IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D4680/2018

In the matter between:

NATIONAL ADOPTION COALITION OF SOUTH AFRICA Applicant

and

HEAD OF DEPARTMENT OF SOCIAL DEVELOPMENT, FOR THE PROVINCE OF KZN First Respondent

MEMBER OF THE EXECUTIVE COUNCIL FOR SOCIAL DEVELOPMENTS, KZN Second Respondent

THE CHAIRPERSON OF THE KZN ADOPTION PANEL Third Respondent

THE MINISTER OF SOCIAL DEVELOPMENT Fourth Respondent

Coram: Seegobin J

ORDER

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1. It is declared that in relation to adoptable children:

(a) The rights articulated in section 28 of the Constitution of the Republic of South Africa, 1996 ('the Constitution'), in particular that in all matters regarding children, the best interest of the child is paramount (section 28(2)) as well as section 28(1)*(b)*, have been violated by the first respondent in failing to give effect to section 239(1)*(d)* of the Children's Act 38 of 2005 ('the Act') in relation to the adoption of adoptable children;

(b) The rights to dignity (section 10), to freedom and security (section 12) and to equality (section 9) of the children who are adoptable, have been violated by the failure of the first respondent to make a decision, alternatively the failure to make a decision within a reasonable time, relating to their prospective adoptions;

(c) The rights to dignity (section 10), to freedom and security (section 12) and to equality (section 9) of the children who are adoptable, have been violated by irrelevant considerations and delays caused by such irrelevant considerations by the first and third respondent, relating to their prospective adoptions.

2. It is declared that in relation to the biological or birth parents of adoptable children, the first and third respondents' failure to consider relevant factors and their consideration of irrelevant factors, including *inter alia* disregarding of informed consent properly given and decisions made by birth parents, regarding the recommendation of adoptions is a violation of these biological or birth parents' rights to dignity (section 10), to equality (section 9), to freedom and security (section 12), to privacy (section 14), to freedom of religion, belief and opinion (section 15) and to the right of language and culture (section 30).

3. It is declared that the right to access to court, and the right to just administrative action of children who are adoptable and that of the prospective adoptive parents of children who are adoptable, have been violated by irrelevant considerations and delays caused by such irrelevant considerations by the first and third respondent, relating to prospective adoptions.

4. It is declared that in relation to the purpose, function and considerations in the decision-making process of the letter of recommendation required by section 239(1)*(d)* of the Act that:
   (a) The purpose of adoption is to provide a permanent family for a child, with bonds that reach beyond the age of 18; and
   (b) The purpose of the section 239(1)*(d)* letter by the provincial head of social development recommending the adoption of the child ('the letter'), is to ensure that:
      (i) The legislative provisions are adhered to by accredited social workers within the framework of their professional ethics and responsibilities; and
      (ii) To provide for the best interests of each child, considering factors specifically and peculiarly within the knowledge of the Department of Social Development ('DSD').
   (c) That, in line with national policy, a period of thirty (30) days from the date of submission of the adoption application to the appointed and appropriate persons at the DSD, KwaZulu-Natal, to the date of the letter being received by the adoption social worker is a reasonable time for the purposes of section 239(1)*(d)* of the Act.
5. It is declared that with regard to the placement, including the mechanisms for placement of an adoptable child pending the finalisation of an adoption:
   (a) An adoptable child is not a child designated in need of care as a consequence of a child's parents consenting to his or her adoption, and the related provisions to a child in need of care are not an automatic consequence of a child's parents consenting to his or her adoption or of an adoption application;
   (b) A placement of a child in place of safety, foster care and freeing orders are each acceptable to place a child with a prospective adoptive parent if such placement is warranted and in the best interests of the child, as decided by the adoption social worker;

(c) That an adoptable child is to be placed in an environment best suited to meet his or her emotional, psychological and physical needs.

6. The first respondent is directed to remedy the failure to make a decision on all outstanding applicants by:

(a) (i) Causing the panel to convene and consider all the listed and still outstanding adoption applications and those submitted more than thirty (30) days before the date of this order,

(ii) which have not yet been before the panel or have been before the panel without decision, and

(iii) finalise these cases within thirty (30) days of the date of this order.

(b) That the first and third respondents, and the panel under their direction, when considering these applications, do so with reference to the other relief sought in this application and within the legislative provisions for adoptions in accordance with the Act;

(c) That the first respondent issues the letters within seven (7) days of the panel interviews referred to in prayer 6(a) above;

(d) Where a panel interview has already taken place and the first respondent decides it is not necessary for the adoption social worker to appear before the panel again, that the first respondent issues the letters within seven (7) days of the date of this order;

(e) Where the decision made is to not recommend an adoption, that the first respondent provides, in writing, the reasons for the decision, as well as the letter not recommending the adoption;

(f) The letter is to be provided to the adoption social worker, and to the relevant children's court, in all instances.

7. It is directed that where the letter is a letter not recommending the adoption, alternatively failing receipt of the letter within the time frame stipulated, for the listed adoptions, and outstanding for more than thirty (30) days, the adoption social worker may set the matter down in the children's court for consideration, in which case:

(a) The requirement of a letter of recommendation may be waived by that court in the interests of justice for the children who are awaiting adoption, on a case by case basis, for those adoptions listed where the letter has remained outstanding for more than 45 days;

(b) A member of the panel is to be present at the children's court at the time of the hearing of the adoption application, being duly notified by the adoption social worker of the set down date;

(c) The court having considered the evidence of the adoption social worker and the member of the panel, may make a decision that it deems fit on the adoption application before it.

8. It is directed that the first and second respondents are to report to this court, on oath, within sixty (60) days of this order on the following matters:

(a) A plan of improvements for the panel, including: its composition in accordance with the guidelines, regular scheduling of panel interviews, adequate notice to adoption social workers of their interviews, a working guide for the panel including factors to be considered and which are not to be considered;

(b) The composition of the current adoption panel and its members' qualifications or positions held, indicating specifically the adoption experience of the permanent and ad hoc members of the panel;

(c) If the panel comprises of no, or insufficient social workers with adoption experience, that a new panel, appropriately constituted in order to ensure compliance with the law and with best practices, be identified and implemented and such be reported to this court;

(d) The schedule of meetings planned for the panel for the next 12 months, and possible improvements which can be made in the scheduling of appointments before the panel;

(e) A report addressing the discrepancies between the provisions of the Act, the national policy and KwaZulu-Natal policy, alternatively implementation of the policy in KwaZulu-Natal, as highlighted in the founding affidavit.

(f) Reporting on how the KwaZulu-Natal policy and/or practice is to be amended to conform with the national policy and legislative provisions, and the time frame in which this will be done.

(g) Reporting of concerns regarding the actions of the adoption social workers, and whether an audit of the adoption social workers in the Province, their qualifications and any other requirements or plan for training and intervention of adoption social workers regarding dealings with biological parents (in accordance with the Act) is required. If required, a plan of what is required and the time frames in which this will be done.

9. The respondents are directed to report to this court on oath, every six (6) months for a period of two (2) years from date hereof, detailing the number of adoption applications being made and the status of such applications.

10. The respondents are directed to pay the costs of the application.

JUDGMENT

Seegobin J

Introduction

[1] There is a growing crisis in the country concerning an ever increasing number of children who are being cared for in alternative care settings, thus growing up without permanency and support of a family unit. The destinies of orphaned or abandoned children are divergent. Some are cared for by their extended families, others are fortunate enough to find adoptive or foster parents who are able to provide them with a home and family life. But sadly there are many who are bound to spend their days in institutions of care.[1]

[1] Expert report by Ms Nonjabula Cynthia Memela and Ms Marietjie Strydom – Annexure 'MS 10' to the founding affidavit.

[2] The obvious solution to this crisis is adoption but as this case seeks to show, this is easier said than done, especially in KwaZulu-Natal. The statistical evidence provided by the applicant points to a steady decline in the number of adoptions taking place in this country generally and in KwaZulu-Natal particularly. According to the applicant, the reasons for this are varied, except that in KwaZulu-Natal it seems to be attributable largely to a misapplication and misunderstanding of the constitutional rights of children on the one hand and the application of the relevant provisions of the Children's Act 38 of 2005 ('the Act') on the other. Whatever the position may be, ultimately it is children who are in desperate need of care who are most affected.

[3] I agree fully with the views expressed by the court in *Herbst*[2] that:

'Too many children in South Africa are abandoned, abused, neglected and left with no hope of experiencing the love, joy and stability of their own family. Adoption is a time immemorial custom embedded in human society. It is also entrenched in our law and gives a child a right to grow up in a family and [to] experience the positive impact developmentally and psychologically as opposed to growing up in an institution. Bureaucratic and unnecessary delays in the adoption procedure should play no part in impeding a child's right to his or her own forever family.'

[4] The need for a child to grow up in a family setting cannot be more emphasised. No child deserves to grow up abandoned and alone without the love, affection and security of a family. The following statement by Justice PN Bhagwati of the Supreme Court of India in the matter of *Lakshmi Kant Pandey v Union of India*[3] are in my view apt:

> 'Every child has a right to love and be loved and to grow up in an atmosphere of love and affection and of moral and material security and this is possible only if a child is brought up in a family.'

The parties

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[2] *Herbst & another v The Presiding Officer of the Children's Court, Johannesburg* (Johannesburg High Court) unreported case no A3025/18 (12 November 2018) para 2.
[3] *Lakshmi Kant Pandey v Union of India* (1984) 2 SCC 244 para 6.

[5] The applicant is the National Adoption Coalition of South Africa ('NACSA').[4] NACSA is a voluntary organisation of those social workers who are in private practice and in child protection organisations accredited as adoption service providers in the Republic.

[6] The first respondent is the Head of Department ('HOD') of the Department of Social Development ('DSD') in KwaZulu-Natal. The first respondent is the person identified in terms of section 239(1)*(d)* of the Act to provide a letter recommending the adoption of children within the province.

[7] The second respondent is the Member of the Executive Council for the DSD in KwaZulu-Natal, and to whom the HOD reports and is accountable to.

[8] The third respondent is the Chairperson of the Kwazulu-Natal Adoption Panel, as constituted by the HOD in terms of section 239 of the Act as well as the policies, both national and provincial, that guide his or her decision making.

[9] While the *locus standi* of the applicant was vigorously challenged by the respondents, both in their answering affidavit and in heads of argument, this challenge dissipated by the time the matter was argued on 1 November 2019. The applicant was represented by Ms Ainslie and Mr Courtenay, and the respondents by Ms Bhagwandeen and Ms Shazi.

The papers

[10] The papers in this matter are voluminous and span 1 126 pages. The founding affidavit was deposed to by Ms Marietjie Strydom, who at all material times, was the

[4]The role of the organisation, as set out in para 6.4 of the founding affidavit, includes:
'6.4.1 To promote and build awareness of adoption;
6.4.2 Build partnerships and collaboration across the adoption community;
6.4.3 Share best practices and building capacity;
6.4.4 Lobby government and regulators on behalf of the adoption community;
6.4.5 Support DSD in their regulation of industry standards and code of conduct; and
6.4.6 To lead the change needed in our society to embrace adoption as the best permanent solution for children, outside of their family.'

chairperson of the KwaZulu-Natal branch of the applicant. Ms Strydom worked in the field of adoption and holds a Master's degree in Social Science. She is also the co-founder of an organisation known as the Attachment Foundation. She is also the co-author of the report referred to in footnote 1 above. Regrettably, by the time the matter reached fruition, Ms Strydom emigrated. As a consequence of this, the applicant's replying affidavit was deposed to by Ms Julie Marie Todd.

[11] The answering affidavit of the respondents was deposed to by Ms Nokuthula Gladness Khanyile as the HOD. Ms Khanyile did not provide her qualifications nor did she provide any information regarding her expertise or experience in the field of adoption.

[12] The answering affidavit itself is a prolific document comprising about 600 pages, 112 of which make up the actual affidavit while the rest are annexures. The manner in which the answering affidavit has been drawn leaves much to be desired. The affidavit is replete with a regurgitation of sections of the Act, without much attempt being made to explain how these sections impact on the respondents' decision making process.

[13] Quite apart from this, the respondents have annexed a number of documents to the affidavit without properly identifying those portions on which reliance would be placed. In *Swissborough Diamond Mines (Pty) Ltd & others v Government of the Republic of South Africa & others*[5] the court expounded the law relating to the contents of affidavits generally. In the course of this exposition Joffe J, citing earlier authorities, said:

> 'Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annex to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed. A party would not know what case must be met.' (references omitted)

[5] *Swissborough Diamond Mines (Pty) Ltd and others v Government of the Republic of South Africa and others* 1999 (2) SA 279 (T) at 324F-G.

And further in *Minister of Land Affairs and Agriculture & others v D & F Wevell Trust & others*[6] Coete JA made the following observation:

> 'It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits . . . Trial by ambush cannot be permitted.'

[14] The respondents and/or their legal representatives have clearly not paid any heed to the established legal principles relating to the preparation of affidavits. The above are not the only criticisms that can be levelled against the respondents. This application was launched by the applicant on 25 April 2018. It took the respondents four (4) months to file their answering affidavit. No valid reasons were proffered for the delay, nor was any condonation sought. In the meantime, the applicant had to wait for an inordinate period of time to have the matter finalised. This conduct on the part of the respondents is to be deprecated.

The relief sought

[15] The relief being sought by the applicant is comprehensive and wide-ranging. The relief includes various declarators in respect of the violation of rights of children, and birth parents, as well as the role of adoption social workers and the interpretation of the prevailing legislative provisions. It further includes a review of the provincial policy/guidelines regarding adoptions and the decision-making of the respondents. Lastly, it calls for a structural interdict or supervisory order to ensure that all overdue applications, and the changes necessitated in the procedures and policy to conform to legislation are addressed, and to bring to an end the violations of rights being infringed.

[16] At the heart of the applicant's case lies the letter of recommendation required in terms of section 239(1)*(d)* of the Act in general, and the procedures and policies guiding the adoption panel and the HOD in relation thereto. The primary complaint by the

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[6] *Minister of Land Affairs & Agriculture & another v D & F Wevell Trust & another* 2008 (2) SA 184 (SCA) at 200C-E.

applicant in this regard concerns the systemic delays on the part of the HOD to provide the letter of recommendation in order that adoptions may be finalised with the least amount of inconvenience and prejudice to the parties involved.

[17] The full extent of the relief as contained in paragraphs 1 to 12 of the notice of motion is the following:

'1 DECLARING THAT in relation to adoptable children:

a. The rights articulated in section 28 of the Constitution of the Republic of South Africa, 1996 ("the Constitution"), in particular that in all matters regarding children the best interest of the child is paramount (section 28(2)) and section 28(1)(b), have been violated by the First Respondent in giving effect to s239(1)(d) of the Children's Act, 38 of 2005 ("the Act") in relation to the adoption of adoptable children.

b. The rights to dignity (section 10), freedom and security (section 12) and to equality (section 9) of the children who are adoptable have been violated by the failure of the first respondent to make a decision, alternatively the failure to make a decision within a reasonable time, relating to their prospective adoptions.

c. The rights to dignity (section 10), freedom and security (section 12) and to equality (section 9) of the children who are adoptable have been violated by irrelevant considerations and delay caused by such irrelevant considerations by the first and third respondent, relating to their prospective adoptions.

2. DECLARING FURTHER THAT in relation to the biological or birth parents of adoptable children:

a. The first and third respondents' failure to consider relevant factors and their consideration of irrelevant factors, including *inter alia* disregarding of informed consent properly given and decisions made by birth parents, regarding the recommendation of adoptions is a violation of the biological or birth parents of potentially adoptable children rights to dignity (section 10), equality (section 9), freedom and security (section 12), privacy (section 14), freedom of religion, belief and opinion (section 15) and the right of language and culture (section 30).

3. DECLARING FURTHER THAT the right to access to court and the right to just administrative action of children who are adoptable and the prospective adoptive parents of children who are adoptable have been violated by irrelevant considerations and delay

caused by such irrelevant considerations by the first and third respondent, relating to prospective adoptions.

4. DECLARING FURTHER THAT in relation to the purpose, function and considerations in the decision-making process of the section 239(1) letter of recommendation:

a. The purpose of adoption is to provide a permanent family for a child, with bonds that reach beyond the age of 18; and

b. The purpose of the s239(1)(d) of the Act, the letter by the provincial head of social development recommending the adoption of the child ("the letter"), is to ensure that:

   i. The legislative provisions are adhered to by accredited social workers within the framework of their professional ethics and responsibilities; and

   ii. To provide for the best interests of each child considering factors specifically and peculiarly within the knowledge of the Department of Social Development ("DSD").

c. That a period of thirty (30) days from date of submission of the adoption application to the appointed and appropriate persons at the DSD, KwaZulu-Natal, to the date of the letter being received by the adoption social worker is a reasonable time for the purposes of s239(1)(d) of the Act.

5. DECLARING FURTHER THAT regarding the placement, including the mechanisms for placement of an adoptable child pending the finalisation of an adoption, that:

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

b. A place of safety placement, foster care and freeing orders are each acceptable to place a child with a prospective adoptive parent if such placement is warranted and in the best interests of the child, as decided by the adoption social worker.

c. That an adoptable child is to be placed in an environment best suited to meet his or her emotional, psychological and physical needs.

6. REVIEWING AND SETTING ASIDE the decisions, alternatively the failure to make a decision, by the first and third respondents where an application has been submitted, and the letter has not been provided after the elapse of thirty (30) days.

7. THAT THE ABOVE DECISIONS ARE REMITTED back to the First Respondent for reconsideration.

a. The first respondent is directed to remedy the failure to make a decision by:
    i. Causing the panel to convene and consider all the listed and still outstanding adoption applications and those submitted more than thirty (30) days before the date of the Order,
    ii. which have not yet been before the panel or have been before the panel without decision,
    iii. within fourteen (14) days of the date of order.

b. That the First and Third Respondents, and the panel under their direction, when considering these applications, do so with reference to the other relief sought in this application and within the legislative provisions for adoptions in accordance with the Act.

c. That the First Respondent issue the letters within seven (7) days of the panel interviews referred to in prayer 7 a) above.

d. Where a panel interview has already taken place and the First Respondent decides it is not necessary for the adoption social worker to appear before the panel again, that the First Respondent issue the letters within seven (7) days of the date of this Order.

e. Where the decision made is to not recommend an adoption that First Respondent provide, in writing, the reasons for the decision, and the letter not recommending the adoption.

f. The letter is to be provided to the adoption social worker and to the relevant Children's Court, in all instances.

8. DIRECTING THAT where the letter is a letter not recommending the adoption, alternatively failing receipt of the letter within the timeframe stipulated, for the listed adoptions, outstanding for more than thirty (30) days, the adoption social worker may set the matter down in the Children's Court for consideration.

a. The requirement of a letter of recommendation may be waived by that Court in the interests of justice for the children who are awaiting adoption, on a case by case basis, for those adoptions listed where the letter has remained outstanding for more than 45 days.

b. That a member of the panel is to be present at the Children's Court at the time of the hearing of the adoption application, being duly notified by the adoption social worker of the set down date.

c. The Court having considered the evidence of the adoption social worker and the member of the panel may make a decision it deems met on the adoption application before it.

9. DIRECTING the first and second respondents to report to this Court on oath within thirty (30) days of this Order on the following matters:

a. A plan of improvements for the panel, including: its composition in accordance with the guidelines, regular schedule of panel interviews, adequate notice to adoption social workers of their interviews, a working guide for the panel including factors to be considered and which are not to be considered;

b. The composition of the current adoption panel and its members' qualifications or positions held, indicating specifically the adoption experience of the permanent and ad hoc members of the panel.

c. If the panel comprises no or insufficient social workers with adoption experience, that a new panel, appropriately constituted in order to ensure compliance with the law and with best practices, be identified and implemented and such be reported to this Court.

d. The schedule of meetings planned for the panel for the next 12 months, and possible improvements which can be made in the scheduling of appointments before the panel.

e. A report addressing the discrepancies between the provisions of the Act, the national policy and KwaZulu-Natal policy, alternatively implementation in KwaZulu-Natal, as highlighted in the founding affidavit.

f. Reporting on how the KwaZulu-Natal policy and/or practice is to be amended to conform with the National Policy and legislative provisions, and the time frame in which this will be done.

g. Reporting of concerns regarding the actions of the adoption social workers, and whether an audit of the adoption social workers in the Province, their qualifications and any requirement or plan for training and intervention of adoption social workers regarding dealings with biological parents (in accordance with the Act) is required. If required, a plan of what is required and time frames in which this will be done.

10. DIRECTING the first, second and third respondents to pay the applicant's costs, which are to be paid jointly and severally with any other respondent opposing these proceedings.

11. That the matter be heard on a semi-urgent basis, alternatively be given preference on the opposed roll if opposed, on the basis that the matter concerns the infringement rights and the best interests of minor children.

12. Further or alternative relief.'

Legislative context

[18] The following pieces of legislation are relevant:

18.1 The Children's Act 38 of 2005;

18.2 The Constitution of the Republic of South Africa, 1996; and

18.3 The Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

Other instruments/documents

[19] The following further instruments and documents were referred to:

19.1 The African Charter on the Rights and Welfare of the Child (July 1990) ('African Charter');

19.2 Practice Guidelines on National Adoption by the Department of Social Development; and

19.3 Terms of reference of the Adoption Panel.

Issues

[20] The following broad issues arise on the papers:

20.1 When is a child adoptable? Who is required to make the decision in each of the following instances: (a) in the case of birth parent(s) consenting to the adoption, (b) in the case of a step-parent adoption; (c) in the case of abandoned children; (d) in the case of abused and neglected children, and (e) in the case of orphaned children?

20.2 Whether the first respondent is bound by the decision of the children's court regarding: (a) consent of the birth parent(s), and (b) dispensing of consent?

20.3 What is a reasonable time frame within which the first respondent is to make a decision regarding the letter of recommendation? What factors are to be considered and how are such factors weighted?

20.4 Is it necessary that provincial policy, procedures and guidelines conform to national policies, procedures and guidelines? And if so, do the provincial policy and guidelines in fact conform thereto?

20.5 Is adoption always a last resort? And what constitutes 'the best interest of a child' and how are 'the best interests of a child' achieved in the adoption process?

[21] Since the application focusses on national adoptions which are governed by Chapter 15 of the Act, I do not intend making any reference to inter-country adoptions (Chapter 16 of the Act) except perhaps for analogous purposes.

Chapter 15 of the Act

[22] Chapter 15 of the Act deals with local or national adoptions. The Act does not refer to the term local adoptions, but it is understood to denote adoptions concluded in terms of Chapter 15, and concluded within the Republic by citizens of this country. Section 228 defines the word adoption to mean that 'a child is adopted if the child has been placed in the permanent care of a person in terms of a court order that has the effects contemplated in section 242.' Section 229 sets out the purposes of adoption which 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.'

[23] Section 230 defines a child who may be adopted. It provides as follows:

'(1) Any child may be adopted if –

(a) the adoption is in the best interests of the child;

(b) the child is adoptable; and

(c) the provisions of this Chapter are complied with.

(2) An adoption social worker must make an assessment to determine whether a child is adoptable.

(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;

(b) the whereabouts of the child's parent or guardian cannot be established;

(c) the child has been abandoned;

(d) the child's parent or guardian has abused or deliberately neglected the child, or has allowed the child to be abused or deliberately neglected;

(e) the child is in need of a permanent alternative placement;

(f) the child is the stepchild of the person intending to adopt; or

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

[24] The voluntary consenting to adoption (s 230(3)*(g)*) is the most common type dealt with by adoption social workers, and should for all practical reasons be dealt with expeditiously and without any real difficulties. By contrast, the adoption of children removed from their parents occurs less frequently, and then only when they have been in the child care system for many years. The issue of consent and whether it is required or not, is governed by the provisions of sections 233 and 236 respectively.

[25] In cases where both parents voluntarily give up their child for adoption, one would expect the process to be relatively uncomplicated. This type of adoption then proceeds in terms of section 233. The section provides for the birth parents' consent (if given within South Africa) to be signed in the presence of a presiding officer of the children's court, and to be verified by the presiding officer. It further provides that if the child to be adopted is older than 10 years of age or if younger with sufficient maturity, the child too must give consent to the adoption. The section also provides for a specific person or persons to be nominated as adoptive parents, subject to their eligibility to do so, in the normal course of adoption. Consent to the adoption may be withdrawn within 60 days after having signed the consent to safeguard the interest of the birth parents.

[26] Section 236[7] of the Act specifies when consent of the parent or guardian is not required. This section is concise and easily understood.

The best interests principle

[27] The relevant part of section 28 of the Bill of Rights, which deals with the rights of children, provides that:

> '(1) Every child has the right –
>
> (a) . . .
>
> (b) to family care of parental care, or to appropriate alternative care when removed from the family environment;
>
> . . .
>
> (2) A child's best interests are of paramount importance in every matter concerning the child.
>
> (3) . . .'

[7] Section 236 states as follows: '236. When consent not required. — (1) The consent of a parent or guardian of the child to the adoption of the child, is not necessary if that parent or guardian—
(a) is incompetent to give consent due to mental illness;
(b) has abandoned the child, or if the whereabouts of that parent or guardian cannot be established, or if the identity of that parent or guardian is unknown;
(c) has abused or deliberately neglected the child, or has allowed the child to be abused or deliberately neglected;
(d) has consistently failed to fulfil his or her parental responsibilities towards the child during the last 12 months;
(e) has been divested by an order of court of the right to consent to the adoption of the child; or
(f) has failed to respond to a notice of the proposed adoption referred to in section 238 within 30 days of service of the notice.
(2) Consent to the adoption of a child is not required if—
(a) the child is an orphan and has no guardian or caregiver who is willing and able to adopt the child; and
(b) the court is provided with certified copies of the child's parent's or guardian's death certificate or such other documentation as may be required by the court.
(3) If the parent referred to in subsection (1) is the biological father of the child, the consent of that parent to the adoption is not necessary if—
(a) that biological father is not married to the child's mother or was not married to her at the time of conception or at any time thereafter, and has not acknowledged in a manner set out in subsection (4) that he is the biological father of the child;
(b) the child was conceived from an incestuous relationship between that biological father and the mother; or
(c) the court, following an allegation by the mother of the child, finds on a balance of probabilities that the child was conceived as a result of the rape of the mother: Provided that such a finding shall not constitute a conviction for the crime of rape. . .'

[28] Section 9 of the Act echoes the provisions of section 28(2) of the Constitution by providing that '(i)n all matters concerning the care, protection and well-being of a child the standard that the child's best interests is of paramount importance, must be applied.' In *S v M (Centre for Child Law as Amicus curiae)*[8] Sachs J pointed out that 'South African courts have long had experience in applying the "best interests" principle in matters such as custody or maintenance. In our new constitutional order, however, the scope of the best-interests principle has been greatly enlarged.' (footnotes omitted)

[29] In paragraph 23 of *S v M*, Sachs J points out:

> '. . . that the very expansiveness of the paramountcy principle creates the risk of appearing to promise everything in general while actually delivering little in particular. Thus, the concept of "the best interests" has been attacked as inherently indeterminate, providing little guidance to those given the task of applying it. Van Heerden in *Boberg* states that:
>
> > "(T)he South African Constitution, as also the 1989 United Nations Convention on the Rights of the Child and the 1979 United Nations Convention on the Elimination of All Forms of Discrimination Against Women, enshrine the 'best interests of the child' standard as 'paramount' or 'primary' consideration in all matters concerning children. It has, however, been argued that the 'best interests' standard is problematic in that, *inter alia*: (i) it is 'indeterminate'; (ii) members of the various professions dealing with matters concerning children (such as the legal, social work and mental health professions) have quite different perspectives on the concept 'best interests of the child'; and (iii) the way in which the 'best interests' criterion is interpreted and applied by different countries (and indeed, by different courts and other decision-makers matters within the same country) is influenced to a large extent by the historical background to and the cultural, social, political and economic conditions of the country concerned, as also by the value system of the relevant decision-maker.'" (footnotes omitted)

[30] The following further comments by Sachs J in paragraphs 24 to 26 of *S v M* are instructive:

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[8] *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) para 12.

‘[24] These problems cannot be denied. Yet this court has recognised that it is precisely the contextual nature and inherent flexibility of section 28 that constitutes the source of its strength. Thus, in *Fitzpatrick* (*supra*) 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 pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.

[25] A more difficult problem is to establish an appropriate operational thrust for the paramountcy principle. The word “paramount” is emphatic. Coupled with the far-reaching phrase “in every matter concerning the child”, and taken literally, it would cover virtually all laws and all forms of public action, since very few measures would not have a direct or indirect impact on children, and thereby concern them. Similarly, a vast range of private actions will have some consequences for children. This cannot mean that the direct or indirect impact of a measure or action on children must in all cases oust or override all other considerations. If the paramountcy principle is spread too thin it risks being transformed from an effective instrument of child protection into an empty rhetorical phrase of weak application, thereby defeating rather than promoting the objective of section 28(2). The problem, then, is how to apply the paramountcy principle in a meaningful way without unduly obliterating other valuable and constitutionally-protected interests.

[26] This Court, far from holding that section 28 acts as an overbearing and unrealistic trump of other rights, has declared that the best interests injunction is capable of limitation. In *Fitzpatrick* (*supra*) this court found that no persuasive justifications under section 36 of the Constitution were put forward to support the ban on foreign persons adopting South African-born children, which was contrary to the best interests of the child. In *De Reuck*, in the context of deciding whether the definition and criminalisation of child pornography was constitutional, this court determined that section 28(2) cannot be said to assume dominance over other constitutional rights. . .’ (footnotes omitted)

Section 239(1)*(d)* letter of recommendation

[31] Section 239(1) of the Act sets out the statutory requirements for an adoption application as follows:

> '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.)

[32] In the matter of *In re XN*[9] the South Gauteng High Court, on special review, held that while the provisions of section 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,

[9] *In re XN* 2013 (6) SA 153 (GSJ) paras 13-19.

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 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 with 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.

[17] Section 229 of the Act stipulates that the purpose of adoption is to protect and nurture children by providing a safe, healthy environment with positive support and to promote the goals of permanency planning by connecting children to other safe and nurturing family relationships intended to last a lifetime. Children's rights are further protected and entrenched in s 28(2) of the Constitution, which stipulates that every child has the right to family care, and in this instance the child's family milieu would be reinforced with the inclusion of a father, which he had never had. It is commendable that the child commissioner and the social worker allowed the child to participate in the process, as envisaged in s 10 of the Act:

'Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.'

> [18] Evidently, the child commissioner and the social worker were mindful of s 7(1)*(a)* – *(n)* of the Act which sets out in great detail 'the best interests of child standard'. The concept of the best interests of the child is also used by the Children's Convention as well as the OAU Charter on the Rights of the Child. Useful content is given to the best interests requirements by the relatively detailed provisions of art 3 of the Children's Convention:
>
> 'States parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the area of safety, health, in the number and suitability of their staff, as well as competent supervision.'
>
> [19] However, although the best interests of the child cannot be sacrificed at the altar of formalism, if the requirement of 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.'

[33] The issues in this matter relate almost exclusively to the process, procedure and issuing of the section 239 letter of recommendation. While the purpose of a section 239 letter is not immediately apparent from the Act it has, however, been held to serve as an oversight role by public officials in the social workers assessment process and to prevent children being used for human trafficking.[10]

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[10] *In re XN*, paragraph 14; see also *JGB & another v Presiding officer, Children's Court, Wynberg NO & others* [2016] 3 All SA 167(WCC).

[34] *In re XN*[11]the court made reference to the opinions expressed by the child commissioner:

> '[12] This court subsequently wrote to the child commissioner for the transcript of the adoption proceedings and to the department in regard to the non-compliance with the s 239(1)*(d)* letter. According to the child commissioner 'it did not seem logical to send letters to departments who are not aware of their functions'. In her opinion 'this does not give the court carte blanche to condone non-compliance with the Act, but if one looks at the requirements in this instance it is absurd'. Furthermore, in her opinion, the commentary in *A Practical Approach to the Children's Act* G by Hester Bosman-Sadie & Lesley Curie suggest that this measure (the s 239(1)*(d)* letter) was implemented for purposes of quality control, and to channel reports of social workers in private practice.'

[35] As the applicant undoubtedly accepts, this letter serves an important purpose in the adoptions process. It contends, however, that the letter is not dispositive of the matter. The children's court, as the judicial authority vested with the power to grant an adoption, is still required to consider the matter in its entirety, and with reference to the best interests principle, it is required to decide whether the adoption should be granted or not.

[36] On the whole, it seems that the system accordingly, and by implication, builds in a series of checks and balances. It follows that where the HOD (the first respondent) errs in her determination on the issue, the children's court may nonetheless rectify the situation. But as the applicant's papers show, and as I pointed out already, a fundamental problem faced by the applicant and its adoption social workers relates to the undue delay on the part of the HOD in providing the s 239(1)*(d)* letter. How significant is the delay, and what impact this may have in the adoption process and the best interests principle, will be considered in due course.

Statistical Evidence

[37] The statistical evidence concerning adoptions in the country is to the following effect:

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[11] *In re XN* fn 9 para 12.

37.1 In 2010, the Human Science Research Council ('HSRC') was commissioned by the DSD to do research into adoption trends in South Africa. The research results which were published in December 2011 showed a dramatic reduction in adoptions. During the period from 1 April 2004 to 31 March 2005, there were 2 601 national adoptions, however for the same period in 2008/2009, this number was 1 150 which is less than half of the previous period.

37.2 Despite its best efforts, the applicant was unable to find any statistics for the 2009/10 period. The next available statistics resume in the following year of 2010/2011, the year immediately following the release of the report by the HSRC. While there was an initial resurgence of adoptions, the dwindling pattern has repeated itself since then.

37.3 A combined analysis of the statistics shows that during the first cycle of 2004/05, the number of adoptions dropped to 44.21 per cent. A resurgence, however, took the number up a bit for 2004/05. By 2015 this had again reduced to 37.6 per cent.

37.4 The Community Survey 2016, undertaken by Statistics South Africa, reveals that 19.88 per cent of the total nation's population lives in KwaZulu-Natal, second only to Gauteng which has 24.08 per cent of the nation's population. Further, 22.51 per cent of the national population under the age of 20 years lives in KwaZulu-Natal:

37.4.1 The survey also analyses the age at which mothers give birth to their children. It is shown as a proportion of the total number of births in the province.

37.4.2 It reveals that not only does KwaZulu-Natal have the third highest proportion of births under the age of 20, it also has the third highest proportion of births under 25, down from the highest in 2011.

37.5 The same survey's graph reveals that there were at least 1.7 million children under the age of 17 who were orphaned. The expression used is 'double orphaned' which indicates that both parents have died. The text therein states the figure to be 2.4 million.

[38] According to the applicant, whether the figure is 1.7 or 2.4 million, it still represents a crisis in the number of children who are orphaned. While many of these children will be living with extended families, others will be fostered and others institutionalised.

[39] However, the minuscule number of adoptions bears no correlation with the orphan statistics in KwaZulu-Natal, and may indicate a severe problem in the care of orphaned children. Furthermore, it should be noted that fostering and institutional care results in children not having permanency beyond 18 years of age.

[40] The applicant points out that in KwaZulu-Natal, which is one of the most populated provinces, the number of adoptions is disproportionately low. Data from the DSD, as shared by the parties during a presentation in November 2016, shows that a total of 174 adoptions took place in the province over a seven-year period. Unfortunately, although national and provincial statistical periods reflect one year periods, the periods are not for the same calendar period. The provincial statistics run for a calendar year, while the national statistics run from April to March annually. It is therefore imprecise to compare these figures, but a calculation in that annexure reveals that the province has never even reached 5 per cent of national adoptions.

[41] Before looking at the position in KwaZulu-Natal specifically, a further issue which exacerbates the situation, concerns the abandonment of children. In this regard, the applicant points out that there has been a large and steady increase in the number of babies, especially new-born babies, who are abandoned annually, many of whom are not found alive. Much of this can be attributed to the difficulties experienced by birth parents in placing their babies up for adoption. Whatever the circumstances, mothers who abandon their babies face criminal convictions. Despite this, the number of babies and toddlers abandoned continues to increase. Difficulties associated with adoption, including the lack of confidentiality and disregard for the right of self-determination, precludes this as an option for many birth mothers. The applicant contends that it has been reported to its adoption social workers by birth mothers consenting to the adoption of their babies,

that at both government hospitals and clinics, they have been disparaged for even considering adoption as an option.

The first 1000 days of a child's development

[42] I have already alluded to the expert report prepared by Ms Strydom and Ms Memela which appears as annexure 'MS 10' to the founding affidavit. The report was commissioned by the applicant in 2017 for the purpose of assisting the court in this application. The two experts were tasked to comment as expert witnesses on the impact of adverse childhood experiences ('ACE') on the developing brain during the crucial first 1000 days, and specifically the impact of impermanence (such as institutionalisation) for orphaned and abandoned infants in the social care system with regard to traumatic ACE. What follows is a brief summary of the opinions expressed by the experts in the said report:

42.1 They point out that attachment is a basic behavioural system that helps process relations-based emotional experience and regulation. Attachment theory provides a powerful framework for understanding the nature of close relationships, the links between mental representations in patterns of emotion regulation, and psychopathology which can be biological as well as cognitively based.

42.2 They inform us that literature is abound with examples of the physical, psychosocial, cognitive as well as emotional sequelae that is associated with children who grow up under these less than favourable conditions. For example, in a paper entitled 'The Neurobiological Toll of Early Human Deprivation'[12] Nelson *et al* wrote that:

'Children raised in institutions frequently suffer from a variety of behavioural, emotional, and neuropsychological sequelae, including deficits in attention, executive functions, disorders of attachment and in some cases a syndrome that mimics autism.'

There are also indications that contrary to this, children adopted away from their institutional background appear to catch up remarkably well in some respects. This means that children exposed to consistent, predictable, nurturing and enriched

[12] C A Nelson *et al* 'The Neurobiological Toll of Early Human Deprivation' (2011) 76(4) *Monographs of the Society for Research in Child Development* 127 at 127.

experiences develop neurobiological capabilities that increase the chance for health, happiness, productivity and creativity, while children exposed to neglectful, chaotic and terrorising environments have an increased risk of significant problems across all domains of functioning. The age at which a child enters and leaves an institution is also an important indicator for the child's response.

42.3 Dealing with the issue of childhood trauma, the experts inform us that generally when we think of childhood trauma, we usually visualise incidents of gross maltreatment, beatings, sexual abuse or grossly dehumanising experiences. They point out, however, that experience and scientific research has indicated that being neglected and removed from home is in itself a significant developmental trauma, which may be conceptualised as an adverse childhood or developmental experience. Childhood trauma has been defined as an event that a child finds overwhelmingly distressing or emotionally painful, often resulting in lasting mental and physical defects. According to the experts, institutionalised children are more than likely to have gone through these overwhelming and painful experiences before they find themselves in institutionalised places of safety and care.

[43] For all these reasons, the first 1000 days of a child's development are crucial in ensuring that a child grows up into a well-balanced and well-nurtured individual. A child deprived of consistent, attentive and attuned nurturing for the first three (3) years of its life, who is then adopted and begins to receive attention, love and nurturing may not be capable of benefitting from these experiences with the same malleability as an infant.

[44] Just to conclude on this aspect, the two experts inform us that from the literature reviewed by them on the subject, it becomes apparent that advances in neuro-science make it possible to elucidate why, from a neurobiological perspective, children reared in institutions are at risk, as they may be substantially deprived of the kind of experiences that are needed to optimise development. In order to obviate the harmful effects of institutional upbringing, it is abundantly clear that the sooner an adoptable child is placed within a family setting, the greater are its chances to grow and flourish. The respondents,

either through ignorance or a lack of understanding, seem to ignore this crucial period in a child's development.

Issue of delays in KwaZulu-Natal

[45] In support of its case that there are inordinate and unreasonable delays on the part of the DSD to finalise adoptions in the province, the applicant relies on statistical evidence compiled from information obtained by it as at 18 March 2019. The information was obtained from each and every adoption social worker throughout the province, extracting such information from their files. Where, however, data was incomplete the applicant excluded such information from the final analysis. Incomplete data could for example relate to the omission of a date of birth of a child or the omission of the date when the application was submitted.

[46] According to the applicant, there were 43 cases still awaiting a decision by the DSD. However, in one case the children's court has in any event granted the adoption order, but the DSD was not informed of the decision at the time. A further two applications were ready but not submitted to the panel and were still in the canalizing process. Of the remaining 40 applications awaiting letters of recommendation from the HOD, only two applications, both of which are related adoptions, were submitted less than 30 days prior to 10 March 2018. Five other related adoptions were awaiting letters where the earliest was first submitted on 23 March 2015, i.e. 1067 days, just short of three years ago. The others were submitted between 246 and 589 days prior to the relevant date set out above. In the case of three adoptions, the applicant was not provided with any information to indicate whether they were related or unrelated, one of which has been waiting for 634 days and was first before the panel a year after submission of the forms on 6 June 2016 and again before the panel in December 2017; another has been waiting for 202 days and was being held up by the insistence of the DSD to provide a combined report where two reports exist by two different social workers involved in the adoption. The bulk of the outstanding cases total 30, and deal with unrelated adoptions in which case the shortest time from submission to date of preparation was 99 days (more than 3 months) while the longest was 1 247 days i.e. three and a half years.

[47] The applicant points out that only four letters of recommendation were issued within an ideal time frame, while a further nine were within an acceptable time frame of less than two months.

Delay and its impact on the best interests of the child

[48] I agree fully with the applicant that long delays in reaching a decision as to whether the adoption is to be recommended or not, result in children and their prospective adopted parents being left in a state of limbo without any real right of recourse, except perhaps to bring costly individual review applications for the failure on the part of the first respondent to make a decision.

[49] The court in *Herbst*[13] importantly held that:

> 'As the rate of unwanted pregnancies for teenagers in South Africa rises there will be many more little M's looking for their forever parents. It is essential that the interpretation and application of the various statutes and regulations becomes settled law so that the necessary procedures can be completed expeditiously. The adoption procedure must be approached and addressed with empathy, understanding and flexibility. This does not mean that the dangers such as human trafficking should be overlooked. We must be vigilant but not to the extent that the evidence of experts is ignored and the paramountcy of the child's best interests.' (emphasis added)

[50] I have already alluded to the expert evidence concerning the first 1000 days of a child's development.[14] For a child to be institutionalised for an extended period, and more so especially in the first 1000 days, has been shown to do irreparable harm to the child and this harm extends into adulthood. This is all the more reason that every effort should be made to place adoptable children in the care and security of their prospective parents without delay.

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[13] *Herbst* fn 2 para 12.
[14] Annexure 'MS 10' of the founding affidavit at 161 – Impact of adverse childhood experiences on the developing brain.

[51] The best interests principle warrants that the HOD makes a decision as soon as possible once favoured with a report from the adoption panel. Even where the adoption is not recommended, I see no reason why the letter cannot be provided within the same tight time frames, with reasons for consideration by the children's court. For the HOD to simply not respond or fail to make a decision cannot in my view be in the best interests of the child.

[52] In not making a decision within a reasonable time, the HOD is in fact failing to make a decision, which under section 6(2)*(g)* read with s 6(3)*(a)* of PAJA, becomes reviewable:

> '. . .In the present cases, the respondent or duly empowered officials in her department have a duty to take decisions in respect of the applicants' applications. . . no law prescribes a time period within which such decisions have to be taken and those decisions have not been taken. In my view, there has, in these circumstances, been an unreasonable delay in taking the decisions. . . It has, accordingly been established that the applicants have established the ground of review envisaged by s 6(2)*(g)* of PAJA. The applicants are consequently entitled to appropriate relief for this infringement of their fundamental right to lawful administrative action.'[15]

What constitutes a reasonable time?

[53] In determining what is a reasonable time, the provisions of the Act, the National Policies and Guidelines, and even the first respondent's own policy guidelines have to be examined.

The Act

[54] The Act, as presently framed, does not provide any time frames relating to the letter of recommendation. According to the applicant, a proposed amendment to the Act which includes time frames has been drafted, but has not yet been considered nor yet come into operation. In determining what may be a reasonable time, it is perhaps convenient to examine other provisions of the Act which specify certain time frames within

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[15] *Vumazonke v MEC for Social Development, Eastern Cape, & three similar cases* 2005 (6) SA 229 (SE) para 39.

which events are to take place. The following time frames are relevant in considering what time frames, if any, should be imposed on the process and decision making regarding the section 239 letter of recommendation:

> 54.1 Information obtained by a social worker involved in an adoption, who obtains information relating to the identity or whereabouts of a person whose consent is required, must without delay submit a report to the clerk of the children's court.[16]
>
> 54.2 The presiding officer of the court, when a child becomes available for adoption, must cause without any delay, the sheriff to serve the required notice.[17]
>
> 54.3 After 30 days, any person whose consent is required, who has not responded to the notice, is regarded as having consented.[18]
>
> 54.4 Likewise, a biological father who has guardianship, and a foster parent with the right to be considered, only have 30 days to respond after receiving the notice as served by the sheriff.[19]
>
> 54.5 Consent to adoption, in instances when it is required, may be withdrawn within 60 days of having signed the consent where after it is final.[20]
>
> 54.6 A freeing order releasing the biological parents of parental responsibilities and rights pending an adoption, lapses after 12 months.[21]

[55] Considering that the freeing order lapses within 12 months, it can reasonably be deduced that there is an expectation that the process is to be completed in less than a year. Given the steps that are required to be taken, and each corresponding time frame that applies, it cannot be that an application for the section 239 letter of recommendation can simply languish on the side-lines, without any real attempt on the part of the HOD to give effect to her statutory or constitutional responsibilities.

DSD policy and guidelines

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[16] Section 237(4).
[17] Section 238(1).
[18] Section 238(3).
[19] Section 231(7)*(b).*
[20] Section 233(8).
[21] Section 235(5).

[56] The DSD's Approach to Management of National and Inter-Country Adoptions in the Province of KwaZulu-Natal of 11 November 2016, as contained in annexure 'MS 13' to the applicant's founding affidavit, provides specifically that: (a) the letter of recommendation is to be issued within 21 days from date of application to the panel, and (b) the letter must be signed by the HOD within 14 days of the panel meeting.

[57] From the information provided by the applicant, it is interesting to note that the interview panel format is not unique to KwaZulu-Natal, and was in fact first introduced in the Western Cape. That province has, however, since abandoned the interview panel and substituted it for an internal panel. Panels are nevertheless envisaged by national government to assist the HOD in the decision making process.

[58] A document from the DSD, entitled Information Guide on the Management of Statutory Services in terms of the Children's Act 38 of 2005[22] ('the information guide'), provides a useful guide on the responsibilities of the role-players generally, as well as providing specific timelines in relation to adoptions in accordance with Chapter 15. With reference to an annexure called the Terms of Reference,[23] it provides that 'before the HOD issues a recommendation letter, the application for adoption must be considered by an adoption panel.'

[59] The Terms of Reference provides for the following timelines: (a) the adoption panel must consider an adoption application within 14 days of submission of the application, and (b) the letter of recommendation is to be issued within 7 days of being presented at the meeting of the adoption panel.

[60] A separate and distinct document entitled Draft Terms of the Reference for the Adoption Panel has also been provided as evidenced by annexure 'MS 15'.[24] It states that the letters are to be issued within 7 working days after a panel meeting. More

[22] First published in 2012 and reissued in 2013 with some minor corrections and amendments.
[23] This appears as annexure 22 to the information guide – annexure 'MS 14' to the founding affidavit.
[24] Annexure 'MS 15' to the founding affidavit.

importantly (as far as the panels are concerned), it provides that meetings of panels should be held as frequently as it is necessary but at least once a week.

[61] An undated document entitled Approved Practice Guidelines on National Adoptions published by the national DSD under the hand of one Ms Rose Mnisi, provides that the letter of recommendation is to be issued within 30 working days from date of submission. It further states that the reasons, if the application is not recommended, be issued within the same time frame.[25]

The HOD's failings regarding adoptions in the province

[62] If the provisions of the Act, the DSD policy and guidelines as well as the province's own terms of reference all provide for adequate mechanisms and time frames for the manner in which adoptions are to take place, why then are there such difficulties in KwaZulu-Natal for adoptions to be finalised within a reasonable and acceptable time frame having regard to the best interests principle? No clear answer to this problem emerges from the respondent's answering papers. The respondents create the impression that there are no real problems in the manner in which adoptions are being dealt with in the province. However, the statistical evidence provided hereinbefore (and not disputed by the respondents) paints a completely different picture on the ground. The problems appear to be multi-faceted, and appear to stem from the following:

62.1 On 20 May 2016 the then Chief Director of Social Services in the office of the first respondent wrote to all Cluster Chief Directors and District Directors informing them of the decision to withdraw the delegation of powers, functions and duties made to them in terms of s 311(1)*(a)* of the Act. The reason for this withdrawal was 'due to the recent scourge of child trafficking and the misappropriation in adoption cases'. They were further informed that the directorate was in the process of facilitating the approval of an adoption panel and terms of reference by the HOD.

62.2 The effect of the withdrawal of delegations resulted in a *de facto* injunction on all adoptions in the province. This pattern continued until November 2016 when

[25] Annexure 'MS 16' to the founding affidavit.

a new procedure was adopted by the department to create an adoption panel, which would interview the assigned social worker and assess the adoption applications before referring the application to the HOD for a letter of recommendation in terms of s 239(1)*(d)* or one not recommending the adoption. While the HOD sought to publicly deny the *de facto* injunction when she appeared on national television on 3 September 2017, the downward trend in adoptions as revealed by the statistics provides adequate proof of this.[26]

62.3 Are cross-cultural adoptions problematic in the province? Cross-culture adoptions are for the most part across race adoptions. The applicant points out that it is generally accepted that these cross-culture adoptions are in the main black children being placed with white adoptive families. Courts have already given recognition to customary adoptions in line with legislative provisions despite the adoptions not having been formally registered as such.[27] Whilst ancestral and cultural beliefs are no doubt necessary considerations in adoptions of this nature, I do not believe that they should stand in the way of any adoption process. In a culturally diverse country such as ours and with an ever increasing number of children being abandoned, neglected and orphaned on a daily basis, the need for adoption becomes greater and must prevail over issues of culture and race.

62.4 The two main causes for the delays in finalising adoptions in this province seem to be the adoption panel on the one hand and the first respondent on the other. Both of them do not seem to understand their constitutional obligations when it comes to adoptions, and the need to expedite the process in the best interest of the child/children concerned. I deal with them separately.

62.5 The purpose of the panel appears from the various policy documents. The information guide provides that the purpose of the panel is:

- 'To consider adoption applications. The use of a panel is more advantageous than an individual assessment of the application due to diversity of ideas, experiences and expertise possessed by different panel members.
- To share ideas, experiences and advice on adoption matters.

[26] See paragraph 37 above.
[27] For example *Maneli v Maneli* 2010 (7) BCLR 703 (GSJ).

- To provide expert advice to adoption social workers who present cases for application for adoption.
- To advise the HOD or the person to whom the function of issuing the adoption recommendation letter has been delegated on each presented case; and
- To ensure that all adoption applications and reports are proficient and comply with all the criteria stated in section 239 before the application and report is presented in court.'

62.6 The panel is to be made up of two permanent members, a chairperson and a secretary. In addition to the permanent members, the panel may also include interested adoption social workers, those adoption social workers presenting cases on adoption applications and a provincial/district coordinator for a child protection or adoption services.

62.7 There appears to be two difficulties that arise as far as the KwaZulu-Natal panel is concerned: the first is that it is not immediately clear from the composition of the panel whether the members are suitably qualified and experienced to deal with adoption matters and the complexities that may arise from time to time, and the second is that it is not altogether clear how often the panel meets to deal with all the adoption applications that arise. The Act empowers adoption social workers to undertake interviews, counsel, make assessments and make decisions regarding the child, the birth parents and prospective adoption parents. The panel members have the power to advise adoption social workers on the presentation of their application. Just how the panel intends meeting its objectives is not clear. As far as meetings are concerned, these appear to erratic: while sometimes they seem to take place at least once a month, at other times they are less frequent. There is, in my view, a need for the panel to set out a proper schedule of its meetings for the year and to ensure that it abides by it. This is one of the reliefs being sought by the applicant herein.

62.8 Turning to the position of the HOD, the applicant's case is that she, in particular, misconstrues the provisions of the Act, the provisions of national guidelines and international instruments such as the African Charter on the Rights and Welfare of the Child. The applicant has contended that the HOD has often

considered irrelevant factors and failed to consider relevant factors. This has resulted in *inter alia* unreasonable delays in her decision making, this then infringing *inter alia* the fundamental rights of children waiting to be adopted and completely disregarding the best interests principle.

62.9 Adoption number 7 cited by the applicant, serves as a prime example of a case where the first respondent failed to recommend the adoption after a period of 148 days on the grounds that the maternal grandmother ought to have been provided with professional services and further interventions, in light of the absence of financial and visible means of support. The panel had in any event recommended the adoption.

62.10 A further example is adoption number 21, in which the adoption social worker was given the run around over a long period of time as a result of unnecessary queries being raised by the adoption panel. The adoption social worker's report was first compiled in December 2016. She was however informed that the report had to be re-done as it did not comply with the standard format. The report was duly re-compiled by the end of January 2017. The matter only came before the adoption panel on 27 March 2017. A query was raised regarding the birth parent's family's involvement and that the report should be on the adoption social worker's letterhead. This was attended to and re-submitted on 27 April 2017. The matter only came before the panel again on 19 June 2017. A query was then raised about the involvement of extended family members and the adopter's decision to adopt. The adoption panel then required the adoption social worker to open a children's court enquiry. The adoption social worker correctly pointed out that, as a social worker in private practice, she had no authority to open a children's court enquiry and would require the services of a child protection organisation. Considering the workload of child welfare organisations, it was unlikely that they would assist in the matter. After a flurry of communication to the HOD and her supervisor, to which no response was received, the matter was eventually placed before the Durban Children's Court <u>without</u> a section 239 letter, and the adoption was approved.

[63] From the two examples cited above, it becomes abundantly clear that the respondents tend to focus on unnecessary and irrelevant issues, resulting in inordinate delays and thus affecting the best interests of the child. The court in *Herbst,*[28] in considering the adoption application of 'Little M' who had been placed in the care of the appellant when he was nine (9) months old, held that 'this delay has created 4 years of agonising uncertainty for the appellants and has ultimately affected the rights of M of the certainty of having his own family'. It should be noted that the biological mother was fully supported by her family in her decision to put up her child for adoption 'as they were all struggling financially'. Consent to the adoption was signed on 15 October 2013, within days of M's birth. Unfortunately, M was placed in a children's home until he met his adoptive parents eight (8) months later. The court in *Herbst* found that the steps followed by the department were all unnecessary in the circumstances.

[64] As far as the African Charter is concerned, Article 24 (dealing with adoption) provides that the 'best interest of the child shall be the paramount consideration' and that the state parties shall further establish competent authorities to:

'ensure that the adoption is carried out in conformity with applicable laws and procedures . . . [based on] relevant and reliable information, that the adoption is permissible in view of the child's status . . . and that if necessary, the appropriate persons have given their informed consent to the adoption on the basis of appropriate counselling.'

The rest of the Article concerns inter-country adoptions, and is not really relevant for purposes of this judgment. In any event it does not seem as if the respondents even pay any heed to the Article.

[65] Chapter 15 of the Act, which deals with national adoptions, and Chapter 16 which deals with inter-country adoptions, accord with the provisions of the African Charter. Article 20 of the African Charter relates to the obligations of the State in the fulfilment of parental responsibilities. Article 20(2) provides that:

'State Parties . . . shall in accordance with their means and national conditions take all appropriate measures:

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[28] *Herbst* fn 2 paras 3 and 5.

(a) to assist parents and other persons responsible for the child and in case of need, provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing;
(b) to assist parents and others responsible for the child in the performance of child-rearing and ensure the development of institutions responsible for providing care of children. . .'

[66] While the State does make provision for *inter alia* child grants, foster grants, free schooling for the poor, school feeding schemes, and so on, it seems to ignore, especially in KwaZulu-Natal, adoption as a viable alternative which ensures that a child is reared in a proper family setting thus placing less strain on the fiscus.

[67] In her affidavit, the first respondent has not only dealt with a number of provisions of the Act prior to the amendments to the adoption provisions, but she has also annexed policy documents which in any event deviate from the national guidelines, specifically on time frames for the issue of the letter of recommendation. The first respondent adopts the view that because the s 239(1)*(d)* letter of recommendation is peremptory in the adoption process, it is up to her to decide when the letter should be provided. The fundamental difficulty that I have with this stance is that while the HOD is entrusted to exercise this power, she fails to realise that this is not an absolute power and certainty not one that can be exercised to the detriment of the child and the best interests principle.

[68] The HOD's stance is concerning, as it tends to denote a clear lack of understanding of her role in the adoption process and the need to exercise her powers according to the precepts of the Constitution, the provisions of the Act, the DSD's policy guidelines and her own terms of reference. The result is a complete violation of certain fundamental rights in the Constitution, such as the rights to dignity (section 10), to equality (section 9), to freedom and security (section 12), to privacy (section 14), to freedom of religion, belief and opinion (section 15) and the right to language and culture (section 30) of potential adoptable children.

[69] While the Act, together with the national guidelines and provincial policies provide adequate mechanisms and safeguards in dealing with adoptions, the failures of the first

respondent, as outlined above, result in serious long-term psychological trauma both for consenting parents and the child in question. Quite apart from a breach of the rights set out above, I consider that the right to access to court and the right to just administrative action of children who are adoptable and the prospective adoptive parents of children who are adoptable, continue to be violated by irrelevant considerations and delays caused by such irrelevant considerations by the first and third respondents relating to prospective adoptions.

Effective relief

[70] From everything that I have said thus far, it is clear that the respondents have misconstrued their statutory duties to the detriment of many children in this province who are adoptable. Children in our country, like women, remain the most vulnerable members of society and accordingly it is important that they enjoy the full protection of the law at all times. Where, as in this case, egregious infringements have occurred, a court would be entitled to step in to provide effective relief. It is the vulnerability of those who suffer most from these failures that underscores just how important it is for courts to craft effective, just and equitable remedies as the Constitution requires them to do.[29] While respecting the doctrine of separation of powers, courts are nonetheless entitled to carry out their constitutionally mandated responsibilities to ensure that government and its functionaries comply with their statutory duties. The Constitutional Court warned in *Doctors for Life International v Speaker of the National Assembly & others*[30] that the separation of powers doctrine should not cause courts to shirk from this constitutional responsibility:

> '[W]hile the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty.'

[29] *Mwelase & others v Director-General, Department of Rural Development and Land Reform & another* 2019 (6) SA 597 (CC).
[30] *Doctors for Life International v Speaker of the National Assembly& others* 2006 (12) BCLR 1399 (CC) at 1462.

[71] Turning to the relief to be granted, the applicant has sought various declarators based on the nature and extent of the respondents' breaches of a number of rights in the adoption process. While I agree that such relief is justified, I see no point in setting aside any decision or the failure to make a decision by the first and third respondents where an application has been submitted and the s 239(1)*(d)* letter has not been provided after the lapse of thirty (30) days. Granting such relief would, in my view, only serve to cause more delays in finalising a matter. The better option, in my view, would be to direct the first and third respondents to make a decision in respect of all outstanding applications within one (1) month of the order herein, and to report to this court in terms of the supervisory order appearing hereunder.

[72] Given the inordinate delays on the part of the first respondent to issue letters of recommendation within a reasonable time, a supervisory order would be justified. The first and third respondents would be obliged to report to this court on the status of all adoption applications which have been submitted. This will no doubt allow this court to retain jurisdiction, and to alleviate the necessity of having individual matters being brought to it, as has been happening since November 2016 on the introduction of the panel. I envisage that such a supervisory function should not last longer than two (2) years. Of course, the consequences for the first and third respondents in failing to adhere to the terms of such an order will in my view be dire.

[73] I should point out that on the conclusion of the arguments in this matter on 1 November 2019, I directed the respondents to file a brief affidavit setting out the status of all adoption applications that were before them at the time. Inasmuch as the respondents had complied with this request and filed such affidavit, it seems, from the response delivered by the applicant, that the respondents were not being truthful regarding the information they provided. In the circumstances, I do not believe that any good will be served by relying on this information for purposes of this application, and I accordingly ignore the further affidavits filed. In my view the supervisory order will serve a more useful purpose in the circumstances.

Costs of application

[74] The applicant has sought an order for costs in the event of success. The applicant has achieved substantial success in the matter and I accordingly see no reason why it should be deprived of its costs. The applicant has demonstrated, adequately in my view, serious failures on the part of the respondents to fulfil their constitutional and statutory obligations with regard to adoptions.

[75] I consider that the present litigation cannot by any stretch of the imagination be regarded as being frivolous or misconceived. The applicant has raised important issues on the state of adoptions in this province, affecting as they do, the fundamental rights of not only adoptable children but also of consenting birth and adoptive parents.

[76] The appropriateness of granting a costs order herein flows from the decision of the Constitutional Court in *Biowatch Trust v Registrar Genetic Resources & others*[31] where the rationale therefore has been explained as follows:

> '[23] The rationale for this general rule is three-fold. In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse. Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy. Thirdly, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs

[31] *Biowatch Trust v Registrar Genetic Resources and & others* 2009 (10) BCLR 1014 (CC) paras 23-25.

consequences of failure. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door.

[24] At the same time, however, the general approach of this Court to costs in litigation between private parties and the State, is not unqualified. If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award. Nevertheless, for the reasons given above, courts should not lightly turn their backs on the general approach of not awarding costs against an unsuccessful litigant in proceedings against the State, where matters of genuine constitutional import arise. Similarly, particularly powerful reasons must exist for a court not to award costs against the State in favour of a private litigant who achieves substantial success in proceedings brought against it.

[25] Merely labeling the litigation as constitutional and dragging in specious references to sections of the Constitution would, of course, not be enough in itself to invoke the general rule as referred to in *Affordable Medicines* (*supra*). The issues must be genuine and substantive, and truly raise constitutional considerations relevant to the adjudication. The converse is also true, namely, that when departing from the general rule a court should set out reasons that are carefully articulated and convincing. This would not only be of assistance to an appellate court, but would also enable the party concerned and other potential litigants to know exactly what had been done wrongly, and what should be avoided in the future.'

[77] Apart from the above consideration justifying a costs order against the respondents, there is in my view a further reason that comes into play. This flows from the manner in which the respondents sought to litigate in this matter. The inordinate delay in filing their answering affidavit, and the manner in which the affidavit was prepared (as alluded to already) seem to suggest that the respondents do not take their responsibilities seriously.

Order

[78] In the result I make the following order:

1. It is declared that in relation to adoptable children:

(a) The rights articulated in section 28 of the Constitution of the Republic of South Africa, 1996 ('the Constitution'), in particular that in all matters regarding children, the best interest of the child is paramount (section 28(2)) as well as section 28(1)*(b)*, have been violated by the first respondent in failing to give effect to section 239(1)*(d)* of the Children's Act 38 of 2005 ('the Act') in relation to the adoption of adoptable children;

(b) The rights to dignity (section 10), to freedom and security (section 12) and to equality (section 9) of the children who are adoptable, have been violated by the failure of the first respondent to make a decision, alternatively the failure to make a decision within a reasonable time, relating to their prospective adoptions;

(c) The rights to dignity (section 10), to freedom and security (section 12) and to equality (section 9) of the children who are adoptable, have been violated by irrelevant considerations and delays caused by such irrelevant considerations by the first and third respondent, relating to their prospective adoptions.

2. It is declared that in relation to the biological or birth parents of adoptable children, the first and third respondents' failure to consider relevant factors and their consideration of irrelevant factors, including *inter alia* disregarding of informed consent properly given and decisions made by birth parents, regarding the recommendation of adoptions is a violation of these biological or birth parents' rights to dignity (section 10), to equality (section 9), to freedom and security (section 12), to privacy (section 14), to freedom of religion, belief and opinion (section 15) and to the right of language and culture (section 30).

3. It is declared that the right to access to court, and the right to just administrative action of children who are adoptable and that of the prospective adoptive parents of children who are adoptable, have been violated by irrelevant considerations and delays caused by such irrelevant considerations by the first and third respondent, relating to prospective adoptions.

4. It is declared that in relation to the purpose, function and considerations in the decision-making process of the letter of recommendation required by section 239(1)*(d)* of the Act that:
   (a) The purpose of adoption is to provide a permanent family for a child, with bonds that reach beyond the age of 18; and
   (b) The purpose of the section 239(1)*(d)* letter by the provincial head of social development recommending the adoption of the child ('the letter'), is to ensure that:
      (i) The legislative provisions are adhered to by accredited social workers within the framework of their professional ethics and responsibilities; and
      (ii) To provide for the best interests of each child, considering factors specifically and peculiarly within the knowledge of the Department of Social Development ('DSD').
   (c) That, in line with national policy, a period of thirty (30) days from the date of submission of the adoption application to the appointed and appropriate persons at the DSD, KwaZulu-Natal, to the date of the letter being received by the adoption social worker is a reasonable time for the purposes of section 239(1)*(d)* of the Act.
5. It is declared that with regard to the placement, including the mechanisms for placement of an adoptable child pending the finalisation of an adoption:
   (a) An adoptable child is not a child designated in need of care as a consequence of a child's parents consenting to his or her adoption, and the related provisions to a child in need of care are not an automatic consequence of a child's parents consenting to his or her adoption or of an adoption application;
   (b) A placement of a child in place of safety, foster care and freeing orders are each acceptable to place a child with a prospective adoptive parent if such placement is warranted and in the best interests of the child, as decided by the adoption social worker;

(c) That an adoptable child is to be placed in an environment best suited to meet his or her emotional, psychological and physical needs.

6. The first respondent is directed to remedy the failure to make a decision on all outstanding applicants by:

(a) (i) Causing the panel to convene and consider all the listed and still outstanding adoption applications and those submitted more than thirty (30) days before the date of this order,

(ii) which have not yet been before the panel or have been before the panel without decision, and

(iii) finalise these cases within thirty (30) days of the date of this order.

(b) That the first and third respondents, and the panel under their direction, when considering these applications, do so with reference to the other relief sought in this application and within the legislative provisions for adoptions in accordance with the Act;

(c) That the first respondent issues the letters within seven (7) days of the panel interviews referred to in prayer 6(a) above;

(d) Where a panel interview has already taken place and the first respondent decides it is not necessary for the adoption social worker to appear before the panel again, that the first respondent issues the letters within seven (7) days of the date of this order;

(e) Where the decision made is to not recommend an adoption, that the first respondent provides, in writing, the reasons for the decision, as well as the letter not recommending the adoption;

(f) The letter is to be provided to the adoption social worker, and to the relevant children's court, in all instances.

7. It is directed that where the letter is a letter not recommending the adoption, alternatively failing receipt of the letter within the time frame stipulated, for the listed adoptions, and outstanding for more than thirty (30) days, the adoption social worker may set the matter down in the children's court for consideration, in which case:

(a) The requirement of a letter of recommendation may be waived by that court in the interests of justice for the children who are awaiting adoption, on a case by case basis, for those adoptions listed where the letter has remained outstanding for more than 45 days;

(b) A member of the panel is to be present at the children's court at the time of the hearing of the adoption application, being duly notified by the adoption social worker of the set down date;

(c) The court having considered the evidence of the adoption social worker and the member of the panel, may make a decision that it deems fit on the adoption application before it.

8. It is directed that the first and second respondents are to report to this court, on oath, within sixty (60) days of this order on the following matters:

(a) A plan of improvements for the panel, including: its composition in accordance with the guidelines, regular scheduling of panel interviews, adequate notice to adoption social workers of their interviews, a working guide for the panel including factors to be considered and which are not to be considered;

(b) The composition of the current adoption panel and its members' qualifications or positions held, indicating specifically the adoption experience of the permanent and ad hoc members of the panel;

(c) If the panel comprises of no, or insufficient social workers with adoption experience, that a new panel, appropriately constituted in order to ensure compliance with the law and with best practices, be identified and implemented and such be reported to this court;

(d) The schedule of meetings planned for the panel for the next 12 months, and possible improvements which can be made in the scheduling of appointments before the panel;

(e) A report addressing the discrepancies between the provisions of the Act, the national policy and KwaZulu-Natal policy, alternatively implementation of the policy in KwaZulu-Natal, as highlighted in the founding affidavit.

(f) Reporting on how the KwaZulu-Natal policy and/or practice is to be amended to conform with the national policy and legislative provisions, and the time frame in which this will be done.

(g) Reporting of concerns regarding the actions of the adoption social workers, and whether an audit of the adoption social workers in the Province, their qualifications and any other requirements or plan for training and intervention of adoption social workers regarding dealings with biological parents (in accordance with the Act) is required. If required, a plan of what is required and the time frames in which this will be done.

9. The respondents are directed to report to this court on oath, every six (6) months for a period of two (2) years from date hereof, detailing the number of adoption applications being made and the status of such applications.

10. The respondents are directed to pay the costs of the application.

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SEEGOBIN J

APPEARANCES:

COUNSEL FOR THE APPLICANT:	Ms Ainslie and Mr Courtenay (instructed by Centre of Child Law c/o Wild & Associates)
COUNSEL FOR THE RESPONDENTS	Ms Bhagwandeen and Ms Shazi (instructed by State Attorney, Durban)
DATE OF HEARING:	1 November 2019
DATE OF JUDGMENT:	24 February 2020