

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2184/2018

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| (1) | REPORTABLE: YES / <input checked="" type="radio"/> NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES / <input checked="" type="radio"/> NO |
| (3) | REVISED. |

..... 26/12/18

In the matter between

STEPHEN ANTHONY NAPIER- JAMESON

1ST APPLICANT

JULIET NAPIER- JAMESON

2ND APPLICANT

MALONE KUDAKWASHE MAKOTO

3RD APPLICANT

And

PRESIDING OFFICER OF THE CHILDREN'S COURT

RESPONDENT

JOHANNESBURG

JUDGMENT

Windell J

Introduction

[1] The issue arising in this urgent application is whether an order of this court should be put in operation and executed pending an application for leave to appeal. The issue arises against the following backdrop.

[2] The first and second applicant is married to each other. The first applicant wanted to adopt the third applicant, who is the biological son of the second applicant. An application was made on 11 February 2017 to the Children's Court for the third applicant's adoption. The application was enrolled for hearing in the Children's Court for 17 October 2017. The respondent ("the magistrate") removed the matter from the role on the basis that the Children's Court had no jurisdiction to hear the adoption application because the minor child is a Zimbabwean citizen and is currently on a visitor's visa in the country. It was also noted that the visa of the third applicant seems to have expired on 4 March 2017.

[3] The reasons for this decision were furnished by the magistrate to applicants on 8 January 2017. The applicants approached the urgent court on 22 January 2018 for an order reviewing and setting aside the order of the magistrate, as the third applicant turns eighteen on 8 March 2018 and would no longer be eligible for adoption. The urgent application was granted by Kathree-Setiloane J on 6 February 2018 and the magistrate's decision to remove the adoption application from the roll was set aside. The Children's Court was ordered to conclude the adoption application on or before 26 February 2018.

[4] The magistrate filed an application for leave to appeal on 20 February 2018. On 22 February 2018 the applicants launched a second urgent application in terms of section 18(1) and 18(3) of the Superior Court Act 10 of 2013 for an order to the effect that the application for leave to appeal shall not suspend the operation and execution of the order of Kathree- Setiloane delivered on 6 February 2018.

Common Cause facts

[5] The following facts are common cause:

[5.1] The first and second applicant is married to each other.

[5.2] The first applicant wishes to adopt the third applicant.

[5.3] The second applicant consents to the adoption and the third applicant wishes to be adopted.

[5.4] The third applicant is the biological son of the second applicant.

[5.5] The third applicant turns eighteen on 8 March 2018.

[5.6] The third applicant is a Zimbabwean national and is in South Africa on a visitor's visa which expired on 4 March 2017.

[5.7] The applicants obtained the necessary official documentation from the Zimbabwean Consulate.

[5.8] The applicants submitted themselves to police clearance checks and medical tests.

[5.9] The Department of Social Development approves of the adoption.

[6] The applicants also averred that the third applicant and his sister (currently 20 years old) have both been living with them in Johannesburg since 2008 and both children were enrolled at Glenside primary school where they completed their

primary education. The third applicant also completed his secondary education in South Africa and his matric certificate is attached to the papers. He intends to study chemistry or chemical engineering at one of the universities in South Africa.

The Children's Court order

[7] In terms of section 44 of the Children's Act 38 of 2005 ("the Children's Act") the Children's Court that has jurisdiction in a particular matter is: *"(1)(a) The court of the area in which the child involved in the matter was ordinarily resident and; (2) Where it is unclear which court has jurisdiction in a particular matter, the children's court before which the child is brought has jurisdiction in the matter"*

[8] The magistrate in her reasons held that the third applicant is a Zimbabwean citizen and entered South Africa on 11 February 2017 on a port of entry visa that expired on 4 March 2017 and the minor child's status is that of illegal since 5 March 2017. In terms of section 44 of the Children's Act the Children's Court does not have jurisdiction as the third applicant cannot be ordinarily resident in the Republic of South Africa as his visa has expired.

[9] Kathree-Setiloane J held that the decision of the presiding officer was materially flawed and constituted a grave misdirection as the Children's Act does not exclude foreign nationals (whether legally or illegally in the country) from its ambit, nor does it exclude them from the jurisdiction of the Children's Court. She further found that section 44 of the Children's Act provides that the Children's Court has jurisdiction in a particular matter if the child involved in the matter is ordinarily resident in that Court's district. The learned Judge held that section 44 of the Children's Act does not

require that the child must be a South African citizen or a permanent resident. The child's immigration status is therefore irrelevant to the question of whether the Children's Court has jurisdiction in a particular matter. In paragraph [23] –[24] of the judgment she held as follows:

“[23] Thus for purposes of establishing the jurisdiction of the Children's Court, it is irrelevant whether the child is legally or illegally in the country. Any contrary interpretation of the words ordinarily resident in section 44 of the Children's Act would mean that foreign children who are in the country illegally would be excluded from the protection of the Children's Court. Such a construction of the words “ordinarily resident” would constitute a violation of their rights to access to court, and their rights to have their best interest considered of paramount importance.

[24] The third applicant is ordinarily resident in South Africa and within the jurisdiction of the Children's Court Johannesburg and has been so for an interactive periodic period of at least 10 years. He has not returned to Zimbabwe and nor could he, as his extended family have permanently relocated to South Africa. He has grown up a South African and has completed his primary and secondary education in South Africa. According to the first and second applicant the only life that the third applicant has known is in South Africa. His friends and family reside here. He ordinarily resides in Johannesburg and has no intention of leaving.”

[10] The court held that the matter is urgent because the third applicant will turn eighteen on 8 March 2018. Had the court not dealt with the applicant's review application as one of urgency then the third applicant would have been denied the prospects of ever being adopted by the first applicant before his 18th birthday and would therefore not have been afforded substantially redress in due course. The court held that the prevailing urgency in the application justified an expedited hearing of the adoption application in the Children's Court.

[11] In the result the following order was made:

- [1] The decision of the magistrate to remove the adoption application from the roll is reviewed and set aside.
- [2] It is declared that the third applicant's immigration status is irrelevant for purposes of determining whether the Children's Court Johannesburg has jurisdiction in terms of section 44 of the Children's Act 38 of 2005.
- [3] It is declared that the third applicant is ordinarily resident within the jurisdiction of the Children's Court Johannesburg.
- [4] It is declared that the first applicant's application to adopt the third applicant is a local adoption and must be determined in terms of Chapter 15 of the Children's Act.
- [5] The Children's Court for the district of Johannesburg is directed to complete the adoption application on or before 26 February 2018.
- [6] The applicants are granted leave to apply on the same papers, duly supplemented, for any order necessary to ensure that the adoption application is concluded timeously and without undue delay.
- [7] The respondent is ordered to pay the cost of the application.

[12] In the application for leave to appeal the magistrate indicated that she had no issue with orders number 1 and 2. It appears from the leave to appeal that the respondent takes issue with the court's finding that the matter was urgent and with the fact that the Department of Home Affairs was not cited in this matter. It is further submitted that the court erred in finding that the third applicant was ordinarily resident in the Children's Court's jurisdiction.

The current application

[13] It is trite that a court will only suspend the execution of an order which is the subject of an application for leave to appeal or appeal under exceptional circumstances. An applicant must further prove on a balance of probabilities that he will suffer irreparable harm if the order is not put in operation and that the respondent will not suffer irreparable harm if the order is granted.

[14] It is common cause that the third applicant is turning eighteen on 8 March 2018. The court *a quo* has already found that the application was urgent, and the urgency is still apparent. If the order of Kathree- Setiloane J is not executed before 8 March 2018, it will no longer be possible for the third applicant to be adopted as he will no longer be eligible in terms of the Children's Act to be adopted. If the order is not allowed to operate regardless the pending appeal, the applicants will be left without a remedy. It will also render the appeal, in the event that leave is granted in the main, moot. This in itself is exceptional circumstances.

[15] The third applicant will suffer irreparable harm in that he will not be able to continue with the adoption application. If the third applicant misses out on his opportunity to be adopted by the first applicant it will violate his right to family life, his right to dignity, his right to access to courts and his right to have his best interests considered to be of paramount importance.

[16] The respondent on the other hand will not suffer irreparable harm if the order is executed. The presiding officer must still consider the adoption application and exercise a discretion. In the event of the adoption application being successful, and another court set aside the order of Kathree–Setiloane J, the adoption can be rescinded. The administration of justice will therefore not be put in jeopardy should the order be put in operation.

[17] I am satisfied that the matter is urgent and that exceptional circumstances exist for the order of Kathree- Setiloane J to be put in operation pending the application for leave to appeal or appeal.

[18] In the result the following order is made:

1. The order of Kathree-Setiloane J dated 6 February 2018 is not suspended pending the outcome of any application for leave to appeal or appeal against the court's judgment.
2. The respondent is ordered to exercise its right to an automatic appeal in terms of section 18(4) of the Superior Court Act 10 of 2013 and lodge any such appeal in terms of the rules with the registrar before 12 pm on 27 February 2018.

3. In the event of not exercising her right to appeal this decision, the Children's Court for the district of Johannesburg is directed to complete the adoption application on or before 2 March 2018.
4. The requirement to furnish security pursuant to Uniform Rule 49(12) is dispensed with.
5. The respondent to pay the costs of the application.



L. WINDELL
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG