Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 13964/2015

In the matter between:

JGB	**First Applicant**
AB	**Second Applicant**
And	
THE PRESIDING OFFICER,	
CHILDREN'S COURT, WYNBERG, N.O.	**First Respondent**
AND 9 OTHERS	**Second – Tenth Respondents**

Court: Justice M I Samela *et* Justice J Cloete

Heard: 30 October 2015 and 25 February 2016

Delivered: 26 April 2016

JUDGMENT

CLOETE J:

Introduction

[1] The applicants, a married couple, are the prospective adoptive parents of a girl, H, who has been in their uninterrupted care since she was almost 3 months old and is now 7 years and 8 months old. They seek the review of various decisions of the first respondent (the magistrate) made during the course of adoption proceedings which commenced in February 2012 but are still ongoing, together with certain declaratory relief. This application is now opposed only by the second and third respondents who are H's biological maternal grandfather and his current wife to whom H is not biologically related. They also oppose the adoption proceedings and seek to adopt H themselves.

[2] Four decisions are sought to be reviewed. First, that the second and third respondents' application must proceed despite the absence of a letter of recommendation from the provincial head of social development as prescribed by s 239(1)(d) of the Children's Act 38 of 2005 (*'the Children's Act'*). Second, that the applicants make H available for psychological assessment by a Ms Kolbe, a mental health professional appointed by the second and third respondents, or by another mental health professional of their choice. Third, that the fourth respondent, who is H's biological mother and whose consent to her adoption has already been held to have been validly given, nonetheless be admitted as a party for the purpose of opposing the applicants' adoption application. Fourth, that by virtue of the definition of a "parent" in the Children's Act the fourth respondent, whether as a "party" or a "parent", is entitled

to be provided with legal representation in the adoption proceedings at all times so as to avoid a miscarriage of justice.

[3] The declaratory relief sought centres principally on the legal status of a biological parent, who has validly consented to the adoption of his or her child, in subsequent adoption proceedings. It is thus linked to some of the review relief. The applicants ask this court to declare that once a biological parent has validly given consent, he or she is not a "party" for purposes of an adoption application as contemplated in s 239 of the Children's Act, but is permitted to participate in the proceedings in terms of s 58 thereof *'…in circumstances where the evidence led or argument addressed to the Court is relevant to the proceedings and in the interests of the child or children concerned'.*

[4] They also ask this court to declare *ultra vires* Chapter 15 of the Children's Act[1] the wording of a certain pro forma order created by the magistrate in which parental responsibilities and rights of the biological parent(s) are nonetheless retained[2] upon the granting of an adoption order as are *'…all claims to contact with the child by any family member'.* During the course of the adoption proceedings the magistrate indicated that she makes these orders from time to time and that they do not necessarily form part of any post-adoption agreement as contemplated in s 234 of the Children's Act[3].

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1 Those sections of the Children's Act dealing with adoption.

2 There will of course be circumstances where the immediately preceding holder of parental responsibilities and rights is not the biological parent, but the same applies.

3 S 234 only permits communication, contact and the provision of information by agreement, and not the retention of any parental responsibilities and rights.

[5] Ancillary to the relief which the applicants seek are orders for confidentiality; the finalisation of the adoption proceedings before another presiding officer (various allegations are made concerning the magistrate's alleged partiality); and that the magistrate bear the costs of this application in her representative capacity. Alternative relief is also sought in the event of this court finding that the magistrate's decision to proceed with the second and third respondents' adoption application in the absence of the s 239(1)(d) recommendation should not be set aside.

Factual background

[6] The facts which are relevant to the determination of the issues, and which are largely common cause, are as follows.

[7] H was born on 8 August 2008. At that time the fourth respondent was an unmarried minor and her consent to H's adoption was given in terms of s 18(4)(d) of the erstwhile Child Care Act 74 of 1983 (which Act was repealed when the Children's Act came into effect on 1 April 2010). The fourth respondent was entitled to provide consent in terms of s 18(4)(d) without the assistance of her guardian[4] but was in fact assisted by her biological mother who was one of her guardians.

[8] The fourth respondent agreed to the applicants adopting H although her formal consent records that it was to the adoption of H by *'a person or persons unknown to me.'* The fourth respondent signed the consent to adoption on 13 August 2008 (when

[4] Such assistance is now required in terms of s 233(1)(a) of the Children's Act.

H was 5 days old). On the same date magistrate Du Toit of the Bellville Children's Court, in her capacity as a commissioner of child welfare, made a determination that such consent had been furnished validly and voluntarily as required by s 18(5) of the Child Care Act.

[9] On 5 November 2008 H was placed in the applicants' care as prospective adoptive parents pursuant to a recommendation by a social worker to the Bellville Children's Court that they were *'geskik om tydelik as veiligheidsouers op te tree totdat die finale aannemingsbevel gemaak kan word'.* (The applicants are also the adoptive parents of a boy, J, who was born on 4 May 2007 and placed in their care when he was 5 months old). On 12 November 2008 a formal "detention" order was made for H to remain in the applicants' care pending the finalisation of their adoption application. The matter was transferred to the Wynberg magistrate's court for that application to be finalised given that the applicants (and therefore H) reside within that court's jurisdiction.

[10] The applicants completed their adoption application on 5 June 2009. The relevant social worker's report to the Wynberg Children's Court was completed on 22 June 2010. On 14 October 2010 the applicants were provided with a s 239(1)(d) recommendation. On 29 March 2011 the magistrate requested the social worker to make further attempts to locate H's biological father, who is the fifth respondent, and he was traced during October 2011.

[11] On 19 October 2011 the magistrate, without prior notification to the applicants, instructed them to bring H to court in order for the second and fifth respondents to

meet her. The applicants had major misgivings about this and approached the High Court on an urgent basis to suspend the fifth respondent's contact. An order was granted to this effect on 11 November 2011. (The fifth respondent later consented to the applicants' adoption of H on 2 April 2014, and a post-adoption agreement has been concluded but will only take effect, with the approval of the court, if the applicants succeed in their adoption application as prescribed by s 234(4) and (6) of the Children's Act).

[12] The applicants' adoption application was scheduled to commence in the Wynberg Children's Court on 27 February 2012. However it did not proceed that day on the merits, given issues relating to the fifth respondent.

[13] On 28 June 2012 the second respondent applied for H's adoption. On 3 December 2012 the former head of the department of social development, Eastern Cape (in whose area of jurisdiction the second respondent resides) purportedly furnished him with a s 239(1)(d) recommendation. (The current head, Mr Stanley Khanyile, has deposed to an affidavit in these proceedings in which he states that the "approval" of 3 December 2012 was irregular and in any event not a s 239(1)(d) recommendation).

[14] A day after that "recommendation" was provided to the second respondent, i.e. on 4 December 2012, the fourth respondent claimed that she had not validly consented to H's adoption, alternatively that she wished to withdraw such consent.

[15] On 25 October 2013 and after hearing oral evidence the magistrate ruled that the fourth respondent's consent to the adoption had been validly given and could not be withdrawn. The fourth respondent has not sought to review or appeal this ruling.

[16] However on 3 March 2014 the magistrate nonetheless ruled that the fourth respondent *'…as a parent who was opposing the adoption, had a right to continue to be a party to the proceedings and be legally represented…'*[5]. Numerous postponements were occasioned by the fourth respondent's subsequent failure to secure legal representation. At various stages legal representation was secured and she participated in the proceedings. It is apparent from the record that the fourth respondent sought contact with H and did not oppose the applicants' adoption application.

[17] On 5 March 2014 the magistrate ordered that the second respondent's adoption application was defective because it did not comply with s 231(a)(i) of the Children's Act in that the second respondent had not applied jointly with his current wife, the third respondent.

[18] On 7 March 2014 the second and third respondents jointly applied for H's adoption. Their application was not accompanied by a s 239(1)(d) recommendation.

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5 Application papers para 91, p47, Item OOO review bundle, p914.

[19] On 4 August 2014 Ms Von Solms (chief social worker) and Ms D Puchert (senior social worker) of Christelik-Maatskaplike Raad, East London (CMR) addressed a letter to the head of adoptions, child welfare, Cape Town, in relation to H as follows:

> *'Our telephone conversation on 1 August 2014 refers.*
>
> *On 24 July 2014 a panel meeting was held at the offices of the Department of Social Development Eastern Province as* [the second respondent] *requested a recommendation letter to adopt his granddaughter as he was informed at the Department of Justice at Wynberg* [sic]. *A discussion was held and the report that went from CMR East London did not recommend a straight adoption but rather that play therapy should start first while* [the second respondent] *builds a relationship with the concerned child. Mrs Mtsi from the Department of Social Development is thus not able to provide a recommendation letter for adoption.*
>
> *However, the panel requested the possibility that the reports be made available to CMR and the panel to assist* [the second respondent]*. The question was also raised of the possibility of* [H] *to start meeting her grandfather and other family through play therapy as was recommended in the report dated 12 June 2014.*
>
> *Your kind assistance in this matter will be appreciated.'*

[20] Referring to this letter, Mr Khanyile states that:

> *'14. …the CMR did advise the Head of Adoptions, Child Welfare, Cape Town on 4 August 2014 that Ms Mtsi from my Department (Ms Mtsi is situated in my Provincial Office and is now responsible for dealing with s 239(1)(d) recommendation letters in my Department) was not able to provide the recommendation letter for adoption.'*

[21] According to Mr Khanyile the aforementioned letter was also emailed to the clerk of the Wynberg Children's Court on 5 August 2014.

[22] On 23 March 2015 CMR again emailed the aforementioned letter to the clerk. (It appears that this letter had previously not found its way to the attention of the clerk of the Children's Court or the magistrate). At this stage the adoption proceedings (both those of the applicants and the second and third respondents) were continuing in the Wynberg Children's Court.

[23] On 19 May 2015 the magistrate ruled that the second and third respondents (for purposes of their own adoption application) were entitled to appoint Ms Cleophas Kolbe (a psychologist) to conduct a further assessment of H (there is a dispute as to whether a previously appointed psychologist, Mr Terence Dowdall had indeed been appointed for this purpose by the second respondent's erstwhile attorneys on his instructions).

[24] Thereafter and on 2 July 2015 the magistrate ruled that the second and third respondents' adoption application would proceed despite the absence of the s 239(1)(d) recommendation. She also ruled that the applicants were to make H available to Ms Kolbe for further assessment.

[25] Dissatisfied with these rulings the applicants obtained a High Court order on 21 July 2015 staying the proceedings in the Children's Court and suspending the magistrate's order that H be made available to Ms Kolbe pending finalisation of a High Court review. The present application was launched on 27 July 2015.

[26] In Mr Khanyile's affidavit, deposed to on 21 October 2015, he expresses the firm view that the provincial department best suited to reconsider issuing a s 239(1)(d) letter of recommendation to the second and third respondents is that of the Western Cape:

> *'12. Even though it is apparent from the founding affidavit from the applicants that the Head of the Department of Social Development of the Western Cape has provided a s 239(1)(d) recommendation in favour of the applicants, I am of the view that the second respondent should approach* [this department] *to consider, given the fact that that the second respondent and his wife are interested in adopting* [H]*, whether that Department would be willing to consider this matter afresh and/or whether it is satisfied that the provisions of the Act have been complied with given the views expressed by the second respondent and in fact the biological father of* [H].*'*

[27] In an affidavit deposed to by Mr Robert MacDonald, the provincial head of the department of social development, Western Cape on 23 February 2016, he stated that no such application has yet been lodged by the second and third respondents. Mr MacDonald confirms that the applicants previously met the relevant requirements stipulated in the Children's Act and their s 239(1)(d) recommendation was therefore provided (on 14 October 2010). It is not suggested by any of the parties that the applicants do not still meet these requirements.

Issues to be determined

[28] It is against this background that the issues may be crystallised as follows:

28.1 Whether a s 239(1)(d) recommendation is a peremptory requirement for an adoption application to be entertained by a court (if it is, then the magistrate's rulings that the second and third respondents were entitled to appoint

Ms Kolbe, and that H be made available for assessment by Ms Kolbe, would fall away because they were made during the course of proceedings that were not competent);

28.2 Whether a parent who has validly consented to the adoption of his or her child is nonetheless a party to subsequent adoption proceedings for purposes of the Children's Act, which by necessary implication would mean that he or she is entitled to oppose the child's adoption by a particular prospective adoptive parent or parents, given that a "party" to proceedings must be able to participate and seek relief if he or she so wishes; or whether such a person is only permitted the participatory rights provided by s 58 of the Children's Act;

28.3 Irrespective of whether such a person is a "party" or a "parent" for purposes of subsequent adoption proceedings, he or she must at all times enjoy legal representation to avoid a miscarriage of justice (not to the child but to the specific person concerned); and

28.4 The competency of the pro forma orders which the magistrate makes from time to time.

S 239(1)(d) recommendation

[29] S 239(1) of the Children's Act sets out the statutory requirements for an adoption application:

> ***'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.'*
>
> (emphasis supplied)

[30] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* [6] the Supreme Court of Appeal summarised the law of interpretation as follows:

> *'… Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute*

[6] 2012 (4) SA 593 (SCA) para [18].

what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[31] In the matter of *In re XN*[7] the South Gauteng High Court, on special review, held that while the provisions of s 239(1)(d) are peremptory, non-compliance may be condoned only in exceptional circumstances and if warranted:

'[13] In the child commissioner's opinion, the s 239(1)(d) letter was "a letter of recommendation", and the –

> *"person drafting this letter has the same information as the commissioner of the children's court and as a result recommends the adoption or not… Surely the court is not bound to the letter of the recommendation and may overrule it should it be necessary. As a result I fail to see why this letter should hijack the finalisation of the adoption proceedings".*

[14] It must be emphasised that in terms of s 239(1)(d) of the Act "an application for the adoption of a child must be accompanied by a letter by the provincial head of social development recommending the adoption of the child". The requirement of the s 239(1)(d) letter is therefore peremptory. It reaffirms and recognises the role to be played by governmental institutions in the protection and wellbeing of children within our borders and those leaving them. The legislature deemed it necessary in the best interests of children to include the s 239(1)(d) letter as a formal requirement in terms of the Act, thereby involving oversight by public officials in the social worker's assessment process, clearly a commendable process. The stringent provisions of the Act encompass protective mechanisms in regard to adoptions, which are clearly to prevent what is becoming a reality that children are being used for human trafficking, as well as

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[7] 2013 (6) SA 153 (GSJ) – also referred to in the adoption proceedings as *Ndala* given its then unreported title.

for illegal purposes, and it is the duty of the courts to ensure that such practices do not result from adoptions.

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

[16] This court addressed an epistle to the department for it to provide reasons for the non-compliance of the s 239(1)(d) letter, and a letter supporting and recommending the adoption addressed to the children's court by the department materialised, almost a year after the order for adoption was granted. It appears that had the formal requirements of the s 239(1)(d) letter not been dispensed with by the child commissioner, the child would have been highly prejudiced, as he would not have accompanied his mother and the applicant to Trinidad. The adoption of the child would have been delayed. Such a delay would clearly not have been rational or reasonable in the circumstances of this case.

…

[19] However, although the best interests of the child cannot be sacrificed at the altar of formalism, if the requirement of the s 239(1)(d) is not complied with, the objectives of the Children's Act will be lost. The children's courts are charged with overseeing the wellbeing of children, examining the qualifications of applicants for adoption and granting adoption orders. To carry out their functions effectively and conscientiously they rely on the efficient collaboration of all stakeholders, the department and social workers to comply with their respective obligations in terms of the Act. Non-compliance with the provisions of the Act will delay the speedy facilitation of adoption applications, bringing the administrative processes to a halt, if not into disrepute. It should be a concern when those who are empowered by legislation to fulfil their functions appear recalcitrant, especially in matters involving the vulnerable members of our society. Nevertheless, in my view this does not give the child commissioner carte blanche to

condone non-compliance with the provisions of the Act. This can only be done if the circumstances are exceptional and warrant it, as in this case.' [8]

[32] The facts at the magistrate's disposal when she ruled on 2 July 2015 that the absence of the s 239(1)(d) recommendation should not delay the second and third respondents' adoption application were the following.

[33] H had been in the applicants' uninterrupted care since 5 November 2008 when she was just under 3 months old. Their adoption application was completed on 5 June 2009, more than 6 years previously, and they had obtained the required s 239(1)(d) recommendation following upon the implementation of the Children's Act[9] as far back as 14 October 2010.

[34] The second respondent only launched his initial adoption application on 28 June 2012 (the reasons for the delay are in dispute but in my view are not materially relevant in light of the subsequent chronological facts). The second respondent was made aware on 5 March 2014 that his initial adoption application was defective. The joint application of the second and third respondents followed 2 days later on 7 March 2014.

[35] On 4 August 2014 the clerk of the Children's Court was notified that the second and third respondents' s 239(1)(d) recommendation would not be forthcoming from the

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8 S 48(1)(a) of the Children's Act affords the child commissioner the additional power to grant auxiliary relief in respect of any matter contemplated in s 45(1), which in turn relates *inter alia* to the adoption of a child. *'Auxiliary'* is defined in the Concise Oxford English Dictionary (10th ed, revised) as meaning *'providing supplementary or additional help and support'.*

9 Which introduced this requirement.

department of social services, Eastern Cape. Assuming for present purposes that this notification did not reach the magistrate, it must surely have done so by 23 March 2015 when it was again transmitted at the specific request of the clerk of the Children's Court. Neither the second nor third respondents took any steps thereafter to challenge what was effectively a refusal by the department to furnish that recommendation. Neither the second nor third respondents requested that the required recommendation be dispensed with by the magistrate in terms of s 48(1)(a) of the Children's Act and that their adoption application should proceed on that basis.

[36] The magistrate reasoned that the second respondent's adoption application had been ongoing for 3 years; that he had previously been issued with a s 239(1)(d) recommendation for what turned out to be a defective application; that the prejudice which the second respondent would suffer should he not be permitted a further opportunity to secure the recommendation would be enormous; and that *'the court intends doing whatever it can in the circumstances, which would be to subpoena the HOD, if necessary, with the intervention of the Minister of Social Development's office to ensure that such letter is* [acquired]*'.* Notwithstanding the communications from CMR to the clerk of the Children's Court of 5 August 2014 and 23 March 2015, the magistrate appears to have concluded that the department was inexplicably dragging its heels. There is no evidence that this was the case.

[37] The rationale for the magistrate's ruling was[10]

[10] Item DDD review record bundle, para 139, p69 of the application papers.

> *'In the circumstances, I am satisfied that this defect in Mr Mbinda's application can still be remedied. I do not believe it is reasonable not to give him any further time to remedy that as long as it is a very reasonable period that is afforded to him. I believe that there appears to be a strong likelihood that a favourable decision will be made in this regard. And in the circumstances, I am going to allow him to proceed with his adoption application. This matter is far from finished. If by the time he reaches the end of his case this letter is not forthcoming, the Court will, at that point, decide whether or not to allow any further time for such certificate. In all likelihood, [I] may then, in line with the Ndala decision, … apply the principles of the Ndala decision and decide to proceed without that. But I am not going to pre-judge this matter. I will deal with it at the appropriate stage.'*

[38] In my view the magistrate misinterpreted both s 239(1)(d) and the findings in the matter of *In re XN* on two fundamental bases. First, the court specifically warned against presiding officers in Children's Court matters assuming that they have carte blanche to condone non-compliance with the provisions of the Children's Act even in circumstances where the relevant stakeholders (in that case, the provincial department of social development) fail to comply with their statutory obligations. It was held that even in those instances, the circumstances which would permit condonation for non-compliance must be exceptional and warranted. Second, in the present case it was not a question of the absence of a recommendation (as occurred in *In re XN*) but rather a refusal to provide one. To the extent that the refusal of the recommendation was considered to be wrong, it was the second and third respondents who should have pursued their review remedies. It was not for the magistrate to allow their adoption application to nonetheless proceed because in her view this was a "defect" which could either be remedied or reconsidered by her at a later stage; and moreover her opinion regarding a favourable outcome for the second respondent did not appear to be based on any objective facts.

[39] Here, the magistrate entertained the second and third respondents' adoption application for 5 months before there was any indication whether a s 239(1)(d) recommendation would even be forthcoming (i.e. from 7 March 2014 until 5 August 2014). She furthermore treated that application as being properly before her for more than a year (even after the clerk was informed in March 2015 that such recommendation would not be forthcoming) until ruling on 2 July 2015 that the application should nonetheless proceed for the reasons already mentioned.

[40] However, the second and third respondents' adoption application was not properly before the magistrate; no exceptional circumstances were advanced to justify condonation of the peremptory s 239(1)(d) recommendation; and in light of the department's refusal to provide one, condonation would in any event not have been competent.

[41] The magistrate's ruling thus falls to be set aside. It follows that her rulings made in respect of the further assessment of H by Ms Kolbe must also be set aside.

Participation of parent who has validly consented to adoption

[42] The magistrate appears to have admitted the fourth respondent as a party to the adoption proceedings notwithstanding the fact that the consent signed by her was in respect of *'a person or persons unknown to me'* (thus an undisclosed adoption) and reflects that the fourth respondent was informed that *'(ii) she is not entitled to be present when the application for adoption is considered unless allowed to be present*

in the interests of the child at the discretion of the court'.[11] Furthermore, the fourth respondent was admitted as a party after the magistrate had already ruled that her consent had been validly given, and in these circumstances the fourth respondent should not have been permitted to "oppose".

[43] A "parent" is defined in the Children's Act as excluding *inter alia* one whose parental responsibilities and rights in respect of a child have been terminated. Although in my view the fourth respondent's parental responsibilities and rights would only fully terminate upon the granting of an adoption order, what needs to be considered is what role, if any, a person in the position of the fourth respondent would have in subsequent adoption proceedings.

[44] Having consented, her parental responsibilities and rights became curtailed because certain of such rights were conferred, initially on H's place of safety, and thereafter upon the applicants pending finalisation of their application for adoption. Implicit in a consent to adoption is an election not to exercise any parental rights or to meet any parental obligations in the future. Also implicit in a consent to an undisclosed adoption (by *'a person or persons unknown to me'*) is the election not to have any say in who the prospective adoptive parents should be (even though the evidence in the present matter is that the fourth respondent in fact approved the applicants as prospective adoptive parents before H was initially placed in their care).

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[11] Form 12 of the regulations promulgated under the (now repealed) Child Care Act, item F of review record, p28.

[45] However the legislature appears to have recognised that persons such as those in the position of the fourth respondent should nonetheless retain the right to adduce evidence in subsequent adoption proceedings, given s 58 of the Children's Act which reads as follows:

> ***'58 Rights of persons to adduce evidence, question witnesses and produce argument***
>
> *The following persons have the right to adduce evidence in a matter before a children's court and, with the permission of the presiding officer of the children's court, to question or cross-examine a witness or to address the court in argument:*
>
> *(a) a child involved in the matter;*
> *(b) a parent of the child;*
> *(c) a person who has parental responsibilities and rights in respect of the child;*
> *(d) a care-giver of the child;*
> *(e) a person whose rights may be affected by an order that may be made by the court in those proceedings; and*
> *(f) a person who the court decides has a sufficient interest in the matter.'*

[46] On a plain reading of the aforementioned section a person contemplated therein has the right to place evidence before the presiding officer, but may only question, cross-examine or address the court in argument with the permission of the court. The presiding officer is thus vested with a discretion which would have to be exercised judicially.

[47] It would seem that the magistrate conflated "party" and "parent" because, although she ruled on 3 March 2014 that the fourth respondent had a right to continue as "a party to

the proceedings", on 17 June 2014 she handed down a further ruling on the fourth respondent's right to be present, but relied on s 57 and s 58 of the Children's Act:[12]

> *'Chapter 15, the adoption chapter, does not have any specific sections that relate to procedures apart from reference to the forms that are involved and therefore the provisions of the sections in chapter four would then relate to procedures in adoption matters as well.*
>
> *Section 57 of the Act, which falls under chapter four, speaks of the compulsory attendance of persons involved in proceedings and mentions that:*
>
> > *"The clerk of the Children's Court may, by written notice in the prescribed manner, request a party in a matter before a Children's Court, a family member of a child involved in the matter or a person who has another interest in the matter, to attend the proceedings of the Children's Court."*
>
> *And then if one looks at the definition of a party, that includes a parent. If one looks at a family member, that again includes a parent. Section 58 then speaks of the right of persons to adduce evidence, question witnesses and produce argument. And it says that:*
>
> > *"The following persons have the right to adduce evidence in a matter before a Children's Court and, with the permission of the Presiding Officer, to question or cross-examine a witness or to address the Court in argument"*
>
> *And it includes in subsections (a) to (f), a parent of the child. So in terms of Section 58 a parent specifically has the right to adduce evidence in a matter before a Children's Court.*
>
> *Apart from not elaborating on the rules as to who may or may not attend proceedings, the chapter that deals with adoptions does not exclude the attendance of parents who have given consent to the adoption.*
>
> *…*
>
> *I do not agree…that there is anything in the regulations or the Act that states that once a parent has given consent to the adoption their presence is not required or that they may not attend the proceedings. It is clear from Section 58 that that parent continues to have the right to attend.*

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12 Item PP review bundle p461.

> *And if the mother then wishes to be present in these proceedings, as she has indicated throughout that she does wish to be, regardless of whether or not she wishes to oppose the adoption, then* ***THE COURT WILL PERMIT HER TO BE PRESENT AS IS HER RIGHT IN TERMS OF THE ACT****.'*

[48] Implicit in the ruling that the fourth respondent be admitted as a "party" to the adoption proceedings must have been the magistrate's view that she has an adequate interest in its subject matter; not a technical concept but rather a direct interest in the relief sought, not too far removed but actual, not abstract or academic, and current, not hypothetical.[13]

[49] In my view, the fourth respondent, at the time she was admitted as a party, met none of these requirements. She had already been found to have voluntarily relinquished her parental rights and responsibilities; and there was no longer any "direct" interest that she could claim to have had. Given the particular facts of this matter she also had no "current" interest because she had consented to an undisclosed adoption. A court cannot confer *locus standi* upon a party, who otherwise has none, on the ground of expediency and to obviate impractical and undesirable procedures.[14] At best she was only permitted the participatory rights provided in s 58, something which appears to have been recognised later by the magistrate in her ruling of 17 June 2014.

[50] The magistrate's ruling that the fourth respondent be admitted as a party to the proceedings thus also falls to be set aside.

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[13] Erasmus Superior Court Practice Vol 2 at D1 – 186.
[14] *Gross and Others v Pentz* 1996 (4) SA 617 AD at 632 F.

[51] However the fourth respondent has, as a consequence of such ruling, already participated in the adoption proceedings, particularly in relation to the validity of her consent, and her stated wish that all she seeks is some form of contact with H. Should the fourth respondent nonetheless wish to place further evidence before the Children's Court she may do so in terms of s 58 of the Children's Act, subject of course to the discretion vested in the presiding officer in terms of that section.

Legal representation for the fourth respondent

[52] S 54 of the Children's Act provides that a person who is a party in a matter before a Children's Court is entitled to appoint a legal practitioner of his or her own choice and at his or her own expense. The magistrate went to considerable lengths to assist the fourth respondent in securing legal representation both prior to and after her ruling that she be admitted as a party to the proceedings. Given the wording of s 54 of the Children's Act it would seem that the magistrate went beyond the call of duty.

[53] I have found that the fourth respondent should not have been admitted as a party, but that she is a parent for purposes of s 58 of the Children's Act. If she wishes to avail herself of the rights conferred upon her therein with the assistance of legal representation then, given the history of this matter and in order to prevent any further delay, she must herself secure such legal representation in good time before the matter resumes in the Children's Court.

[54] In *Magistrate Pangarker v A Botha and Another*[15] it was stated that the right to legal representation is a corollary of the right of access to justice and that the denial of such right would accordingly have *'wide-ranging consequences for the nature and experience of justice'*[16]. However legal representation in each particular matter must also be weighed against the rights and potential prejudice to other affected parties.

[55] It is not in dispute that since December 2012 postponements and delays totalling some 9 months were occasioned due to issues pertaining to securing legal representation for the fourth respondent (and the fifth respondent until April 2014), coupled with the magistrate's refusal to permit the proceedings to continue when no representative was available and even after legal aid was refused. When the fourth respondent was represented, court time was taken up by her legal representative who cross-examined witnesses and addressed the court on the basis that she was a party to the proceedings and "opposed" the applicants' adoption application. Given the history of this matter, the scales must now tip in favour of the applicants who, along with H, have a right to resolution without further delay.

[56] Having regard to the totality of the circumstances it is my view that the magistrate's rulings to entertain the applicants' adoption application only when the fourth respondent was legally represented constituted a reviewable irregularity and this too must be set aside.

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[15] 2015 (1) SA 503 (SCA).
[16] At para [34].

Competency of pro forma adoption order

[57] S 242(2)(a) of the Children's Act provides that an adoption order confers full parental responsibilities and rights in respect of the adopted child upon the adoptive parent; and s 242(3) stipulates that *'an adopted child must for all purposes be regarded as the child of the adoptive parent and an adoptive parent must for all purposes be regarded as the parent of the adopted child'.*

[58] S 242(1) however provides that:

> *'**242 Effect of adoption order***
>
> *(1) Except when provided otherwise in the order or in a post-adoption agreement confirmed by the court an adoption order terminates---*
>
> *(a) all parental responsibilities and rights any person, including a parent, step-parent or partner in a domestic life partnership, had in respect of the child immediately before the adoption;*
>
> *(b) all claims to contact with the child by any family member of a person referred to in paragraph (a);*
>
> *(c) all rights and responsibilities the child had in respect of a person referred to in paragraph (a) or (b) immediately before the adoption; and*
>
> *(d) any previous order made in respect of the placement of the child.'*
>
> (emphasis supplied)

[59] The applicants challenge the competency of a pro forma order which the magistrate advised that she makes from time to time and which includes the following:

*'**THE APPLICATION IS ACCORDINGLY GRANTED.***

2. The surname……...is conferred or / retained by the child.

3. The Post Adoption Agreement, Exhibit……., is made an order of this court.

4. It is further ordered that:

(a) The parental responsibilities and rights that the father of the child, to wit…… (name), had in respect of the child immediately before the Adoption;

(b) all claims to contact with the child by any family member of a person referred to in paragraph (a); and/or

(c) all rights and responsibilities the child had in respect of a person referred to in paragraph (a) or (b) immediately before the adoption

SHALL NOT BE TERMINATED

The court, in its discretion, makes these orders to this effect without giving a hearing to any person. Prescribed documents to be forwarded as soon as may be to the Registrar for the registration of the adoption.'

[60] Louw, in Child Law in South Africa[17], notes that an adoption order has the effect of creating a legal relationship between the adoptive parent and the adopted child in the interests of the child. She goes on to say that:

> *'adoption provides a child with a constitutionally entrenched form of care and protection that is unsurpassed by any other form of permanent placement in securing stability in a child's life.'*[18]

[61] In the event that an adoption order stipulates that the former parent shall nonetheless retain full or partial parental responsibilities and/or rights post adoption, then the adoptive parents will not acquire full parental responsibilities and rights. The effect of

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17 T Bouzaart: Child Law in South Africa 133.
18 At 133-134.

such an order is therefore something less than adoption; and what needs to be considered are the circumstances in which such orders would be permissible.

[62] In *Centre for Child Law v Minister of Social Development*[19] the applicant sought an order declaring *inter alia* that s 242 of the Children's Act does not automatically terminate all the parental responsibilities and rights of the guardian of a child whose spouse or permanent domestic life partner seeks to adopt the child. It was held that[20]:

> *'[14] The advice allegedly given by officials of the Children's Court to prospective applicants for adoption that, in terms of s 242 of the Act, the granting of an application for adoption by a step-parent will automatically terminate all rights and responsibilities of the parent in respect of the child, ignores the exception provided for in the preamble to s 242. In terms thereof, an adoption order terminates those rights, "(e)xcept when provided otherwise in the order". The Children's Court therefore has a discretion to order that the rights and responsibilities of a child's parent or guardian will not terminate upon the grant of an adoption order in favour of the step-parent. It will, save in exceptional circumstances, clearly be in the best interests of the child that such an order be made. The Children's Court is obliged to function in a manner which in each case promotes the best interests of the child and should, except where there are sound reasons not to do so, make an order that the granting of an adoption order in favour of a step-parent will not terminate the responsibilities and rights of the child's parent or other guardian.'*

[63] It is entirely understandable that the court reached that conclusion given the clear exceptional circumstances. However, having regard to the provisions of s 242(2)(a) and (3) it could not, in my view, have been intended by the legislature that s 242(1) should otherwise be interpreted as conferring an unfettered discretion on a presiding

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19 2014 (1) SA 468 (GNP).
20 At para [14].

officer in a Children's Court to issue wide-ranging orders eroding the legal concept of adoption, particularly without even affording those to be affected any hearing. Were that intended, then not only would those sections dealing with the effect of adoption be rendered largely superfluous, but there would have been no reason for the legislature to limit what can be contained in post-adoption agreements in terms of s 234 to communication (including visitation) and the provision of information; nor would the additional powers of a Children's Court be defined in s 48.[21] Proper heed must be paid to the legal effect of an adoption order, namely that the legal ties between a parent and a child are severed. A finding that the invoking of the exception in s 242(1) is justified would have to be reached on a proper consideration of all relevant evidence and would have to be warranted in the particular circumstances.

[64] It follows that the *pro forma* order created by the magistrate must be declared *ultra vires* the provisions of Chapter 15 of the Children's Act.

Costs

[65] As previously stated, the applicants seek a costs order against the magistrate in her representative capacity. In the exercise of my discretion I do not believe that in the particular circumstances of this matter such an order is warranted.

[21] S 46 defines the orders that a Children's Court may make; and s 48 its additional powers.

Conclusion

[66] S 6(4) (b) of the Children's Act stipulates that in any matter concerning a child a delay in any action or decision to be taken must be avoided as far as possible. Given the history of this matter, and without it being necessary to make any finding in relation to the allegations of partiality on the part of the magistrate, it is my view that it would be in the best interests of H, as well as the administration of justice, to order that the record of proceedings in the Children's Court to date shall stand as such, without the applicants' adoption application having to commence *de novo*, but for such application to be finalised without further delay before another presiding officer.

[67] **In the result the following order is made:**

1. The following decisions or rulings of the first respondent in the adoption proceedings pending in the Children's Court, Wynberg, are hereby reviewed and set aside:

1.1 That the second and third respondents' application for the minor child's adoption proceed despite the absence of a letter of recommendation from the provincial head of social development as prescribed by section 239(1)(d) of the Children's Act 38 of 2005 (*'the Children's Act'*);

1.2 That the applicants make the minor child available for psychological assessment by Ms Cleophas Kolbe or such other mental health professional as may be appointed by the second and third respondents;

1.3 That the fourth respondent be admitted as a party to the applicants' adoption application; and

1.4 That the fourth respondent is entitled to be provided with legal representation in such application at all times.

2. It is declared that:

2.1 The fourth respondent is not a party to the applicants' pending adoption application;

2.2 A parent who gives consent in terms of s 233 of the Children's Act is not a party for the purposes of an adoption application as contemplated in s 239 of such Act, but is permitted to participate in such proceedings as envisaged in terms of s 58 of such Act;

2.3 The *'order'* on page 2 of the *pro forma* document created by the first respondent and annexed to the first applicant's founding affidavit marked "JGB3" is *ultra vires* Chapter 15 of the Children's Act in that:

(a) it constitutes an impermissibly wide exercise of the discretion of the presiding officer provided for in section 242(1) of the Act;

(b) it purports to confer something less than full parental responsibilities and rights on the adoptive parents of an adopted child as set out in section 242(2) of such Act; and

(c) it is in conflict with the provisions of section 242(3) of such Act, and with the legal concept of adoption.

3. The Chief Magistrate, Wynberg, or such other magistrate as she, in her discretion, may appoint to hear the matter, shall finalise the applicants' application under case no 14/12/2-22/09 for the adoption of the minor child H

within 3 (three) months from the date of granting of this order; and for this purpose the record of proceedings to date shall stand as the record for purposes of finalisation of such application;

4. **The fourth respondent shall be entitled to be present at such further proceedings, but only to the extent permitted by section 58 of the Children's Act, and it shall be her responsibility to timeously secure and retain legal representation should such representation be her choice;**
5. **The identities of the applicants, the minor child and the second to fifth respondents shall not be disclosed; and**
6. **No order is made as to costs.**

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J I CLOETE

SAMELA J

I agree.

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M I SAMELA