
JUDGMENT

MIA, J

[1] This is an urgent application by the first, second and third applicants (the applicants) for the following relief:

- 1.1 that the rules time limits, forms and procedures provided for in the Uniform Rules are dispensed with, to the extent necessary, and leave is granted for this application to be heard as a matter of urgency;
- 1.2 the applicants, in terms of sections 23 and 24 of the Children's Act 38 of 2005, be awarded, jointly, full parental responsibilities and rights as envisioned in section 18(2) and section 18(3) of the Children's Act in respect of the minor children.
- 1.3 that the children's primary place of residence shall be with the first and second applicants at their address in the USA;
- 1.4 that the first and second applicant shall be responsible for the children's maintenance in the USA, which shall include education, medical costs, accommodation, food and clothing;
- 1.5 that the first and second applicants shall be responsible for enrolling the children in school in the USA and shall be responsible for the costs associated with education and extra-mural activities;
- 1.6 that the first and second applicant shall enrol the children as dependants on the first applicant's medical insurance at their own cost and shall be responsible for all medical dental and therapeutic costs not covered by the first applicant's medical insurance;

- 1.7 that the applicants shall be permitted to remove the minor children from the Republic of South Africa;
- 1.8 that the Third and/or Fourth Respondents be ordered to comply with section 245 of the Children's Act 38 of 2005, read with section 27B of the Birth and Deaths Registration Act 51 of 1992, and register the adoptions of the children, and thereafter to furnish the applicants with new birth certificates in respect of the children.

The application is opposed by the respondents; two South African government departments responsible for inter country adoptions (Department of Social Development) and registration of citizenship including birth (Department of Home Affairs) and the designated Central Authority, Department of Social Development.

[2] The first applicant is a pediatrician residing in Los Angeles (LA) the United States of America (USA). The second applicant is married to the first applicant and is a school teacher. The third applicant, AA, is an adult and a sibling of the minor children SA and DA. The first respondent (the Department of Social Development) is the responsible government department designated under the Hague Convention on Inter Country Adoptions for South Africa. The Director General of the DoSD is the Central Authority on inter country adoptions. The Central Authority for SA has an interest in the matter as it relates to section 25 of the Children's Act of 38 of 2015. The Minister of Home Affairs is the member of the National Executive responsible the registration of adoptions in terms of section 245 of the Children's Act, 38 of 2005, read with section 27B of the Births and Deaths Registrations Act, 51 of 1952 (Births and Death Registrations Act) and section 5 of the Births and Deaths Registrations Act. The fourth respondent is the Acting Director General: Department of Home Affairs who is responsible for administering the registration of adoptions in terms of section 245 of the Children's Act as well issuing of birth certificates in terms of the Births and Deaths Registrations Act.

[3] The first applicant is a half sibling of the minor children, SA, DA and AA (the children). The children SA, DA and AA were adopted by LDA and his wife LA in 2009 and 2010. The minor children's adoptive mother passed on in 2017. Their adoptive father was the primary care giver after his wife's passing on and as such they lived with him under the same roof and he cared for them. He too (unfortunately for the minor children) passed on in May 2022. From that time, they are under the care of their older sibling AA who turned 18 in April 2022.

[4] The minor children including AA (who turned 18 recently as indicated) and their parents were living on a property which was owned by LA's father who sold it to a neighbor subject to it being rented to the children until permanent arrangements were made for their care. The children's adoptive grandfather is aged and unwell and not able to care for the minor children. He pays the rent due for the property each month. Their accommodation is secure as long as the rental agreement is in place.

[5] The applicants have not had contact with the children directly. Their contact with the children was always through their father LA. They have learned more about the children after their father's passing on. After they learned about their father's passing on, the applicants have contributed to the children's maintenance as their adoptive mother's brother expressed no interest in assisting and their grandfather is unable to care for them. They contribute a cash amount to assist with their living needs each month.

[6] The applicants appointed a social worker, Ms Nel, to investigate their home circumstances. Ms Nel was accompanied by a social worker from the USA, Ms De La Cruz. Mrs Nel's report is attached to the application.

[7] The applicants contend that the matter is urgent as the children can no longer be cared for by their older sibling AA, who is experiencing emotional stress. The applicants approached the court as they have an interest in the safety and well-being of both the minor children who are their half siblings as

well as AA. They seek to be granted full parental rights and responsibilities as envisioned in section 18(2) and (3) of the Children's Act in respect of the minor children. They maintain that they do not seek to adopt the children and the matter is distinguishable from matters where foreigners seek to adopt children in that they are legally related to the children through their father LA.

[8] The first applicant indicates that she was raised by her mother after her parents got divorced. She maintained contact with her father (LA) after he left to live in South Africa. She met the second applicant in 2003. They dated for two years before they got married. At the time of her marriage, LA had already left the USA to live in South Africa. The applicants live in Philadelphia which they chose for its community diversity. However, because their circle of friends does not include the diversity reflected within their community, they indicated to the social worker that they have no objection to engaging with families that are different to their own to ensure the children integrate.

[9] The applicants' have discovered that the children were not registered under their adoptive surnames. The social worker's report indicates that the children were not in any formal schooling system. They were home-schooled by their adoptive mother. They also reported to the social worker that they experienced verbal abuse regularly from their adoptive father who was often under the influence of alcohol. In addition to the abuse, their lack of attendance of a formal school resulted in their limited social interaction with peers. The social worker expresses concern in regard to their integration into formal schooling and the children's engagement with peers.

[10] The issues for determination are whether

10.1 the application is urgent or not?

10.2 whether the applicants should be granted full parental responsibilities and rights as envisioned in section 18(2) and (3) of the Children's Act

10.3 whether the application ought to be regarded as an inter-country adoption as the applicants are non- nationals of South Africa?

[11] The applicants maintain that the children are in a difficult position being cared for by their older sibling. They seek to have the children in their care as soon as possible to enrol them in educational institutions and to provide the assistance they believe is required. They request this court to make an order directing that they are granted parental rights and that the children are furnished with birth certificates and the necessary entries be made in the records of the relevant departments to enable them to collect the children and leave with them to the USA.

[12] The application is opposed by the two State respondents who submit that the matter is not urgent as the children's adoptive father (LA) passed away in May 2022 whilst the application is brought in December 2022. The nature of the relief sought where the applicants are foreign nationals seeking parental rights to be granted is clearly indicated in the Children's Act to be dealt with as an intercountry adoption. The applicants' submission that their case is distinguishable because they are half-siblings is not sufficient and requires the same kind of attention as envisioned in the legislation regulating intercountry adoptions because it relates to the best interests of minor children (who coincidentally were not registered under the names of their adoptive parents). This, prima facie, requires more attention than what seems to be the case presented by the applicants. Particularly because of the distinguishable features of the matter and the facts which are evident it requires more attention from the two State departments responsible for intercountry adoptions and in respect of the registration of citizenship and issuing of passports. The matter cannot be dealt with in the rushed and unregulated manner in which the applicants seek an order to remove the children and to issue amended birth certificates and passports. Moreover, the issuing of birth certificates with new names and surnames where the children's adoptive names have not been registered requires attention and cannot be rushed. Whilst the children's best interests are paramount they

cannot be dealt with in the manner proposed by the applicants and requires the proper processing and investigation by the respondents' offices especially the first and second respondents in so far as the matter is to be dealt with in terms of section 25 of the Children's Act.

[13] In the circumstances I grant the following order:

ORDER :

1. The matter is struck from the urgent roll and referred to the First and Second Respondent to consider the application in terms of section 25 of the Children's Act.
2. The Second, Third and Fourth respondents are ordered to deal with the minor children's registration of birth and related matters under the relevant legislation within 90 (ninety) days of the date of this order.
3. The applicants may re-enroll the matter (on the same papers) if so advised for reconsideration of the issues by this court.
4. No order as to costs.

**S C MIA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Appearances:

On behalf of the applicants : Adv.RM Courtney

Instructed by : Clarks Attorneys

On behalf of the respondents : Adv. VJ Chabane

Instructed by : State Attorney

Date of hearing : 15 December 2022

Date of judgment : 22 March 2023