

THE SOUTH AFRICAN CHILD'S RIGHT TO MAINTENANCE – A CONSTITUTIONALLY ENFORCEABLE SOCIO-ECONOMIC RIGHT?

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ABSTRACT

The article highlights the lack of resources for both the prevention of abuse and neglect and for the protection of children as a central issue of concern in South Africa, especially in the light of the devastating effect of the HIV/AIDS pandemic. The large number of maternal deaths in particular has led to the emergence of child-headed families. There are some indications that increasing amounts of time and effort to improving the plight of poverty-stricken children in South Africa but a worrying degree of fraud and corruption is still prevalent with inadequate resources reaching poverty-stricken children. The article considers the implications of the South African ratification of the United Nations Convention on the Rights of the Child (CRC), the South African constitutionalisation of children's rights, and South African case law on this point. Families which formerly could have absorbed children without parents into communal life are frequently no longer be relied upon to fulfil that function. The article discusses the present South African judicial maintenance system and the problems of the enforcement of maintenance claims. Constitutionally the South African state is under an obligation to provide the legal and administrative structure necessary to achieve the realisation of children's rights under the Constitution. New approaches towards child maintenance urgently required in South Africa, including the identification of a minimum core of the government's obligations and a policy on the treatment of child-headed households in line with the recommendations of the General Committee of the CRC. The Supreme Court of Appeal has adopted a generous interpretation to section 38 of the Constitution in order to give disadvantaged and poor people

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1. INTRODUCTION

The lack of resources for both the prevention of abuse and neglect, and for the protection of children is a central issue of concern in South Africa (Sloth-Nielsen, 2003; Pieterse, 2003).¹ South Africa has a population of about 44 million. Of that figure, there are approximately 20 million children under the age of 18 in South Africa, a figure which constitutes almost half of the population.. Two thirds of these children live in fairly remote rural areas, and half of these children do not even possess birth certificates (Burman, 2003). Poverty is widespread largely due to unemployment and the devastating effects of the HIV/AIDS pandemic. It is estimated that 40 per cent of

the population in South Africa are unemployed (Burman, 2003). The current situation of South African children living in extreme poverty indicates that 75 per cent of children live in poverty. The absolute definition of child poverty categorises a child as poor if he or she has income per month below the level estimated necessary to ensure a secure existence or where individuals, households or communities are unable to command sufficient resources to satisfy socially acceptable minimum standards of living (Taylor Report, 2002). This situation has been exacerbated by the impact of HIV/AIDS. It is estimated that by 2010 there will be more than 2 million children under the age of 16 who have been orphaned by HIV/AIDS, many of whom are living in child-headed households (Sloth-Nielsen, 2003)². There are many reports of child-headed households with no access to food (Sloth-Nielsen, 2003). Current child health indices of South African children reflect a picture of high and rising child mortality – a pattern of child morbidity characterised by a health service response that has not quite embraced the primacy of the best interests of the child as contained in the South African Constitution (s.28(2);Burman, 2003).

Family patterns are changing dramatically in South Africa: it is estimated that three percent of children between the ages of 12 and 18 are now heads of households, largely as a result of maternal deaths due to the disease.. Many children do not qualify for social welfare benefits since they lack the necessary documentation and skills to make a valid claim. Furthermore, it would appear that there is a worrying degree of fraud and corruption with social grants being paid for deceased persons and public servants who generate 'ghost beneficiaries' and open accounts through the banks.³ In several cases, especially in the Eastern Cape Province, the court has held that incidents of administrative inefficiency on the part of the Department of Welfare in this province were not isolated, but were "the tip of the iceberg."⁴ The sacking of South African's

Deputy President, Jacob Zuma, following the conviction for fraud of his former financial adviser, Shaik may indicate an important step towards accountability. On the eve of the upcoming G8 summit, one of the main demands of the New Partnership for Africa's Development (NEPAD) is to consider a total write-off of the continent's debts and large-scale financial aid. If this is to be implemented, there will need to be strong indications that the leaders of Africa are committed to rooting out corruption and to setting standards of accountability and social welfare reform. It is hoped that the South African Social Security Agency,⁵ functional in April 2005 will speed up the delivery of social grants, cut down on corruption and lift the burden of administration in the country's nine provinces. At present it seems that the extent to which poverty-stricken children are given priority is greater on the policy front than on the budget and service delivery fronts.

Debate rages in South Africa about the appropriate social security provision for children in the context of HIV/AIDS. The state has, in some cases, encouraged use of formal care system to address poverty related needs of orphans as well as considering other alternatives. It has been recognised that the extended African family is, in many cases, no longer able to assume a welfare role towards orphaned children (Sloth-Nielsen, 2003). However, it could be argued that more attention should be given to the extended family as an innate form of protection to receive orphaned children where it is possible. A danger in the construction of formal institutions for children is the accompanying destruction of the family and community held values and beliefs. A sensitive approach is required to ensure that the maintenance of family and community systems are not overlooked or undermined so as to upset or neglect the families and children in child-headed households already providing care for these children in their

communities. While the HIV/AIDS pandemic may be so devastating as to require a generalised response to the magnitude of its problems, any existing culture of care should be supported financially and the creation of formal institutions should be a last resort after careful consideration of the protection which already exists. To some extent, the State has an obligation, where possible, to restore confidence in the traditional family system.

The CRC has been described as the Magna Carta of children's rights, set to guide the struggle for children's rights in this century. As the most highly ratified international human rights treaty in the world, it embodies principles such as the best interests of the child and emphasises the State's obligation to support parents in their child-rearing duties (article 18) and the right of a child who is deprived of family to alternative care, protection and assistance (article 20). Article 43 of the CRC led to the establishment of the Committee on the Rights of the Child for the purposes of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the CRC.

The United Nations' Committee on the Rights of the Child considered South Africa's first report on 26 January 2000. The Committee expressed dissatisfaction with the current Child Support Grant and concern about vulnerable children, especially child-headed households which *inter alia* consist of large numbers of children who are orphaned through maternal deaths due to HIV/AIDS. For these children, the UN Committee emphasised the need to give greater financial aid and support, whilst allowing such children to remain within their communities. However, primary research, demographic and economic projections indicate that providing grants specifically for orphaned children as a category of children as distinct from other children is not a viable option. A social security system which attempted to do this

would be in danger of misdirecting resources, would be inequitable to other poverty-stricken children, risk further burdening the system and it is not a cost-effective way of supporting poverty-stricken children (Meintjes, Budlender, Giese, Johnson 2003).

In 2003, the United Nations' Committee on the Rights of the Child, in its General Comment, endorsed the philosophy of the Committee that it is in the best interests of children living without caregivers or in child-headed households to remain together in the care if possible of relatives or family members of the extended family. If the extended family has been destroyed, the State must provide as far as possible a family-type of alternative care such as foster care. It recommended that institutional care should play only an interim role in providing for the care of orphaned children and only when family or community-based care is not available or feasible. The General Comment of the Committee further indicates that limits must be imposed on the length of time that children spend in institutions (Sloth-Nielsen, 2004). The main goal should be to reintegrate such children into their communities. The strategy of the State should be focused on making decisions as to how best to provide support for orphans living in those communities.

2. THE EFFECT OF THE RATIFICATION OF UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD IN SOUTH AFRICA

Articles 26 to 31 of the CRC deal with the right of the child to social welfare. Article 26 protects the child's rights to social security, whilst taking into account 'the resources and the circumstances of the child and persons having responsibility for the maintenance of the child.' Article 27(1) requires States to recognise the 'right of every child to a standard of living adequate for the child's physical, mental, moral and social development.' This is qualified by referring to the 'abilities and financial capacities of

the child's carers and the national conditions and means of States'.ⁱ Subject to this, States are required to assist carers with the implementation of the child's right by providing material assistance and support programmes directed, in particular, towards nutrition, clothing and housing. Article 27(4) requires States to 'take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child.'

These 'rights' contained in the UNCRC could arguably never be enforced as legal rights by individual children in the courts, being progressive and dependent on the availability of resources of the various countries (Bainham, 2005). The primary responsibility would appear to be that of the parent, but the State clearly has a secondary responsibility.ⁱⁱ Although the CRC, and hence the Committee, carries considerable moral force. The CRC has weak enforcement mechanisms. The approach of the Committee on the Rights of the Child to the promotion and protection of children's rights is advisory and non-adversarial in nature. Its successes rely on diplomacy rather than legal sanction.

3. THE EFFECT OF THE CONSTITUTIONALISATION OF CHILDREN'S RIGHTS

In South Africa, the CRC enjoys a heightened status because its major features have been constitutionalised in section 28 of the South African Constitution. Children's rights as outlined in Articles 26 and 27 of the CRC have thus acquired direct legal significance. Furthermore, such rights have been awarded a special status relative to the other rights in the Constitution. Thus, the force of the CRC is augmented by the

fact that South Africa has incorporated the CRC into its domestic legislation in the South African Constitution, which acknowledges that the courts have an obligation to have regard to relevant international law.⁶

However, the Constitutional Court has not thus far in its jurisprudence referred in any depth to the CRC (ratified 1995) in its interpretation of children's socio-economic rights, but certain provisions of the Constitution have developed the jurisprudence in this regard. The South African Constitution provides that everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.⁷ The State is obliged to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.⁸ Section 28(1)(c) of the Constitution refers directly to the child's rights to basic social services (Liebenberg, 2001), and it has been alleged that "there is a close link between social security and social services rights" (Liebenberg and Pillay, 2000: 324). Where parents cannot meet their obligations, children's rights focus on the State to fulfil its international and constitutional commitments to its children. Section 28(1) (c) places an obligation on the State to provide children with access to shelter, basic nutrition, basic health care and social services.

In the landmark decision of *The Government of the Republic of South African v Grootboom and Others*,¹⁰ the Constitutional Court of South Africa acknowledged the need for the South African government to develop a policy to ensure that every effort is made to comply with its constitutionally incorporated socio-economic rights.¹¹ However, the Constitutional Court was at pains to stress that the carefully constructed

constitutional scheme for the progressive realisation of socio-economic rights would make little sense if it could be trumped in every case by the rights of children to get shelter from the State on demand. The Constitutional Court was careful to emphasise that the children's rights clause did not create independent rights. In the view of the court, all the children's rights clause did was to ensure that children were properly cared for by their families and that they received appropriate alternative care in the absence of family or parental care; the State did not have the primary obligation to provide shelter for children if the children were being cared for by their families.

The *Grootboom* case illustrates the relationship between every person's right to housing, contained in s.26 of the South African constitution, and children's right to shelter, as provided for in s.28(1)(c). The court held that there was an obvious overlap between the rights. Section 28(1) (c) and s.26 could not be regarded as establishing separate and distinct entitlements. The court held that s.28 (1) (c) did not normally create a "direct and enforceable" claim upon the State by children" (para. 74). Section 28(1) (b) of the South African Constitution gives every child the right to "family care or parental care or to appropriate alternative care when removed from the family environment". This wording suggests that children living in child-headed households have a right to be provided with substitute parental or family care, or alternative care (such as institutional care). The court in *Grootboom* held that the rights enumerated in s.28 (1) (c) should be interpreted in the context of the primary duty of parents towards their children as provided for in s.28 (1) (b). Thus, the rights to "basic nutrition, shelter, basic health care services and social services [encapsulate] ...the scope of care that children should receive in our society" (Sloth-Nielsen, 1995:331), while s.28(1)(b)

ensures that children receive proper parental or familial care (Sloth-Nielsen, 2001). However, although the court stressed that the primary responsibility for supporting children rested on parents and families, it also emphasised that, where children are abandoned or lack a family environment, the State does bear the primary responsibility for providing for them. If one were to widen the context, this would imply that urgent measures need to be taken to provide State support and social services to children orphaned by HIV/AIDS. *Grootboom's* case requires that accessibility should be progressively realised through the provision of facilities. It is only the pace of progressive realisation that is dictated by available resources.

3. CURRENT MAINTENANCE AND SOCIAL SECURITY PROVISIONS FOR CHILDREN

The South African maintenance system rests, on the one hand, on the judicial maintenance system which is based on the legal duty to support one's dependants, determined judicially where there is dispute¹² while, on the other hand, there is the State maintenance system, which is meant to act as a safeguard by providing support where the procedures of the judicial maintenance system fail to do so. Insofar as the private maintenance system is concerned, the Maintenance Act 99 of 1998 is a comprehensive piece of legislation which was designed to provide a speedy and effective remedy at minimum cost for the enforcement of parents' obligation to maintain their children. The Act does include a number of innovations, including the introduction of maintenance investigators, but there is evidence that the system is not functioning effectively.¹³ This law provides important mechanisms to give effect to the rights of children in terms of section 28 of the Constitution. Failure to ensure their effective operation amounts to a

failure to protect children against those who attempt to benefit from the deficiencies in the operation of the Act, such as defaulting parents (usually fathers).¹³

Service delivery to children in terms of the private maintenance position would appear to be in a fairly parlous position. The South African courts dealing with family-related matters are fragmented. Special Maintenance courts deal only with child and spouse support claims and special Children's courts deal only with child welfare matters. It is generally recognized in South Africa today that there is a need for specialized family courts, which would have jurisdiction to deal with all family-related issues.¹⁴ The Maintenance Courts are by far the most extensively used courts within the legal system dealing with family law. The problems in these courts caused by overcrowding, inefficiency and bureaucracy have been well documented to the extent that the Constitutional Court has stated that the administrative problems within the maintenance system constitute a denial of children's rights.¹⁵ The courts have a constitutional duty to develop mechanisms of ensuring that the constitutional rights of parties are honoured.¹⁵ In this regard, the courts have a particular responsibility to forge new tools and develop innovative remedies, if need be, to achieve effective relief and remedies for parties.¹⁶ It has also been held that an obligation rests on the State to create the necessary environment to ensure that all children are adequately cared for.¹⁷ The Constitutional Court in *Bannatyne's* case¹⁸ held that the State was under an obligation to provide the legal and administrative structure necessary to achieve the realisation of children's rights under the Constitution.¹⁹ The function of the State in this area is to create not only a procedural structure for the protection of children's rights, but also to create a system which ensures that such a structure operates effectively.²⁰ Resources are urgently required to improve these facilities and the quality of South African legal remedies in this field.

As far as the State maintenance system is concerned, there are three main types of child grant: Child Support Grants, Foster Care Grants and Care-Dependency Grants. The Child Support Grant was implemented in 1996. Initially, it was only payable to primary caregivers of children who were under seven years old.²¹ A primary caregiver is defined as a person (whether related to the child or not) who takes primary responsibility for meeting the daily care needs of the child, but excludes a person who is paid (or an institution which received an award) to care for the child and also excludes a person who does not have the (express or implied) consent of the parent, guardian or custodian of the child. The Department of Social Development is progressively extending the child support grant to cover children up to the age of 14. Children aged between 10 and 11 now qualify, while children between the ages of 12 and 14 will be included in 2005/6. The 'take-up rate' for the CSG has increased from 30,000 children who benefited in 1998 to 1.2 million children by April 2001 (Department of Social Development, 2002) and approximately 3.9 million in November 2003.²² The Department of Social Development estimates that this will bring the total number of South African children receiving grants to roughly seven million. Child support grants are now paid at an amount of R170 per month (June 2005 – approximately UK £14 per month).

Foster care grants are another form of social welfare grant. A person is eligible for this grant if he or she is a foster parent. This grant has become the preferable child support grant for a number of reasons, including the increased amount and the fact that it is paid until the child is eighteen years old, while the Child Support Grant (CSG) at present ends with the child's eleventh birthday. Furthermore, in contrast to the CSG and other grants available in South Africa, the Foster Care Grant is not means tested and there is no legal impediment to the payment of the FCG to relatives.

A Care Dependency Grant is available to a parent of a child under the age of eighteen who receives permanent home care due to severe disability. This, like the Foster Care Grant, is payable until the child reaches the age of 18 years, after which age a child beneficiary may apply for a disability grant. There have been problems in regard to the payment of this grant due to the lack of clear criteria for the awarding of the grant, and the lack of a coherent definition of 'care dependency' with a consequent lack of uniformity in assessments of care dependent children. This grant is only payable to the parents or foster parents or guardians or custodians for a child in their care suffering from a severe mental or physical disability. It would appear that at present this grant is unavailable to HIV/AIDS infected children and certainly not paid to children living in child-headed households caring for HIV/AIDS children.

Furthermore, in order to claim a child support grant, it is necessary to produce an identity document with a valid 13-digit identity number and a birth certificate. Many children living in child-headed household do not have this documentation. Thus, unless such children are aged under 11 and living with a primary caregiver who can apply for a CSG, or placed in formal foster care in order for the Foster Care Grant to be payable, there is *no* monetary support available for many categories of poverty-stricken children. Furthermore, children who themselves are HIV/AIDS positive, are not regarded as competent to qualify for the Child Disability Grant. Finally, the previous absence of effective measures to prevent maternal to child transmission of the virus has meant that babies born to HIV infected women are themselves infected (Burman, 2003). The exclusion of these vulnerable groups of children infringes their constitutional and international rights to social assistance, human dignity, life and equality..

In January 2001, the South African government at last agreed (tentatively) to the free treatment of HIV pregnant women and the provision of free anti-retroviral drugs for these women, but only as a pilot project in eighteen training pilot centres which would only reach 10 percent of the population. The gains made by this were offset by the announcement by the South African Department of Health that it would appeal against a court ruling brought by the Treatment Action Campaign ordering the government to provide the anti-retroviral drug Nevirapine to all HIV positive pregnant women giving birth at State institutions. Anti-AIDS campaigners, such as the members of the Treatment Action Campaign (TAC), accused the government of deliberately hampering efforts to combat AIDS in South Africa, a country which has one of the highest number of persons infected in the world. In December 2001, a High Court of South Africa (per Botha J.), in response to an application brought against the Minister of Health by the TAC, ordered that the government had a duty to provide Nevirapine to pregnant women who were HIV-positive, giving birth in State institutions, where it was medically indicated and where there was capacity to do so.²⁴ This court also ruled against the present system of providing the medication only at certain pilot sites and ordered that the government present an outline of how it planned to extend provision of the medication to its birthing institutions countrywide. The State did not implement the order despite the convincing evidence that a comprehensive 'Mother to Child Transmission Programme' would result in a saving of resources in the public sector when compared to the costs associated with the illnesses and death of HIV positive children. The arguments presented by the TAC also indicated that, by failing to provide Nevirapine, the government was acting *ultra vires* its own policy²⁵ that entitles pregnant women and children under the age of 6 years to free health services.²⁶ By only making Nevirapine available selectively, the TAC argued that the government was guilty of

discrimination against the poor.²⁷ Furthermore, by placing effective drugs beyond the reach of most people in the country, the government was threatening the fundamental rights of South Africans to access to health care (s.27), basic health care services for children (s.28(1)(c)), life (s.11), human dignity (s.10), equality (s.9) and psychological integrity, including the right to make decisions regarding reproduction (s.12(2)(a)). Finally, the applicants pointed to a breach of the State's positive obligation to promote access to health care in terms of s.27 (2) of the Constitution.²⁸

The decision of the Constitutional Court²⁹ on the major issues of the government's obligation to provide access to rights of housing, health care, food, water and social security is of great significance in the increasing socio-political conflict over the government's handling of South Africa's HIV/AIDS pandemic. The court's order represents a remarkable direct enforcement of the right to health care enshrined in s.27 (1) (a) of the Constitution Act 108 of 1996 (Klug, 2002). The court had to apply the test of reasonableness to determine whether the government's programme was consistent with its obligation in terms of s.27. The court identified two sets of criteria that could be used in assessing the rationality of the government's standpoint. In this regard, the court held that firstly, legislative action is insufficient and must be accompanied by appropriate, well-directed policies and programmes implemented by the Executive.

4. CONCLUSION: A CLASS ACTION ON BEHALF OF CHILDREN DEPRIVED OF SUPPORT AND FAMILY CARE

In the Supreme Court of Appeal case of *The Permanent Secretary, Department of Welfare, Eastern Cape Government v Ngxuza*,³³ the court acknowledged that the

poverty of many would-be litigants and the technicalities of legal procedures had led to the creation in the South African Constitution of the express entitlement that anyone asserting a right in the Bill of Rights could litigate as a member of or in terms of the interest of a group or class or person (Corder, 2004: 261).³⁵ The Constitution has radically extended the capacity for standing to sue, such that a group of class actions is now possible and actions in the public interest are now possible (Corder, 2004: 261).³⁵ The Supreme Court of Appeal adopted a generous interpretation to this section of the Constitution in order to give disadvantaged and poor people a chance to approach the courts on public issues to ensure the public administration adheres to the fundamental principle of legality in the exercise of public power. Thus, the case establishes an important precedent in such cases and might well lead to the institution of some type of class action on behalf of children deprived of any form of maintenance. This could have a very far-reaching impact on the development of human rights litigation in South Africa and opens the way for further action in South Africa on behalf of hitherto 'invisible litigants' such as children who are suffering from malnutrition as a result of bureaucratic inability to deliver the required (albeit inadequate) Child Support Grant.

The South African State, via the Departments of Social Development and Justice and the courts will have to assume increased responsibility for the maintenance of children, if it is to avoid substantial harm to its children. The grants system and the recommendations concerning the broadening of access of children to state-provided social security will obviously have large-scale fiscal implications for the State. New approaches towards child maintenance are urgently required in South Africa, including the identification of a minimum core of the government's obligations in relation to this right. It is suggested that the CSG should be extended to all children in South Africa and the means test should be removed. . This would have the effect of drawing all

children into the social security net and would greatly reduce the administrative burden resting on the state at present in administering the CSG systems (Meintjes, Budlender, Giese and Johnson 2003)..

When adequate grants are available and children's socio-economic rights are challenged, there is a core need for the State to provide protection and the access to litigation.. Legal aid should be available where rights are threatened and a member of the Bar should be encouraged to come to the aid of children on a *pro amico* basis. The case will often start with non-governmental organisations and care will be required in the accurate citation of parties with *locus standi*. Although litigation may not be the best means of challenging breaches of children's rights, it is useful as a last resort and to ensure that the government is compliant with international minimum standards. If the government is not seen to be moving towards progressive realisation of such rights by social programmes and funding for agencies and by legislation, the only resort will be to the courts.

In this context, a Southern Africa Litigation Centre has recently been opened in Johannesburg. At the opening of the Centre, retired Constitutional Court judge, Justice Richard Goldstone emphasised the need for specialised training in human rights advocacy. This new Centre is predicted to play a critical role in this function. As the first organisation dedicated to the training and support of lawyers litigating human right issues in Southern African countries, this represents a joint initiative of the International Bar Association and the Open Society Initiative for Southern Africa and is supported one of the three largest law firms in the world.

The beginning of a period of children's rights public interest litigation may follow, especially in areas such as health, access to nutrition and enforcement of the

government's welfare responsibilities. The development of legal activism in South Africa shown that those cases to be litigated need to be carefully selected to ensure that they are grounded upon a firm legal and moral basis. The General Committee on the Rights of the Child could also further strengthen its general comment to provide interpretive guidance to the South African government and courts in implementing their obligations under the CRC.. As the *TAC* case indicates, the South African government must not only have a plan to implement the progressive realisation of socio-economic rights, particularly where children are affected, but also that plan must examine how to progressively and reasonably assist the plight of the poverty-stricken so as to ensure that the South African Constitution is based on actual and not merely illusory rights (Corder, 2004: 273).

NOTES

1. Julia Sloth-Nielsen has comprehensively assessed the situation with particular reference to child-headed households and with consideration of alternative types of care for such children. The ambit of this paper is wider with greater focus on the provision of support.
2. A distinction may obviously exist between AIDS orphans and child-headed households.
3. See http://www.southafrica.info/ess_info/sa_glance/social_delivery/social_grants.htm, accessed on 10 March 2005.

4. See *Mahambela v MEC for Welfare, Eastern Cape and Another* 2002 (1) SA 342(SE); *Mbanga v MEC for Welfare, Eastern Cape and Another* 2002(2) SA 359 (SE).
5. Social Security Act 2004
6. 3 June 1995.
7. Section 28 of the Constitution of the Republic of South Africa 108 of 1996.
8. Section 37 of the Constitution of the Republic of South Africa Act 108 of 1996.
9. Section 27(1) (c) of the Constitution of the Republic of South Africa Act 108 of 1996.
10. 2001 (1) SA 46 (CC).
11. The court *a quo* in this case had interpreted s.28(1)(c) of the South African Constitution as bestowing upon evicted children of squatters the right to shelter at the State's expense.
12. A ruling of the Constitutional Court expressed the concern of this court for the difficulties experienced by women and children in enforcing their rights under this system (see *Bannatyne v Bannatyne* 2003 (2) BCLR (CC)).
13. *Bannatyne v Bannatyne* 2003 (2) BCLR (CC).
14. As early as 1983, as a result of a Commission of Enquiry into the court structure, a Bill as proposed which would have created Family Courts with more specialized judicial officers and specialised jurisdiction (First Hoexter Report: *The Commission of Enquiry into the Structure and Functioning of the Courts* (1985)). However, this Bill never became law, although work continued on the establishment of a specialized Family Court – culminating in the abortive and disappointing enactment of the Magistrates' Courts Amendment Act of 1993 that was never brought into operation. Instead, in 1997, the special 'Black Divorce

Courts' were deracialised by the amendment of the old Black Administration Act and the old 'Black Divorce Courts' were opened to all races. These courts became a component of five pilot family courts established to try to provide integrated family law services to court users. These courts are almost all located in large urban centres. In practice, a two-tier system of divorce adjudication has been created with wealthier litigants making use of the High Courts (staffed by judges) and poorer litigants proceeding by way of the family courts (staffed by magistrates).

15. See *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).
16. See *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at Para [69]
17. See *Bannatyne v Bannatyne* (Commission for Gender Equality, as *Amicus Curiae*) 2003 2) SA 363 (CC).
18. See *Bannatyne v Bannatyne* (Commission for Gender Equality, as *Amicus Curiae*) 2003 2) SA 363 (CC) at paragraph [25] at 376C-E. See too *Magewu v Zozo and Others* 2004 (4) SA 578 (C) at para. [16] 584E. See further section 28(2) of the Constitution of the Republic of South Africa Act 108 of 1996.
19. Welfare Amendment Act 106 of 1997.
20. Section 15(1) (b) of the Child Care Act 74 of 1983 permits the placement of a child "into the custody of a suitable foster parent designated by the court under the supervision of a social worker", which indicates that there is no legislative distinction between placements with relatives as opposed to non-relatives.
21. See TPD case 21182/2001, unreported, per Botha J.
22. See GN 657 of 1994.
23. See *Minister of Health and others v. Treatment Action Campaign and others* 2002(5) S.A. 721 (CC); 2002 (10) B.C.L.R. 1033 (CC).

24. See *Minister of Health and others v. Treatment Action Campaign and others* 2002(5) S.A. 721 (CC); 2002 (10) B.C.L.R. 1033 (CC) at Para. 1.11.3.
25. *The Permanent Secretary, Department of Welfare, Eastern Cape Government v Ngxuzo* 2001 (4) SA 1184 (SCA).
26. See *Mahambela v. MEC for Welfare, Eastern Cape, and Another* 2002 (1) SA 342 (SE) and *Mbanga v. MEC for Welfare, Eastern Cape, and Another* 2002 (1) SA 359 (SE).
27. See s.38 of the Constitution of the Republic of South Africa Act 108 of 1996.

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