that in considering an application for adoption the Children's Court, Section 261(5)(a) requires that before making an Order for an intercountry adoption, the provisions of section 240 applicable to national adoptions have been considered.

[154] Section 240 provides:

240 Consideration of adoption application

- (1) *When considering an application for the adoption of a child, the court must take into account all relevant factors, including-*
 - (a) *the religious and cultural background of-*
 - (i) *the child;*
 - (ii) *the child's parent; and*
 - (iii) *the prospective adoptive parent;*
 - (b) *all reasonable preferences expressed by a parent and stated in the consent; and*
 - (c) *a report contemplated in section 239 (1) (b)."*

[155] It should be noted that the religious and cultural background of the child are but one of the relevant factors which must be considered by the Children' Court. Equally relevant would be the wishes expressed by E's mother prior to her death that the applicants care for E.

[156] In addition, relevant for present purposes is section 233(1)(c) which specifies that the child's consent to the adoption should be taken into account where:

- " (c) *the child, if the child is-*
 - (i) *10 years of age or older; or*
 - (ii) *under the age of 10 years, but is of an age, maturity and stage of development to understand the implications of such consent."*

[157] I have already indicated that E has, in so far as it may properly be relied upon in view of his level of maturity, expressed a preference to reside with the applicants. This is also a factor which the AC states should be considered when determining whether an intercountry adoption is in the best interests of a minor child.

[158] It is thus apparent that there is nothing contained in Chapter 15 of the Act pertaining to national adoptions, rendered applicable to intercountry adoptions by section 261(5) of the Act in dealing with intercountry adoption between South Africa and a convention country, which includes Poland, which would in and of itself preclude the applicants' adoption of E.

[159] There is similarly nothing contained in Chapter 16 of the Act which deals with intercountry adoptions that stipulates that where a local placement is available for a child, that child may not be declared ‘*adoptable*’ for the purpose of an intercountry adoption or would prohibit prospective adoptive parents who have had prior contact with an adoptable child from adopting that child.

[160] Section 261(5) of Chapter 16 provides-

- “(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-*
- (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;*
 - (d) the arrangements for the adoption of the child are in accordance with the requirements of the Hague Convention on Inter-country Adoption and any prescribed requirements;*
 - (e) the central authority of the convention country has agreed to the adoption of the child;*
 - (f) the Central Authority of the Republic has agreed to the adoption of the child; and*
 - (g) the name of the child has been in the RACAP for at least 60 days and no fit and proper adoptive parent for the child is available in the Republic.”*

[161] In terms of section 257 of the Act, the Central Authority is the DG of the DSD who must, after consultation with the DG: Justice and Constitutional Development, perform the functions assigned by the Hague Convention to Central Authorities.

[162] The purposes of Chapter 16 of the Act, which deals with intercountry adoptions are said to be:

- “(a) to give effect to the Hague Convention on Intercountry Adoption;*
- (b) to provide for the recognition of certain foreign adoptions;*
- (c) to find fit and proper adoptive parents for an adoptable child;*
and
- (d) generally to regulate intercountry adoptions.” (emphasis added)*

[163] Section 256 provides:

- “(1) *The Hague Convention on Intercountry Adoption is in force in the Republic and its provisions are law in the Republic.*
- (2) *The ordinary law of the Republic applies to an adoption to which the Convention applies but, where there is a conflict between the ordinary law of the Republic and the Convention, the Convention prevails.*” (Emphasis added)

[164] As indicated above, the Hague Convention does not place the same emphasis on local placement and rather stipulates that a child-centric approach should be adopted having regard ultimately to the best interests of the particular child.

[165] It is apparent from the analysis of the Act outlined above, that the stated policy of the DSD is not prescribed in the Act and that the sole source of its policy is based upon its Guidelines both on intercountry and national adoptions.

THE PRACTICE GUIDELINES ON INTERNATIONAL AND NATIONAL ADOPTIONS

[166] The clear policy of the DSD set out in its answering affidavit is that an international adoption must always be regarded as ‘*subsidiary*’ to a local placement for a minor child. The policy applied by the DSD appears to be applied, without regard to the best interest of the particular child.

Although the DSD did not expressly rely on the Practice Guidelines in its answering affidavit, it is clear that its stated policy has been informed by its Practice Guidelines dealing with both intercountry and national adoptions. Like with Chapters 15 and 16 of the Act, there is considerable overlap between the intercountry and national Guidelines and it is clear that in many instances, the DSD’s stated policy has been derived from its national Guidelines.

The Intercountry Guidelines

[167] After the publication of the Children’s Act but prior to its commencement on 1 April 2010, the DSD published Practice Guidelines on Intercountry Adoption signed by Dr Zst Skweyiya. (‘*the Intercountry Guidelines*’) which have been attached to the applicants’ papers. Dr Zst Skweyiya was the Minister of Social Development between 1999-2009.

[168] These Guidelines place great emphasis upon the subsidiary principle and go beyond the requirements set out in the already by then published Children's Act and in the Hague Convention. These Guidelines demonstrate that it was the DSD's stance from the outset to strictly apply both the subsidiary and pre-identification principles, notwithstanding the more child centric approach taken in the Hague Convention (which was to be given the force of law in Children's Act) and the soon to be implemented provisions contained in the Act itself. This is contrary to the stated purpose of the Intercountry Guidelines set out in the Foreword to the Guidelines signed by the Minister which record that they had been developed:

"to ensure compliance with the Hague Convention as well as to meet our international obligations in relation to the United Nations Convention on the Rights of the Child and to facilitate the implementation of the Children's Act."

[169] In the first instance the definition of "*family*" set out in the Intercountry Guidelines is far more limited than that of "*family member*" provided in the Act. It is said to encompass what one would traditional regard as a blood related 'family' and includes-:

"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. (Draft Family Policy)"

[170] The Act contains only the broader definition of '*family member*' and has no similar definition of '*family*'.

[171] Paragraph 5.4 of the Guidelines makes it mandatory to find a placement within the child's extended family and states:

"If a child cannot be cared for by his/her own biological parent/s, the Competent bodies responsible for child protection, shall consider all alternatives for permanent care or adoption within the child's extended family". (Emphasis added)

[172] Paragraph 5.5 in turn provides that adoption of a child outside of his/her own family may only be considered if placement within the child's extended family is not possible. It reads:

“[A]doption of a child outside his/her own family shall be considered only if no appropriate placement or adoption within the extended family is possible.” (Emphasis added)

- [173] Where placement within the child’s extended family is not possible, efforts need to be made to place the child permanently within his/her community before any an outside adoption (being one outside of the child’s community) may be considered. Paragraph 5.6 provides:

“When biological parent/s and the extended family of origin for various reasons do not meet conditions which guarantee the full and harmonious development of a child, competent bodies responsible for the child welfare and protection must ensure permanent placement of a child within the community” (Emphasis added)

- [174] This is re-emphasised in paragraph 5.9 where it is made plain that an intercountry adoption is the last resort which may only be considered if a local placement, first within the child’s community and then outside of his community, cannot be found:

“As a priority, a child shall be adopted within his/her own community and State of origin. Intercountry adoption can be considered as an alternative only after having ensured that a permanent placement for the child cannot be found with in his/her State of origin.” [Emphasis added]

- [175] It is further stated in paragraph 8.1.2 that the child will be placed on RACAP for 60 days “only after SACA agrees in writing that no local adoptive parents can be found”, and only after the lapse of 60 days “an intercountry adoption can be considered.” (Emphasis added)

- [176] In the conclusion to the Intercountry Guidelines this approach is re-emphasised, making it plain that an intercountry adoption may only be considered where there is no ‘suitable’ local placement for the child:

“It is envisaged the guidelines formulated will ensure that South Africa adheres to internationally recognised standards of intercountry adoption and that’s the best interests of children who cannot be placed into suitable care locally are taken care of by placing them with the adoptive parents of foreign countries.” (Emphasis added).

- [177] The requirement that the local placement be ‘suitable’ is emphasised as it would appear that the Intercountry Guidelines are applied by the DSD to

exclude an intercountry adoption when any local placement can be found. This is contrary to the best interests of the child. Paragraph 5.16 makes it plain that:

“The principles of the best interest of the child, non-discrimination, participation and protection of the child must be ensured”

- [178] Paragraph 6.2 stresses that the approach to adoption should always be child centred and that the best interests of the child are paramount. Although the child's language, culture, race and religion should always be respected and considered, this cannot supersede the best interests of the child:

“6.2.1. The purpose of adoption should always be to provide a suitable home for an adoptable child and not to provide a family with a child (in other words the focus lies on the needs of the child and not on the needs of the prospective adoptive parents.”

6.2.2 The best interests of the child is of paramount importance and must always be taken into consideration

6.2.3 The child's language, culture, race and religion should always be respected and taken into consideration in the placement of the child.” (Emphasis added)

- [179] Paragraph 5.14 of the Intercountry Guidelines seeks to give effect to the rule against pre-identification and reads:

“It is important to keep in mind that foreigners should not be allowed to visit the Child and Youth Care Centres for the purpose of linking up and adopting a child. The Centres should have a volunteer policy in place which do not allow adoption of pre-selected children.”(Emphasis added)

- [180] The DSD has applied this rule against the applicants but have failed to consider that their contact with E did not arise *“for the purpose of linking up and adopting him”*; on the contrary, they were asked by the TLC to look after him over the Christmas period soon after his placement at the TLC and hereafter, sought to take care of him whilst his mother got on her feet. Before leaving South Africa, the applicants had no intention of adopting E- nor was his mother prepared to put him up for adoption.

- [181] Paragraph 5.7 accords preference to foster parents in the adoption of a child and makes it plain that adoption or long-term foster care is always preferable to institutionalisation of a child. Paragraph 5.7 provides:

“The natural 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 permanent substitute family to a child through adoption or long-term foster family care necessitated by circumstances shall prevail over care in an institution.”

- [182] Of further relevance for current purposes is that despite the provisions of section 255 of the Children’s Act dealt with below, which does not require that there be a working agreement between Convention countries, it is stipulated in paragraph 8.1.1 that even in the case of Hague Convention adoptions-

“[I]ntercountry adoptions can only take place where a working agreement between South Africa and the other Hague country was established and the working agreement was approved by the Central Authorities of the two countries, unless the child is being adopted by a blood related family member.” (Emphasis added)

The National Guidelines

- [183] Although the Intercountry Adoption Guidelines were annexed by the applicants to their papers, the National Guidelines, which were plainly relied upon by the DSD, were not annexed to its papers. At my request, I was provided with a copy of the current Practice Guidelines on National Adoption (“*the National Guidelines*”). These Guidelines were expressly relied upon by the DSD in support of its stance in **TT**.²³
- [184] The National Guidelines repeat the stance taken in the Intercountry Guidelines that when placing a child, preference must always be given to local and extended family and the adoption of a child by prospective parents who have pre-identified that child for adoption should be prohibited. However, the National Guidelines are more extensive than the Intercountry Guidelines Relevant for current purposes are the following National Guidelines, which have clearly served to inform the approach taken by the DSD in the current matter.
- [185] The purpose of adoption was said to be:

²³ Supra.

“The main purpose of adoption is 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.

An adoption of a child has the same legal status to that of a biological family in that, it assures children as part of their adoptive families and a continuous relationship with their family members long after their 18th birthday, unlike other forms of alternative care placements, such as foster care and Child and Youth Care Centre (CYCC). It is therefore a preferred option over other forms of care due to the permanency and protection it brings to the permanent relationship between the child and the adoptive family.” (Emphasis added)

[186] Despite this, it is apparent from the National Guidelines that local foster care is always preferable to an international adoption.

[187] The more restrictive definition of ‘family’ provided in the Intercountry Guidelines is retained in the National Guidelines. However, the broader definition of ‘family member’ contained in the Children’s Act (which would include the applicants), is acknowledged and is stated to include:

“Any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship.”

[188] Despite this, the psychological and emotional attachment which E has formed with the applicants has not been considered by the DSD or the social workers seeking to find a placement for E. This notwithstanding that it is said in paragraph 6, Chapter 2 of the National Guidelines that “a child’s rights approach is a central principle to the understanding and implementation of these Guidelines.”

[189] Paragraph 6.1 further emphasises that the overarching principle of the National Guidelines is that the best interests of the child will always outweigh any other considerations. The child’s need for affection and long-term stability are paramount considerations. It is stated

“The best interests of a child, non-discrimination, child participation where applicable and the protection of a child, are paramount overarching principles 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."

- [190] The dichotomy between this child-centred approach, the need to place a child first and foremost with family members and if not possible, with extended family, and the application of the subsidiary principle is made plain under the heading, "Key Operating Principles" in para 6.2 of the National Guidelines. There 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."

- [191] Paragraph 7 states that the national norms and standards as outlined in Annexure A of the Regulations of the Children's Act require, *inter alia*, that adoption services must–

- "(c) take the child's needs and best interests into account;*
- (d) provide for assessment of the child in order to determine if the child is adoptable;"*
- ...*
- (f) ensure that the child's biological family if available, and the child is involved and participate in the decision-making process during adoption procedures, provided the child is of a sufficient age, maturity and stage of development;*
- ...*

- (h) *take account of and address the changing social, physical, cognitive and cultural needs of the child and his or her family throughout the intervention process before and after adoption;*
- (i) *ensure that all avenues to maintain the child within his or her family are explored before adoption is considered;*
- (j) *ensure that the child's family has access to a variety of appropriate resources and support before an adoption is considered;*

[192] However, it is stressed in paragraph 8.1 that adoption services must be provided by competent and experienced adoption service providers, *"who are adoption social workers in the employ of the Department of Social Development, accredited Child Protection Organizations as well as adoption social workers who are in private practice accredited and registered to provide adoption services."* In paragraph 8.1.1. it made clear, *inter alia*, that adoption service providers are expected to meet a number of important requirements which includes that *"the best possible family should be found and the child's best interests should be paramount above all standards and practices."* It would appear, however, that this fundamental rule is rendered secondary in the case where there is a local placement for a South African child, irrespective whether the prospective adoptive parents would be the *"best possible family for the child."*

[193] Issues of race, culture and religion are accorded preference and the National Guidelines make it plain that the policy of the DSD is clearly against cross-cultural adoptions, irrespective of the best interests of the particular child. In paragraph 10.2.1.1 it is stipulated that children of the same race as the adoptive parents is preferred and in paragraph 10.2.2 it is stated that the child's *"language, culture, race and religion should always be respected and taken into consideration in the matching and placement of the child."* Paragraph 11.2.3.1.9, in turn, deals with the social-cultural aspects of adoption and provides that:

"When assessing the prospective adoptive parent/s, an adoption social worker may take the cultural and community diversity of the adoptable child and prospective adoptive parent/s into consideration."

Adoptive parents of a different culture, who would like to adopt a child of another culture, 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 available and willing to adopt the child."

- [194] The adoption of a child from another culture is dealt with in paragraph 11.2.4.2.3 which stresses that an adoption of a child by a person of a different culture will only be considered where the child cannot be placed within his own culture and tradition. Despite stating that prospective parents from another culture ought not to be discriminated against, this is said only to apply if no placement within the child's own culture can be found. It is stated:

“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 [A]ct 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.”

- [195] This rule against adoptions outside of the child's own culture is said to apply irrespective of the financial circumstances of the family or extended family of the child. It is stated in paragraph 13.1.4 that to disallow an adoption *“where poverty, however defined, seems to be the sole reason why the child cannot grow up in his/ her biological family, including extended family environment,”* is discouraged. This rule is clearly to prevent persons of wealthier backgrounds who are able to afford to provide a child with better financial benefits being given preference in considering the suitable placement for an adoptable child.

- [196] The culture and religious background of the child and the prospective adoptive parents is again emphasized in paragraph 13.3.2.1 in setting out the factors which the Children's Court must consider when determining whether an adoption application should be granted. It should be noted that the emphasis is not only on the culture but also on the religion of the child. Despite this, the DSD has chosen to ignore the fact that the both the applicants and E are catholic, and E's faith appears to be important to him.

Indeed, Ms. Menemene reported that he missed attending Church as he was accustomed to do at the TLC when he visited Ms. K at her home.

- [197] Although it is accepted that as a general rule, it will be preferable that children are placed with family and/or within their own community, the Act and the case law make it clear that the facts of each case must be examined to determine whether this would be in the best interests of the particular child. In mindlessly applying the Guidelines, the DSD and the social workers tasked to find a suitable placement for E have ignored that the applicants are the only *de facto* family he has ever known and that they would be regarded as ‘*family members*’ within the meaning of the Children’s Act making them suitable adoptive parents for E.
- [198] In **TT**, Dippenaar J criticised the DSD’s stance in slavishly applying its Guidelines in refusing the adoption by prospective parents of two young children referred to as “B” and “L”, even when the children had been in their care- in the one instance since birth and the other shortly after birth-without proper regard to the best interests of the children concerned. In that matter, a duly accredited adoption social worker recommended that the children be declared “*adoptable*”. The Children’s Court relied on the findings of the adoption social worker that the prospective parents were best suited to adopt the children and proposed making an Order that the respective applicants adopt B and L respectively. The Department, however, refused to issue a letter of recommendation in relation to the one child, B, and sought to renege on its letter of recommendation in the case of the other child, L, by seeking to self-review its decision to issue a letter of recommendation. The reasons provided by the DSD was that the prospective adoptive parents were of a different culture to that of the children and it was its policy that children should maintain a connection with their family or extended family and culture and tradition.
- [199] Dealing with the DSD’s stance which emphasised culture and tradition, Dippenaar J made it plain that maintaining a child’s culture and tradition was not an overriding consideration in the Children’s Act, but was but one of the factors to consider in determining the best interests of a child. He explained in **TT** that-

“[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 with 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 lie, 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...."

[200] Dippenaar further stated:

"[123] According to the Department, the Guidelines don't overreach but 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.'

[201] This is in essence a political stance which has been echoed by the approach taken by the DSD in the present matter. It is a stance that does not necessarily take the best interests or particular circumstances of the child into consideration and is not an approach endorsed in the Children's Act. It is readily apparent that DSD's National and Intercountry Guidelines go way beyond what is contemplated in the Act and the Hague Convention (incorporated into the Act by section 256) regarding the need to try and place a child locally before an intercountry adoption is considered. Moreover, whatever the DSD's policies and Guidelines may say, they

cannot override the provisions of the Act and will always be trumped by the best interests of the child.

[202] In dealing with the National Guidelines relied upon by the DSD in the matter before him, Dippenaar J made it plain that they could not be applied without prioritising the best interests of the children concerned and could not impose conditions for adoption not provided for in the Act-

“[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 of 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 to these factors. ...

[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 are not justified, having regard to the express wording of the relevant provisions.

[143] It further appears from the Guidelines that they interpret 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] 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. ...

[145] The Guidelines in material respects impose conditions that are not contemplated or contained in the Act. They also seek 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. ... (Emphasis added)

[203] In agreeing with the applicants that the National Guidelines ought to be reviewed and set aside as being contrary to the Constitutional prerogative

that the best interests of the child must be paramount, Dippenaar J stressed that the Guidelines could in no way override the provisions of the Act by stipulating additional requirements for adoption not prescribed in the Act:

“[148] The Act and the Constitution provide 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.

[150] Whoever was responsible for the Guidelines was not empowered to include in the Guidelines provisions that do not comply with the Act and undermine 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.

...

[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.”

[204] The stance taken by Dippenaar J in **TT** is equally applicable to the further National Guideline embodying the DSD’s prohibition against pre-identification of children set out in paragraph 12. This deals with the “*matching*” of prospective adoptive parents and a child and stipulates unequivocally that-

“Matching should not be done by the prospective adoptive parent/s themselves, in other words, they should not visit a CYCC to pick out an appealing child. There shall be no pre-identification of children by any person who wishes to adopt as such arrangement is not in compliance with the provision of the Act.”

- [205] There is no such provision in the Act. This rule has been applied by the DSD against the applicants in the current application without any regard to the fact that the applicants did not “*visit a CYCC to pick out an appealing child.*” It is repeated that the applicants’ contact with E during the period that they were in South Africa arose under circumstances when they had no intention to adopt E.
- [206] It is apparent from the facts before me and those before Dippenaar J in **TT** that the Guidelines have not served to protect the best interests of children eligible for adoption but instead, serve to promote a political agenda which disapproves of the adoption of orphaned South African children by culturally different adoptive parents who may be able to offer financial advantages to them. Whilst this is a purpose which has substantial merit, it should not be blindly applied without regard to the best interests and particular circumstances of the child sought to be adopted. This is particularly so as so many South African children have remained in institutions when they could have been offered a better life by both local and foreign prospective adoptive parents who may have been racially and culturally different from them.
- [207] Although in **TT**, Dippenaar J reviewed and set aside the National Guidelines as being inconsistent with the Act and the Constitution, by agreement between the parties before him, he granted leave to appeal to the SCA to determine the Constitutionality of the Guidelines and his setting aside the Guidelines has thus been suspended. Should it transpire that Dippenaar’s judgment is upheld, this would be dispositive of the stance taken by the DSD in this matter as, without the Intercountry and National Guidelines, there is nothing in the Act or in the Hague Convention which supports its insistence that E is not “*adoptable*” as a local placement has been found for him or that the applicants’ prior contact with E precludes them from being considered as prospective adoptive parents to E.
- [208] Moreover, the findings made by Dippenaar J supports my view that the prior contact and bond which has already developed between applicants and E should not be considered as ‘*pre-identification*’ and should instead serve to confirm that it may be, in the particular circumstances of E’s case, that it is in his best interests that E be permitted to apply to adopt him; indeed it was the fact that B and L had been living with the applicants from birth or virtually since birth that tipped the scales for Dippenaar J against their placement with extended family and motivated Dippenaar J to order that the adoption orders in their favour should be confirmed.

- [209] Whilst the prior relationship between the minor child and his prospective adoptive parents was not regarded as a sufficiently exceptional circumstance to persuade the CC to hear the application for the sole custody and guardianship of the minor child in **AD**, it was recognised by the Constitutional Court that this was a factor that may have tipped the scales in an application for the adoption of baby R by the respondents in **AD**.

THE BEST INTERESTS OF THE MINOR CHILD

- [210] What is abundantly clear from the International Conventions, the Constitution, the Children's Act and the Guidelines is that of paramount importance, is the best interests of the child under consideration. Subsection 240(2)(a) provides that-

“(2) 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;”

- [211] Section 7(1) of the Act provides a list of factors to be considered when determining the best interests of a child. The section is mandatory and where relevant provides:

“(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely-
(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". (Emphasis added)*

[212] In **TT** Dippenaar J pointed out that the approach taken by the Department ignored the broader definition of a '*family member*' in the Act quoted above, and in particular, its extended definition beyond blood ties to "*any other person with whom the child had developed a significant relationship based on psychological or emotional attachment, which resembles a family relationship*". He stated that the best interests of the children under consideration to remain with those with whom the children had formed a significant psychological and emotional attachment had been ignored by the Department in favour of its slavishly applied Guideline that it was in the best interests of children to remain with his/her extended biological family and to live amongst persons of the same culture and community. Dippenaar J stated:

"[137] Despite the definition of 'family member' in (d), which accords with that definition under s 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 seem to place a limitation on the interpretation of family which is not constitutionally justifiable..."

[213] Dippenaar J went on to state:

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

'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.”

[214] In emphasising the rights of B and L whose adoption was under consideration, Dippenaar J criticised the Department for ignoring the family ties which had been established between the prospective adoptive parents and the children concerned: He stated:

“[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. The section recognises that family life is important to the wellbeing of children. 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. 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: '[Section] 28(1)(b) [of the Constitution] 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 the background of a history of disintegrated family structures caused by government policies.'

[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 include preventing the child from being psychologically harmed.

...

[198] ... 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-term psychological trauma both for consenting parents and the child in question'.

[199] In the process the Department also manifestly failed to have regard to the constitutional rights of the prospective adoptive parents and their other 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."

[215] Dippenaar J also criticised what he regarded as the callous application by the DSD of its guidelines without regard to the impact and trauma separation from the only family the children had known, should they be placed as required by the DSD:

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

[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, those 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, but it is also 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-term psychological trauma both for consenting parents and the child in question'. The same can

be said for the impact on the prospective adoptive parents and their families.”

- [216] Dippenaar J admonished the DSD's for prioritising family ties and cultural bonds without regard to the facts and circumstances of the case, which he said was cruel and inimical to the best interests of the children under consideration:

“[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 children at the altar of expedience is indefensible. It is cruel and inimical to the best interests of the children involved and smacks of a lack of insight into and compassion for the reality of the situation.” (Emphasis added)

- [217] He pointed out that in terms of the minutes of the Department's panel discussion meeting of 21 July 2020 the Department was mindful that:

“[221] The child is currently 2 years old and in the Cs' 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 cognisance 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 Emphasis was on maintaining a cultural connection and the prioritisation 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.”

- [218] Dippenaar was shocked by “*the callous attitude*” of the Department epitomised by the statement made during the course of the proceedings in the Children’s Court by the fifth respondent when questioned whether in his assessment that it was in the best interest of the child concerned (B) that he be removed from his prospective adoptive parents and placed with his grandparents? In response to this and the further question whether this would not be traumatic for the child the fifth respondent said:

“The child is still . . . young but he can adjust, the child can adjust.”

- [219] Dippenaar J admonished the social workers in **TT** for failing to have regard to the traumatic effect it would have on the children concerned should they be removed from their adoptive parents and contemplated by the DSD:

[225] The failure of the social workers to meet or assess B and 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 Eleventh and twelfth respondents would be in his best interests in accordance with the various factors listed in s 7(1) of the Act.

....

[227] Despite acknowledging that B had already at the time been in the temporary care of Eleventh and twelfth respondents for some 20 months, this factor was not rationally taken into consideration, given the Department’s acknowledgement that placing B with his maternal grandparents would be disruptive.

...

[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, Eleventh and twelfth respondents, will be devastating.

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

[220] As the DSD did in the matter before Dippenaar J, the DSD has in this case, entirely ignored the definition of a ‘*family member*’ in the Act which would undoubtedly include the applicants and relied on section 7(1)(f) to bolster their case that it is in the best interests of E that he remains with his biological family or extended family. Should one adopt the prescribed definition of ‘*family member*’ and ‘*caregiver*’ set out in the Act, in complying with section 7, it was incumbent on the DSD, and the social workers who have sought to transfer E to the foster care of Ms. K, to have considered the nature of the personal relationship between the applicants and E (as required in section 7(1)(a)(ii)) and the likely effect a separation from them would have upon E (as stipulated in section 7(1)(d)(ii)).

[221] I have similar feelings to those expressed by Dippenaar J in **TT** with regard to the failure by the the social workers in the present matter to have regard to the bond that has already been established between E and the applicants; to say that children easily adapt is to say the least, callous and uncaring. It also falls far short of the requirements set out in section 7(1) of the Act in determining the best interests of E and their obligation to provide a suitable local placement for him, which should not be judged in a vacuum, but rather with regard to other available options for the placement of E. The DSD and the social workers concerned in the present matter were not entitled to simply apply the Guidelines and completely ignore the possibility that his best interests might be served should the applicants adopt E. Indeed they seem to have entirely disregarded the traumatic effect which E’s separation from the applicants and his placement with Ms. K may have on him. In so acting, the social workers concerned failed in their duties set out in section 239 of the Act to investigate the best interests of E.

[222] Dealing with this section, Dippenaar stated:

“[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 [social] worker must provide information on whether or not the proposed adoption is in the best interests of the child. The best-interests criteria are of paramount importance. It is child-centric and revolves around the particular facts and circumstances of the specific individual prospective adoptable child.*”

[223] After referring to section 7(1) of the Act, Dippenaar J made it plain that:

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

'Yet this court has recognised that it is precisely the contextual nature and inherent flexibility of s 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 particular child involved. To apply a predetermined 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.*"(emphasis added)

[224] The failure by the social workers to investigate the nature of the relationship between the applicants and E constituted, in my view a dereliction of their duties and terms of office to safeguard the best interests of E. Like in the present case, Dippenaar J pointed out that the DSD had made no attempt to investigate the circumstances under which the minor children would live if adopted by the applicants, their relationship and suitability as adoptive parents and stated:

"[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 Enquiry. From the undisputed evidence, it is clear that

Eleventh and twelfth respondents and their daughter are the only family B has ever known. B has been in their care for nearly four years. The siblings have established bonds. He is an 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 Eleventh and twelfth respondents. It is clear that the removal of B from their care would have devastating long-term effects on 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 descent as the second applicant and is preserving L's connection with his culture and tradition. As in the case of B, L is an integral part of the family and his removal would 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 its 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. 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."*

[225] Dippenaar J, thus, had no hesitation in reviewing and setting aside the Department's decision to issue a letter of non-recommendation relating to B's adoption. He summarily refused to allow the DSD to review and set aside its decision to issue a recommendation regarding the adoption of L

by the Children's Court as being pointless and contrary to L's best interests.

[226] Although it was said by the DSD that it is in the best interests of local children to be placed with local family and extended family in order to preserve their culture and traditions, in the present matter and in **TT**, this principle has been applied with no consideration whatsoever to the best interest of E or the children under consideration in TT. The DSD did not interview the Head of the TLC, its staff or the applicants; instead, the social workers applied the Guidelines prescribed by the DSD without question; and without any regard at all to the best interests of E, or his particular circumstances. I put it to CDS's counsel during argument whether he seriously believed that it was in the best interests for E to be placed with his great aunt, who he hardly knew and did not have a relationship with; he was, commendably, hard pressed to affirm this.

[227] That is not to say that at the end of the day, the Children's Court would not find that it would E's best interests to be placed with Ms. K. However, were it to do so, this would only occur after a proper investigation into E' best interests had been carried out. This would require that the benefits to E in remaining within his extended family and culture be weighed against the trauma it would cause him to be separated from the applicants' family, with whom he has expressed a desire to live and his mother had indicated she wished should take care of him. What would also have to be seriously weighed against the strong emotional attachment which E has with the applicants, is the substantial impact and trauma that would be experienced by E should he be removed from the TLC (which is the only permanent home he has ever known) and be taken from the only country he has known to Poland where the culture is entirely different and the language spoken is foreign. These are all factors that would have to be taken into account by the Children's Court in considering the application for E's adoption by the applicants which I intend to refer to the Children's Court.

THE CENTRAL AUTHORITY

[228] The Central Authority referred to in the Hague Convention is defined in section 257 of the Act to be the DG of the DSG. Its powers and functions are set out in section 258.

"257 Central Authority

(1) *For the purposes of the Hague Convention on Intercountry Adoption, 'Central Authority'-*

- (a) *in relation to the Republic, means the Director-General; or*
- (b) *in relation to a convention country, means a person or office designated by such convention country under Article 6 of the Hague Convention on Intercountry Adoption.*
- (2) *The Director-General, after consultation with the Director-General: Justice and Constitutional Development, must perform the functions assigned by the Convention to Central Authorities.*

258 Performance of functions

- (1) *The Central Authority of the Republic may in terms of section 310 delegate any powers or duties of the Central Authority under the Hague Convention on Intercountry Adoption to an official in the Department.*
- (2) *Any powers or duties of the Central Authority in terms of Articles 15 to 21 of the Convention and sections 261 (3) and (4), 262 (3) and (4), 264 (2) and 265 (2) may, to the extent determined by the Central Authority, be performed by-*
 - (a) *another organ of state; or*
 - (b) *a child protection organisation accredited in terms of section 259 to provide intercountry adoption services."*

[229] Poland is a convention country. Adoption of a child by a person in a convention country is dealt with in section 261:

"261 Adoption of child from Republic by person in convention country

- (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 Intercountry 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 Intercountry 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) 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-
- (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;
 - (d) the arrangements for the adoption of the child are in accordance with the requirements of the Hague Convention on Intercountry Adoption and any prescribed requirements;
 - (e) the central authority of the convention country has agreed to the adoption of the child;
 - (f) the Central Authority of the Republic has agreed to the adoption of the child; and
 - (g) the name of the child has been in the RACAP for at least 60 days and no fit and proper adoptive parent for the child is available in the Republic.
- (6) (a) The Central Authority of the Republic may withdraw its consent to the adoption of the child within a period of 140 days from the date on which it has consented to the adoption, if it is in the best interests of the child to do so.
- (b) In Event of the Central Authority of the Republic withdrawing its consent, the child must be returned to the Republic forthwith in the prescribed manner.
- ...
- (8) 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." (Emphasis added)

[230] It is thus apparent that Section 261(5)(f) of the Act requires that, before making any international adoption order, the Children's Court must be

satisfied that the Central Authority has given its consent. In the process of deciding whether to consent in each case, the Central Authority may require proof that national placement options have been properly considered. If the principle of subsidiarity has not been complied with in this manner, it could in view of the wording of s 261(5)(f) conceivably refuse to consent to the adoption of E.

[231] Thus, even were the Children's Court to approve the adoption of E by the applicants, the DSD conceivably could, in its capacity as the Central Authority, refuse to consent to E's adoption as it did in **TT**, notwithstanding the consideration by the Children's Court of the best interests of E. Indeed, in this matter the DSD has said that it would not issue a letter of approval unless E is declared to be '*adoptable*' which it says is not possible as a local placement exists for him. In essence, the DSD's view is that there is no way that the applicants may be considered as a placement option for E, because an intercountry adoption is entirely prohibited in the circumstances where any local placement is available to E and they are excluded from consideration in view of E's pre-identification by E.

[232] This would result unnecessarily result in further litigation to set aside the DSD's decision and delay E's placement. It clear from its Guidelines that the DSD itself appreciates that it is in the best interest of a child for his/her placement to be considered expeditiously. In addition, section 7(1)(n) of the Act makes it clear that in all matters in which the best interests of a child need to be determined, regard must be had to which action or decision would minimise further legal and administrative proceedings in relation to the child.

[233] Bearing this in mind, it is hoped that any decision made by the Children's Court as to the placement in the best interests of E will be respected by the DSD and it will issue a compliance certificate under section 263 should it be decided that E's adoption by the applicants is in his best interests. However, in order to avoid such a situation arising, I intend making an order that in considering the adoptability of E, his best interests must be taken into account and that the availability of a local placement shall not exclude a declaration as to the adoptability of E, but be one of the factors to be taken into account by both the appointed accredited adoption social worker and the DSD in considering the best interests of E. I similarly propose formulating an Order which would preclude the 'pre-identification' principle being blanketly applied in the current circumstances either by the appointed accredited adoption social worker or an accredited adoption agency, without regard to the best interests of E.

[234] It remains now only to consider what I have termed “*the technical defences*” raised by the DSD.

COMPLIANCE WITH THE RACAP PROVISIONS

[235] The relevant portions of section 232 of the Act provide:

“Register on Adoptable Children and Prospective Adoptive Parents

- (1) *The Director-General must keep and maintain a register to be called the Register on Adoptable Children and Prospective Adoptive Parents for the purpose of-*
 - (a) *keeping a record of adoptable children; and*
 - (b) *keeping a record of fit and proper adoptive parents.*
- (2) *The name and other identifying information of a child may be entered into RACAP if the child is adoptable as contemplated in section 230 (3).*
- (3) *The name and other identifying information of a child must be removed from RACAP if the child has been adopted.”*
(Emphasis added)

[236] The applicants seek a waiver of this provision. They maintain that in considering whether the listing of E on RACAP is necessary, the purpose of the listing of a child and prospective adoption parents on RACAP must be considered. The applicants argue that in the current circumstances, only two possible placements for E are realistically available; that with Ms. K on a semi-permanent foster-care basis, or with the applicants on a permanent basis. They maintain that adherence to the provisions of section 232 to ensure that there are no other local prospective adoptive parents who would be willing and suitable adoptive parents for E would thus serve no purpose in the current circumstances. The applicants stress that adherence of this section would only serve to delay the adoption E should his adoption by the applicants be recommended by the Children’s Court. The applicants further argue that it should also be borne in mind that there are circumstances where children may be adopted who were not placed on RACAP where the adoption of the child is by step fathers, foster parents and family members.

[237] Although the word ‘may’ is used in section 232, in the context and on a purposive construction of the section, the intention of the legislature was not to make the listing of an adoptable child’s name on RACAP optional. It is mandatory for the DG to keep and maintain a list of persons seeking to adopt children and children who are ‘adoptable’. The use of the word ‘may’ in this context indicates that only children who have been declared

adoptable name's may be placed on RACAP, indicating the names of those children who have not been declared adoptable may not. The section is thus permissive and not discretionary and in my view may thus not be waived.

- [238] The DSD correctly argues that an intercountry adoption cannot proceed unless a child has been listed on RACAP as being '*adoptable*'. Moreover, in terms of section 261(5)(g) of the Act, an intercountry adoption may not proceed unless the child's name has been placed on RACAP for a period of 60 days and no fit and proper adoptive parent in South Africa is found. This section provides:

"(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-

...

(g) the name of the child has been in the RACAP for at least 60 days and no fit and proper adoptive parent for the child is available in the Republic"

- [239] There is no question in my mind that this provision is peremptory. The intention of the legislature behind this provision and that contained in section 232 is that all adoptable children must be placed on the list and all prospective adoptive parents who qualify to be placed on RACAP should be afforded an equal opportunity to be considered as prospective adoptive parents to all children listed as adoptable on RACAP.

- [240] It is readily apparent that both the RACAP provisions and the rule against pre-identification are designed to ensure that a '*child-centred*' approach is adopted which ensures that the family most suitable for the child is found; not that an application for adoption is made for a child most suited to the family applying for adoption. The DSD is rightly of the view that foreign families cannot simply '*choose*' a child, and then attempt to adopt that child. That being said, in the circumstances of the present matter, this is not what the applicants have sought to do . Nevertheless it is still necessary that E's name be placed on RACAP to determine whether, apart from the applicants and Ms. K, there are no other more suitable adoptive parents for E.

- [241] Although it is in this Court's inherent jurisdiction to order that the applicants' application for the adoption of E be considered on an expedited basis, the provisions of section 261 (5) are clearly mandatory and E's name would need to have appeared on RACAP for 60 days before an

adoption order may be made by the Children's Court and may not be waived.

- [242] However, as the definition of a "*family member*" is broad enough to include the applicants, it would not be necessary that the further extended period required to enable the DSD to withdraw any consent set out in section 261(8) quoted above be complied with.

THE ABSENCE OF A WORKING AGREEMENT BETWEEN SOUTH AFRICA AND POLAND

- [243] DSD insist that existence of an intercountry working agreement is mandatory before any intercountry adoption can be considered by Polish citizens. It has already been demonstrated that this comes from the Guidelines and not the Act.

- [244] The terms of section 255 make it clear that a working agreement is only required where the prospective adoptive parents come from a country that is not a signatory to the Hague convention. Where the receiving country is a convention country, the terms of the Convention constitute the terms of the working document. In such an instance, a working agreement is discretionary and may be entered into "*for the purpose of supplementing the provisions of the Convention or to facilitate the application of the principles contained therein*". The section provides in relevant part:

"255 International co-operation

(1) *The President may on such conditions as he or she deems fit-*

- (a) *enter into an agreement with a foreign State that is not a State Party to the Hague Convention on Intercountry Adoption in respect of any matter pertaining to the intercountry adoption of children; and*
- (b) *enter into an agreement with a foreign State that is a State Party to the Hague Convention on Intercountry Adoption in respect of any matter pertaining to the intercountry adoption of children for the purpose of supplementing the provisions of the Convention or to facilitate the application of the principles contained therein.*"

- [245] It is thus readily apparent that the Act does not require that a working agreement be entered into between South Africa and Poland before an application for E's adoption of E can be brought. Should the DSD wish to do so in order to supplement the provisions of the Hague Convention it

may do so, but cannot use the absence of such a working agreement as a basis to oppose the current application. The DSD's Guidelines cannot impose more stringent requirements than those stipulated in the Act. Thus, the DSD's reliance on the Guidelines in insisting upon a working agreement being place with Poland in the face of the clear provisions of the Act is misconceived.

[246] Furthermore, the working agreement between countries is not restricted to the overarching agreement between state and state, but also between adoption agencies, referred to in section 260 of the Act, which are subject to the approval of the DSD. There would be nothing to preclude an international adoption agency tasked with the application to be brought by the applicants to the Children's Court to enter into an appropriate agreement with Poland.

[247] Section 260 of the Act provides:

"260. Entering into adoption working agreement

- (1) A child protection organisation accredited in terms of section 259 to provide intercountry adoption services may enter into an adoption working agreement with an accredited adoption agency in another country.*
- (2) A child protection organisation referred to in subsection (1)-*
 - (a) must provide the Central Authority with certified copies of all adoption working agreements entered into by that child protection organisation for approval thereof; and*
 - (b) may not act in terms of any such adoption working agreements before it has been approved by the Central Authority."*

[248] DSD submits that the President ought properly to have been joined to the current proceedings as it was contemplated in the notice of motion that the DSD be ordered to enter into a working agreement with Poland. The DSD stresses that Section 255 of the Act envisages that the President of South Africa must enter into such an agreement. However, the DSD argues that the President of the Republic cannot be compelled to enter into a working agreement with Poland as this would constitute a breach of the principle of separation of powers and would be a considerable overreach by the courts into the functions of Executive. Without a working agreement, the DSD states that an adoption order made would not be effective and enforceable in Poland.

[249] The applicants point out that the Hague Convention itself does not require that individual working agreements are in place to facilitate specific intercountry adoptions between individual states. They state where there is a conflict between domestic law and the convention, the convention must apply. Moreover, it is argued that there is nothing to preclude the DSD from motivating to the President that he conclude a working agreement (if required) with Poland to facilitate the adoption of E in this instance.

[250] The applicants stress that Poland has indicated its willingness, in fact, has requested to enter into a working agreement with South Africa. The applicants argue that the DSD cannot simply refuse an adoption to Poland, but is required to take the necessary steps to enter into or cause the President to enter into an intercountry working agreement, or an inter-agency working agreement and/or to waive the requirement for a working agreement in the best interests of E.

[251] These arguments have essentially become academic as in terms of their amended draft Order, the applicants have abandoned the relief sought in the notice of motion obliging the DSD to enter into a working agreement with Poland. What the applicants now contend is that:

251.1. The Children's Court, like any court, may be reluctant to grant an order where such order cannot be given effect to, and in order to prevent that from being a factor in a decision, and to avoid the necessity of relitigating the matter, the DSD should be ordered to give effect to any Order granted by the Children's Court.

251.2. The exact mechanisms to give effect to an adoption order granted in Poland are formulated in such a way in the amended draft order so as to direct the SDS to give effect to any adoption order that may be granted, without prescribing how to effect same.

[252] This in my view, deals adequately with the DSD's complaint that there is at present no existing working agreement with Poland. Should it feel that such an agreement is necessary, there is nothing to preclude it entering into a working agreement with Poland to facilitate E's adoption. It is, however, hoped that this will be done expeditiously in the best interests of E.

THE CONSENT GIVEN BY THE HLATSHWAYO FAMILY TO THE ADOPTION OF E BY THE APPLICANTS

[253] The DSD refutes the validity of the consent given by the Hlatshwayo family to the adoption of E by the applicants based on the provisions of Article 29 of the Hague Convention. This provides:

“There shall be no contact between the prospective adoptive parents and the child's parents or any other person who has care of the child until the requirements of Article 4, sub-paragraphs a) to c), and Article 5, sub-paragraph a), have been met, unless the adoption takes place within a family or unless the contact is in compliance with the conditions established by the competent authority of the State of origin.”

[254] The relevant provisions in Article 4 provide:

“An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin –

- a) have established that the child is adoptable;*
- b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests;*
- c) have ensured that*
 - (1) the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin,*
 - (2) such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing,*
 - (3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and*
 - (4) the consent of the mother, where required, has been given only after the birth of the child;”*

[255] The DSD complains that the applicants have had contact with the Hlatshhwayo family with negates their consent to the adoption of E by the applicants.

[256] This is a non-issue as section 233 of the Act makes it plain that only the consent of a parent or guardian is relevant. Moreover, although the minor child is less than 10 years of age, he made his preference known to me that he wished the applicants to adopt him and it may well be found, after

proper investigation, that he has the maturity and stage of development to understand the implications of such consent.

[257] In any event, article 29 only prohibits contact between the prospective adoptive parents and “*the child’s parents and any other person who has care of the child.*” The Hlatshwayo family have never cared for the child; the TLC has been responsible for his care, which it has, from time to time, by way of leaves of absences, delegated to the applicants .

[258] The consent of the Hlatshwayo family to the adoption of E by the applicants would thus, together with E’s and his mother’s consent that the applicants care for him, be but relevant factors for the Children’s Court to consider when considering the best interests of E.

THE APPOINTMENT OF A CURATOR AD LITEM

[259] The applicants initially sought the appointment of *a curator ad litem* to E so that his voice may be heard in any subsequent proceedings before the Children’s Court. This was opposed by the DSD on the basis that the applicants also identified who the *curator ad litem* should be and thus, had concerns about the curator’s objectivity. However, during argument, it was submitted by the applicants that this would not be necessary as it is contemplated that a report by an adoption social worker will be submitted to the Children’s Court who will fully canvass the best interests of E. This relief is no longer persisted with and thus need not be dealt with.

THE RELIEF SOUGHT IN THE AMENDED DRAFT ORDER

[260] The applicants have clearly experienced some difficulty in formulating an appropriate remedy. It is incumbent upon me to consider the relief now sought in the amended draft order attached to the applicants’ counsel’s heads of argument.

Referral of the matter to the Children’s Court

[261] I am satisfied that it is within my powers as the Upper Guardian of E to refer this matter to the Children’s Court and direct that an accredited intercountry adoption agency facilitate the submission of an application for the adoption of E by the applicants to the Children’s Court for its consideration.

[262] I stress that in TT, Dippenaar J made it plain that:

“[212] ... 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.”

[263] Although this statement was made with reference to the review application brought by the DSD to set aside its letter of consent to the adoption of L, it is a statement of general application. It certainly applies to this Court's powers in the present application to safeguard the best interests of E.

[264] In doing so, I do not prejudge the application but only wish that the applicants are afforded the opportunity to be considered as adoptive parents. I would expect that the Children's Court will apply the law as set out in the Act and the Constitution and evaluate solely the best interests of E in considering his placement, having regard to all the factors that the Act prescribes be considered in the process of this evaluation.

Directing an accredited adoption social worker to consider the adoptability of E

[265] The DSD is not comfortable with the relief sought that a private adoption social worker be appointed to consider whether E is “*adoptable*”; they argue that such a social worker would be commissioned and paid by the applicants and it would thus, not be likely that such social worker would canvass suitable local placements first. The DSD's view is that a ‘commissioned’ social worker, approached directly by prospective adoption parents who have already ‘*chosen*’ a child, would not be considered “*independent both because they have paid for the report and because of the private social worker's brief.*”

[266] I stress that it is my intention to direct that any adoption social worker appointed consider first and foremost, the best interests of E and that the applicants are neither summarily excluded from consideration by virtue of their prior association with E, nor by the fact that an alternative, local placement with Ms. K has been found. These directions will apply to any adoption social worker appointed and should allay the DSD's fears of bias on the part of any adoption social worker.

Interdicting the DG of the DSD and the Head of the Department of the DSD from removing E from the care of the TLC and placing him with Ms. K

[267] The applicant's seek an interim interdict precluding the DG of the DSD and the Head of the Department of the DSD placing the child in the foster care of Ms. K pending the outcome of their application to the Children's Court

for the adoption of E. Although this interdict is couched in final terms, it can only operate pending the outcome of the applicants' application to the Children's Court to adopt E.

[268] It is trite that an interim interdict will be granted in circumstances where *prima facie* right has been established, where there is no alternative remedy; there is a well-grounded apprehension of irreparable harm and the balance of convenience favours the granting thereof.

[269] As I am mindful of referring this application to the Children's Court to consider an application to be brought by the applicants for the adoption of E, the applicants would clearly have a *prima facie* right to ensure that E is not placed in the foster care of Ms. K pending the outcome of their application for the adoption of E.

[270] It is apparent from the provisions of the Act set out above that the adoption by a foster parent takes precedence in matters of adoption. Thus, should E be placed in Ms. K's foster care and she is willing to adopt E, she may be afforded preference in any application for the adoption of E by the applicants. It is in all probability to avoid such a situation arising that the applicants seek an interdict precluding E being placed in Ms. K's care pending the outcome of the application they hope to bring in the Children's Court to adopt E. The interdict sought would also prevent E establishing a substantial bond with the K family which might affect the outcome of their application to adopt him and/or strengthen the case for E to be placed in the care of Ms. K.

[271] I also have little doubt that the interdict is also sought in the best interests of E as it would be detrimental and traumatic for him to be placed with Ms. K at this stage, should it ultimately turn out that the applicants are able to adopt E. This does, however, mean that E must remain institutionalised pending the outcome of the current dispute between the parties.

[272] I am satisfied that the applicants have a reasonable apprehension of harm should the requested interdict not be granted. In terms of section 173 of the Act, the Head of the Department ("*HOD*") of the DSD (the fifth respondent, who does not oppose this application) may move a child already in alternative care, without an order of court in certain circumstances. In moving the child from one province to another, all that is required is the agreement of the HOD of the other province; a court order is not required. It is for this reason that an interdict is sought, preventing such a move, without the involvement of a Court.

- [273] Similarly, in section 174 of the Act, a temporary move of a minor for a period of not more than six months is permitted, and in terms of section 175, if the child is being reunited with immediate or other family members. This I am satisfied establishes the requirement that there be a reasonable apprehension that should the proposed interdict not be granted, the applicants, and indeed also E, may suffer irreparable harm.
- [274] The applicants submit that the balance of convenience and the best interests of E dictate that the *status quo* should be preserved and he should remain in the care of the TLC, where he has been for nearly 7 years, with visitation rights being afforded to the applicants and telephonic or video contact with them when they are not in the country while his future is being determined. The TLC is the only permanent home he has ever known and he appears to be happy and have friends there and thus, it would be in his best interests to remain there pending the outcome of present litigation between the parties.
- [275] In **National Adoption Coalition of South Africa**²⁴ it was stated that a minor child “*is to be placed in environment best suited to meet his or her emotional, psychological and physical needs.*” The continued placement of E with the TLC would be the environment best suited to meet his needs pending the outcome of the application for his adoption to be brought by the applicants. It would not be in his best interests to be temporarily placed with Ms. K as this is not an environment with which he is familiar.
- [276] The applicants argue that by virtue of their bond already established with E that they have reasonable prospects of being able to adopt E. Without prejudging the matter, I tend to agree; they have as precedence the approach taken by Dippenaar in **TT**.
- [277] Although no undertaking was provided on the papers, counsel for the DSD indicated that his client had no intention of placing E with Ms. K until the dispute regarding his placement had been finally resolved. I appreciate this approach. However, as a precautionary measure, I propose to grant the requested interdict. While it is not ideal for any child to remain institutionalised for longer than may be necessary, the emotional and psychological upheaval which would be caused to E should he be placed in the foster care of Ms. K at this stage will be extremely damaging to E. Section 157 of the Act requires that the court orders should be “*aimed at*

²⁴ **National Adoption Coalition of South Africa v Head of Department of Social Development KwaZulu-Natal and Others** 2020 (4) SA 284 (KZD) at paragraph 5(c)

securing stability in [a] child's life". In this instance, the interdict sought will provide such stability.

- [278] However, should it be found that it is in the best interests of E that he remain in South Africa and be placed with Ms. K, it is important that he continues to have contact with Ms. K and her family as well as with the Hlatshwayo family pending the outcome of the applicants' application for the adoption of E. This is also important as the applicants have tendered to enter into a post-adoption agreement which would provide that E continue to have contact with the K and Hlatshwayo families.

The declaratory relief sought

- [279] The applicants seek the following relief, purportedly, "*for purposes of determining the best interests of the aforesaid minor child*", which I will deal with in turn.

279.1. First, the specific circumstances in which the applicants' relationship with the minor child developed does not fall within the definition or "*pre-identification*". I agree that in the particular circumstances of this case, the applicants' prior contact with the minor child was not for the purpose of pre-identifying a child for adoption. In any event, on the strength of the approach taken by Dippenaar J in TT, any prohibition against the prior contact between a minor child and prospective adoptive parents, would be outweighed by the best interests of E; indeed this prior contact should properly serve to afford preference to the applicants' adoption of E, as in the case of foster parents and caregivers in national adoptions.

279.2. I thus propose to declare that in determining the adoptability of E and in assessing his best interest, the applicants' prior contact with E shall not be regarded by the appointed accredited adoption social worker or the accredited adoption agency appointed to facilitate the application for the adoption of E by the applicants, as bar to his adoption by the applicants.

279.3. Second, the relationship established between the applicants and the minor child without the intention of finding a child to adopt, does not fall into the category of "*baby shopping*". If relief is granted as set out in subparagraph 1 above, there is no need for

this relief as the concept of “*baby-shopping*” is simply an extension of the prohibition against pre-identification.

279.4. Third, the pre-existing relationship which has formed between the applicants and the minor child shall not be considered a hindrance in the consideration of their adoption of the minor child by the Children’s Court. This Court is not permitted to unduly fetter the discretion of the Children’s Court in its determination of what is in the best interests of E. However, on the strength of the authority of **TT** and this judgment, when considering the best interests of E, his close bond with the applicants should be considered by the Children’s Court as strengthening their case for the adoption of E. Moreover, there is no provision in the Children’s Act which would preclude the applicants adopting E because of their prior relationship with him and the Guidelines prescribing this cannot lawfully stipulate conditions for adoption that go beyond those stipulated in the Act.

279.5. Fourth, the subsidiarity principle is not the overriding principle and shall not prevent E’s adoption by the applicants contrary to the best interests of E. This is in accordance with the Hague Convention, the Act, the findings of the Constitutional Court in **AD** and this Court in **TT**; as such, the declaratory relief sought in this regard would be appropriate.

The intergration of E into the K family

[280] In terms of paragraph 5 of the draft Order, an order is sought that if E is placed with Ms. K that a further assessment and an integration program be considered in order to protect E. In support of the relief sought, the applicants argue that the attitude of Ms. K – “*reflected not only during the visit by the applicants, but also in her answering affidavit, the report of E’s first visit, as well as the incomplete and incorrect reports on first respondent by ENGO in Heilbron, are sufficient to raise concern about the child if he is placed directly with the first respondent without the appropriate preparation and oversight thereafter.*”

[281] I am mindful that the relief sought by the applicants has been sought solely in the best interests of E. Should this application or their application for the adoption of E not be successful, they do not wish E to be placed with Ms. K without a proper intergration program being followed prior to his placement.

[282] This notwithstanding, should it be decided that E should be placed with Ms. K, the Children's Court is pre-eminently suited to ensure that any family integration steps which ought to be taken to assist E to properly form familial bonds and to feels safe and secure before he is placed with Ms. K be taken. I have trust that the Children's Court will ensure that these steps are taken.

The conclusion of a post-adoption order with E's biological family

[283] The applicants maintain that in the event that the Children's Court find that E ought to be placed with the applicants, the relief sought in paragraph 6.3 of the draft order directing the Children's Court to consider a post adoption order requiring access to his biological family is purely for the protection of the interests of E. Whilst I have no doubt that such an Order would be in the best interests of E, again, this is an issue that would need to be determined by the Children's Court after a thorough investigation as to whether it would be in the best interests of E to maintain ties with his biological family. This court is not empowered to prescribe to the Children's Court what would be in the best interests of E.

That the referral of the applicants' application for the adoption of E be expedited

[284] The applicants maintain that it is in E's best interest to have the matter of his future decided as soon as is possible, and that his future be secured. They rely on **Fraser**²⁵ _which emphasised_ the importance of finalising the decisions relating to a minor child and that the "*continued uncertainty as to the status and placing of the child cannot be in the interests of the child*". I agree with this and thus propose making an Order that this matter be referred to the Children's Court on an expedited basis. This is in any event in accordance with the DSD's Guidelines.

[285] The applicants finally argue that the relief sought in claims 1,2 and 3 of their draft order can be immediately granted. They argue that question of the "*adoptability*" of E and the adoption application can commence simultaneously, if so authorized, by a suitably qualified adoption social worker, and the Children's Court can then proceed to make a determination in the best interest of E. I cannot see why this could not be achieved.

Costs

²⁵ Fraser v Naude and Others 1999 (1) SA 1 (CC) at para 9

- [286] The applicants sought costs against the respondents only in the event that the matter was defended. The applicants maintain that DSD has not only opposed the relief sought, but has misconstrued the relief sought and therefore a punitive costs order is sought as against the second respondent. No costs were sought against Ms. K.
- [287] There is absolutely no basis for this relief. I find that the initial opposition of the application by the DSD was *bona fide* pursued on the basis of the its own internal policies and Guidelines, which it clearly believed it was obliged to follow.
- [288] However, I cannot see why the costs of the application should not follow the result and thus intend ordering the DSD to pay the costs of this application. In this respect, I point out that by the time this matter was argued, the judgment of Dippenaar J in **TT** had been delivered in which he criticised the DSD's approach in blindly applying its Guidelines without regard to the best interests of the children under consideration before him. It would have been readily apparent to the DSD that the facts of that case were directly relevant to facts in the present matter. The DSD would also have been aware that Dippenaar J had set aside its Guidelines as being unconstitutional- in not prioritising the best interests of children, and unlawful-by stipulating additional requirements for the adoption of children not prescribed in the Children's Act. In these circumstances, the DSD ought not to have proceeded with its opposition to the current application, alternatively ought to have requested that it be postponed pending the outcome of the appeal in **TT**.

ORDER

- [289] Having regard to all the considerations outlined above, I make an Order directing that-
1. The applicants' proposed application for the adoption of E is referred to the sixth respondent for its consideration on an expedited basis.
 2. An accredited adoption agency be appointed by the applicants to facilitate an application by them to the Children's Court for the adoption of E within 90 days of this Order and that neither the fact that an alternative local placement has been found for E nor that the applicants have had a pre-association with E shall be considered as a bar to such an application.

3. An accredited adoption social worker appointed by the applicants and/or such accredited adoption agency consider whether the minor child is '*adoptable*' in terms of section 230 of the Children's Act 30 of 2005 ('*the Act*') and prepare a report to the Children's Court as required in terms of section 239(1)(b) within 60 days of such appointment.
4. In considering the adoptability of the minor child and in reporting to the Children's Court, neither the fact that an alternative local placement has been found for E, nor that the applicants have had a pre-association with E, shall be considered as a bar to a declaration as to his adoptability.
5. In the event that the appointed adoption social worker declaring E to be adoptable, that E's name be placed on Register on Adoptable Children and Prospective Adoptive Parents (RACAP) within five working days of such declaration.
6. The third and fifth respondents are hereby interdicted from removing E from the care of the fourth respondent without an Order of the Children's Court, alternatively this Court, pending the outcome of the application to be made by the applicants to the Children's Court for the adoption of E.
7. Pending the outcome of the application for the adoption of E by the applicants, the applicants and the first respondent shall be permitted to have access to E as approved by the fourth respondent acting in E's best interests.
8. The Court file is declared to be confidential and the anonymity of the applicants and E must be protected by all of the parties in this matter.
9. The applicants and the DSD are directed to ensure that within 10 business days of this Order, all references to the applicants in the papers before this Court are redacted and replaced with the applicants' initials and that all references to the minor child shall be replaced by "*E*".
10. The second respondent pay the costs of the application.

S.M. WENTZEL

Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 12 June 2023
Judgment: 26 October 2023

Appearances:

For Applicants: DM Ainslie
Instructed by: NLA Legal Inc.

For Second Respondent: TM Malatji
Instructed by: State Attorney