

Adoptions in KwaZulu-Natal: Control, collateral damage and unintended consequences

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After 18 months of agonising stalemate in KwaZulu Natal adoptions, two vulnerable children, a questionable social development decision and a landmark High Court ruling may have paved the way for adoptions to resume in the province. But in the strange world of government's unintended consequences, inter-country adoptions could now be easier than local ones. It surely represents an appalling backfire in departmental policy. What happens next will depend on how it reacts.

In KwaZulu-Natal (KZN), the province with the highest number of orphans, just eight adoptions were finalised in the first 11 months of 2016. Even in a country that only managed 1,165 adoptions for the year, it is a shockingly small amount. But while it may seem like a massive failure in child protection, the Head of Department (HOD) for Social Development in KZN, Nokuthula Khanyile, appears unconcerned. Perhaps her reaction isn't that surprising though. Despite adoption forming an integral part of the child protection process in the Children's Act, it is not a strategic priority for the department. It is easily confirmed. A cursory glance at the Department of Social Development in KZN's annual reports shows that it has clear priorities for child protection. They are family reunification and preservation, and foster care. It also has goals for the placement of children in Child and Youth Care Centres (CYCCs). In the annual reports, each goal has a key performance indicator, with quantitative targets, how well they were met and why, or why not. But adoption doesn't even get a mention.

Granted, it has taken ages for the amendment in legislation permitting department social workers to perform adoptions to be promulgated. But, the country's social welfare model has always allowed NGOs to complete tasks on behalf of the department, a



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delegated authority that is reflected in numerous other places in the annual report. In addition, the department has the crucial role of ratifying adoptions prior to an adoption order being granted by the Children's Court. So, its absence from the annual report seems quite telling. Instead of adoption forming an integral part of the department's child protection arsenal, the HOD in particular, seems to view it as a hindrance to family reunification, and a failure in family preservation. Put this way, when the HOD's team [substantially over-delivered on its family reunification targets in 2016](#), due to "reorientation of social workers" and "intensified performance review sessions", it could well be because it has made adoptions almost impossible. Nor should we intimate that this is purely a performance management issue. Each strategic target is clearly based on values, and a belief system.

Interestingly, no one is disputing the importance of family reunification, it is the foundational tenet of all child protection strategies in South Africa (every intervention, including adoption, begins with an attempt at family reunification). But, it was surely never intended to be an end in itself. The Children's Act makes specific provision for what happens when family reunification fails, and recognises that it is not always the best solution. Moreover (uncomfortably for those proponents of family reunification at all costs), the Act even allows a birth mother to choose to place her child for adoption with people who are not related to her, rather than with extended family. Adoptions can only occur if family reunification has failed, or been precluded, which is undoubtedly one of the reasons why it is so controversial. Furthermore, this is a province where the Social Development MEC has publicly stated that "[foster care remains our priority](#)" and even placement of children in CYCCs is goal-based. Effectively, adoption is not just an omission, but a negative value in the KZN department's strategic performance chart. This, despite adoption remaining legal, fundamental to the Children's Act and, many would argue, essential, especially for abandoned children, and other children for whom family reunification is not an option and foster care too impermanent.

Not surprisingly, these competing values have resulted in the department exercising a vice grip on adoptions. And, in some ways, the strategy seems to be working. Faced with the high impossibility of getting the department to process adoptions, social workers with statutory powers (specifically those from Child Welfare) are increasingly opting to place adoptable children in foster care because they don't want them to grow up in institutions. Between [2014](#) and [2016](#), almost 64,000 children were placed in foster care in the province, a figure which is now increasing because children who are eligible for a permanent solution are instead being forced into a temporary, tenuous one. While researching this article and the [previous one on the KZN adoption crisis](#), I spoke to large numbers of affected families. All expressed their desperation and the haunting fear that their children may be removed at any point. And yet, in the absence of adoptions, foster care seems the only way for these children to avoid institutionalisation.

But not all will avoid it. When family reunification has failed, and social workers are unable to find a match for a child locally (sometimes because of prematurity, special needs, or the child having been abandoned in circumstances that could result in a long-term psychological impact), these children are often fated to long-term care. Baby homes in KZN are overfull. When asked about the crisis, a number confided that their

children are growing older in care. For the first time, one baby home even has a seven-year-old who has yet to be placed in a family. Tragically, this child (who has seen other children matched with families), has started to “shop for parents” among visitors and volunteers. Another baby home, which has been operational for 18 months said that they were yet to have a single child placed. They joked humourlessly that they have to keep editing the age limit on posters advertising their home (it has already shifted from two to four years old).

For many of these children, the only hope is that they are eligible for an inter-country adoption and, more importantly, that the department will approve it. It hasn't been willing. But, two such vulnerable children, Sibusiso and Khethiwe* have now (inadvertently) set in motion a dramatic change to adoption in the province, and in South Africa as a whole.

Both children were selected for an inter-country adoption by Durban Child Welfare after attempts at family reunification, and to match them locally had failed. Neither of the children's birth families could be traced and in one case, the child had been declined by three local families prior to being matched with a South African mother living in the UK, and her British spouse. In November 2016, the families were issued with their letters confirming that the adoptions had been approved by both the South African Central Authority and their own Central Authority in the UK. All that remained before they could meet their children was for the DSD in KZN to approve the adoption, and issue the Section 239(1)(d) letter required for an adoption order to be granted.

I say “all”, but four months later, they were still waiting, and their children were still in care. In desperation, they joined a High Court application with another British family whose son, Philani*, had also been in an institution for an extended period waiting for the department to approve his adoption. The High Court application requested that the department grant their letters urgently. In response, the HOD submitted an affidavit declaring that she would approve two of the adoptions but decline Sibusiso's. Bizarrely though, in the same affidavit was a paragraph stating that Section 239(1)(d) letters were not actually required for inter-country adoptions.

On the basis of the affidavit, the High Court ordered that Khetiwe and Philani's adoptions proceed, and further ordered the department to pay costs. In Sibusiso's case, the adoptive parents were told that they could lodge their applications for an adoption order with the Children's Court, but that because the department was opposing the adoption, it could make applications at the hearing. In the end, the department was present at the hearing, but although it was adamant that it would not approve the adoption, it did not oppose it (its additional attempts at finding Sibusiso's birth family had also failed, confirming Durban Child Welfare's assessment that family reunification was not an option for him). After spending seven extra months in care, Sibusiso's adoption order was finally granted.

But, for Khethiwe's family, there was a further impediment. The department changed its mind at the last minute about granting the adoption, and, without warning (they had apparently forgotten to notify the couple's attorney), appeared at Children's Court to

oppose it. Seemingly afraid that Khethiwe would lose her culture (which is unknown), they asked the magistrate to adjourn the adoption order so they could return to high court, reverse the consent order and place her back on the adoption register. The magistrate ruled against the department, and granted the order anyway, ending a hugely stressful and (it seems) unnecessarily hostile adoption process. But, both Sibusiso and Khethiwe's adoptions had to proceed without DSD consent, and without the Section 239 letters.

Still, few could have anticipated that the affidavit submitted by the HOD would result in a significant [shift in adoptions](#). For the department, the statement that 239 approvals were not required for inter-country adoptions must have seemed like a neat solution at the time, a way of avoiding prolonged legal proceedings but still withholding consent. But, it should probably have foreseen what happened next. Less than a month after Sibusiso's adoption order was granted, another High Court judge used the affidavit to rule that Section 239 letters are not necessary for any inter-country adoptions. This decision has effectively removed the KZN HOD from the inter-country adoption process, paving the way for three children to be adopted by Canadian families now, and for other inter-country adoptions (both in KZN and across the country) to occur in the future. In hindsight, it must seem less a successful strategy to the DSD, and more like an own-goal. But will this ruling open the floodgates for inter-country adoptions as the department may fear? The answer is no, it won't. The reason is quite simple. Despite what the department believes, adoption social workers are also deeply committed to family reunification. Failing that, they always try to place children locally first, and only if that isn't an option will they pursue an inter-country adoption. And these checks and balances are scrupulously policed by the Central Authorities, both here in South Africa, and in the child's receiving country. With this rigorous vetting in place, some might argue that there was never an acceptable reason for the provincial department to be "verifying" these adoptions.

Such careful evaluation will always make inter-country adoptions infrequent. So, it is ironic (although again, not funny), that the six inter-country adoptions approved in KZN in the last few months have added substantially to the tiny number of unrelated cross-cultural adoptions that have been approved in the province since November 2016. And now, based on the court ruling, inter-country adoptions will continue unfettered, while local ones are proceeding at a glacial pace. This must undoubtedly be challenged. No one is arguing for the screening and matching processes to be less stringent. But, if these processes are done correctly and according to the law, the DSD should be open to approving adoptions, regardless of whether or not it believes that adoption is a valid child protection strategy.

And, even if adoption violates its values (or worse, is seen as a culturally problematic approach to child care), the DSD's strategy of restricting adoptions has backfired in two other important ways. First, it isn't preventing children from the province from being adopted. Many social workers have resorted to placing children with adoptive families from other provinces, where the department is ratifying adoptions. While these won't reflect on the KZN department's annual report in any way (other than possibly, fewer

family reunifications), the upshot is that these children will be even less likely to grow up with any proximity to Zulu culture. This, again, is surely an own goal.

Secondly, because adoptions remain legal and permissible under the Children's Act, the department in KZN has been subjected to a number of legal cases in both the High Court and Children's Court. In one instance, the HOD was even subpoenaed to court to explain why the department hadn't issued the 239 letter. And, while the national department has not spoken publicly against (or for) KZN's approach to adoption, it has reportedly chosen not to defend these cases. This may be a bit of litigation fatigue (the department has been taken to court a lot in the past couple of years), but may also be part of a deeper concern, that the cases are indefensible in terms of the act.

To justify its strategy, the KZN department has argued that the High Court is the upper guardian of a child, and therefore that litigation is an integral part of child protection. But, it more probably indicates the failure of the department's processes. And given the associated cost, if families have to resort to legal action to obtain adoption approvals, it could make adoptions even more elitist and scarce. Either way, it is resulting in the adoption process becoming increasingly adversarial.

This should be the most concerning part of the HOD and her department's approach. Child protection activists have conceded that there are valid concerns about adoption in an African context, and that the country could benefit from a [decolonised approach to adoptions](#). But instead of facilitating this dialogue, the KZN department's belligerence is detracting from it. And given that its approach seems to fall on the wrong side of the law, a court ruling on a national adoption case (which seems inevitable in the future) may result in the department being compelled to approve more adoptions. It would all add up to a significant missed opportunity for dialogue and a shared plan. For now, in KZN, many domestic adoptions will continue to be blocked or opposed, children will continue to get older in care (other than the few matched with families overseas or in other provinces); Baby Homes and CYCCs will continue to function above capacity; families will continue to foster when they wanted to adopt — and live the daily fear of losing their children — and the process will continue to be conflictual, rather than co-operative. But the signs of fraying around the edges are appearing, and it could all unravel at any moment.

Here's hoping that instead, the department concedes, and participates in planning a new approach to adoption: one where adoption can finally be a key part of its child protection strategy, and ultimately, even make an appearance on its annual report.

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** Names changed to protect identities*

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