

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 30278/2020

- (1) REPORTABLE: YES
- (2) OF INTEREST TO OTHER JUDGES: YES
- (3) REVISED.

15 FEBRUARY 2021  
MODIBA I

JUDGE L.T.

In the matter between:

**TISLEVOLL: GURO MARIE**

Applicant

and

**MINISTER OF SOCIAL DEVELOPMENT**

First Respondent

**MEC FOR SOCIAL DEVELOPMENT**

Second Respondent

**GAUTENG DEPARTMENT OF  
SOCIAL DEVELOPMENT**

Third Respondent

**SAVF HEIDELDERG**

Fourth Respondent

**DIRECTOR-GENERAL FOR  
SOCIAL DEVELOPMENT**

Fifth Respondent

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**J U D G M E N T**

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**Mode of delivery:** *this judgment is handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 11:00am on 15 February 2021.*

**Summary** – Family law - whether chapter 15 and 16 of the Children's Act are at the disposal a foreign national who intends to undertake the domestic adoption of a child under circumstances where she has been habitually resident in South Africa for less than one year.

Held: chapter 15 and 16 of the Children's Act are not at the disposal of a foreign national who seeks to adopted a child domestically under these circumstances.

**MODIBA J**

## **INTRODUCTION**

[1] This application brings the interplay between The Hague Convention on the Protection of Children and Co-operation in respect of Inter-Country Adoption ("The Hague Convention"),<sup>1</sup> and the inter-country and domestic adoption procedures provided for in the Children's Act<sup>2</sup> into sharp focus.

[2] The crux of this application is whether chapter 15 and 16 of the Children's Act are at the disposal a foreign national who intends to undertake the domestic adoption of a child under circumstances where she has been habitually resident in South Africa for less than one year.

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<sup>1</sup> The Hague Convention developed by The Hague Conference on Private International Law. It was concluded on 29 May 1993 and entered into force on 1 May 1995.

<sup>2</sup> 38 of 2005.

- [3] The applicant is Norwegian. She has been residing in South Africa since August/September 2020. She intends to adopt a minor child, who was born in South Africa in 2017. Alternatively, she seeks appointment as a foster parent for the minor child.
- [4] To protect the identity of the minor child, in this judgment, the court refers to her as “the minor child”.
- [5] The proceedings relating to the placement of the minor child with other prospective adoptive parents are currently pending before the Children’s Court. The court refers to these prospective adoptive parents as “Family X”. Although this court is not ceased with the pending adoption application, the applicant seeks a suite of relief from this court that would enable her to give effect to her intention to adopt the minor child or to be appointed as a foster parent for the minor child.
- [6] The applicant seeks the said relief on the basis of urgency in terms of Rule 6(12) of the Uniform Rules of Court.
- [7] The first respondent, the Minister for Social Development (“the Minister”) and the fifth respondent, the Director-General in the National Department Social Development are jointly opposing the application. The second respondent, the Member of the Executive Council for Social Development in Gauteng (“the MEC”), the third respondent, the Gauteng Department of Social Development (“the Department”) did not enter the fray.

[8] The Director-General in the National Department for Social Development is the designated South African Central Authority (“SACA”) in terms of The Hague Convention.<sup>3</sup> Given that his role as SACA is central to his citation in these proceedings, unless the context requires otherwise, it is convenient to refer to the Director-General as SACA whenever individual reference is made to him in this judgement.

[9] Cited as the fourth respondent is SAVF Heidelberg (“SH”). SH has mounted a separate opposition to the application.

[10] For brevity, the court jointly refers to the Minister, SACA and SH as the respondents. Where it is necessary to draw a distinction between the National and Gauteng Department for Social Development, reference is made to “the National Department” and “the Department” respectively. All the respondents initially opposed both the urgency and the merits of the application. By the time the application was heard, the respondents had abandoned the issue of urgency. It is trite that urgency is not founded on the agreement between the parties. The party alleging it ought to set out the basis for it in her founding papers.<sup>4</sup> As I find below, the applicant does not meet the test for urgency. The basis on which this court proceeded to deal with the application is set out in this judgment.

[11] This judgment follows the following scheme. After this introduction, the applicable legislative framework is detailed. Then, an extensive background of the application is set out to give context to the issues to be determined in the application. A brief outline of the

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<sup>3</sup> Section 257, Children’s Act

<sup>4</sup> *Luna Meubel Vervaardigers (Edms) Bpk v Makin & Another (t/a Makin’s Furniture Manufacturers)* 1977 (4) SA 135 (W)

applicant's case is then set out followed by the relief sought by the applicant. The relief sought by the applicant is elaborate. It is for this reason that it set out in detail. The respondents' basis for opposition is then outlined, followed by the issues to be determined. Then, the question of urgency, the preliminary issues raised by some of the respondents and the merits of the application are determined. An order that is consistent with the findings made by this court concludes the judgment.

## **THE APPLICABLE LEGISLATIVE FRAMEWORK**

[12] The Hague Convention sets out internationally accepted inter-country adoption standards. South Africa acceded to The Hague Convention on 1 December 2003. Norway acceded to The Hague Convention on 1 March 1998. Therefore, South Africa and Norway are convention countries as envisaged in The Hague Convention. Inter-country adoption between the two countries is regulated by The Hague Convention. Chapter 16 of the Children's Act which regulates inter-country adoptions in South Africa, domesticates or incorporates The Hague Convention into South African law.<sup>5</sup> The Hague Convention takes

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<sup>5</sup> Section 254 and 256 (1)

precedency over the Children's Act where there is a conflict between the two instruments.<sup>6</sup>

[13] Chapter 15 of the Children's Act regulates domestic adoptions. Except where otherwise specified, the two Chapters set out distinct requirements that are applicable to domestic and inter-country adoptions respectively.

[14] Chapter 12 regulates foster care.

[15] Unless otherwise specified reference in this judgement to a chapter or section of an Act of parliament is to the Children's Act.

### ***The Hague Convention***

[16] The Hague Convention recognizes that growing up in a family is of primary importance and essential for the happiness and healthy development of the child.<sup>7</sup> The Hague Convention also observes that inter-country adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her country of origin. The Hague Convention was therefore borne out of the recognition of inter-country adoption as a valuable solution offering a permanent family to a child for whom a suitable family cannot be found in his or her country of origin. The Hague Convention was developed to establish safeguards which ensure that inter-country

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<sup>6</sup> Section 256 (2)

<sup>7</sup> The preamble to The Hague Convention

adoptions take place in the best interest of the child and with respect for the child's fundamental rights.

[17] The Hague Convention sets out clear procedures and provides greater security, predictability and transparency for all parties to the adoption, including prospective adoptive parents. It also establishes a system of co-operation between authorities in countries of origin and receiving countries, designed to ensure that inter-country adoption takes place under conditions which help to guarantee the best adoption practices and eliminates abuses.

[18] The Hague Convention requires states to consider national solutions first before resorting to an inter-country adoption. This is known as the principle of subsidiarity. The principle recognizes that a child should be raised by his or her birth family or extended family whenever possible. If that is not possible or practicable, other forms of permanent care in the State of origin should be considered. Only after due consideration has been given to national solutions should intercountry adoption be considered, and then only if it is in the child's best interest. If inter-country adoption is needed as part of such a national child care system, it must be ethical and child-centered.

[19] The Hague Convention also requires States to ensure that the child is adoptable, preserve information about the child and his or her parents, evaluate thoroughly the prospective adoptive parents, match the child with a suitable family and impose additional safeguards where needed.

[20] Only competent authorities may perform Convention functions. Hence, The Hague Convention provides for a system of Central Authorities (CAs) in all Convention States and imposes certain general obligations on them, such as: co-operation with one another through the exchange of general information concerning intercountry adoption; the elimination of any obstacles to the application of the Convention<sup>8</sup> and a responsibility to deter all practices contrary to the objects of the Convention.<sup>9</sup> Convention States are required to designate a CA to discharge the duties which are imposed by the Convention upon such authorities.<sup>10</sup>

[21] The objects of The Hague Convention are to establish safeguards to ensure that intercountry adoption takes place in the best interest of the child and with respect for his or her fundamental rights as recognized in international law, establish a system of co-operation amongst contracting States to ensure that the safeguards are respected and thereby prevent the abduction and sale of, or traffic in children, and secure the recognition in contracting States of adoptions made in accordance with the Convention.<sup>11</sup>

[22] The Hague Convention applies where a child habitually resident in one Convention State ("the State of origin") has been, is being, or is to be moved to another Convention State ("the receiving State") either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin.<sup>12</sup> An intercountry adoption within the scope of The Hague Convention occurs only when the CA of the receiving State has:

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<sup>8</sup> Article 7(2) (b)

<sup>9</sup> Article 8

<sup>10</sup> Article 6

<sup>11</sup> Article 1

<sup>12</sup> Article 2



22.1 determined that the prospective adoptive parents are eligible and suited to adopt;

22.2 ensured that the prospective adoptive parents have been counselled as may be necessary;

22.3 determined that the child is or will be authorised to enter and reside permanently in that State.<sup>13</sup>

[23] A person who is habitually resident in the receiving State, who wishes to adopt a child habitually resident in the State of origin shall apply to the CA in the State of their habitual residence.<sup>14</sup> If the CA of the receiving State is satisfied that the applicants are eligible and suited to adopt, it shall prepare a report including information about their identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, as well as the characteristics of the children for whom they would be qualified to care.<sup>15</sup> The latter factor is an important consideration in the context of this case because the pre-identification of a child for the purposes of adoption is generally not allowed.<sup>16</sup> To put it differently, a prospective adoptive parent may not personally identify and select the child they wish to adopt.

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<sup>13</sup> Article 5

<sup>14</sup> Article 14

<sup>15</sup> Article 15

<sup>16</sup> Article 65 of the Practical Guidelines for Inter-Country Adoption

[24] The receiving State shall transmit the report to the CA of the State of origin. If the CA of the State of origin is satisfied that the child is adoptable, it shall prepare a report including information about his or her identity, adoptability, background, social environment, family history, medical history including that of the child's family, and any special needs of the child; give due consideration to the child's upbringing and to his or her ethnic, religious and cultural background; ensure that consents have been obtained in accordance with Article 4; and determine, on the basis in particular of the reports relating to the child and the prospective adoptive parents, whether the envisaged placement is in the best interest of the child.<sup>17</sup> The CA of the State of origin shall transmit to the CA of the receiving State its report on the child, proof that the necessary consents have been obtained and the reasons for its determination on the placement, taking care not to reveal the identity of the mother and the father if, in the State of origin, these identities may not be disclosed. It is important to mention that the Children's Act prohibits such disclosures. It also limits the giving of notice of a proposed adoption only persons who are required to consent to the adoption of the child.<sup>18</sup>

### *Chapter 16 - Inter-Country Adoption*

[25] The relevant section of Chapter 16 is section 261. It provides as follows:

***“261 Adoption of child from Republic by person in convention country***

*“(1) A person habitually resident in a convention country who wishes to adopt a child habitually resident in the Republic must apply to the central authority of the convention country concerned.*

*“(2) If the central authority of the convention country concerned is satisfied that the applicant is fit and proper to adopt, it shall prepare a report on that person in*

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<sup>17</sup> Article 16

<sup>18</sup> Section 238

*accordance with the requirements of The Hague Convention on Inter-Country Adoption and any prescribed requirements and transmit the report to the Central Authority of the Republic.*

*“(3) If an adoptable child is available for adoption, the Central Authority will prepare a report on the child in accordance with the requirements of The Hague Convention on authority of the convention country concerned.*

*“(4) If the Central Authority and the central authority of the convention country concerned both agree on the adoption, the Central Authority will refer the application for adoption together with all relevant documents and the reports contemplated in subsections (2) and (3) to the Children’s Court for consideration in terms of section 240.*

*“(5) The court may make an order for the adoption of the child if the requirements of section 231 regarding persons who may adopt a child are complied with, the application has been considered in terms of section 240 and the court is satisfied that-*

*“(a) the adoption is in the best interest of the child;*

*“(b) the child is in the Republic;*

*“(c) the child is not prevented from leaving the Republic-*

*“(i) under a law of the Republic; or*

*“(ii) because of an order of a court of the Republic;*

*“(d) the arrangements for the adoption of the child are in accordance with the requirements of The Hague Convention on Inter-Country Adoption and any prescribed requirements;*

*“(e) the central authority of the convention country has agreed to the adoption of the child;*

*“(f) the central authority of the Republic has agreed to the adoption of the child;*

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

## *Chapter 15 - Adoption*

[26] 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.<sup>19</sup> A child is adopted if the child has been placed in the permanent care of a person

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<sup>19</sup> Section 229

in terms of a court order.<sup>20</sup> An adoption terminates all claims to contact, guardianship and legal duties over the child and any previous court orders in respect of the child unless otherwise specified in the adoption order.<sup>21</sup>

[27] In terms of section 231 (1) (b) and (c), a child may be adopted by an unmarried person and the foster parent of the child. Section 231 (2) prescribes the following qualification for a prospective adoptive parent:

*“A prospective adoptive parent must be-*

*“(a) fit and proper to be entrusted with full parental responsibilities and rights in respect of the child;*

*“(b) willing and able to undertake, exercise and maintain those responsibilities and rights;*

*“(c) over the age of 18 years; and*

*“(d) properly assessed by an adoption social worker for compliance with paragraphs (a) and (b).”*

[28] In terms of section 232(1) the Director-General keeps the Register of Prospective Adoptive Children and the Register of Prospective Adoptive Parents (“RAPCAP”). This is a record of adoptable children and fit and proper prospective adoptive parents. The name of a child may be entered into RAPCAP when the child becomes adoptable.<sup>22</sup>A prospective

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<sup>20</sup> Section 228

<sup>21</sup> Section 242

<sup>22</sup> Section 232 (2)

adoptive parent may be registered in RAPCAP if section 231 (2) has been complied with and if the person seeking registration is a citizen or a permanent resident of South Africa.<sup>23</sup>

[29] Concerning access to RAPCAP, section 232 (6) provides:

*“Only the Director-General and officials in the Department designated by the Director-General have access to RAPCAP, but the Director-General may, on such conditions as the Director-General may determine, allow access to-*

*“(a) a provincial head of social development or an official of a provincial department of social development designated by the head of that department;*

*“(b) a child protection organisation accredited in terms of section 251 to provide adoption services; or*

*“(c) a child protection organisation accredited in terms of section 259 to provide inter-country adoption services.”*

[30] Concerning a notice to be given regarding the adoption of a child, section 238 provides:

***“238 Notice to be given of proposed adoption***

*“(1) When a child becomes available for adoption, the presiding officer must without delay cause the sheriff to serve a notice on each person whose consent to the adoption is required in terms of section 233.*

*“(2) The notice must-*

*“(a) inform the person whose consent is sought of the proposed adoption of the child; and*

*“(b) request that person either to consent to or to withhold consent for the adoption, or, if that person is the biological father of the child to whom the mother is not married, request him to consent to or withhold consent for the adoption, or to apply in terms of section 239 for the adoption of the child.”*

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<sup>23</sup> Section 232 (4)

[31] Concerning access to the adoption register, section 248 provides:

***“248 Access to adoption register***

*“(1) The information contained in the adoption register may not be disclosed to any person, except-*

*“(a) to an adopted child after the child has reached the age of 18 years;*

*“(b) to the adoptive parent of an adopted child after the child has reached the age of 18 years;*

*“(c) to the biological parent or a previous adoptive parent of an adopted child after the child has reached the age of 18 years, but only if the adoptive parent and the adopted child give their consent in writing;*

*“(d) for any official purposes subject to conditions determined by the Director-General;*

*“(e) by an order of court, if the court finds that such disclosure is in the best interest of the adopted child; or*

*“(f) for purposes of research: Provided that no information that would reveal the identity of an adopted child or his or her adoptive or biological parent is revealed.”*

[32] In terms of section 249(1), making or receiving any consideration in cash or kind for the adoption of the minor child or inducing any person to give up the minor child for adoption is prohibited.

*Chapter 12 – Foster Care*

[33] Foster care is one of the forms of alternative placement of a child in need of care which the Children’s Court or the Provincial Head of Social Development may authorise.<sup>24</sup> A child

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<sup>24</sup> Section 171.

may be placed in foster care when the child has been deemed by the Children's Court to be a child in need of care and protection as defined in section 150 or if a child is transferred to this type of placement in terms of section 171.

[34] In terms of section 181, the purpose of foster care is:

*“(a) to protect and nurture children by providing a safe, healthy environment with positive support;*

*“(b) promote the goals of permanency planning, first towards family reunification, or by connecting children to other safe and nurturing family relationships intended to last a lifetime; and*

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

[35] In terms of section 180 (3) (a) to (c), a child may be placed in foster care with a person who is not a family member of a child, a family member who is not the parent or guardian of the child or in a registered cluster foster care.

## **FACTUAL BACKGROUND**

[36] On 7 August 2017, the minor child was born at a hospital in South Africa to a woman of Mozambican descent. Following the birth of the minor child, her biological mother opted to give her up for adoption. It is for this reason that the minor child was placed in temporary safe care with an organization referred to in this judgement as TLC. The placement of the minor child with TLC was effected in terms of the Children's Act. The child's biological mother attended the first Children's Court proceedings concerning the child. She failed to

attend subsequent Children's Court sessions despite being warned to remain in attendance. Her whereabouts are unknown.

[37] Attempts to trace the minor child's biological mother in South Africa did not yield any results. So were attempts to trace the minor child's biological mother and/ or her family through the Mozambican Government. The Mozambican Government found no trace of the minor child's biological mother's records in Mozambique. As a result, the government of South Africa assumed responsibility for the care of the minor child as there is no legal basis for the Mozambican Government's involvement in the arrangements for the care of the minor child.

[38] When this application was heard, the minor child was still in temporary care at TLC. As already mentioned, proceedings for her placement with Family X are underway in the Children's Court.

[39] At the commencement of 2017, the applicant was residing in Norway. She was due to complete her matric in June 2017. She intended taking a gap year to serve as a volunteer rendering social services to the poor in South Africa for about one year after completing matric.

[40] She arrived in South Africa on 1 August 2017 and enlisted as a volunteer with TLC. She served in this capacity until June 2018. The applicant alleges that during this time, she met and took care of the minor child's physical and emotional needs. The child spent most time in her arms, indicating her need for human contact. The respondents dispute this. In their view, the applicant pre-identified the child as the one she prefers to adopt and developed a



close relationship with the child - a practice they consider prohibited in terms of The Hague Convention.

[41] In March/ April 2018, the applicant commenced adoption procedures in relation to the minor child. She first attempted an inter-country adoption through the Norwegian Government. When that fell through, she relocated to South Africa to pursue a domestic adoption.

[42] I deal in more detail below with the process followed by the applicant with her attempts firstly to adopt the minor child inter-country and subsequent efforts to adopt the child domestically.

*The applicant's attempts to adopt the minor child inter-country*

[43] On 10 April 2018, the applicant instructed her attorney to address a letter to SACA to draw SACA's attention to the circumstances of the minor child, her intention to adopt the minor child and the efforts she has taken in an attempt to adopt the minor child inter-country. She alluded to the advice she was given by an official of the National Department to pursue inter-country adoption of the minor child through the Norwegian Government because she has bleak prospects of adopting the minor child domestically. She also alluded to the obstacles that she encountered to adopt the minor child inter-country through the Norwegian Government and expressed confidence that she has overcome the obstacles and will be positively assessed by the Norwegian Government. She expressed her awareness that an inter-country adoption becomes an option after all the local options have been explored and expressed her opinion that the minor child's interest, which will best be served when the

applicant adopts her due to the deep psychological bond that she has developed with the minor child ought to supersede all the applicable requirements. She further let SACA know that the minor child will become adoptable and placed with either Impilo or Wandisa, the adoption agencies that TLC works with. She contended that placing the minor child with Impilo or Wandisa will be prejudicial to her because Impilo or Wandisa do not facilitate inter-country adoptions. Hence, she requested that the minor child be placed with an adoption agency that facilitates inter-country adoptions, namely Abba.

[44] SACA replied to her attorneys on 25 May 2018 essentially expressing their displeasure with the applicant's approach to adopting the minor child as pre-identification of a prospective adoptive child is prohibited in terms of the Practical Guidelines for Inter-Country Adoptions.

[45] SACA also noted the obstacles that stood in the applicant's path to become eligible to pursue an inter-country adoption of the minor child through the Government of Norway. SACA advised the applicant's attorney that the minor child would first have to be declared adoptable. Most importantly, SACA informed the applicant that it is unable to consider the applicant's request to adopt the minor child due to the applicant's non-compliance with the prescribed procedure and the relevant legislative framework.

[46] In July 2018, the applicant returned to Norway to elicit the Norwegian's Government's assistance to adopt the minor child through an inter-country adoption process. The Norwegian Central Authority ("NCA") initiated contact with SACA on this issue on 22 October 2018. In its correspondence to SACA, the NCA noted receipt of the applicant's request for an advance approval to adopt the minor child. The NCA advised SACA that it

does not know if the applicant meets the eligibility requirements. It noted its procedural and substantive requirements and the exceptions to the applicable requirements provided that, amongst other exceptions, the applicant has a close relation with the child which was not established with the intention to adopt the child. The NCA informed SACA that it may consider to offer the applicant an adoption preparation course and to screen her if the South African Government needs an inter-country adoption. The NCA also noted that the prospective adoptive parent may not mediate their own application with SACA but should use an adoption agency failing which it is the NCA that ought to apply to SACA and to interact with the latter government in respect of the application. The NCA specifically requested SACA to let it know if an inter-country adoption of the minor child is out of question.

[47] On 16 August 2018, the applicant addressed another letter to SACA, letting SACA know that she is desirous to be considered as the prospective adoptive parent of the minor child and enquiring on the adoptability status of the minor child. On 7 September 2018, SACA informed the applicant that the minor child's family circumstances must first be investigated in order to establish the adoptability status of the minor child, that the pre-identification of the minor child is not allowed and that the application for the inter-country adoption of the minor child should be handled through SACA and the NCA.

[48] On 23 October 2018, SACA responded to the NCA reiterating its response to the applicant but most notably, letting the NCA know that it does not recommend that the NCA screens the applicant for the adoption of the minor child as the pre-identification of prospective adoptive children is discouraged. SACA advised the NCA that it may screen the

applicant for the adoption of any other child in South Africa as the two countries are convention countries.

[49] On 26 October 2018, the NCA informed the applicant in writing that her request to adopt the minor child is unsuccessful, setting out detailed reasons consistent with the position taken by SACA on the matter.

*The applicant's efforts to adopt the minor child domestically or to be appointed as the foster parent for the minor child*

[50] Between November 2018 and June 2019, the applicant returned to South Africa several times to exercise contact with the minor child. TLC allowed the applicant to have contact with the minor child. In August 2019, the applicant relocated to South Africa with a view to apply for the foster care or adoption of the minor child and to maintain contact with the minor child.

[51] During August 2019, the applicant tried to re-establish contact with the minor child. TLC refused to afford her contact with the minor child. TLC granted the applicant contact with the minor child in December 2019 upon further request. It appears that in this instance, contact was approved by the minor child's social worker on condition that it does not give rise to the applicant's expectation to succeed in her attempts to adopt the minor child and further, that the applicant does not take the minor child out of the TLC premises. The minor child's social worker also let the applicant know that the minor child is yet to be declared adoptable, the

process will take long as the whereabouts of the minor child's biological mother are yet to be traced through the Mozambican government.

[52] The applicant exercised further contact with the minor child until March 2020. During this time, the applicant continued making enquiries with TLC, the child's social worker and the Department regarding whether she could adopt or foster care the minor child. She made contact directly to the Meyerton Children's Court concerning the adoption of the minor child, which the minor child's social worker frowned upon.

[53] In March 2020, the minor child's social worker advised the applicant that she has taken the child outside the TLC premises inappropriately, that he is still busy with investigations concerning the child's adoptability status and that the applicant is unduly interrupting the process. He suspended the applicant's contact with the minor child until further notice.

[54] For the next three months, the applicant did nothing further due to the COVID-19 lockdown. On 28 July 2020, she instructed her attorney to enquire with the Department why the minor child has not been declared adoptable, why is the applicant not being considered as a prospective adoptive parent and why her contact with the minor child has been terminated. The applicant's attorney sought written reasons in this regard. The Department referred this enquiry to the minor child's social worker.

[55] On 29 September 2020, the minor child's social worker forwarded a comprehensive written response to the applicant's attorney giving the minor child's background and informing her that:

55.1 when the minor child was placed with TLC, her prospective adoptive parents were to hand;

55.2 the child's screening has been delayed by efforts to trace the minor child's biological mother;

55.3 the applicant should approach an adoption agency in her area in order to follow the correct adoption procedures.

[56] The minor child's social worker also raised concerns regarding how the applicant obtained the minor child's background information and the applicant's pre-identification of the minor child. She requested the attorney to furnish her with the volunteer agreement between TLC and the applicant, which ought to contain a confidentiality clause and a prohibition against a volunteer using children's information to the volunteer's advantage. It does not appear that this request was met.

[57] The applicant launched this application on 9 October 2020.

#### **THE RELIEF SOUGHT BY THE APPLICANT**

[58] The applicant is aggrieved by the manner in which the respondents as well as the minor child's social worker handled her request to be considered as a prospective adoptive parent for the minor child. She complains that:

58.1 for several months the Department maintained that the minor child's adoptability status was yet to be determined. Yet on 29 September 2020, the minor child's social worker informed her attorney that the minor child has been declared adoptable from the outset.

58.2 the minor child's social worker accused her of child shopping yet he engaged in child shopping even before the parents whom he is considering for the adoption of the child were approved as adoptive parents.

58.3 the process followed by the minor child's social worker is prejudicial to her, he acts as a gate keeper and has failed to comply with the Children's Act, in particular, section 230 (1) (c) which requires that Chapter 15 of the Children's Act ought to be complied with.

[59] As I demonstrate later in this judgment, this is a misrepresentation of what the minor child's social worker communicated to the applicant's attorney in his letter of 29 September 2020.

[60] The relief that the applicant seeks is elaborately set out in her notice of motion. She essentially seeks to review and to have set aside the decisions that the relevant respondents and the child's social worker have taken or failed to take concerning the minor

child and the applicant's suitability or otherwise to adopt or foster parent the child. She also seeks a suit of interdictory, declaratory, compelling, referral and/or access to information relief and other ancillary relief. She wants the Children's Court orders concerning the minor child to be suspended. Further, she wants this court to remove the minor child's social worker and order the Department to replace the minor child's social worker and to direct the new social worker to assess her as the minor child's prospective adoptive parent.

[61] To ensure that the elaborate relief that the applicant seeks is fully dealt with, it is detailed below, but paraphrased where necessary to avoid prolixity:

*If the minor child has not been declared adoptable*

61.1 In the event that the minor child has not been declared adoptable, the applicant seeks an order:

61.1.1 reviewing and setting aside the first to fourth respondent's decisions or failure to make a decision and/ or a recommendation in terms of section 230 of the Children's Act;

61.1.2 directing the first to fourth respondent's to make a decision and/ or recommendation in terms of section 230 of the Children's Act regarding the adoptability of the minor child within thirty days of



this order or within a period determined by this court;

61.1.3 alternative to the order in 61.1.2 above, an order declaring that the minor child is adoptable;

61.1.4 directing the first to fourth respondent to inform the applicant of the decision declaring the minor child adoptable to enable the applicant to commence adoption procedures in respect of the minor child within 10 days of such decision;

61.1.5 if the first and fourth respondent do not declare the minor child to be adoptable, they are to furnish this court with reasons for their decision;

*In the event that the minor child has been declared adoptable*

61.2 In the event that the minor child has been declared adoptable, the applicant requests this court to:

61.2.1 suspend any adoption procedures in respect of the minor child, including any order issued by the

Children's Court in respect of the minor child in terms of section 23 (3) (b);

61.2.2 compel the first to fourth respondents to disclose to the applicant the name of the Children's Court seized with the matter and the Children's Court case number allocated to the matter;

61.2.3 in the alternative to the prayers set out in prayers 61.1.2 to 61.1.5 and 61.2.1 above, an order compelling the respondents to disclose to the applicant the following information within five days from the date of such an order:

(a) the date on which the minor child became adoptable in terms of section 230 of the Children's Act;

(b) whether the peremptory letter referred to in section 239 (1) (d) has been obtained;

(c) whether a report was provided in terms of section 239 (1) (b);

- (d) whether an assessment was conducted in terms of section 239 (2) (d);
- (e) whether an adoption order has been granted and, if so, the date of the adoption order;
- (f) whether the minor child was placed on the Register of Adoptable Children ("RAPCAP"), if so, the date the child was placed on the RAPCAP;
- (g) whether Family X has been registered in the Register of Prospective Adoptive Parents and if so, when;
- (h) whether Family X complies with the requirements set out in section 231 (2);
- (i) whether section 231 (7) has been complied with;
- (j) whether the steps detailed in section 246 have been taken and if so, the details of the steps taken;

*Further relief*

61.3 The applicant also seeks the following relief:

61.3.1 an order in terms of section 239 (3) allowing the applicant the permission to access the documents lodged with the Children's Court seized with the matter;

61.3.2 an order reviewing and setting aside any decision that the first to fourth respondents have made concerning the applicant in terms of section 231. Alternatively, an order reviewing failure by these respondents to make a decision concerning the applicant in terms of section 231;

61.3.3 an order compelling the respondents to appoint a new social worker for the minor child within 10 days of the order and to direct the newly appointed social worker to conduct the assessment contemplated in section 231 (2) (d) in respect of the applicant within 40 days of his or her appointment;

61.3.4 if the appointed social worker makes a decision not to recommend the applicant to be considered as a prospective adoptive parent for the minor child, an order directing the social worker to

provide written reasons within five days of making such a decision;

61.3.5 if the applicant's assessment is successful, an order directing the fifth respondent to place the applicant's name on the register of prospective adoptive parents within 5 days of the assessment being successful;

61.3.6 an order compelling the applicant to bring an application in terms of section 239 within 10 days of her name being placed on the register of prospective adoptive parents;

61.3.7 an order suspending any foster care procedure including any order issued by the Children's Court in relation to the minor child;

61.3.8 an order directing the newly appointed social worker to assess the applicant's suitability to act as a foster parent to the minor child within 40 days of such an order;

61.3.9 if the social worker does not recommend the applicant to be considered as a prospective foster

parent for the minor child, an order directing the respondents to provide written reasons for the decision within five days of such a decision;

61.3.10 an order in terms of section 23 (3) referring the matter to the Family Advocate to furnish this court and/ or the Children's Court with a report concerning the best interest of the minor child;

61.3.11 an order compelling the first to third respondent to investigate whether any circumstances referred to in section 249 (1) exist in relation to the adoption and/ or foster care of the minor child and to report to this court in writing within 60 days of this order;

[62] All the respondents contend that the applicant has failed to meet the requirements for a review in terms of PAJA and for the other relief that she seeks. In that:

62.1 the applicant fails to meet the requirements set out in Chapter 15 of the Children's Act;

62.2 the applicant seeks to adopt a pre-identified child of her choice – a prohibited practice;

62.3 this court lacks jurisdiction over the application;

[63] The SH also takes issue with the applicant's *locus standi* in this application. The gravamen of the SH's basis for opposition is that the applicant does not qualify for a domestic adoption of the minor child in that she does not have permanent resident status in South Africa. She also does not qualify for an inter-country adoption as she is not habitually resident in Norway.

[64] To the extent that counsel for the applicant contends that a *lacuna* exists in the law in that Chapter 15 and 16 fail to accommodate the applicant's peculiar circumstances, counsel for SH contends that this is an entirely new case not borne out of the applicant's founding affidavit.

#### **QUESTIONS TO BE DETERMINED**

[65] In the premises, the following questions stand to be determined:

65.1 whether the applicant meets the requirements for the determination of this application on the basis of urgency;

65.2 whether the applicant has *locus standi* in this application;

65.3 whether this court has jurisdiction over the application;

65.4 whether the applicant makes out a case:

65.4.1 to review and have set aside the respondent's decisions or recommendations or failure to make a decision or recommendation in relation to the minor child and/ or the applicant as prayed for in the notice of motion;

65.4.2 for granting of the variety of interdictory, declaratory, compelling, referral and/ or access to information relief as prayed for in the notice of motion;

65.4.3 the suspension of any decision that the Children's Court has made concerning the minor child;

65.4.4 the removal of the minor Child's social worker by the Department or by this court;

## **URGENCY**

[66] The applicant contends for the urgency of the application on the following grounds:

66.1 she has developed a relationship with the minor child over a period of two years;



66.2 if she brings the application in the ordinary course, it is highly likely that the minor child will be placed on adoption with other parents. If the minor child is so placed, the minor child will develop a close bond with the adoptive parents;

66.3 permitting the minor child to develop a close bond with the adoptive parents does not serve the child's best interest;

66.4 if the minor child's social worker's conduct is found to fall short of the requirements in the children's Act, it is liable to be reviewed in terms of the Promotion of Administrative Justice Act<sup>25</sup> and set aside;

[67] The respondents deny that the applicant meets the requirements for urgency. However, they urged the court to deal with the application on the basis of urgency in the interest of the minor child, hence they abandoned their opposition to the applicant's prayer for urgency.

[68] The applicant's approach to this court has been extremely tardy. Courts, particularly the urgent court, continued to function during the Covid-19 lockdown period. Therefore, the Covid-19 lockdown does not justify the applicant's tardy approach to the court.

[69] It is trite that the question of urgency does not turn on the expediency with which an applicant approaches the court. The ultimate test for urgency is whether the applicant will be

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<sup>25</sup> 3 of 2000

denied substantive redress in due course if her application is not dealt with on the basis of urgency;<sup>26</sup>

[70] As I determine in this judgment, the applicant fails to establish her entitlement for the relief that she seeks. For that reason, she can hardly be denied any redress in due course if she is not afforded urgency. Therefore, she fails to meet the ultimate test for urgency.

[71] Although the applicant fails to meet the test for urgency, given that the matter has been specially allocated to a judge who is not on urgent duty due to its large volume, this court exercised a discretion to hear the matter in the interest of the minor child. Otherwise an order striking the application off the urgent roll with punitive costs would have been appropriate.

[72] The court is compelled by the Constitution of the Republic of South Africa, 1996 ('the Constitution') to consider the child's best interest as the child's best interest are paramount in any proceedings concerning the child.<sup>27</sup> The minor child has been in temporary care since 2017. The proceedings for the minor child's placement with Family X have been kept in abeyance pending this application. Removing the application from the roll would result in the Children's Court proceedings being kept in abeyance for longer while the application awaits hearing on the ordinary Special Motion Court roll. The minor child has been in temporary care since 2017. It is in the minor child's best interest that her permanent placement is resolved without further delay.

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<sup>26</sup> Rule 6(12). See also *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* ZAGPJHC 196 (23 September 2011)

<sup>27</sup> Section 28 (2)

### **THE APPLICANT'S *LOCUS STANDI***

[73] The SH's 's *locus standi* point lacks merit. SH's contention that the applicant does not qualify for a domestic adoption of the minor child in that she is not a South African permanent resident and that she also does not qualify for an inter-country adoption as she is no longer habitually resident in Norway does not disentitle the applicant of standing to have the dispute between the parties determined in these proceedings. Therefore, SH's *locus standi* point is dismissed.

### **THE JURISDICTION OF THIS COURT**

[74] No basis for the lack of jurisdiction of this court has been established. The substantial relief that the applicant seeks is a review in terms of PAJA. This cause of action falls within the jurisdiction of this court. Therefore, the jurisdiction point is also dismissed.

### **THE MERITS**

[75] In her papers, the applicant did not specify whether she seeks the various decisions or omissions by the respondents reviewed and set aside in terms of PAJA or whether she bases her cause of action on the legality review. An applicant who seeks to review and have an administration action set aside ought to bring the application in terms of PAJA. She may only bring a legality review where PAJA is incompetent.<sup>28</sup>

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<sup>28</sup> *State Information Technology Agency SOC Ltd v Gijima* 2017 (2) SA 63. In *Gijima Constitutional Court*, reported at 2018 (2) SA 23 (CC), the Constitutional Court disagreed with the SCA on this principle on the basis that organs of State do not have the right to review their own decisions in terms of PAJA. This principle remains good under the current circumstances where the administrator is not reviewing his own decision.

[76] Section 1 of PAJA defines administration action to include:

*“any decision taken, or any failure to take a decision, by:*

*“(a) an organ of state, when:*

*“(i) exercising a power in terms of the Constitution or a provincial constitution; or*

*“(ii) exercising a public power or performing a public function in terms of any legislation;”*

[77] The grounds which render an administrative action vulnerable for review are set out in section 6 (2) of PAJA.<sup>29</sup>

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<sup>29</sup> Section 6(2) of PAJA provides that a court or tribunal may judicially review an administrative action if:

*“(a) The administrator who took it:*

*“(i) was not authorised to do so by the empowering provision;*

*“(ii) acted under a delegation of power which was not authorised by the empowering provision;*

*Or*

*“(iii) was biased or reasonably suspected of bias;*

*“(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;*

*“(c) the action was procedurally unfair;*

*“(d) the action was materially influenced by an error of law;*

*“(e) the action was taken:*

*“(i) for a reason not authorised by the empowering provision;*

*“(ii) for an ulterior purpose or motive;*

*“(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;*

*“(iv) because of the unauthorized or unwarranted dictates of another person or body;*

*“(v) in bad faith; or*

*“(vi) arbitrarily or capriciously;*

*“(f) the action itself:*

*“(i) contravenes a law or is not authorised by the empowering provision; or*

[78] On the basis of the trite *Plascon Evans* rule, the respondent's version that the minor child does not have a strong bond with the applicant is accepted by this court. The respondents' version is not far-fetched. On her own version, it is unlikely that the applicant is the only person who had human contact with the minor child. The minor child arrived at TLC a few months after the applicant arrived at TLC. The minor child remained at TLC after the applicant left TLC. It is not the applicant's case that TLC afforded her contact with the minor child between 2018 and 2020 because the minor child was not coping without the applicant. There is no basis to find on the papers before court that the applicant's contact with the minor child was child-centered. Evidently, the applicant actively pursued the contact and is aggrieved that TLC and the minor child's social worker have terminated it.

[79] The determination that it is in the best interest of the minor child for the minor child to be placed in foster care with the applicant or adopted by her is one the applicant personally makes in these proceedings. It is not supported by the minor child's social worker or TLC as the organization where the minor child is in temporary care or any of the respondents in these proceedings. More importantly, it is not supported by any expert opinion. The best interest of the minor child may not be determined on the mere say so of a party.

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*"(ii) is not rationally connected to:*

*"(aa) the purpose for which it was taken;*

*"(bb) the purpose of the empowering provision;*

*"(cc) the information before the administrator; or*

*"(dd) the reasons given for it by the administrator;*

*"(g) the action concerned consists of a failure to take a decision;*

*"(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or*

*"(i) the action is otherwise unconstitutional or unlawful."*

[80] The applicant has not advanced reasons why it is not in the minor child's best interest for the minor child to be placed with another adoptive parent(s). Even if this court accepted the applicant's version, that the applicant has developed a strong bond with the minor child does not mean that placing the minor child with other adoptive parents does not serve the minor child's best interest. The minor child's social worker has introduced the minor child to Family X. The minor child is responding well to Family X. On this issue the present facts are distinguishable from those in *Fitzpatrick*<sup>30</sup> where the court found that it was in the child's best interest for the child to be placed with the Fitzpatricks as placing her with other adoptive parents was not in the child's best interest. This is not a finding that was merely made. The child had been in foster care with the Fitzpatricks for several years. The Fitzpatricks were about to relocate back to the United States of America. The child had been placed in temporary care with other parents and was not coping. The facts in this matter and in *Fitzpatrick* are therefore distinguishable.

[81] The order that the applicant seeks for the referral of the matter to the Family Advocate to assess the minor child and furnish this court and/ or the Children's Court with a report on the best interest of the minor child may not simply be granted because the applicant has prayed for it. The applicant has to establish her entitlement and basis for calling for such a report.

[82] Although this court is not seized with an application for the adoption of the minor child, invariably, the court has to assess the applicant's entitlement to the relief that she seeks against the requirements for adoption and foster care as set out in the Children's Act because her right to the relief that she seeks hinges on her meeting the applicable statutory requirements.

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<sup>30</sup> *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC).

[83] Therefore, Chapter 12, 15 and 16 of the Children's Act is the basis to determine whether the administrative actions complained of fall short of section 6(2) of PAJA, rendering the applicant entitled to the relief that she seeks.

[84] It is common cause that the applicant pursued an inter-country adoption process through the NCA and SACA. She did so as a habitual resident of Norway, seeking to adopt a child in South Africa.

[85] By the time SACA responded to the applicant's letter of 16 August 2018, the difficulties that the applicant faced had become evident from the correspondence exchanged between her, SACA and the NCA. She inappropriately side-stepped the NCA by corresponding directly with SACA either personally or through her attorneys, despite being informed not to do so. Her application was not mediated by an adoption agency. Her application was in relation to the adoption of a pre-identified child. The child's adoptability status was yet to be determined. Options for the domestic adoption of the child had not been exhausted. The NCA had not yet assessed her. The NCA seemed loath to assess the applicant in futility, hence it sought SACA's views on the prospects of the intended adoption. SACA and the NCA had not agreed to the adoption of the child as required by section 261(5)(e) and (f). SACA did not recommend her assessment by the NCA.

[86] I pause to mention that given the role of CAs in inter-country adoption, the applicant's direct inter-action with SACA either personally or through her attorney, particularly under circumstances where she had applied to the NCA for the inter-country adoption of the minor child was utmost inappropriate.

[87] The applicant was not successful in her inter-country adoption efforts. The outcome of her efforts was communicated to her by both SACA and the NCA in writing. She was also furnished with detailed reasons for these decisions.

[88] The decision by SACA not to consider the applicant's adoption request is consistent with The Hague Convention and Chapter 16 of the Act.

[89] It appears that the applicant has accepted SACA's decision because she is not seeking a review and setting aside of SACA's decision in these proceedings.

[90] To the extent that the applicant seeks to rely on Chapter 16 to establish the relief that she seeks in these proceedings, the applicant has established no affront to her right to administrative justice as envisaged in section 6(2) of PAJA.

[91] From the papers before court, it does not seem that the applicant intends continuing with her inter-country adoption efforts. If the applicant seeks to continue with her efforts to adopt the minor child inter-country, the applicant has not complied with section 261 (1) to (4). A literal reading of section 261 (1) and indeed the whole of chapter 16, as well as The Hague Convention does not make provision for the convention country and the recipient country to be the same. It envisages the adoption of a child who is in the origin country by a prospective adoptive parent who is habitually resident in the recipient country. This is the position adopted by both SACA and the NCA in their correspondence in respect of the applicant's initial attempts to adopt the minor child inter-country, which the applicant seems to have accepted.



[92] Given that applicant has since become habitually resident in South Africa, the applicant has no entitlement to be considered for the adoption of the minor child in terms of Chapter 16 because both the minor child and the applicant are habitually resident in South Africa.

[93] The interpretation promoted by counsel for the applicant that South Africa is both an origin and a recipient country under Chapter 16 is a misconstruction of this Chapter. The purpose of Chapter 16 is to facilitate the implementation of The Hague Convention and not its avoidance. That The Hague takes precedence in the event of a conflict with Chapter 16 supports a construction that Chapter 16 exclusively applies to inter-country adoption as envisaged in The Hague Convention.

[94] If the applicant seeks to further pursue the adoption of the minor child inter-country, the applicant has not followed the correct procedure in terms of section 261. The applicant ought to apply for the adoption of the child through the CA of the country where she is habitually resident. This is the recipient country as envisaged in section 261 and article 2 of The Convention. Further, the CA of the recipient country must be satisfied that the applicant is fit and proper to adopt the child, in which case the CA of the recipient country will prepare a report on the applicant in accordance with The Hague Convention principles and transmit it to the CA in the origin country. The latter country is the country where the prospective adoptive child is located.

[95] Under the present circumstances, South Africa being the country where the applicant is habitually resident and where the minor child is located is neither a convention or a recipient

country as envisaged in Chapter 16 of the Children's Act and The Hague Convention. An adoption in terms of Chapter 16 and The Hague Convention is incompetent.

[96] Chapter 15 applies to an inter-country adoption scenario where a person habitually resident in South Africa intends to adopt a child from another convention or non-convention country in terms of section 266 or 268 and SACA has refused to recognize the adoption, having determined that the adoption is manifestly contrary to public policy in South Africa taking into account the best interest of the child.<sup>31</sup> In such a case, the prospective adoptive parent may apply to the Children's Court for the adoption of the child in terms of section 271 (1).

[97] Section 271 (2) authorizes the Children's Court to determine such an application in terms of Chapter 15 with the necessary adaptations as required by the circumstances of a particular case.

[98] Given that the minor child is not in another convention or non-convention country for the purpose of Chapter 16, section 271 (1) does not apply. Further, SACA has not declined to recognize the adoption of the minor child for the reasons stated in section 271 (1). Therefore, I find that the Children's Court lacks the jurisdiction envisaged in section 271 (2) under the prevailing circumstances.

[99] The applicant seeks to rely on Chapter 15 in her continued efforts to adopt the minor child. In terms of section 232(4), the applicant does not qualify for registration on RAPCAP because she does not have a permanent resident status in South Africa. Unfortunately for

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<sup>31</sup> See section 270.

the applicant, she simply does not qualify to adopt the minor child in terms of Chapter 15 until she becomes a permanent resident of South Africa. Under these circumstances, conducting an assessment on the applicant for the purpose of adoption will be pointless.

[100] The applicant conflates the respondents' position regarding the minor child's adoptability status and Family X's assessment status. The minor child's social worker informed the applicant's attorney in his letter of 29 September 2020 that the child's adoptability status must first be determined. This has always been the position even when the applicant was pursuing the inter-country adoption. The minor child's social worker never informed the applicant's attorney that the minor child was declared adoptable from the outset. This clearly appears from the 29 September 2020 letter.

[101] The minor child's social worker informed the applicant's attorney that Family X has been assessed and that his efforts to determine the child's adoptability status were delayed by the investigations he undertook to trace the minor child's mother. Under these circumstances, there is no basis for the applicant to accuse the respondents for failing to make a decision regarding the child's adoptability status. There is also no basis for the applicant's allegation that section 230 (1) has not been complied with and/ or that Family X has not been assessed.

[102] The applicant has not established any basis for this court to upset the processes, decisions or failure to make a decision regarding the child's adoptability status. As already determined, the applicant is not being considered to adopt the minor child because she does not qualify to adopt the minor child. She therefore has no right to any relief that she seeks concerning the assessment or placement of the minor child.

[103] The minor child's social worker identified and assessed Family X and introduced the minor child to Family X as part of his statutory duties in respect of the minor child. There is no basis on the papers before court to find that his activities amount to child-shopping as alleged by the applicant.

[104] The minor child's social worker has furnished the applicant with written reasons for the decisions he has taken concerning the applicant's contact with the minor child. Given his statutory role in respect of the minor child, the child social worker's concerns regarding how the applicant obtained information on the minor child's background and that she is using the information on the minor child to her advantage is not only reasonable, it is consistent with the statutory protection of such information.

[105] The prospective adoption of the minor child by Family X presents a serious hurdle for the applicant's efforts to become the child's foster parent. As argued by counsel for SH, foster parenting is part of permanent placement planning. Considering the applicant as a foster parent for the minor child may not promote permanent planning and may result in the child remaining in temporary care for a prolonged period of time. Under these circumstances, it will be irrational for the minor child's social worker to consider the applicant as the foster parent for the minor child because the applicant does not qualify to adopt the minor child. For this reason, the applicant's lack of permanent residency remains an issue even on the question of her eligibility to be appointed as the minor child's foster parent, particularly under circumstances where prospective adoptive parents for the minor child are to hand. There is no guarantee that the applicant will qualify for permanent residency in the future. If she does ever qualify for permanent residency, it is unknown how long the process will take. This

court finds that the approach that the minor child's social worker has taken in this matter is not only rational, it is consistent with the purpose of foster care as provided for in the Children's Act.

[106] This court finds that it would be irrational for the child's permanent placement to be placed in abeyance and for the minor child's prospects for placement with Family X to be interfered with under these circumstances.

[107] The applicant has not made out a case for the removal of the minor child's social worker. She has also not made out a case for this court to assume an executive function by granting an order for the removal of the minor child's social worker.

[108] The relief which the applicant seeks in terms of section 249 (1) is far-reaching relief that may not be granted in pursuit of a fishing expedition. A case for this relief ought to be made out in the papers. This court finds no basis to compel the first to third respondent to investigate whether any person made or received any consideration in cash or kind for the adoption of the minor child or induced any person to give up the minor child for adoption in terms of section 249(1).

[109] The applicant has not established any basis for this court to find that any of the respondents breached the applicant's right to just administration action in terms of section 6 (2) of PAJA. Neither has the applicant made out a case for this court to suspend any order made by the Children's Court concerning the minor child.

[110] The applicant has not established any basis for complaining that section 231 (7) has not been complied with, nor has she established the basis for her to make any issue about the alleged non-compliance. She is not the child's foster parent as envisaged in 231(7).

[111] Section 246 deals with the registration or the birth and adoption of a child born outside South Africa. There is no basis for the relief that the applicant seeks in terms of this section as the child was born in South Africa. Even if the child was born outside South Africa, the applicant has not established her entitlement for the minor child's registration information.

[112] Access to information relating to the adoption of children is severely restricted in the best interest of children. The applicant does not meet the statutory requirements to access the information in terms of section 232(6), 237, 238 and 248. Further, she has not established the basis for this court to allow her such access in terms of section 248 (1) (e).

[113] Chapter 15 and 16 are clear as they apply under these circumstances. In her attorney's 10 April 2018 letter to SACA, the applicant demonstrated a clear understanding and acceptance of the distinction between domestic and inter-country adoption and the respective and distinctly applicable legislative framework. The applicant's failure to meet the requirements to adopt the minor child domestically or inter-country does not imply a *lacuna* in the law. Further, as contended by SH, the applicant makes no such case in the papers.

[114] The applicant contends for costs on the basis of the trite *Biowatch* principle in the event that she is unsuccessful in the application. The basis for the application of the *Biowatch* principle does not exist in this case as the applicant is not asserting a constitutional right in

these proceedings. That the right to administrative justice finds its genesis in section 33 of the Constitution, does not imply that every PAJA review application falls within the purview of *Biowatch*, particularly in cases such as this where the litigation is frivolous.

[115] There is also no basis to depart from the general principle that costs follow the course. The respondents have always maintained a position consistent with the substantial findings of this court and furnished the applicant with reasons for their decisions. The applicant has not accepted the respondents' decisions under the guise of the child's best interest when what she is in fact pursuing are her interest. Her conduct has been self-serving and utmost unreasonable. This court would have strongly considered a punitive cost order against the applicant if the respondents had sought it.

[116] In the premises, the following order is made:

## **ORDER**

1. The application is dismissed with costs.

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**MADAM JUSTICE L T MODIBA  
JUDGE OF THE HIGH COURT,  
GAUTENG LOCAL DIVISION,  
JOHANNESBURG**

## **APPEARANCES**

Counsel for applicant:

Advocate S Spangenberg

Attorney for applicant:

Mathys Krog Attorneys

Counsel for 1 <sup>st</sup> and 5 <sup>th</sup> respondent:	Advocate T Mlambo
Attorney for 1 <sup>st</sup> and 5 <sup>th</sup> respondent:	State Attorney
Counsel for 4 <sup>th</sup> respondent:	Advocate L Van Der Westhuizen
Attorney for 4 <sup>th</sup> respondent:	State Attorney
Date of hearing:	27 November 2020
Date of judgment:	15 February 2021