

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 862/2023

In the matter between:

MINISTER OF SOCIAL DEVELOPMENT	**FIRST APPELLANT**
MEMBER OF THE EXECUTIVE COUNCIL FOR SOCIAL DEVELOPMENT, GAUTENG	**SECOND APPELLANT**
HEAD OF DEPARTMENT, GAUTENG DEPARTMENT OF SOCIAL DEVELOPMENT	**THIRD APPELLANT**

and

TT	**FIRST RESPONDENT**
BM	**SECOND RESPONDENT**
SINAH PHIRI	**THIRD RESPONDENT**
LIVHUWANI MUFAMADI-MALAKA	**FOURTH RESPONDENT**
PEARL HLATSHWAKO	**FIFTH RESPONDENT**
MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, GAUTENG	**SIXTH RESPONDENT**
EVELYN MAHLANGU	**SEVENTH RESPONDENT**
GOITSEMANG BOTES	**EIGHTH RESPONDENT**
SOUTH AFRICAN COUNCIL FOR	

SOCIAL SERVICE PROFESSIONS	**NINTH RESPONDENT**
MBC	**TENTH RESPONDENT**
TLC	**ELEVENTH RESPONDENT**
MT	**TWELFTH RESPONDENT**
BAT	**THIRTEENTH RESPONDENT**
CENTRE FOR CHILD LAW	***AMICUS CURIAE***

Neutral citation: *Minister of Social Development and Others vs TT and Others* (862/2023) [2026] ZASCA 142 (20 October 2026)

Coram: DAMBUZA, KATHREE-SETILOANE, and SMITH JJA, KOEN and CHILI AJJA

Heard: 13 November 2024

Delivered: This judgement was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 20 October 2026.

Summary: **Family Law:** Children's Act 38 of 2005 (the Act) : distinction between adoption and the care and protection process : obligation to adhere to the statutory regime governing adoptions : Department of Social Development not authorised to issue Guidelines more onerous than provisions of the Act : conduct of social workers unlawful and unconstitutional.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Dippenaar J, sitting as court of first instance):

The appeal is dismissed with costs including the costs of three counsel.

JUDGMENT

Dambuza JA (Kathree-Setiloane and Smith JJA and Koen and Chili AJJA concurring)

Introduction

[1] This appeal concerns, in the main, the correct interpretation and application of the provisions of the Children's Act 38 of 2005 (the Act) that regulate the adoption of minor children. More particularly, the issue is the correct interpretation of those provisions and whether the social workers employed by the Department of Social Welfare, Gauteng Province, interpreted and implemented the provisions of the Act correctly during the adoption processes relating to two minor children.

[2] The Gauteng Division of the High Court, Johannesburg, per Dippenaar J (the High Court) found that the adoption procedures adopted by the government social workers were, inconsistent with the law and the Constitution. It also found that the Departmental Guidelines on National Adoptions (the Guidelines), in terms of which the social workers purported to act, were unconstitutional. In this

appeal the Minister of Social Development (the Minister), the Member of the Executive Council for Social Development in the Gauteng Province (the MEC), and the Head of Department of the Gauteng Provincial Department of Social Development (the Department), (also collectively referred to as the government parties) appeal against the decision of the High Court. Leave to appeal was granted by the High Court.

[3] The circumstances leading to the two children being put up for adoption, are broadly similar. They are comprehensively set out in the judgment of the High Court. In summary, the two minor children, who were referred to as B and L[1] by the High Court, were both born of single mothers. The children's biological mothers, the first and second respondents, consented to their adoption.

Facts relating to B

[4] B's biological mother was a 23year old university student when she fell pregnant with B. She decided not to inform her parents and extended family about her pregnancy because they were strict and 'conservative', and she feared that they would disown her and cause her to cease her studies. B's biological father also a student, made it plain that he did not want to have anything to do with B, even suggesting that the pregnancy be terminated. When his suggestion was rejected, he terminated all contact with B's biological mother.

[5] B's biological mother decided to put him up for adoption. She did so with the assistance of Ms Wasserman, an adoption social worker in private practice. B was born prematurely and had to remain in hospital for a week after his mother's discharge from hospital. Shortly after discharge from hospital, during July 2018, B's mother formally consented to B's adoption by executing the relevant legal

[1] As the High Court refers to them.

documents before a magistrate in the Children's Court. B would be placed in temporary care with the prospective adoptive parents (the first prospective adoptive parents) chosen by his mother until the adoption process was finalised.

[6] While B was still in hospital, the seventh respondent, Ms Evelyn Mahlangu (Ms Mahlangu), a social worker employed by the Gauteng Department of Social Welfare and stationed at the hospital, spoke with B's mother about the adoption process. She (Ms Mahlangu) was of the view that B's father should be traced to ascertain his wishes regarding the adoption. A difference of views on this aspect, between B's mother and Ms Mahlangu, resulted in B remaining at the hospital for longer than had been initially anticipated. The first prospective adoptive parents thereafter abandoned the adoption as a result of the uncertainty of the process.

[7] During July 2018, the third and fourth respondents, Ms Sinah Phiri (Ms Phiri) and Mrs Livhuwani Mufamadi-Malaka (Mrs Mufamadi-Malaka), also government social workers, became involved in B's adoption. Ms Phiri informed B's mother that she was going to tell her parents, (B's biological grandparents) about B's birth because they had a right to know. She was of the view that B's grandparents had to consent to the adoption. Ms Phiri also advised B's mother that arrangements would be made to place B in the care of the grandparents. Mrs Mufamadi-Malaka supported this course of action.

[8] During August 2018 the Department obtained an order from the Children's Court to move B from the birth hospital, to a different hospital. The order was obtained on the basis that B was a child in need of care and protection. The order was obtained without B's mother being informed. B was then kept in a temporary care facility for four months before being placed with the current adoptive

parents, the tenth and eleventh respondents, MBC and TLC (the adoptive parents). The placement was made in terms of an order of the Children's Court.

[9] In September 2018, the Department issued a report advising the magistrate in the Children's Court that it had referred B's adoption for investigation. The magistrate ruled that no investigation was necessary and that Ms Wasserman should continue as the adoption social worker and place an advert in the newspaper in an attempt to trace B's biological father. The advert did not yield any results.

[10] On 14 November 2018, following a number of postponements at the instance of the Department, the adoption process served before the Children's Court. The Children's Court ruled that B be placed in temporary care with his adoptive parents pending finalisation of the adoption process. The proceedings were postponed to February 2019 for the Department to file a recommendation letter as required under s239 of the Act The matter was again postponed until August 2019 when the Children's Court granted an order referring the matter to the Department to determine whether B was a child in need of care and protection. B's mother and Ms Wasserman were never alerted to the application which resulted in this order. In addition, despite repeated protest by B's mother, the biological grandparents were informed of B's birth and the adoption process. The government social workers visited the grandparents on several occasions between March and May 2020 to persuade them to take custody of B and raise him. Although not unwilling, the grandparents were ambivalent about the matter.

[11] In a report prepared in May 2020, regarding whether B's biological grandparents should be the foster parents, Mrs Mafumadi-Malaka recommended that B be placed with his biological grandparents 'in terms of sections 7*(f)*(i)(ii), 8 and 9' of the Children's Act. The recommendation was motivated as follows:

'The undersigned social worker interviewed all family members about the issue of B to be placed under the foster care of their parents. The family members do not have any problems for B to be placed with their parents. The family indicated that they were never consulted on adoption of B and they are against it. According to the guideline of adoption it is stated that the family of origin should be considered or given opportunity to participate in the process, however the maternal grandparents were not informed about the process and they are willing to care for the child concerned. . .

. . . According to the Children's Act 38 of 2005, it is in the child's best interests of the child concerned to be placed in the care of his parents, family, and extended family to maintain a connection with his or her family, extended, culture or tradition in terms of section 7(f)(i)(ii). The T family is willing to care for their grandchild as the close family members.

The undersigned saw the importance of placing the child concerned with his maternal family as the child rights needs to be considered and his best interest is paramount. It is also best for him to be in the care of his family in order to maintain his culture and tradition.

CONCLUSION

In view of the above information it can be concluded that the child BT is a child in need of care and protection and his best interest and as well as his rights must be protected as they are paramount in terms of [the] section of Children's Act, 38 of 2005.'

[12] The view of the government social workers that B's interests would best be served by placing B in the care of the biological family for maintenance of his culture, permeates all communication from the Department, including the numerous reports issued by the Department,[2] and the submissions made in the Children's Court. In line with this view, the government social workers were determined to delay the adoption proceedings while attempts were made to persuade the magistrates and B's biological family that B should be placed in the care of his biological grandparents. As a result, the adoption proceedings in the Children's Court were postponed 15 times between 2018 and 2020.

[2] Including a report on Ms Wasserman, in which it was suggested that her conduct be investigated.

[13] On 29 June 2020 the matter again served before the Children's Court. Mrs Mufamadi-Malaka testified, reasserting the contents of the May 2020 report that she had prepared. She admitted that she had never met B's adoptive parents with whom B presently resides. No investigation had ever been conducted into their circumstances, and that, B had never met his biological grandparents.

[14] On 7 August 2020 the Children's Court found that B's adoption by the adoptive parents was in B's best interests, having found that B was adoptable under s 230(3)*(g)* of the Act. It found that Mrs Mufamadi-Malaka's recommendation against adoption by the adoptive parents was not justified and directed the Department to issue a s239(1)*(d)* recommendation letter within 30 days. This section requires that an application for the adoption of a child be accompanied by a letter from the provincial head of social development recommending the adoption of the child. The Department refused to do so. Instead, it issued a letter under the same section stating that the Department did not recommend B's adoption.

The facts relating to L.

[15] When L was born, his mother, a university student, decided to give him up for adoption. She already had another child at the time, and her parents had expelled her from their home when they learnt about the first pregnancy. However, she was able to return home after five months. The father of the L abandoned her. L's mother secured Mrs Wasserman's assistance and consented to L's adoption before a magistrate in the Children's Court. L was then placed in the temporary safe care of the adoptive parents, the twelfth and thirteenth respondents, MT and BAT. The placement was made pending the finalisation of the adoption as provided in s 46(1)*(a)* of the Act.

[16] During September 2019, the fifth respondent, Ms Pearl Hlatshwayo (Ms Hlatshwayo), also a social worker in the employ of the Department, became involved in L's adoption process. She interviewed L's mother who told her that she did not want her parents to know about L.

[17] On 17 June 2020, Ms Wasserman submitted a report to the Department, recommending L's adoption by the adoptive parents. However, during October 2020, Ms Hlatshwayo informed L's mother that she was in possession of a court order instructing her to advise her parents (L's biological grandparents) about the adoption and that a site visit would be conducted at the grandparents' home on 15 October 2020. Through pro bono legal assistance, L's mother obtained a High Court order barring the Department and the government social workers from informing her parents about L and the adoption process.

[18] On 14 October 2020 the Department issued a letter, purportedly in terms of s 239(1)*(d)* of the Act, recommending L's adoption by the prospective adoptive parents. However, just over a month later, in November 2020, the Department. particularly, the Minister, and the Head of Department, launched a self-review in the High Court seeking that the letter of recommendation be reviewed and set aside.

[19] During December 2020 the mothers of B and L launched a joint application in the High Court seeking various orders, a number of which were aimed at enforcing confidentiality of the proceedings to protect the minor children's privacy. In addition, they sought orders that: (1) the letter of non-recommendation of B's adoption be reviewed, set aside, and substituted with an order recommending B's adoption by the adoptive parents; (2) the guidelines in terms of which the department and the social workers purported to act, be set aside, (3) the conduct of the department's functionaries in relation to the adoption of B and

L be declared to be in breach of their mothers' rights under ss 10, 12 and 14 of the Constitution, and (4) that, to the extent necessary, and in the event that the court found that s 7(1)*(f)* of the Act was incapable of an interpretation that is consistent with ss 10, 12, 14 and 28(2) of the Constitution, it be declared to be constitutionally invalid and set aside.

[20] In the High Court, it was the government parties' case that it was not in the interests of B and L that they be adopted by their adoptive parents. because Ms Wasserman and the magistrates who had presided over the adoption applications, did so in circumstances of material contraventions of the law. They sought to have B and L removed from their prospective adoptive parents, and placed in foster care with their grandparents and that the process of adoption start afresh. A report compiled on behalf of the Department by the Deputy Director: Monitoring and Evaluation: Social Welfare, (Ms Naidoo) in respect of B formed part of the Department's answering affidavit in the High Court.

[21] It is evident from the report that the Department took issue with the order granted by the magistrate finding that B was adoptable on the basis of Ms Wasserman's report. The Department considered Ms Wasserman unqualified to issue a recommendation report because she was a private adoption social worker and not a designated social worker under the Act. The government social workers considered that in adoptions 'Designated Statutory Social Workers (PASW) are mandated to investigate and recommend to the court if a "child is in need of care and protection".' Their view was that social workers in private practice were 'accredited to only render National Adoption Services within the "Child Protection System".' The report also explains that it is 'peremptory' in processing adoptions to find a child in need of Care and protection and to subsequently ensure that designated social workers provide the relevant services to the child and family prior to the court declaring the child adoptable.

[22] The High Court found that the Department and the social workers adopted an incorrect approach in processing the adoptions by assuming that adoption must be preceded by a determination by a designated statutory social worker on whether the child in question is in need of care and protection. It ordered that the review application launched by the Department be permanently stayed. It granted essentially all the orders sought by the mothers and did not find it necessary to declare the provisions of s7 of the Act.

[23] The court strongly criticised the conduct of the government social workers. It found that the manner in which they conducted themselves in relation to the adoptions was substantially inconsistent with the Act and the adoption procedures set out therein. First, their disregard of the of the orders granted by the Children's Court, directing that a letter of recommendation for B's adoption be issued was unlawful. Further, their disregard of the order of 7 August 2020 to the effect that B was adoptable and that his adoption by the adoptive parents was in his best interests, was similarly unlawful. The Department had unlawfully interfered with the adoption of other vulnerable children, other than B and L and had illtreated B and L's mothers. The High Court then ordered that its judgment be brought to the attention of the Department and that the conduct of the implicated government social workers be reported to the South African Council for Social Service Professions.

[24] This appeal only relates to the orders granted by the High Court in respect of the constitutionality of the conduct of the government social workers in relation to B and L, the constitutionality of the Guidelines, and the referral of the conduct of the government social workers to the South African Council for Social Service Professions. The orders pertaining to confidentiality of the proceedings, setting aside the non-recommendation letter in relation to B's adoption, and

permanently staying the self-review, do not form part of this appeal as the High Court did not give leave in respect thereof.

In this appeal

[25] Two issues arise in this appeal. The first is whether the conduct of the government social workers and the Guidelines in terms of which they purported to act in relation to the adoption of B and L, are consistent with the Constitution and the Act. There is a related issue raised by the government parties, that in electing to give B and L up for adoption, their mothers did not act independently but were unlawfully influenced by Ms Wasserman. The second issue is whether the judgment of the High Court should be brought to the attention of the South African Council for Social Service Profession.

[26] The government parties argue that Ms Wasserman and the Children's Court transgressed the legal provisions relevant to adoption. For that reason, their conduct and decisions in relation to the adoptions, particularly in relation to the letter recommending L's adoption, should be declared 'null and void'. They contend that the High Court failed to have regard to transgressions of law by Ms Wasserman and the magistrate who flouted the provisions of Chapter 9 of the Act.

[27] The government parties persist in the argument that the adoption proceedings must start afresh because the application documents were not 'compliant'. They insist in this course of action in circumstances where B's adoption was finalised on 26 May 2023 and that of L on 8 August 2023. They maintain that the High Court's conclusion that the Department conflated the requirements of ss 9 and 15 of the Act when drafting the Guidelines, was founded on a misunderstanding of their case.

[28] B and L's mothers, and the Ninth Respondent, the South African Council for Social Service Professions (SACSSP), oppose the appeal.

Was the conduct of government social workers consistent with the provisions of the Act and the provisions of the Constitution?

[29] The High Court correctly found that the approach adopted by the Department and its social workers was wrong. At the heart of the erroneous approach by the government social workers is a conflation of the provisions in Chapter 9 of the Act, which regulate how children in need of care and protection must be processed (the care regime), and the provisions in Chapter 15 of the Act, which regulate adoptions. These are two different processes. Although they share the same constitutional and interpretative core[3] as reinforced in ss 7 and 9 of the Act – which highlight the advancement of the best interests of a child, the care regime is essentially a protective intervention, mostly in family relationships, which cause or threaten harm to a child.

[30] Care proceedings are triggered by a protective concern emanating from a report made under s 47[4] or s 110[5] of the Act regarding the existence of the grounds

[3] Section 28(2) of the Constitution provides that '[a] child's best interests are of paramount importance in every matter concerning the child.'

[4] Section 47 of the Act provides:

'**47 Referral of children by other court for investigation**

(1) If it appears to any court in the course of proceedings that a child involved in or affected by those proceedings is in need of care and protection as is contemplated in section 150, the court must order that the question whether the child is in need of care and protection be referred to a designated social worker for an investigation contemplated in section 155 (2).

(2) If, in the course of any proceedings in terms of the Administration Amendment Act, 1929 (Act 9 of 1929), the Matrimonial Affairs Act, 1953 (Act 37 of 1953), the Divorce Act, the Maintenance Act, the Domestic Violence Act, 1998 (Act 116 of 1998) or the Recognition of Customary Marriages Act, 1998 (Act 120 of 1998), the court forms the opinion that a child of any of the parties to the proceedings has been abused or neglected, the court-

(a) may suspend the proceedings pending an investigation contemplated in section 155 (2) into the question whether the child is in need of care and protection; and

(b) must request the Director for Public Prosecutions to attend to the allegations of abuse or neglect.

(3) A court issuing an order in terms of subsection (1) or (2) may also order that the child be placed in temporary safe care if it appears to the court that this is necessary for the safety and well-being of the child.'

[5] Section 110 of the Act provides:

'**110 Reporting of abused or neglected child and child in need of care and protection**

set out in s 150(1) of the Act, such as abuse, neglect, exploitation or abandonment of a child.[6] The state initiates the care process. Under ss 151 and 152 the child

(1) Any correctional official, dentist, homeopath, immigration official, labour inspector, legal practitioner, medical practitioner, midwife, minister of religion, nurse, occupational therapist, physiotherapist, psychologist, religious leader, social service professional, social worker, speech therapist, teacher, traditional health practitioner, traditional leader or member of staff or volunteer worker at a partial care facility, drop-in centre or child and youth care centre who on reasonable grounds concludes that a child has been abused in a manner causing physical injury, sexually abused or deliberately neglected, must report that conclusion in the prescribed form to a designated child protection organisation, the provincial department of social development or a police official.
(2) Any person who on reasonable grounds believes that a child is in need of care and protection may report that belief to the provincial department of social development, a designated child protection organisation or a police official.
(3) A person referred to in subsection (1) or (2)-
(a) must substantiate that conclusion or belief to the provincial department of social development, a designated child protection organisation or police official; and
(b) who makes a report in good faith is not liable to civil action on the basis of the report.
(4) A police official to whom a report has been made in terms of subsection (1) or (2) or who becomes aware of a child in need of care and protection must-
(a) ensure the safety and well-being of the child concerned if the child's safety or well-being is at risk; and
(b) within 24 hours notify the provincial department of social development or a designated child protection organisation of the report and any steps that have been taken with regard to the child.
(5) The provincial department of social development or designated child protection organisation to whom a report has been made in terms of subsection (1), (2) or (4), must-
(a) ensure the safety and well-being of the child concerned, if the child's safety or well-being is at risk;
(b) make an initial assessment of the report;
(c) unless the report is frivolous or obviously unfounded, investigate the truthfulness of the report or cause it to be investigated;
(d) if the report is substantiated by such investigation, without delay initiate proceedings in terms of this Act for the protection of the child; and
(e) submit such particulars as may be prescribed to the Director-General for inclusion in Part A of the National Child Protection Register.
(6) *(a)* A designated child protection organisation to whom a report has been made in terms of subsection (1), (2) or (4) must report the matter to the relevant provincial department of social development.
(b) The provincial head of social development must monitor the progress of all matters reported to it in terms of paragraph *(a)*.
(7) The provincial department of social development or designated child protection organisation which has conducted an investigation as contemplated in subsection (5) may-
(a) take measures to assist the child, including counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behaviour modification, problem solving and referral to another suitably qualified person or organisation;
(b) if he or she is satisfied that it is in the best interest of the child not to be removed from his or her home or place where he or she resides, but that the removal of the alleged offender from such home or place would secure the safety and well-being of the child, request a police official in the prescribed manner to take the steps referred to in section 153; or
(c) deal with the child in the manner contemplated in sections 151, 152 or 155.
(8) The provincial department of social development or designated child protection organisation which has conducted an investigation as contemplated in subsection (5) must report the possible commission of an offence to a police official.'

[6] Section 150(1) and (2) of the Act provides:
'"**150. Child in need of care and protection.**
— -(1) A child is in need of care and protection if such a child-
(a) has been abandoned or orphaned and has no family member who is able and suitable to care for that child;
(b) displays behaviour which cannot be controlled by the parent or caregiver;
(c) lives or works on the streets or begs for a living;

may be removed from the family with or without a prior court order. Parental rights mostly continue but are restricted or supervised.[7] In terms of s 159 care orders are time limited and are reviewable.

[31] By contrast, adoptions mostly emanate from privately initiated processes, as happened in this case. In terms of s 239 the prospective adoptive parent makes an application to the Department. Adoptions are controlled by the state through a social worker driven fact finding process, which culminates in the report of the adoption social worker compiled under s 239(1)*(b)* and the s 239(1)*(d)* letter of recommendation from the provincial head of social development.[8]

[32] Section 229 describes the objectives of adoption as the protection and nurturing of children 'by providing a safe, healthy environment with positive support,' and promoting 'the goals of permanency planning by connecting children to other safe and nurturing family relationships intended to last a lifetime.' Unlike the time limited orders in care proceedings, under s 242 the statutory effects of adoption include termination of the rights and responsibilities

---

(d) is addicted to a dependence producing substance and is without any support to obtain treatment for such dependency;
(e) has been exploited or lives in circumstances that expose the child to exploitation;
(f) lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social wellbeing;
(g) may be at risk if returned to the custody of the parent, guardian or caregiver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social wellbeing of the child;
(h) is in a state of physical or mental neglect;
(i) is being maltreated, abused, deliberately neglected or degraded by a parent, a caregiver, a person who has parental responsibilities and rights or a family member of the child or by a person in whose care the child is;
(j) is an unaccompanied migrant child from another country;
(k) is a victim of trafficking; or has been sold by a parent, caregiver or guardian.

(2) A child found in the following circumstances may be a child in need of care and protection and must be referred for investigation by a designated social worker—
(a) a child who is a victim of child labour; and
(b) a child in a child headed household."

[7] Sections 18 to 41 of the Act engage parental responsibilities and rights.
[8] Compare with the investigation in terms of s 155(2) of the Act, emanating from the social worker's report

that anyone might have had in respect of the adopted child immediately before the adoption. The main pre-requisites for adoption are that: (1) the child must be adoptable, (2) the adoption must be in the in the interests of the child, and (3) there must be compliance with the relevant statutory provisions.[9]

[33] There are overlaps between the care and adoption processes. As the High Court clarified ss 230(3)*(a)* to *(e)* list circumstances which result from a finding by the Children's Court that a child is in need of care and protection and that reunification with their parents or extended family is neither possible nor in the child's best interests. In terms of s 230(3): 'where a child is an orphan and has no guardian or caregiver who is willing to adopt him or her; or the whereabouts of the child's parent or guardian cannot be established; the child has been abandoned' their parent or guardian had abused or deliberately neglected them, or has allowed the child to be abused or abandoned; the child's parent or guardian has abused or deliberately neglected the child or has allowed the child to be abused or deliberately neglected; or the child is in need of a permanent alternative placement, s 230(2) requires that a social worker must make an assessment to determine whether the child is adoptable. We are not here concerned with such circumstances.

[34] In terms of s 231(1),[10] persons who may adopt a child are: a husband and wife, jointly; partners in a permanent domestic life-partnership or other persons

---

[9] In full the Section 230(1) of the Children's Act provides:
'**230 Child who may be adopted**
(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.'

[10] Section 231(1) of the Act provides:
'231 Persons who may adopt child.-
(1) A child may be adopted-
(*a*) jointly by-
(i) a husband and wife;
(ii) partners in a permanent domestic life partnership;
or

sharing a common household and forming a permanent family unit; a widower, widow, divorced or unmarried person; a married person whose spouse is the parent of the child; the biological father of a child born out of wedlock; or the foster parent of the child.

[35] Relatives of an adoptable child, such as grandparents, aunts and siblings may also adopt the adoptable child. Section 7 lists factors that must be considered whenever a provision of the Act requires the best interests of the child standard to be applied. These include the nature of the personal relationship between the child and their parent(s), the attitude of the parent(s) and their capacity or the capacity of other care-giver(s), to provide for the needs of the child, the likely effect of a change in the circumstances on the child, the practical difficulty of or the expense of enabling the child to have contact with the parent(s), and whether that will substantially affect the child's right to maintain personal relations with the parent(s) on a regular basis, the need for the child to remain in the care of the parent family and extended family and to maintain contact with them, their culture or traditions, the child's age, gender, background and any other relevant characteristic.

[36] Relevant in this case, is that children 'may' be adopted only with the consent of each of their parents, guardian or their own consent, for children older than 10 years. This is regulated under s 233.[11] Consent is not required only in

---

(iii) other persons sharing a common household and forming a permanent family unit;
(*b*) by a widower, widow, divorced or unmarried person;
(*c*) by a married person whose spouse is the parent of the child or by a person whose permanent domestic life partner is the parent of the child;
(*d*) by the biological father of a child born out of wedlock; or
(*e*) by the foster parent of the child.'

[11] The section provides:
'**233. Consent to adoption.** -
(1) A child may be adopted only if consent for the adoption has been given by-
(*a*) each parent of the child, regardless of whether the parents are married or not: Provided that, if the parent is a child, that parent is assisted by his or her guardian;
(*b*) any other person who holds guardianship in respect of the child; and

circumstances provided for under s 233(2) read with s 236; for example, where a parent or guardian is incompetent due to mental illness, is divested of the right to consent through a court order, is no longer alive or where he or she has failed to respond within 30 days to a s 238 notice of the proposed adoption. In casu, only the last-mentioned factor is implicated.

[37] The mothers of B and L consented to the adoption. They are not disqualified by any of the s 236 factors. Their consent was never withdrawn. The argument that in both instances, the consent given 'was not exercised independently' must be immediately dismissed. The government parties rely on the evidence of Ms Naidoo who cites concerns that arose within the Department, about 'irregular adoptions in the Gauteng Province which led to an investigations and identification of common trends relating to cases of certain pregnant women. According to Ms Naidoo (who was not involved in the investigation that resulted in the report), women would be admitted at the Tower of Life Shelter in the West

---

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

(2) Subsection (1) excludes a parent or person referred to in section 236 and a child may be adopted without the consent of such parent or person.

(3) If the parent of a child wishes the child to be adopted by a particular person the parent must state the name of that person in the consent.

(4) Before consent for the adoption of the child is granted in terms of subsection (1), the adoption social worker facilitating the adoption of the child must counsel the parents of the child and, where applicable, the child on the decision to make the child available for adoption.

(5) The eligibility of the person contemplated in subsection (3) as an adoptive parent must be determined by a children's court in terms of section 231 (2).

(6) Consent referred to in subsection (1) and given—
  (*a*) in the Republic, must be—
    (i) signed by the person consenting in the presence of a presiding officer of the children's court;
    (ii) signed by the child in the presence of a presiding officer of the children's court if the consent of the child is required in terms of subsection (1) (c);
    (iii) verified by the presiding officer of the children's court in the prescribed manner; and
    (iv) filed by the clerk of the children's court pending an application for the adoption of the child; or
  (*b*) . . .

(8) A person referred to in subsection (1) who has consented to the adoption of the child may withdraw the consent within 60 days after having signed the consent, after which the consent is final.'

Rand when they were about to give birth. The babies would be delivered in the Krugersdorp and Pinehaven Netcare Private Hospitals. The mothers signed consents at the Krugersdorp Court, and the babies were placed in the temporary safe care of the prospective adoptive parents, following statutory reports provided by private social workers employed by the Child Protection Organisation, to the exclusion of the Department.

[38] According to the government parties, through its intervention together with Magistrates Ismail and Breedt of the Krugersdorp Court, an agreement was reached between the Department and the magistrates that adoption cases would be referred to the Department's Canalization Department for investigation. This has been referred to as the stakeholders agreement. The approach adopted by the Department and its social workers is that the procedure agreed upon in the stakeholders agreement became the operative procedure instead of the procedures set out in the Act. Hence, the manner in which the cases under consideration were handled, as part of the cases referred to the Canalization Department. The High Court's finding that the replacement of the statutory procedure with the stakeholders agreement was unlawful was plainly correct.

[39] Once the children's mothers had given consent and the fathers' disinterest became indisputable, the role of the government social workers was limited to gathering of information as prescribed in s 237, counselling of the mothers, assessment of the children as provided in s 230(2), and of the adopting families under s 231(2), preparing the report (s239(1)*(b)*, and letter of recommendation under s239(1)*(d)*. Other than the circumstances set out under s 236, the only other instance in which an adoption order may be granted by court without the consent of the parent is where such consent is unreasonably withheld as provided in s 241. However, even then there must be evidence that the adoption is in the child's best

interests. The government parties did not rely on any of these exceptions for the conduct of Department's functionaries in ignoring the consents given.

[40] Apart from the stakeholders' agreement, the misguided approach implemented by the government social workers was fueled by the Guidelines. I refer to a few provisions to demonstrate their impropriety. The introduction to the Guidelines provides, among other things, that:

'Adoption is one of the statutory services rendered to children who are in need of care and protection. Due to different circumstances in their lives, there are no prospects of reuniting them with stable and loving their families of origin, therefore placing them with stable and loving families through adoption should be considered the best option for them.'

[41] Clause 6 sets out the guiding principles to be 'adhered to' in processing adoptions. Clause 6.2 lists the 'key operating principles'. They include the following:

'It is a priority that a child should have the opportunity to be cared for and be raised by his or her biological parent/s and a family of origin.

If a child cannot be cared for by his/her own biological parent/s or family, the responsible service provider all alternatives for permanent care or adoption with the child's extended family.

In respecting the subsidiarity principle in the light of the child's best interests, priority must be given to adoption by family of origin. Where this is not an option, preference should be given to other suitable options such as adoption within the community from which the child came or at least within his or her own culture, before considering adoption by family from other cultural or race group.

The biological father of the child born out of wedlock and or foster parents of the child shall be given preference to adopt the child if he/she becomes available for adoption.'

[42] In relation to the adoption of children by families who belong to a different culture from the adoptable child, the Guidelines provide:

'Section 7(1)(f) &(h) of the Children's Act stipulates that whenever a provision of this Act requires the best interests of the child's standard to be applied, like it is applied in adoption in terms of Section 230(1)(a) of the Act, factors such as the child's cultural development including the child' need to maintain a connection with her culture and tradition must be taken into consideration.

Cross-cultural adoption should be considered as a second option when prospective adoptive parents sharing the same culture with the adoptable child could not be found to adopt the child. In other words, priority must be given to the same culture adoption, as it resembles a natural family that adoption is intended to create for the child. Adoption social workers should therefore no discriminate against any person of a different culture/race who would like to adopt a child of another culture/race, they should be given the opportunity to adopt the child once it is established that there are no parents sharing the same culture/race with the child, who are available and willing to adopt the child,'

[43] The norms and standards created in the Guidelines continue with the theme of giving priority to the child's 'biological' extended family, his or her community and their culture

[44] I agree with the finding by the High Court that the Guidelines are anchored on the premise that maintenance of the bond between an adoptable child and his or her biological family, together with the family's culture and community. are paramount. There is no foundation for such an approach in the Act and the Regulations promulgated in terms thereof. More importantly, the prioritisation of these factors could result in a disregard of the circumstances peculiar to specific children, as happened in the cases of B and L. The Guidelines add requirements for adoption additional to those prescribed under the Act and fundamentally alters the approach to adoptions as prescribed in the Act. This is impermissible. I may add that there is no provision in the Act for the adoption of the Guidelines.

[45] Evidently, the government social workers, in ignoring the provisions of the Act and the consent given for the adoption of B and L, sought to comply with the

key operating principles prescribed in the Guidelines. Their determination to place B and L with their biological families was driven by these principles. The affront to the independence and the rights to dignity and privacy of the children's mothers finds no support in the Act. The brazen, unauthorised conduct of the government social workers in: (1) communicating with the mothers' parents about their daughters' pregnancies and the impending adoption; (2) initiating unfounded investigations into the adoptions; (3) removing B from the hospital and his placement at a place of safety, which resulted in him being exposed to seriously unhealthy living conditions; (4) approaching the court for an order that B was a child in need of care; and (5) disregarding statutorily determined procedures; are part of the high handed manner in which they performed their duties. Their lack of appreciation of their role in adoptions and the empathetic framework that balances the competing rights and complex emotions at play during adoption is of great concern. Drawing this conduct to the attention of the relevant professional body, as the High Court did is necessary. There is no basis to set aside the relevant order.

[46] It was not the Department's case that specific acts of criminality or involvement in child trafficking conduct are attributable to Ms Wasserman in relation to the adoption of B and L. The High Court correctly found that 'no cogent evidence was produced by the Department that Ms Wasserman was involved in an organised ring of unlawful adoptions'. This finding is borne out by the record filed in this case.

[47] The relationship with the biological family, which naturally includes the family's religion and culture, is not necessarily paramount in adoptions. Neither is affinity or national placement. The overarching consideration is the best interests of the child. The focus is on suitability, rather than relation, marital status or income.

[48] Culture one of many relevant factors that are components of what constitutes the best interests of a child. The Act does not set out a hierarchy of relevant factors. This has been the stated position in our courts since at least the mid-2000s. In *Minister of Welfare and Population Development v Fitzpatrick,*[12] the Constitutional Court considered the constitutional validity of s 18(4)*(f)* of the Child Care Act 74 of 1983, the predecessor of the Children's Act, which proscribed inter country adoptions by persons with the necessary residential qualifications for the grant of South African citizenship but who had not applied for a certificate of naturalization. As in the appeal cases before us the suitability of the prospective adoptive parents was not in dispute. The Constitutional Court rejected a rigid rule that made citizenship a dispositive factor in determining the circumstances of a child.

[49] There is no evidence that the adoptive parents of B and L do not qualify as suitable parents. To qualify as prospective adoptive parents, persons must be approved by an adoption social worker (not as a designated social worker), as fit and proper to be entrusted with the full parental responsibilities and rights in respect of the child and must be willing and able to undertake, exercise and maintain such responsibilities and rights.[13] They must be over the age of 18 years.[14]

[50] As highlighted in the written submissions made on behalf of B and L, the children's adoptive families are the only families they have ever had. The Department does not dispute this. There is no conceivable reason why they should be wrenched from their families. The government parties' lack of insight and

[12] *Minister of Welfare and Population Development v Fitzpatrick and Others 2000 (7) BCLR 713 (CC); 2000 (3) SA 422 (CC) (Fitzpatrick).*
[13] Section 231(2) *(a), (b)*and *(e).*
[14] Section 231(2) *(c).*

persistence in seeking to have the children removed from their families is gravely unsettling, particularly given the role they are tasked to play in adoption proceedings.

[51] When the matter was heard in the High Court no assessment had ever been done of B and L's adoptive families by the government social workers. Yet the letter of non-recommendation was issued and the government parties sought to enforce it. In this Court they were persistent in their condemnation of the conduct of the magistrates that had issued the relevant orders and Ms Wasserman. They sought to have their conduct in relation to the adoptions declared unlawful even though they had not been cited as parties in the High Court proceedings.

[52] As to where, in each case, the interests of a child lie, a flexible, child specific, rather than generic inquiry is required. There is no fixed formula.[15] Individual circumstances determine which factors secure the interests of a particular child in specific circumstances.[16] In *S v M*,[17] the Constitutional Court highlighted that in determining the best interests of a child, statutes are to be read and the common law developed in a child protective manner, through the prism of s 28 of the Constitution. In this case the interests of B and L clearly lie with them remaining with their current families.

[53] Both the order of unconstitutionality and the referral order made by the High Court involved the exercise of the discretion of that Court under s 172(1)*(a)* of the Constitution. There is no evidence that such discretion was exercised improperly exercised, particularly when viewed against the egregious intrusions

[15] *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* [2007] ZACC 27; 2008 (3) SA 183 (CC); 2008 (4) BCLR 359.
[16] Fitzpatrick fn15 above.
[17] *S v M (Centre for Child Law as Amicus Curiae*) [2007] ZACC 18; 2008 (3) SA (CC); 2007 (12) BCLR 1312 (CC).

by the government social workers on the statutory and Constitutional rights of B, L and their mothers. It follows that the appeal must be dismissed and that costs should follow the cause.

[55] The following order is made:

The appeal is dismissed with costs including the costs of three counsel.

_____

N DAMBUZA

JUDGE OF APPEAL

Appearances:

For the appellant:	F Nalane SC with J Maart
Instructed by:	State Attorney, Johannesburg
	State Attorney, Bloemfontein
For the respondent:	M Abro with N Muvangua and N Stein
Instructed by:	Women's Legal Centre, Cape Town
	Maduba Attorneys, Bloemfontein.