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**IN THE HIGH NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)**

**DATE: 27/05/2011
CASE: 47723/2010**

REPORTABLE

THOMAS FREDERICO CHIRINDZA

First Applicant

SIKOLUHLE MOYO

Second Applicant

CENTRE FOR CHILD LAW

Third Applicant

And

**GAUTENG DEPARTMENT OF HEALTH
AND SOCIAL WELFARE**

First Respondent

**THE CITY OF TSHWANE METROPOLITAN
MUNICIPALITY**

Second Respondent

**ITERELENG RESIDENTIAL FACILITY FOR
THE DISABLED**

Third Respondent

DESMOND TUTU PLACE OF SAFETY

Fourth Respondent

PABALELO PLACE OF SAFETY

Fifth Respondent

MINISTER OF POLICE

Sixth Respondent

MINISTER OF SOCIAL DEVELOPMENT

Seventh Respondent

JUDGMENT

Fabricius J:

1. This application concerns the question whether or not sections 151 and 152 of the Children's Act 38 of 2005 ("The Act") are unconstitutional to the extent that they failed to provide for a child who has been removed in terms of those sections, and placed in temporary safe care, to be brought before the Children's Court for a review of the placement in temporary safe care.
2. During August 2010 the applicants brought an urgent application for the relief sought in the amended notice of motion which resulted in a draft order being made an order of this Court on 24 August 2010 per Preller J. Thereafter the parties hereto set down the application in the unopposed Motion Court where I happened to preside. By agreement it was then arranged that heads of argument be filed which would represent the submissions of the applicants and those of second respondent. Thereafter the application was set down before me for argument, and I was asked to make an amended draft order an order of court. It is however obvious that because the application concerns constitutional issues, and because I was asked to declare certain sections of the said Children's Act to be unconstitutional, that I properly consider the submissions before me, and give my reasons for making the suggested draft order an order of court.

3. At the hearing before me Advocate A. Skelton represented the applicants and the Centre for Child law, Advocate S Hassim represented the first, sixth and seventh respondents, and Adv Springveldt represented the second respondent. I must express my gratitude to Adv Springveldt and Adv Skelton for their well-considered and thorough heads of argument herein with which Ms Hassim associated herself.
4. The relevant relief is not opposed, and similarly, the facts giving rise to this application are not an issue. The relevant facts are briefly the following:

On Friday 13 August 2010 the applicants were both in Sunnyside near a well known Take-away restaurant. The first applicant sits there every day applying his trade as a shoe repairer. On this particular day he had his daughter V (3 years old) with him because his partner, who usually looks after the child, was in hospital giving birth. The second applicant was also at the same intersection. She begs for a living. She was accompanied on this day by an assistant, because she is blind, and her two children, C (1years old) and T (4 years old). Social workers of the Department of Social Development, together with officials from the City had been planning a “raid” on the people who have children with them or near them, whilst begging. They had published a pamphlet warning “mothers” of this raid, they had planned to arrive at the same time accompanied by police, and wearing neon coloured vests, and

furthermore they had forewarned the media, who were present at the scene with cameras crews. Despite the fact that there was a high degree of planning, no attempt was made by the social workers concerned to obtain a court order for the removal of the children: a procedure, so it was argued, is a requirement for the removal of children, save in emergency situations. The social workers removed V, C and T, amongst others. The traumatised first applicant, after searching for V over the weekend, made contact with Lawyers for Human Rights. The second applicant was placed in a school for the blind, and was unable to proceed to breastfeed C, as her children were placed at the place for safety. Lawyers for Human Rights similarly took up her case. I must applaud Lawyers for Human Rights for the work they do on behalf of the poor, the illiterate and the under-privileged.

The application was originally framed in two parts. Part one was brought on an urgent basis and aimed to restore the children to the parents. At the court hearing on 24 August 2010 Preller J made the order referred to, namely that Vanessa be immediately returned to the care of the first applicant and his wife. He also ordered that C and T should remain at the Place of safety for 5 weeks, pending an investigation whether they were in need of care and protection. These two children have subsequently been placed by order of the Children's Court back into the care of the second applicant and her husband, under the supervision of a social worker. Part 2 of the application continued and is the subject of the settlement order currently before

me. The issues included in the original notice of motion have been reduced, and the only two remaining issues are:

- a) A declaratory order relating to the wrongful actions of the social workers, and
- b) A declaration of constitutional invalidity relating to Sections 151 and 152 of the Children's Act 38 of 2005, insofar as they fail to provide for judicial review of removal and placement decisions made by social workers and/or police.

5. The rights that are infringed or placed at the risk:

As I have said, there was no issue before me on this topic, and the following submission were made in this context:

- 5.1 The right of the child in terms of section 28 (1)(b) of the constitution to family care or parental care;
- 5.2 The best interest of the child being considered as a paramount consideration as set out in section 28 (2);
- 5.3 The breach of the States obligation of Article 9 of the United Nations Convention on the Rights of the Child, to ensure that the child is not separated from his/her parents unless necessary for the best interest of the child and subject to judicial review, with an opportunity to participate in the proceedings;
- 5.4 The right to enjoy parental care and protection, and not be separated from his/her parents except when a judicial authority

decides the separation will be in the best interest of the child as set out in Article 19 of the African Charter on the Rights and Welfare of the Child.

The said United Nations convention was ratified by South-Africa in June 1995. Article 9(1) reads as follows:” States Parties shall ensure that a child shall not be separated from his/her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that separation is necessary for the best interests of the child.“ Article 9(2) reads:” in any proceedings pursuant to paragraph 1 of the present article, all interest parties shall be given an opportunity to participate in the proceedings and make their views known.”

The said African Charter was ratified by South-Africa in January 2000 and Article 19 reads as follows:” Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his/her parents. No child shall be separated from his/her parents against his will except when a judicial authority determines according with the appropriate law, that such separation is in the best interest of the child.“

6. The South African legal framework for the removal of children from parental care:

The Children’s Act sets out a scheme for the investigation and removal of children who are thought to be in need of care and protection, which

aims at the avoidance of removal of children, in particular without a warrant from the Children's Court. This is because the arbitrary removal of children invades the right to parental and family care, and causes them trauma, which should be avoided unless it is absolutely necessary and unavoidable.

See in this context: S v M (Centre for Child Law As amicus curiae) 2008 (3) SA 232 (CC) (hereinafter S v M) paragraph 19." foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma."

7. Paragraph 20 of this judgement reads as follows:" No constitutional injunction can in and of itself isolate children from the shocks and terrible perils of harsh family and neighbourhood environments. What the law can do is create conditions to protect children from abuse and maximise opportunities for them to lead productive and happy lives. Thus, even if the state itself can not repair disruptive family life, it can create positive conditions for repair to take place, and diligently seek wherever possible to avoid conduct of its agencies which may have the effect of placing children in peril. It follows that section 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that, may threaten to put children at increased risk. Similarly, in situations where rupture of the family becomes inevitable, the state is obliged to minimise the consequent negative effect on children as far as it can."

Obviously, I associate myself with that dictum. It was argued in this context that removal of a child is regarded as a means of ensuring that the child is protected from child abuse or neglect as mandated by section 28 (1) (d) of the Constitution. However, that very removal is a restriction on the right of the child to parent's right in terms of section 12 of the Constitution, to privacy within the family. The balancing of these rights of the child is necessary, and the limitation of the child's and parents rights is justified in order to protect children from abuse. A critical part of the balancing exercise, so it was suggested, is judicial review of the removal of the child. Having a decision to remove a child from parental care subject to judicial review, is one of the cornerstones of international law and standards relating to the removal of children. This critical component of the child protection system is absent in the current system created by the said Children's Act.

8. Section 151 of the Children's Act is the foundational clause relating to care and protection. It provides that the presiding officer in the Children's Court can make an order that an investigation be completed by a social worker in terms of section 155(2). Such a court order is made on evidence given by any person on oath or affirmation.

Section 155 (2) reads as follows: "before the child is brought before the Children's Court, a designated social worker must investigate the matter and within 90 days compile a report in the prescribed manner on whether the child is in need of care and protection." It is clear that the

aim is to investigate first, then to open the Children's Court hearing. The general rule is that the children remain in the care of the usual care givers, during this time, unless that is not appropriate due to the safety of the child.

9. It is not an issue that there are circumstances which necessitate the removal of children. There are two legal avenues for this purpose. The obviously preferable route is by way of a court order issued by the Children's Court. This can be achieved in terms of section 151(2), read with subsections (3) to (8). The presiding officer, having heard the evidence referred to in section 151(1), would be well placed to decide whether or not to order the removal of a child to temporary safe care, and will do so on the basis of the best interest of the child, taking all relevant factors into account, including the safety and wellbeing of the child as their first priority.

10. The second route for the removal of a child is provided for by section 152 of the Children's Act. In terms of this section a designated social worker or police official may remove a child and place him/her in temporary safe care without a court order. This however, it was submitted, is a drastic measure, and the act therefore specifies very stringing rules for its application. It also provides penalties in Sections 152(5), (6), and (7), for the misuse of this power by a social worker. It obviously does so to minimise the use of this option all the factors referred to in section 152 in this context must be present. Any decision

to remove a child must always be made in the light of section 152 (4) of the Act which reads as follows: "the best interest must be the determining factor in any decision whether a child in need of care and protection should be removed and placed in temporary safe care, and all relevant facts must for this purpose be taken into account including the possible removal of the alleged offender in terms of section 153 from the home or place where the child resides, and safety and well-being of the child as a first priority."

11. The obvious aim of section 152 is to ensure that emergency removal of children occur only under strict conditions. It was contended in this context that the terminology used in the Child Care Act is different to that used in the Children's act. There has been a shift between the prejudicial safety and welfare of the child as used in the former, to the use of phrases such as "immediately obedient emergency protection" and "jeopardise the safety and well – being" which denote a greater urgency to the situation than the words used in the previous act repealed by the Children's Act. It was also conceded that the somewhat drastic powers given to social workers and police in terms of section 152 are sometimes necessary if a child is in immediate danger, requires immediate emergency protection, and if delay in obtaining a court order would compromise the child's safety and welfare.

12. Judicial review of renewal of the children:

It was submitted that the violation of the children's' and parents rights in this instance was exacerbated by the lack of judicial review of the decision to remove, and it is this lacuna that renders section 151 and 152 unconstitutional.

In terms of section 152 read with the corresponding regulations, the matter will be heard for the first time by a magistrate after the 90 days have passed. This means that there is no automatic appearance before the Children's Court that would allow parties to contest the appropriateness of the removal. Once the child is removed, the social worker has 90 days to conduct an investigation, and it is only after the 90 day period has passed that the child is brought before the Children's Court.

The previous legislation dealing with the child protection system, section 12 of the Child Care Act 74 of 1983, stated that a child which was removed without a warrant must be brought before the Children's Court. The corresponding regulation (regulation9) stated that a child which was removed with or without a warrant had to be brought before the Children's Court within 48 hours to allow the commissioner of child welfare i.e. the Magistrate presiding in the Children's Court, to make a formal determination whether or not the removal was justified. These relevant provisions in the child care act ensured that judicial review of a decision to remove a child without a warrant would follow within 48 hours of removal. It also meant that a hearing would be held, and a parent could appear at the Children's Court to contest the removal of the child. When the removal was executed, the parent was served with

a form which indicated the time, date and place at which the parent could attend the Commissioner of Child Welfares review of the removal.

In terms of section 151(7)(a) of the new Children's Act the person who removes a child need only notify the parent, guardian or caregiver of the child of the removal of the child (if that person can be readily traced). There is no requirement to notify the children's court, presumably because in a section 151 removal, the court has authorised the relevant removal.

In terms of section 152(3)(d) of the new Children's Act the person performing the removal must, within 24 hours, inform the parent, guardian or caregiver of the removal. The person performing the removal must also notify the clerk of the Children's Court thereof by no later than the next court day. However, the duty to notify parents, guardians and caregivers about the removal does not amount to a notice to appear in court, which was the previous requirement under the child care act. There is no requirement in either section 151 or 152 that the child be brought before the Children's Court. The only indication that this will be done ultimately is contained in section 155(2). This clearly does not provide an opportunity within the reasonable timeframe for judicial review of the removal decision. The decision that the court will be called upon to make when the social workers investigation report serves before it within 90 days of removal, will be about whether the child is in need of care and protection, and

whether the child needs to be placed in alternative care via a court order.

13. In the absence of provisions similar to those in the regulations to the Child Care Act, the only logical conclusion that can be drawn from the new Children's Act is that the social worker may remove a child without a warrant, and thereafter has 90 days to complete his /her investigation. There is no requirement that there be any form of judicial oversight during this 90 day period. There is no return date provision that would provide an opportunity for a parent to obtain occurs to the Children's Court for the parent to oppose the removal, and show reasons why removal was not necessary in any particular context. It was submitted on behalf of applicants that as a result it was probably not the intention of the legislature to deprive children and parents of the right to judicial review of the decision to removal a child, as this right had existed under the previous law, albeit in the regulations, and in any event the international documents that I have referred to, made provision for such review, and South-Africa was a signatory to such documents. In a recently published article in *Speculum Juris* Volume 54 2009 (2) titled "The wisdom of Solomon: removal of children as part of the child protection system in the Children's Act 38 of 2005" professor J Gallinetti points out that in addition to being an infringement of children's rights to parental care, removal of a child, unless justified, is an infringement of Section 12 of the Constitution to privacy within the family. Although the right to "family life" is not expressly included in the

constitution, the Constitutional Court has alluded to such a right in a number of cases :

Daywood v Minister of Home Affairs 2000 8 BCLR 837 CC;

Du Toit v Minister of Welfare and Population Development 2003 (2) SA 198 CC;

Booyesen v Minister of Home Affairs 2001 (4) SA 485 CC.,

The lacuna created by the new Act, according to this view, is that the legislation is now procedurally deficient with inadequate protective mechanisms being in place, to ensure that a very drastic interference with the child's right to parental care is not arbitrary, unreasonable and unjust.

14. In the present context it was also submitted that there was an inherent right of review of administrative decisions as provided for in section 33 of the Constitution of the Republic of South Africa. I can however not accept this submission without referring to *Bato Star Fishing Pty Ltd v Minister of Environmental Affairs 2004 (4) SA 490 CC* at paragraph 25, wherein it was held that the provisions of the Administrative Justice Act, and particularly Section 6 thereof, divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action of the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. PAJA gives effect to section 33 of the Constitution. In the context

of the provisions of Section 39(2) of the South-African Constitution it was submitted that it in itself is insufficient to provide adequate protection of the best interest of the child in the present context. The section reads as follows: “When interpreting any legislation, and when developing the common law or customary law, every court tribunal or forum must promote the spirit purport an objects of the bill of rights. “ It was put to me that the public would never know of any inherent right of review in the given context. The majority of effected persons were too vulnerable, too poor and too illiterate and defenceless, to obtain any meaningful assistance until and unless they could possibly approach the High Court on an urgent basis in the context of that court’s inherent jurisdiction. A number of reasons were put before me why this was so: The problems with section 151 and 152 is simply that there is a silence in the legislation that might cause the person interpreting the law to think that there is no right to judicial review of the decision to remove. The silence is compounded by section 155(2) which strongly implies that there will be no review of the removal and placement decisions, until after the social workers report was ready which could take 90 days, and that the issue at that point would not be the review of the initial removal decision or the placement, but rather whether the child was in need of care and protection, and if so what the best outcome would be. The poor, the illiterate and the young would not be able generally speaking, to provide proper instructions to anyone, even if they were ultimately assisted by an organisation such as the third applicant or Lawyers for Human Rights. It would simply be too onerous

to expect a parent, guardian or caregiver of a child which has been subjected to a removal in terms of the imputed provisions, to bring an application of their own accord to either the Children's Court or the High Court. Furthermore, the nature of the infringement of the right was an important consideration. The States action of removal relates to the liberty of a child and to an intrusion into family life. Parents, guardians and caregivers are affected on the one side, and vulnerable children on the other. The state has thus an additional duty to ensure measures are in place that ensures the best interest of the child at all times. A specific provision for review of the removal and temporary placement decision was therefore a minimum requirement of such duty. Arrested persons, by analogy, have certain constitutionally protected rights in terms of section 35(1) of the Constitution. It was therefore submitted that the removal and placement of the child created similar obligations on the State to bring the relevant affected person before a court within a certain specified time.

15. In the light of all of the above it was therefore submitted that sections 151 and 152 were unconstitutional in so far as they fail to provide an appropriate mechanism for judicial review of decisions to separate children, and place them away from their parents, guardians or caregivers. The remedies sought were set out in the draft order handed to me and I subsequently enticed a debate as to whether or not I should make an interim order pending the confirmation of my order by the Constitutional Court. This, I believe, I could do in terms of the

provisions of Section 38 of the Constitution read with section 172(1)(b) thereof. In considering such I had regard to the particular facts before me, the apparent daily occurrence of the conduct of the respondents such as in the present case, the fact that the order sought was by agreement between all parties before me, and the likelihood that the Constitutional Court would substantially be of a different view or not. I did so considering the mentioned factors, and I am of the view that the draft order should be made an order of court, which draft order includes an order which would be of effect pending the confirmation thereof by the Constitutional Court. By agreement between the parties I have amended the draft order handed to me in par 4.2 which relates to costs of part B of the notice of motion.

16. It was contended that I could grant the order on the basis of “reading in” what was lacking and what was required. In this context a Court must define with sufficient precision how the statute ought to be extended in order to comply with the Constitution.

See: National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 200 (2) SA 1 CC at 40-41.

17. Sections 151 and 152 of the Children’s Act 38 of 2005 (“The Act”) are declared unconstitutional to the extent that they fail to provide for a child who has been removed in terms of those sections and placed in temporary safe care to be brought before the children’s court for a review of the placement in temporary safe care.

18. Pending the confirmation of the order of invalidity, referred to in paragraph 17 of this order, by the Constitutional Court: (see section 167(5) of the Constitution)

18.1 Section 151(7) and Section 152(7) of the Act is to read as though the following appears as Section (d):

“(d) within 48 hours, place the matter before the Children’s Court having jurisdiction for a review of the removal and continued placement of the child, give notice of the date and time of the review to the child’s parent, guardian or caregiver, and cause the child to be present at the review proceedings where practicable.”

18.2 Section 152(3)(b) of the Act is to read as if: the following words appear therein:

18.2.1 **“without delay but within 24 hours”** immediately before the word “refer; and

18.2.2 **“to place the matter before the Children’s Court for review as contemplated in section 152(2)(d) and”** immediately before the words “for investigation”

18.3 Section 152(3)(b) of the Act will accordingly read as follows:

(b) without delay but within 24 hours refer the matter to a designated social worker to place the matter before the children’s court for review as contemplated in Section 152(2) (d) and for investigation contemplated in section 155(2); and”

18.4 Section 155(2)(b) of the Act is to read as if the words “**Before the child is brought before the children’s court,**” appearing immediately before the words “**a designated social worker**” have been deleted there from.

19. The first, sixth and seventh respondents jointly and severally are to pay the following costs:

19.1 The opposed costs of the application and the costs occasioned by the opposition to Part A of the notice of motion, the costs are to include the costs of the hearings on 20 and 23 August 2010, in relation to the latter hearing the costs to include the costs occasioned by the employment of two counsel.

19.2 In the context of Part B of the notice of motion each party is to bear its own costs.

I do not deem it appropriate or justified to grant the prayer sought against the particular (but unidentified) social workers.

27 May 2011

H FABRICIUS J.
JUDGE OF THE HIGH COURT
NORTH GAUTENG DEVISION
PRETORIA

Appearances:

For Applicants:

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**For 1st, 6th and 7th:
Respondents**

Adv. S Hassim
Instructed by State Attorney Pretoria

For 2nd Respondent:

Adv. Springveldt
Instructed by M Christiaan Attorneys.

Date of Hearing: 13 May 2011.

Date of Judgement: 27 May 2011.