

METISO v PADONGELUKFONDS 2001 (3) SA 1142 (T)

Headnote : Kopnota

Following the death of the father of two minor children, his brother, S, accepted custody of the children. It had become necessary that the children be adopted as their mother had left them and never again made contact with them nor shown any interest in them. According to the rules of the tribe, the family of the children's father had to decide whether it was necessary that they be adopted, the children had to be formally adopted by the adoptive parent and the adoption had to be made public, normally by a report to the head of the tribe. Although it was necessary that the mother be notified, the decision rested with the paternal family, regardless of the wishes of the mother. The head of the tribe was informed of the adoption at some stage, although the mother was not notified. S was subsequently killed in a motor accident. The defendant opposed an action for compensation on behalf of the children on the basis that it was not liable as the children, at the time of his death, had not had a legally enforceable claim against S due to the absence of a valid adoption of the children by S, *inter alia* because there had been no negotiation with the children's mother and her family before the adoption. It was also contended, on behalf of the children and in the event that the children had not been properly adopted, that there had been an agreement between the family and S in favour of the children that S would maintain the children.

Held, that it would not only have been irrational but also against the best interests of the adopted children if the fact that the mother's family had not been notified in this case was decisive as to whether the adoption had been valid. That was clear from the fact that the mother had not shown an interest in the children for more than a decade. To let the fact that she had not been notified stand in the way of a valid adoption would have harmed the best interests of the children and would therefore have been *contra bonos mores*. This would have been so even if it could have been shown that the mother's family had had to be notified in terms of customary law of the proposed adoption. (At 1147H/I - J and 1149C/D - E.)

Held, further, that, as it had been shown that the adoption had been performed by the paternal family and that there was sufficient proof that the adoption had been properly announced, there had been a duty on S to maintain the children. (At 1149E - I.)

Held, further, that, in the event that the children had not properly been adopted, S's duty to maintain the children had had its origin in an act of adoption which, in the best interests of the children, should be accepted, regardless of any possible formal defect which could attach to it. In the event that there was a defect in the publication requirement and that the adoption could therefore be regarded as incomplete, the offer of S to adopt the children was a binding offer which could and should be enforced on behalf of the children. There was no doubt that the recognition of such duty to maintain was enforceable in terms of customary law and that it was reconcilable with the

boni mores. Insofar as such a duty was not recognised by the common law, it was a logical extension thereof. The acceptance of the validity of a duty to maintain minor children which arose from a promise which was made in the context of a (possibly) incomplete customary adoption would merely be a logical further step in the development of the common law. (At 1150C - E, 1150G and 1150H/I - I)