An Analysis of the role of the courts in selected child protection cases: jurisprudence and remedy

Nicole Christina Breen

(27073018)

Submitted in partial fulfilment of LLM Coursework in Child Law

November 2017

Supervisor: Prof Ann Skelton

Abstract

This dissertation aims to explore the role of the courts in crafting jurisprudence and remedy in order to catalyse change in the lives of children in the care and protection system or children at risk of entry into it. In order to conduct this analysis, four child protection cases will be analysed, namely, Centre for Child Law and Others v MEC of Education, Gauteng and Other; Centre for Child Law v Minister of Social Development (North Gauteng High Court); C and Others v Department of Health and Social Development 2012); and S v M (Centre for Child Law as Amicus Curiae). The first two of these deal with children in alternative care, the third with automatic review of removals of children and the fourth with separation of children from their parents. Be it through building onto the body of knowledge on child law or granting redress through innovative means, the role of the court in the matters analysed provides a clear picture of what kinds of changes can be made in such matters and how children's lives can be improved as a result.

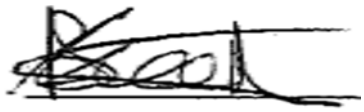
Declaration of Originality

NICOLE CHRISTINA BREEN

Student number: 27073018

I, undersigned declare that I,

1. Understand what plagiarism is and I am aware of the University's policy in this regard.
2. Declare that this mini-dissertation is my own original work. Where other people's work has been used (either from a printed source, internet or any other source) this has been properly acknowledge and referenced in accordance with departmental requirements.
3. Have not used work previously produced by another student or any other person to hand in as my own.
4. Have not allowed and will not allow anyone to copy my work with the intention do passing it odd as his or her own.



Signature of student

_____

Signature of supervisor

Contents page

Chapter 1: Introduction

1.1 General introductory remarks

In the case of Centre for Child Law & Others v MEC for Education, Gauteng and Others the court held as follows:

> *As a society, we wish to be judged by the humane and caring way in which we treat children. Our Constitution imposes a duty upon us to aim for the highest standard, and not to shirk from our responsibility. By that token…government must provide appropriate facilities and meet the children's needs*.[1]

The child care and protection system was created to protect the most vulnerable of children. It is therefore vital that duty-bearers are obliged to comply with existing legal imperatives, and that defects in existing legislation be rectified. This has been partially achieved through court intervention. The courts have both developed jurisprudence and crafted remedies that have served to shape and mould the child care and protection system in a way that is both progressive and transformational.

1.2 Hypothesis

The child care and protection system is a well-designed feature of South African law, but defects exist which give rise to inequitable situations as well as situations that are unjust or do not serve children's best interests optimally. The courts play a growing role in making improvements to the system through judgments and court orders. Litigation as a means of securing the rights of vulnerable children has emerged as a valuable tool, with precedents being set that stand the children in South Africa in good stead. This document aims to explore how the courts have made these improvements in selected case studies and to analyse and critically assess these cases and their impact. It will conclude by drawing together the achievements of four cases.

[1]Centre for Child Law & Others v MEC for Education, Gauteng and Others 2008 (1) SA 233 par20.

1.3 Central Research Question

What role have the courts played in addressing defects in the child care and protection system?

1.4 Methodology

This study aims to demonstrate how the courts can influence the legal framework, or the interpretation thereof, in a particular context. In order to answer the research question set out above, it is thus necessary to delineate two core aspects: The structure and nature of the legal framework surrounding the child care and protection system and the way in which the actions of the courts can rectify disparities in the system. This will be done through library research, a desktop literature review of relevant material and perusal of court papers.

The methodological approach is thus descriptive, analytical and prescriptive. The descriptive aspects of this research provide an overview of these areas of law, and an explanation of their existence- incorporating national and international norms and standards. This will provide an historical and theoretical overview of both the right of the child to care and protection, and the evolution of a culture of the active role played by the courts in post-apartheid South Africa. The analytical aspects will critically evaluate how the intervention of the courts has worked and how they have influenced the lives of vulnerable children. The prescriptive elements of this research will be used towards the end of this study when, after having evaluated the *status quo* and current jurisprudence, recommendations will be made with a view to further develop both the law, and the practices purporting to facilitate its implementation.

The above approach was selected to the exclusion of others (such as comparative legal research), because of the need to keep the resultant study focused. Examining both an area of law, the practical application and litigation relating to both thereof represents a broad-spanning task. The inclusion of other methodologies would thus render the analysis overly broad, which would diminish the overall quality of the result.

1.5 Limitations

This study focuses on four cases in particular because these illustrate a spectrum of the issues the courts have dealt with and provide good examples of innovative remedies and instances where valuable jurisprudence was developed. There are also a limited number of cases dealing with the child care and protection system. Of the four cases analysed, there exists a disproportionate amount of existing analysis between them, with S v M (Centre for Child Law as Amicus Curiae 2008 (3) SA 232 (CC)[2] having been written about by other authors far more than Centre for Child Law v Minister for Social Development and Others,[3] Centre for Child Law and Others v MEC of Education, Gauteng and Others 2008,[4] C and Others v Department of Health and Social Development 2012 (2) SA 208 (CC).[5]

1.6 Conclusion

This dissertation will aim to show the importance of the courts and the change they can serve to catalyse in the lives of children. It will illustrate the child rights framework in which it operates and will analyse important cases. The importance of upholding the rights of vulnerable children either in the care and protection system or who stand to become a part of it cannot be overstated. The creation of jurisprudence and the formulation of remedy have, to date, been one of the determinant factors in ensuring that the system functions properly or that offending provisions are altered.

[2] S v M (Centre for Child Law as Amicus Curiae 2008 (3) SA 232 (CC).
[3] Centre for Child Law v Minister of Social Development (North Gauteng High Court) Case Number 2176 2011a. Reported in the Government Gazette No.34303. Notice 441. 20 May 2011.
[4] Centre for Child Law and Others v MEC of Education, Gauteng and Others 2008 (1) SA para223
[5] C and Others v Department of Health and Social Development 2012 (2) SA 208 (CC).

Chapter 2: Overview of legal landscape surrounding child care and protection

2.1 Introductory remarks

South Africa's legal framework surrounding children and the law is extensive. As such, the following description will provide a snap-shot of the law as it relates to the child care and protection system. First the relevant provisions at international and regional law, then the rights of the child to care and protection as enshrined in the Constitution will be canvassed. Thereafter, the justiciability of socio economic rights in South African law and the textual significance of section 28 of the Constitution will be discussed.

2.2 Child care and protection: An international and regional overview

Treaties are instruments under which States Parties acquire rights and duties at international law.[6] This is done through a process known as ratification. The primary treaties incorporating the rights of the child to care and protection relevant to South Africa are the United Nations Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC).

International law occupies an important place in litigation in South Africa. This is due to the provisions of section 39(1) and of the Constitution, which state respectively that *"when interpreting the Bill of Rights, a court, tribunal or forum…(b) must consider international law"*[7]and *"when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.*[8]On this basis, it is important not only that statutes and policies are aligned with instruments to which South Africa is a State Party, but also that the law is applied and interpreted in a manner consistent with their prescripts.

[6] Rosa and Dutschke "Child Rights at the core: the use of international law in South African Cases on Children's Socio-Economic Rights" (2006) 22 SAJHR p226.
[7] Section 39(1)(b) of the Constitution.
[8] Section 233 of the Constitution.

The UNCRC was ratified by South Africa in 1995.[9] It incorporates the full spectrum of civil, political, social, economic rights of children. ACRWC was ratified in 2000.[10]It contains a spectrum of similar provisions. With regard to child care and protection, South Africa has incorporated the majority of the provisions of these instruments into the Children's Act,[11] Child Justice Act,[12] Social Assistance Act[13] and other legislation.

The UNCRC was created under the premise that children required special protection under international law; that there was a need to provide a *"special normative visibility, and to an extent "priority" for children's rights and needs due to this vulnerability."*[14] As set forth by Mahery, what makes the UNCRC so unique is that in addition to being the most widely ratified of all treaties in the world, it was ratified at record speed and has had a monumental impact on state behaviour.[15] She observes that it is premised on what are known as the four P's: Provision, protection, prevention and participation.[16] The ACRWC entered into force nine years later and was conceived out of the notion that the UNCRC did not provide for all of the *"socio-cultural and economic realities"* faced by African Children.[17] Despite this, a number of their provisions are similar, both *"addressing holistically all rights of children."*[18]

Both the UNCRC and ACRWC contain general principles which aid in interpreting and applying the other articles contained within them. Firstly article 3(1) of the UNCRC states that *"all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*[19]Article 4 of the ACRWC contains a similar provision, but goes a step further, citing the best interests

[9]Department of Women, Children and People with Disabilities "South Africa's Combined Second, Third and Fourth Periodic State Party Report to the Committee on the Rights of the Child (Reporting Period 1998- June 2012), 2012" DWCPD 11.
[10]Table of ratification available at www.achpr.org/instruments/child/ratification/ accessed on 21 July 2014.
[11] Children's Act 38 of 2005.
[12]Child Justice Act 72 of 2008.
[13]Social Assistance Act 13 of 2004.
[14] Scott and Alston "Adjudicating constitutional priorities in a transnational context: A comment on Soobramoney's legacy and Grootboom's promise" (2000) 16 SAJHR 206 p227.
[15] Mahery "The United Nations Convention on the Rights of the Child. Maintaining its Value in International and South African Child Law in Boezaart "Child Law in South Africa" 2009 p309.
[16] Mahery 314.
[17] Rosa and Dutschke (2006) 22 SAJHR p231.
[18] Rosa and Dutschke (2006) 22 SAJHR p226.
[19] Article 3(1) of the United Nations Convention on the Rights of the Child.

of the child as *"the primary consideration."*[20]Second is the principle of non-discrimination,[21] third that of participation.[22] Finally the right to *"maximum survival and development"* is also a general principle.[23] As illustrated by Rosa and Dutschke

> *while 'survival' deals with the actual protection of life, the concept of 'development' is a holistic one referring to the child's physical, mental, spiritual, psychological and social development which is aimed at preparing the child for an individual life in a free society*.[24]

A further important general provision, articulated in article 2 of the UNCRC is the duty to "respect and ensure" the realisation of the rights of children without discrimination.[25] This implies both a duty not to infringe the rights of the child (ie: to respect) as well as a duty to take positive action to facilitate their realisation (ie: to ensure). Both positive and negative obligations are thus placed upon States Parties to the UNCRC.

An additional important premise, designated specifically toward vulnerable children, and flowing from the UNCRC is contained within its preamble. It states that *"there are children living in exceptionally difficult conditions and that such children need special consideration…"* This has been affirmed by the Committee on the Rights of the Child which state that,

> *states are required to take all possible measures to realise the rights of children 'paying special attention to the most disadvantaged groups[26]. The non-discrimination obligation requires states to actively identify children and groups of children who may need special measures to enable the realisation of their rights.*[2728]

[20] Article 4 of the African Charter on the Rights and Welfare of the Child.
[21] Article 2 of the United Nations Convention on the Rights of the Child; Article 3 of the African Charter on the Rights and Welfare of the Child.
[22] Article 12 of the United Nations Convention on the Rights of the Child and Articles 4(2) and 7 of the African Charter on the Rights and Welfare of the Child.
[23] Article 6 of the United Nations Convention on the Rights of the Child and Article 5 of the African Charter on the Rights and Welfare of the Child.
[24] Rosa and Dutschke (2006) 22 SAJHR p232.
[25] Rosa and Dutschke (2006) 22 SAJHR p234.
[26] Committee on the Rights of the Child *General Comment 5* (2003) para8.
[27] Committee on the Rights of the Child *General Comment 5* (2003) para12.
[28] Rosa and Dutschke (2006) 22 SAJHR p235.

As to the provisions of the UNRCR and ACRWC concerning children in alternative care (and thus relevant to the child care and protection system), Article 3 (2) of the UNCRC create the imperative for States Parties to ensure the protection and care of children as required for their well-being.[29]The UNCRC provides at Article 5 for the respect of the "responsibilities, rights and duties" of parents or other relevant persons to provide for "direction and guidance" of the child in the exercise of his or her rights.[30] Article 20 of the ACRWC confers the duty of bringing up the child primarily on the parents.[31] Both the UNCRC and the ACRWC- at articles 9(1) and 19(1) respectively- provide that a child *"shall not be separated from his or her parents against their will"* unless, in a process subject to judicial review, competent authorities make the determination that this will be in the best interests of the child.[32]In the event of such a separation, both the UNCRC (at article 9(3)) and the ACRWC at article 19(2)) provide that such a child has the right to maintain contact with the person from whom they are separated- unless doing so would be contrary to their best interests.[33] Both treaties also provide (at article 9(4) of the UNCRC and article 19(3) of the ACRWC) that where a separation of this nature is initiated by a state party, that the state party shall provide, upon request, essential information regarding the whereabouts of the absent member- again provided that doing so is not detrimental to the rights of the child or other person.[34] While there are many situations through which a child may become separated from his or her caregiver, in this context it would relate to instances in which a child is removed from the family environment and placed in alternative care.

Where children are removed from their parents, both conventions discuss how States Parties should provide for and protect the children concerned. Articles 20 and 25(1) of the UNCRC and ACRWC respectively provide that a child who is temporarily or permanently removed from their family is entitled to special protection from the state.[35] The treaties both create the obligation of States Parties to "ensure alternative care" for

[29] Article 3(2) of the United Nations Convention on the Rights of the Child.
[30] Article 5 of the United Nations Convention on the Rights of the Child.
[31] Article 20 of the African Charter on the Rights and Welfare of the Child.
[32] Article 9 of the United Nations Convention on the Rights of the Child and Article 19(1) of the African Charter on the Rights and Welfare of the Child.
[33] Article 9(3) of the United Nations Convention on the Rights of the Child and Article 19(2) of the African Charter on the Rights and Welfare of the Child.
[34] Article 9(3) of the United Nations Convention on the Rights of the Child and Article 19(3) of the African Charter on the Rights and Welfare of the Child.
[35] Article 20 of the United Nations Convention on the Rights of the Child and Article 25(1) of the African Charter on the Rights and Welfare of the Child.

children so-situated (at article 20(2) of the UNCRC and article 25(2)(a) of the ACRWC).[36] Both provide for examples of placements of this nature, including foster care, adoption or a suitable institution-this is at article 20(3) of the UNCRC and article 25(2)(a) of the ACRWC.[37] Article 25(3) of the ACRWC provides further that in the consideration of alternative placement of the child *"due regard shall be had for continuity in a child's upbringing and the child's ethnic, religious and linguistic background".*[38] Finally, article 25 of the UNCRC obliges States Parties to periodically review the treatment and all other circumstances of the child relevant to his or her placement in alternative care.[39]

One feature of the ACRWC that is not contained within the UNCRC is Article 30 of the former which deals with children of imprisoned mothers. This was utilised in the case of *S v M*. The Article articulates that states must provide special treatment to expectant mothers and mothers of young children. It provides that wherever possible non-custodial sentences must be imposed, that measures alternative to imprisonment must be established and promoted and that "special alternative institutions" must be established for these mothers.[40]

Article 43(1) the UNCRC[41] and Article 32 of the ACRWC[42] establish the United Nations Committee on the Rights of the Child (UNCRoC) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) respectively. These committees exist to further and protect the rights of the child and to evaluate states' progress on implementing the provisions of the treaty to which each is attached.[43] State's report on their progress and the committees make recommendations.[44] The ACERWC also interprets the provisions of relevant treaties,[45] works with other African Union or other[46]

[36] Article 30(2) of the United Nations Convention on the Rights of the Child and Article 25(2)(a) of the African Charter on the Rights and Welfare of the Child.
[37] Article 20(3) of the United Nations Convention on the Rights of the Child and Article 25(2)(b) of the African Charter on the Rights and Welfare of the Child.
[38] Article 25(3) of the African Charter on the Rights and Welfare of the Child.
[39] Article 25 of the United Nations Convention on the Rights of the Child.
[40] Article 30 of the African Charter on the Rights of the Child.
[41] Article 43(1) of the United Nations Convention on the Rights of the Child.
[42] Article 32 of the African Charter on the Rights and Welfare of the Child.
[43] Article 43(1) of the United Nations Convention on the Rights of the Child; Article 32 of the African Charter on the Rights and Welfare of the Child.
[44] Article 44 of the United Nations Committee on the Rights of the Child; Article 43(1) of the African Charter on the Rights and Welfare of the Child.
[45] Article 42(c) of the African Charter on the Rights and Welfare of the Child.
[46] Article 42(b)(iii) of the African Charter on the Rights and Welfare of the Child.

as well as additional required tasks and duties.[47] After a set reporting process is followed, the committees issue what are known as Concluding Observations in the case of the UNCRoC and Concluding Recommendations in the case of the ACERWC.[48] In assessing the progress of a state, the committees look at legislation, policy, programs and also developments in the courts. An example of a recommendation South Africa received from both the UNCRoC and the ACERWC emanating from their latest reports deals with the crisis in foster care that this country is currently experiencing. The nature of this issue and the associated court case will be discussed in detail in Chapter 3 of this study. Suffice to say, both Committees recommended design and implementation of systemic solutions, with the UNCRoC calling on South Africa to expedite the formulation of these solutions and do so with appropriate consultation and revision of the Social Assistance Act to provide for an extended support grant for families caring for orphans.[49] Similarly, the ACERWC called upon South Africa to *"adequately recognise and support kinship carers looking after orphans"* and to thus *"free up"* social workers to provide services to neglected or abused children.[50]

The United Nations Guidelines for the Alternative Care of Children[51] (the Guidelines) provide considerable insight into the care and protection needs of children not living with their immediate families. Children so-situated will be discussed in Chapter 3. The Guidelines were adopted by the United Nations General Assembly in 2010.[52] Save the Children sets out the principles contained in the Guidelines: the question as to whether the alternative care is necessary; the appropriateness of the alternative care; the child's best interests and the right of the child to participate; that there exists a preference for family-based care; that there exists a right of the child to an environment that is caring and protective; that mere poverty is not a reason to separate a child from his or her family; and that the state is mandated to protect children and to make provision for alternative care.[53] The Guidelines recognise kinship care, foster care,

[47] Article 42 of the African Charter on the Rights and Welfare of the Child.
[48]Alternate Reporting Coalition- Children's Rights in South Africa "Advocacy Brief 7: Social Assistance" 2017 p5.
[49] Alternate Reporting Coalition- Children's Rights in South Africa "Advocacy Brief 7: Social Assistance" 2017 p5.
[50] Alternate Reporting Coalition- Children's Rights in South Africa "Advocacy Brief 7: Social Assistance" 2017 p5.
[51] United Nations Guidelines on the Alternative Care of Children 2010.
[52] United Nations Guidelines on the Alternative Care of Children 2010.
[53] Save the Children "Guidelines on the Alternative Care of Children" Policy Brief 2012 p2-3.

other forms of family-based care or family-like placements, residential care in non-family group settings and supervised independent living situations.[54] A golden thread throughout the Guidelines is that alternative care is a last resort. In 2015, the ACERWC called upon South Africa to make use of the Guidelines in respect of children so-situated.[55]

2.3 Children's rights and the South African Bill of Rights

Chapter 2 of the Constitution contains the Bill of Rights. The rights in the Bill of Rights provide an expansive package of guaranteed entitlements to everyone in South Africa. Subject to the rights containing age limitations, for instance the right to vote, all of these entitlements extend to children. Section 28 of the Constitution provides for a set of rights accorded specifically to children.[56] The following will entail a discussion of the relevant sections of the Bill of Rights as they relate to child care and protection. Justiciability of rights in the post-Constitutional era and the textual significance of section 28 are discussed separately.

2.3.1 The textual significance of section 28 of the Constitution

2.3.1.1 Section 28(1) of the Constitution

Despite the fact that section 28 should not be seen as the full complement of the rights of children, the inclusion of section 28 in the Constitution is significant for several reasons. Most relevant for the purposes of this study are the rights enshrined in sections 28(1)(b), 28(1)(c) and 28(1)(d) as well as 28(2).

As articulated above, section 28(1)(b) focuses on the right *"to family care or parental care, or to appropriate alternative care when removed from the family environment."*[57] This section is particularly relevant to discussing children in the care system. The manner in which the courts have interpreted section 28(1)(b) is an indication of the court's approach to children in need of care and protection as well as those removed from their parents.. Through the cases, it is clearly evident that the state aims to protect

[54] Save the Children "Guidelines on the Alternative Care of Children" Policy Brief 2012 p3.
[55] Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Republic of South Africa Initial Report on the Implementation of the African Charter on the Rights and Welfare of the Child 2015 p9.
[56] Section 28 of the Constitution.
[57] Section 28(1)(b) of the Constitution.

children from separation from their parents or families. This was illustrated in the case of S v M (Centre for Child Law as Amicus Curiae) in which the court found section 28(1)(b) read with section 28(2) requires the law and decision makers- to the greatest extent possible- to avoid separating children from their families and having them placed in an alternative care setting.[58] This was also held to be the case in C v Department of Health and Social Development, Gauteng[59] Both of these cases will be discussed later. In the event that children are removed from the family environment, the conditions of the care into which they are placed cannot be said to be constitutional should they be inadequate. In this regard, *Centre for Child Law v MEC for Education, Gauteng* 2008 (1) SA 223 (T) held that children are *"fail[ed]"* and *"betrayed"* by the state should this be the case.[60]

Children's socio-economic entitlements are set out in section 28(1)(c). These differ textually from the socio-economic rights set out in sections 26 and 27 of the Constitution. The latter two- the rights to access the healthcare and social security contain internal qualifiers such as "reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights"[61]. This means that these rights are not immediately realisable. Section 28(1)(c) on the other hand contains no such internal qualifiers, This section thus provides children with certain valuable protection at law, which is particularly relevant to the care and protection system. Textually, it would therefore suggest that children have an immediate claim to these rights; something unique to children and different from all other vulnerable groups. While the courts have quite readily recognised this notion in respect of children living in the alternative care setting, they have been more reluctant to do so in instances where children live with their families or some other visible means of support.[62] This does not, however mean that this textual difference is not meaningful to all children: according to Proudlock,

> *The textual differences between the rights of everyone and the rights of children, together with the best interests principle and the right to be protected*

[58] S v M (Centre for Child Law as Amicus Curiae 2008 (3) SA 232 (CC)para20.
[59] C and Others v Department of Health and Social Development 2012 (2) SA 208 (CC)para208.
[60] Centre for Child Law & Others v MEC for Education, Gauteng and Others 2008 (1) SA 233
[61] Section 27 of the Constitution.
[62] Proudlock "Children's socio-economic rights" in Boezaart (ed) Child Law in South Africa Forthcoming Juta 2017 p2.

> *from neglect and abuse, have given rise to an interpretation that children should have a priority claim on state resources for the prompt delivery of a basic minimum level of socio-economic goods and services.*[63]

Section 28(1)(d) of the Constitution states that every child has the right to be *"protected from abuse, neglect, maltreatment and degradation."*[64] Children who come into the care and protection system have often found themselves in a situation where this right is violated. Section 150 of the Children's Act[65] sets out grounds where a child is considered to be in need of care and protection. These include when a child *"has been exploited or is exposed to exploitation," "lives in or is exposed to harmful circumstances," "is neglected,"* or *"is being neglected or abused by a caregiver or other person controlling the child."*[66] Should section 28(1)(d) be violated, a possible cause of action- in fact the last resort- is to place the child in alternative care. In Chapter 3 of this study, issues emanating from various forms of alternative care will be discussed; specifically child and youth care centres and foster care. Alternative care is also a feature in

2.3.1.2 Section 28(2) of the Constitution

As illustrated in Minister of Welfare and Population Development v Fitzpatrick and Others 2000 (3) SA 422 (CC), section 28(2) does not provide a complete list of entitlements the Constitution designates for children. In this case, the court set out,

> *Section 28(2) requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of these words clearly indicates that the reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and 28(2) must be interpreted to extend beyond these provisions. It creates a right that it independent of those specified in section 28(1)*.[67]

---

[63] Proudlock p7.
[64] Section 28(1)(d) of the Constitution.
[65] Section150 of the Children's Act.
[66] Section 150(1) of the Children's Act.
[67] Minister of Welfare and Population Development v Fitzpatrick and Others 2000 (3) SA 422 (CC) para17.

As set out above, the "best interests" permeates extensively into our law and is contained both in section 28(2) of the Constitution and throughout the Children's Act. This principle and its interpretation have shaped the landscape of child rights jurisprudence. While the principle in and of itself was not new, when it was elevated to Constitutional status questions arose as to how it should be interpreted. Of the nature and extent of the best interests principle, Skelton articulates that section 28(2) has become integral in constitutional jurisprudence, helping to increase understanding of other rights contained in the Bill of Rights In spite of the emphatic tone of "paramount importance," it is not a trump to be used to overrise other rights. [68]

Skelton's explanation highlights two main aspects worthy of consideration- firstly that the application of section 28(2) is necessary in the contemplation of other rights, and secondly that it is necessary to contemplate the ambit and nature of the concept "of paramount importance" in order for it to be justly applied. As to the latter, Sachs J explains that the word *"paramount"* coupled with *"in every matter concerning the child"* could be construed as being too far-reaching if the application of the section is spread too thinly. He states that there is a risk of it being transformed from an effective tool to an *"empty rhetorical phrase of weak application*" thus *defeating rather than promoting other valuable and constitutionally protected interests."* He states that the Constitutional court thus holds that the principle is *"capable of limitation"* [69]

2.4 Concluding Remarks

It is clear that the international and constitutional legal provisions provide a comprehensive framework that ought to be conducive to the effective protection of children in South Africa. What will be shown in the forthcoming chapters is how the courts have utilised this framework to wrought and mould the child care and protection system so as to align it with this framework.

[68] Skelton "Constitutional protection of children's rights" in Boezaart T *Child Law in South Africa*, Juta 2009, p29.
[69] S v M (Centre for Child Law as Amicus Curiae 2008 (3) SA 232 (CC) par25-26.

Chapter 3: Cases of children in alternative care: Studies of Centre for Child Law v MEC of Education, Gauteng and Others[70] and Centre for Child Law v Minister of Social Development[71]

3.1 Introduction

Alternative care denotes a setting in which the child is no longer in family care. It is a space occupied by the most vulnerable of children and cracks in the system must thus be properly and thoroughly filled when they arise. This Chapter will examine two issues that have arisen in alternative care. The first of these relates to children living in poor conditions at what was then described as a school of industry and the second to South Africa's foster care crisis- which was briefly alluded to in Chapter 2. In respect of the first, the case of Centre for Child Law v MEC of Education, Gauteng and Others will be analysed with a focus on the children's socio-economic rights jurisprudence that was developed in this case as well as on the remedy granted to ameliorate the plight of the children concerned. In the second, the court order in the case of Centre for Child Law v Minister for Social Development will be discussed; analysing how the order set forth steps to alleviate the problems in foster care- a component of the system in dire straits.

3.2 Centre for Child Law v MEC for Education, Gauteng and Others

3.2.1 Facts

Children placed in a school of industry (now a child and youth care centre) lived without basic amenities, therapeutic services or access control. The infrastructure of the dormitories was poor and children were exposed to the elements in their sleeping quarters. They did not have proper bedding and there was no form of heating. Some of the children did not have proper clothes because they would sell them to outsiders in order to buy drugs. There was no proper access control and the school had no form of therapeutic services available for the children. The applicants argued that the way in which these children were situated violated a spectrum of constitutional rights and that immediate remedial action had to be taken to urgently improve matters for these

[70] Centre for Child Law & Others v MEC for Education, Gauteng and Others 2008 (1) SA 233 par20.
[71] Centre for Child Law v Minister of Social Development (North Gauteng High Court) Case Number 2176 2011a. Reported in the Government Gazette No.34303. Notice 441. 20 May 2011.

children. While they conceded that the school was inadequate to meet the needs of the children, the respondents cited lack of available resources and the question as to whether the courts ought to intervene in budgetary matters was raised. They argued that they ought to be given the opportunity to remedy the issue themselves- progressively- without intervention. They made the proposition that instead of immediately furnishing the children with sleeping bags- which is what the applicant requested- that the blankets of the children who had gone home for the holidays be distributed to the children still in attendance at that particular time. They argued that should they furnish the children at this school with sleeping bags, that this may create an inequality between this and other schools of industry. The court remarked that even furnishing all of the children at schools of industries in the province would possibly have cost less than the costs incurred by the respondent in defending this litigation.

The case took the form of an urgent application because of the immediate need to come to the aid of the children living in such dire conditions. On the date of hearing an order was made for the respondents to immediately provide each child with a sleeping bag. Two days later reasons for the order were given as well as judgement on the other aspects of relief sought by the applicants. These will be analysed below.

At this time, the Children's Act[72] was not yet in force. The case was decided based upon the prescripts of its predecessor, the Child Care Act[73] which, in this regard, bears some similarity. The cardinal distinction for the purposes of this discussion is that schools of industry are now child and youth care centres, administered by the Department of Social Development and no longer partly by the Department of Basic Education. Section 15 of the Child Care Act prescribed that a child could be sent to a school of industry if they were found in need of care after a court inquiry was held in terms of section 13 of the Act.[74] The Act's regulations provided for the keeping of appropriate standards in these facilities. The regulations to the Act dealt with, among others provision of appropriate therapeutic programs,[75] that this plan be based on an assessment of the needs of the children,[76] that the children had the right to food,

[72] The Children's Act.
[73] The Child Care Act 74 of 1983.
[74] Sections 13 and 15 of the Child Care Act.
[75] Regulation 31A91)(b) of the Child Care Act.
[76] Regulation 31(A)(1)(f) of the Child Care Act.

clothes and nurturing at the school[77] and that they had the right to protection from exploitation and respect. This all stemmed from the rights contained in section 28 of the Constitution- the right to "alternative care when removed from the family environment"[78] and to be "protected from maltreatment, neglect, abuse or degradation."[79] It was argued these rights were being violated by the conditions under which the children at the school were living. The applicants submitted, in fact, that it was likely that the children were living in conditions that were poorer than those from which they were removed.

3.2.2 The High Court judgment

The argument of the respondents was couched largely in the notion that socio-economic rights be realised progressively. At the advent of the judgement Murphy J articulates that this was unconstitutional. He explained that there is a distinction between the rights contained in section 28 of the Constitution[80] and the other sections dealing with socio-economic rights because the rights in section 28 contain no internal qualifiers making them subject to "availability of resources and legislative measures for their progressive realisation."[81] He highlighted that while they are subject to reasonable limitation, they are immediately enforceable. As articulated above, the respondents had also argued that the courts ought not to interfere with distributing or budgeting processes. Murphy J countered this by stating that that the Constitution recognises that budgetary implications should not curtail the justiciability of rights, and stated that the interests of the children were of far greater importance than budgetary allocation problems.

The court then turned to the equality issue raised by the respondents. Murphy J stated simply that the argument held no water. He said that "levelling-up" the services provided to the children concerned was the necessary remedy. He highlighted the issues of aspects such as access control and therapeutic services and emphasised their importance and the gravitas of the respondent failing to provide these to the children at the school. Murphy J then went on to describe how staff at the school had

[77] Regulation 31A(1)(f) of the Child Care Act.
[78] Section 28(1)(a) of the Constitution.
[79] Section 28(1)(d) of the Constitution.
[80] Section 28 of the Constitution.
[81] Sections 26 and 27 of the Constitution.

pleaded with the respondent for assistance, concerned about the psychological well-being of the children at the school- some of whom had experienced depression and suicidal ideation.

In his analysis, the Judge exclaimed,

> *I have to pause here, perhaps in a moment of exasperation, to ask: what message do we send these children when we tell them that they are removed from their parents because they deserve better care and then neglect wholly to provide that care? We betray them and we teach them that neither the law nor state institutions can be trusted to protect them. In the process we are in danger of relegating them to a class of outcasts, and in the final analysis we hypocritically renege on the constitutional promise of protection.*[82]

The court held that the situation at the school of industry violated the rights in question, that each child be supplied with a sleeping bag, that the respondents immediately compile plans regarding improvements of access control and that they had to report contents of same to the court by a specified date, that a departmental quality assurance process be undertaken with a multi-disciplinary team and that the findings thereof had to be reported by a specified date and that other support structures surrounding the psychological and therapeutic needs of the children be put in place. Contained within the order was a section that stated that if the respondent failed to comply, that the applicants could place the matter before him again. As an interim measure, the first respondent was ordered to put in place therapeutic and psychological support services including an advisor to support the school's management and an assessment process of all the children.

3.2.3 Analysis

In this case the role of the court was twofold. First of all it created valuable jurisprudence by enunciating clearly the distinction between the socio economic rights contained in section 28 of the Constitution[83] and elsewhere. This differed from the dicta set forth in one of South Africa's landmark Constitutional Court cases- that of

[82] Centre for Child Law & Others v MEC for Education, Gauteng and Others 2008 (1) SA 233 para10.
[83] Section 28 of the Constitution.

Grootboom and Others v Oostenberg Municipality and Others.[84] In this case it was held that the socio-economic rights of children living with their parents were not immediately enforceable. While Centre for Child Law v MEC for Education, Gauteng and Others dealt with children in alternative care, Murphy J did not specify that the immediate enforceability of children's socio-economic rights applied only in matters of children not living with their families. One can therefore infer that this meant that the lack of internal qualifiers in the section should be interpreted as being across the board, regardless of how the children are situated; in alternative care or otherwise. The court thus illustrated the possibility of a different approach to the socio-economic rights of children. Its role was thus to develop the interpretation of the law- however indirectly- thus broadening and extending the scope of its application.

The second role played by the courts was to craft a supervisory interdict, compelling the respondent to take steps to improve conditions at the school. As Woolman puts it, the scope of the interdict went beyond the norm of an interdict of this kind.[85] He articulates that this remedy "creates the conditions for a paradigmatic participatory bubble" leaving it up to the parties to derive a plan to resolve the issues.[86] The remedy required the invitation of experts to solve issues at the school that the court itself did not possess.[87] This meant that the solution would be practically applicable and would respond to the needs of the children concerned as opposed to being an empty statement that did not solve the problem at hand.

3.3 Centre for Child Law v Minister of Social Development

3.3.1 Facts

There have been numerous challenges associated with the implementation of foster care, most notably in terms of the volumes of children entering the system and certain provisions of the Children's Act regarding extension of foster care orders.[88] These formed the basis of this case. In terms of numbers of children entering the system,

[84] Grootboom and Others v Oostenberg Municipality and Others (6826/99) [1999] ZAWCHC 1 (17 December 1999).
[85] Woolman "The Selfless Constitution: Experimentation and flourishing as the foundations of South Africa's Basic Law" LLD thesis University of Pretoria 2007 p185.
[86] Woolman "The Selfless Constitution: Experimentation and flourishing as the foundations of South Africa's Basic Law" LLD thesis University of Pretoria 2007 p185.
[87] Woolman "The Selfless Constitution: Experimentation and flourishing as the foundations of South Africa's Basic Law" LLD thesis University of Pretoria 2007 p185.
[88] Breen "Policy brief: foster care in South Africa: where to from here"" 2014 Jo'burg Child Welfare p2.

due to a number of factors, notably the HIV and AIDS pandemic, the rate of orphaning rose exponentially.[89] In 2002, the then Minister for Social Development encouraged relatives caring for children to approach the children's court seeking foster care orders, placing them in the care of their relatives.[90] One of the reasons why so many children came into foster care is because of social grants. Poor families caring for children are entitled to what is known as a Child Support Grant (CSG) in accordance with section 6 of the Social Assistance Act.[91] Caregivers fostering children are entitled to a Foster Child Grant (FCG) in terms of section 8 of the same piece of legislation.[92] The value of the former was and is nearly three times of the latter. This made it obviously more "desirable" for children to be placed in foster care. Difficulties arose because while the CSG is an administrative process that extends to the point in time where the child reaches 18 years, the FCG cannot be issued without a court order which is generally reviewed every two years.[93] This meant that social workers were spending an inordinate amount of time working on foster care matters.

The amount of children in foster care rose from 50 0000 to 500 000 between the early 2000's and 2010 with 80% of these children being placements with relatives.[94] Due to lapses in court orders, the number had declined to the region of 300 000 orders by 2015.[95] But why the lack of reviews? This came about due to the aforesaid crisis in the system. There were so many foster care orders that social workers and children's courts simply couldn't cope with the volumes of orders they had to obtain or grant and extend or have extended.[96] This, according to Proudlock, led to social workers processing paperwork as opposed to dealing with children who were genuinely in need of care and protection.[97]

---

[89] Breen Jo'burg Child Welfare 2014 p1
[90] Xi "Over a million children fall through the foster care cracks" GroundUp 12 November 2014, available at www.groundup.co.za/article/over-million-children-fall-through-foster-care-cracks_2438 accessed on 8 January 2017.
[91] Section 6 of the Social Assistance Act.
[92] Section 8 of the Social Assistance Act.
[93] Hall, Skelton and Sibanda "Social assistance for orphaned children living with family" *Child Gauge* 2016. Children's Institute and University of Cape Town p68.
[94] Hall, Skelton and Sibanda Children's Institute and University of Cape Town 2016 p70.
[95] Annexure to urgent application to the High Court. In Centre for Child Law v Minister of Social Development and Others. Unreported Case 2176/11. Department of Social Development December 2014.
[96] Hall, Skelton and Sibanda Children's Institute and University of Cape Town 2016 p71.
[97] The Foster Care System is failing a million orphans: child rights NGO's call for a kinship grant, Press Release by the University of Cape Town, 23 October 2014 available at http://children.pan.org.za/node/9720 accessed on 17 September 2017.

3.3.2 The High Court settlement

In 2011, the crisis peaked with over 120 000 orders having lapsed.[98] The matter was brought to court in Centre for Child Law v Minister for Social Development and Others.[99] The matter settled out of court with a resultant order stating that all grants that had lapsed because of the backlog would be deemed to be valid and that orders of this nature could be extended administratively until the Department of Social Development could come up with a systemic solution.[100] During the time for which the order was valid, the Department of Social Development took several steps to address the backlog. This included the development of a monthly foster care monitoring tool, successfully approaching National Treasury to allocate funding for the employment of social work graduates, and engagement with veteran social workers to assist with the supervision of the social work graduates.[101]

Despite these efforts, the court order expired in December 2014 with no solution having been reached. In the wake of another potential crisis situation, the Department of Social Development approached the courts requesting an extension of the order to 2017 or until the Children's Act could be amended, whichever came first.[102] The order was granted. This time, the Centre for Child Law contributed to this order by insisting that this time, the Department would be compelled to report to the courts every six months on progress they had made in deriving a way forward.[103]

3.2.3 Analysis and next steps

In issuing this order, the court suspended the provisions of the Children's Act that required the cases to be brought to the court, pending legislative reform, and issued a declaratory order that the provisions were unconstitutional. Given that there was no judgment, only an order and then an extension of that order, and given that the parties agreed on the terms and conditions made before the orders were granted, the role of the court was to rubberstamp, in a sense, the existing intent of the respondent. The

[98] Hall, Skelton and Sibanda Children's Institute and University of Cape Town 2016 p71.
[99] Centre for Child Law v Minister for Social Development and Others (North Gauteng High Court) Case Number 2176/11. Order 10 May 2011a Reported in Government Gazette No.34303. Notice 441. 20 May 2011.
[100] Breen Jo'burg Child Welfare 2014 p2.
[101] Founding affidavit Minister of Social Development in RE Centre for Child Law v Minister for Social Development and Others Case no 21726/2011.
[102] Breen Jo'burg Child Welfare 2014 p2.
[103] Breen Jo'burg Child Welfare 2014 p2.

role of the first order was to set forth what changes had to be made and how this ought to be done as well as what should be done in the meantime. The second order, with the addition of the supervisory element served to ensure that progress was made accordingly.

There exist several options as to how to move forward. The option viewed as the most viable is to implement what is known as the "CSG Top-Up" or "CSG-plus"[104] This is a midpoint between the CSG and FCG and is designed specifically for children living with relatives. It aims to discourage the entrance of such children into the child care and protection system for purely financial reasons.[105] The other options include placing all children so-situated onto the CSG, or leaving things as they are.[106] There are manifest problems with options such as these. In the case of the former, for instance, there is a concern that because the state would assist the families of such children to a lesser degree, that it would be a retrogressive change.[107] In the case of the latter, the system would most likely continue to collapse.[108] The CSG Top-Up's value has yet to be finalised but it is likely to end up as 50% higher than the current value of the CSG.[109] The CSG Top-Up is set to reduce the caseload of social workers and enable them to respond to instances in which the need for intervention is dire- for example when a child has been abused or neglected.[110] As articulated, application for the child support grant is an administrative process which is fairly simple, while foster care is a court process, having to be reviewed, which takes time and resources. The option proffered in respect of the CSG Top-Up is that it would be an administrative process like the CSG, which would further reduce the burden on practitioners as well as the children's families.[111] To date, both the Minister of the Department of Social Development and Cabinet have, in principle, approved the proposition for this option,

[104] Hall, Skelton and Sibanda Children's Institute and University of Cape Town 2016 p73.
[105] Hall et al 2016 p91.
[106] Hall et al 2016 p73.
[107] Hall et al 2016 p73.
[108] Hall et al 2016 p73
[109] Hall and Skelton "Introducing a child support grant top-up for orphaned children living with family members" Child Gauge 2016. Children's Institute and University of Cape Town p91.
[110] Hall and Skelton 2016 p91.
[111] Hall and Skelton 2016 p91.

but, as Skelton explains, it *"can only be effected via an amendment to the Social Assistance Act."*[112]

The Centre for Child Law requested a legal opinion from Budlender and Griffiths so as to determine the next steps in solving this problem and ameliorating the plight of the children concerned. They concluded that

> *…A fresh application should be brought by the [Department of Social Development] or [the Centre for Child Law] in which…The DSD's conduct is declared unlawful and/or unconstitutional;…An appropriate order is granted which grants effective relief to those in need, if necessary by effectively suspending the operation of section 159 of the Children's Act, for a period of two years; and… A supervisory order is put in place requiring the DSD to report every six months (or even more frequently) on its progress.*[113]

This differs from the approach taken thus far in that it also goes to the unlawfulness and unconsitutionality of the conduct, rather than simply devising temporary solutions to the problems in the system.

While the situation remains precarious, there have been definite advances. To date, cabinet has, in principal, approved the introduction of the CSG top-up.[114] In the review of the White Paper for Social Welfare was included a proposal surrounding the proposition.[115] A draft Social Assistance Bill was approved by cabinet and is set to be released for public comment.[116] An amendment to the Children's Act was meant to be drafted by 2014 but this has been extended to 2017.[117]

3.4 Conclusion

The two cases are very different, but both illustrate how easily vulnerable children can be placed in peril by the actions of duty bearers. In Centre for Child Law v MEC for Education and Others, interpretation of various subsections of section 28 of the

[112] Davis "Festering Indifference: Foster care grant mess has echoes of SASSA crisis" Daily Maverick 21 March 2017 available at https://www.dailymaverick.co.za/article/2017-03-21-festering-indifference-foster-care-grant-mess-has-echoes-of-sassa-crisis/#.WZ18cfkjHcs accessed on 23 August 2017.
[113] Budlender and Griffiths "Opinion for Centre for Child Law concerning a legal analysis of the foster care crisis and its implications" 2017 p17.
[114] Hall and Skelton Children's Institute and University of Cape Town 2016 p93.
[115] Hall and Skelton Children's Institute and University of Cape Town 2016 p91-93.
[116] Hall and Skelton Children's Institute and University of Cape Town 2016 p93.
[117] Hall and Skelton Children's Institute and University of Cape Town 2016 p93.

Constitution demonstrated the unlawfulness of treatment of the children concerned, while in Centre for Child Law v Minister for Social Development, it was law that were at issue. In both cases conduct of the state was deemed unconstitutional. The cases highlight the need for a strong constitutional framework but also demonstrate that this is not always enough; that it is the all-important implementation through compliance with enabling legislation and indeed the freedom South Africa's legal system affords us to change the law that can make an immense difference to the lives of children.

Chapter 4: Automatic review of removal of children: study of C v Department of Health and Social Development[118]

4,1 Introduction

Under the Child Care Act, when a child was removed from his or her family or caregiver, provision was made for automatic review of the removal. This meant that the court would have to ascertain whether removing the child was justified. This was a logical approach as it could prevent a child from being unnecessarily separated from his or her parents or caregiver should the removal have been wrongly made. The 2005 Children's Act, however, contained no equivalent provision. This came to the fore in the case of C v Department of Health and Social Development (C and Others).

4.2 Facts and Proceedings in the High Court

At an intersection in Pretoria, a man was fixing shoes on the side of the road with his young daughter. His partner, who usually cared for the child, was in hospital giving birth. A blind woman was also present at the intersection. She was begging accompanied by her assistant and her children. DSD social workers and officials from the city executed a well-planned and publicised operation to remove children from people begging. They did so without a court order. The children in question were removed and placed in the care facilities of the Department. This was done without notifying the parents of where the children were. Through engagement with the case, it emerged that the Children's Act had no mechanism for the automatic judicial review of removal of children; there was thus nothing in law to say that the removals could be challenged in the Children's Court right after the removal. Instead, children such as those removed in this case, had to remain in a limbo situation while a social worker investigated whether the children concerned were in need of care and protection.

A two part application was brought before the High Court. The product of the first was that the child of the first-mentioned individual was returned to his care. It was ordered that the children of the blind woman would be kept at the place of safety to which they had been taken for a period of 5 weeks so that a social worker could investigate the matter and compile a report for the Children's Court making a determination as to

[118] C and Others v Department of Health and Social Development 2012 (2) SA 208 (CC).

whether these children were in need of care and protection. The children were subsequently returned to the care of their mother.

In the second part of the application the applicants sought, among others, a declaratory order in respect of the conduct of the social workers and a declaration of constitutional invalidity of sections 151 and 152 of the Children's Act insofar as they failed to provide for judicial review and decisions surrounding placement made by designated social workers and the police. Section 151 deals with removals made with a court order, and section 152 deals with removals made in the absence of one.[119] The respondents in the matter initially opposed the matter, but an agreement was then reached. Despite this, written and oral arguments were placed before the Court because the court was being asked to declare sections to be unconstitutional.

The presiding officer in the matter contrasted the provisions of the Child Care Act[120] and the Children's Act[121] (the former is the predecessor of the latter). The former made provision for the matter to be brought before the Children's Court in 48 hours so the court could make a formal determination whether the removal was justified and would allow the parent to challenge the child having been removed. In the case of the latter, the Children's Court would hear the matter for the first time only after a social worker had had 90 days in which to investigate the matter, compile a report and place it before the courts. The High Court deemed this to be procedurally deficient and that the mechanism was inadequate to protect children from unlawful interference with their right to family care. By the time the Children's Court did hear the matter, the question would not be whether the removal was justified, but whether the child is in need of care and protection, and those are two different questions. It was thus concluded that the best interests of the child must be ensured at each stage of the process and that automatic review is thus a pre-requisite.

As a result of the above, the High Court declared sections 151 and 152 of the Children's Court unconstitutional to the extent that they failed to provide for automatic judicial review of instances where a child has been removed in terms of the aforesaid

[119] Sections 151 and 152 of the Children's Act.
[120] Child Care Act.
[121] Children's Act.

sections and placed in temporary safe care. As an interim order, the Court read words into the sections to remedy the unconstitutionality.

4.3 Proceedings in the Constitutional Court

The applicants and respondents approached the Constitutional Court for confirmation of the High Court's Order, subject to a few typographical errors. There were three separate judgments: the majority by Yacoob J, the separate but concurring minority by Skweyiya J and a dissent by Jafta J. They will be discussed in turn.

Yacoob J focused on whether lack of judicial review was unconstitutional. He highlighted that the requirements for removal are stringent. There has to be a reasonable belief that the child is in need of care and protection. Removal can only be for the safety and well-being of the child, not simply if it is desirable. In terms of removals without a court order, this can only be enacted if the delay of ordering a court order may endanger the child's safety and well-being and then only if removal is in the best interests of the child. There are also significant penalties should this power be misused.

Yacoob J believed that the rights that were limited in this situation were those set out in sections 28 and 34 of the Constitution.[122] Section 28 relates to the rights of children and section 34 to access to courts. In terms of section 28, he set out that the provisions in question undoubtedly existed to protect children and that it was a difficult question to answer as to how they could conflict with section 28.[123] He provided an answer to this question by articulating that there existed the danger that a removal could be wrongly made. This was the case with the children in question, particularly the little girl with her father. Should lawyers not have intervened, the two of them would likely have been separated, and would have had to wait for 90 days before her being returned to him. He said that the provisions in question thus run the risk of being counter-productive.

[122] Sections 28 and 34 of the Constitution.
[123] Section 28 of the Constitution.

In terms of the analysis of section 34 of the Constitution,[124] he set forth that the question as to whether a removal is justified is a justiciable issue. He stated that it is in the interests of children for the correctness of their removals to be tested in a court.

In his final analysis, he stated simply that the sections cannot be justified.

In terms of remedy, Yacoob J did not confirm the reading in done by the High Court, he did, however, employ reading in as a remedy. He did not make a mere order of invalidity because then that would mean that children so-situated could continue to be subject to hardships until the legislature corrects the defect.

The court held the following:

> *…4. An additional paragraph numbered 2A is read into section 151 of the Children's Act 38 of 2005 as follows:*
>
> > *(2A) The court ordering the removal must simultaneously refer the matter to a designated social worker and direct that social worker to ensure that:*
> >
> > *(i) the removal is placed before the Children's Court for review before the expiry of the next court day after the removal; and*
> > *(ii) the child concerned and the parents, guardian or care-giver are, unless this is impracticable, present in court."*
>
> *5. An additional paragraph to be numbered (d) is to be read into section 152(2) of the Act as follows:*
>
> *"(d) ensure that:*
>
> > *(i) the removal is placed before the Children's Court for review before the expiry of the next court day after the removal; and*
> > *(ii) the child concerned and the parents, guardian and caregivers as the case may be are, unless this is impracticable, present in court."*

[124] Section 34 of the Constitution.

Section 153(3)(b) is severed and is replaced by a section reading:

> *"(b) refer the matter of the removal before the end of the first court day after the removal to a designated social worker who must ensure that:*
>
> *(i) the removal is placed before the Children's Court for review before the expiry of the next court day after the referral;*
>
> *(ii) the child concerned and the parents, guardian or caregiver as the case may be are, unless this is impracticable, present in court; and*
>
> *(iii) the investigation contemplated in section 155(2) is conducted."*[125]

In contrast to Yacoob J, Skweyiya J believed the unconstitutionality lay in the removal itself. He discussed the invasive nature of removing a child from the family environment, the rupture in family relations, the disgrace and loss of dignity it could cause the family. He emphasised the importance of section 28(1)(b) of the Constitution, that is the *"right to family or parental care"* and said that while this section also contemplates *"appropriate alternative care when removed from the family environment*,[126] he cites the latter as being secondary to and not an equivalent of the former. He utilised the African Charter on the Rights and Welfare of the Child and the United Nations Convention on the Rights of the Child, specifically around rights to parental care- guarantees that ought not be interfered with if at all possible. He discussed section 28(2)- that *"a child's best interests are of paramount importance in every matter concerning the child,"*[127] and that this is an important consideration in the decision to remove a child. He stated that, at the very least, a child and his or her family must have the opportunity to make representations as to whether removal accords with the child's best interests.

[125] C and Others v Department of Health and Social Development 2012 (2) SA 208 (CC) para96.
[126] Section 28(1)(b) of the Constitution.
[127] Section 28(2) of the Constitution.

Like Yacoob J, Sweyiya J also discusses infringement of section 34 of the Constitution.[128] He states that *"although access to the courts is not denied, it is no doubt delayed"*[129]

Skweyiya J commenced with a limitations analysis in terms of section 36 of the Constitution.[130] He discussed section 28 of the Constitution, relying on the case of *S v M*.[131] He held that the purpose of the provisions was legitimate. In considering the relationship between the limitation and its purpose, he relied again on the Articles of the UNCRC and ACRWC and referred to the manner in which *S v M* considered the influence of international law on the Constitution. He stated that the removal of children and the provisions of section 28 must be read in such a way that it is compatible with the UNCRC. He illustrated that removal is drastic and that judicial oversight is vital. He articulated that judicial review within a reasonable time would render the process far less restrictive. He therefore articulated that the provisions of section 151 and 152 of the Children's Act[132] insofar as they did not provide for judicial review could not pass constitutional muster.

He articulated that while it may seem that there is already a remedy available in that nothing precluded the parents or the child from approaching the High Court in order to challenge the removal that this is not functionally true. He stated that this would be far too costly and onerous and thus too restrictive.

In terms of remedy, Skweyiya J agreed with Yacoob J that a bald declaration of invalidity coupled with a suspensive order would be inappropriate. He agreed with Yacoob J as to the remedies made to sections 151 and 152 of the Children's Act.

In his dissenting judgment, Jafta J took a wholly contrasting approach to both Yacoob J and Skweyiya J. He believed that both Justices had erred in their finding of constitutional invalidity entirely. He did not feel that automatic judicial review was required in these circumstances. He articulated that it was unclear which sections of the Constitution the High Court found were impugned in this matter. He states that

[128] Section 34 of the Constitution.
[129] C and Others v Department of Health and Social Development 2012 (2) SA 208 (CC) para28.
[130] Section 36 of the Constitution.
[131] S v M (Centre for Child Law as Amicus Curiae 2008 (3) SA 232 (CC).
[132] Sections 151 and 152 of the Children's Act.

since section 28 of the Constitution[133] does not refer to judicial review then an argument that this section is impugned is invalid. He stated that if international law and national law conflict, then it is national legislation that prevails. He encouraged the reading of section 28 of the Constitution as a whole- taking into account, for instance, that a child has the right to be *"protected from maltreatment, abuse, neglect and degradation"* in section 28(1)(d).[134] This must be harmonised with the rest of the section, including with section 28(2).[135] He stated that there is thus no room for parental care that is harmful. He articulated that the right to parental care extends only so far as to that which is beneficial. He stated that the requirements for removal of a child are sufficiently stringent. He also stated that since the applicants did not rely on section 34 of the Constitution that it should not be used in argument surrounding the questions raised in this case.

From the above it is clear that one case can easily split the opinion of the bench. While the first two of the Justices may have arrived at the same remedy, their reasoning was very different. The dissent was a stark opposition, bearing no resemblance to the others at all. The rest of the bench was relatively closely split between the judgements of Yacoob J and Skweyiya J, which is demonstrative of the fact that the outcome of litigation is not a foregone conclusion, even if there are good prospects of a positive result. The thinking of different Justices can significantly influence the development of the law as while only the majority truly sets the precedent, the others may nevertheless be referred to on certain aspects in future cases.

4.4 Analysis

In this matter the court served to create jurisprudence and enact law reform. Both the majority and minority were in agreement that changes had to be made and urgently so. Here the role played by the court involved formulating a remedy that would both come to the immediate aid of children in peril as well as allow the legislature to find a permanent solution to the problem. The jurisprudence created by the matter- in all three judgments is of interpretive value- regardless if one agrees with the sentiments in all three or not- and can be used in other cases about child protection. In the case

[133] Section 28 of the Constitution.
[134] Section 28(1)(d) of the Constitution.
[135] Section 28(2) of the Constitution.

of the majority and the separate but concurring judgment, the Justices took a liberal approach- applying the Constitution in a manner consistent with the jurisprudence developed in other cases. They "built onto" existing precedents and thus served to solidify and increase the body of knowledge surrounding child law.

Yacoob J produced what can be termed a child-centred judgment. He accomplished this through deriving his conclusions based largely on section 28(2) of the Constitution. He adopted the approach that this section is a self-standing right. The judgement of Skweyiya J was also child-centred, but utilised the combination of sections 28(1)(b) and 28(2), which is arguably a more balanced stance. Jafta J emphasised the need to adopt a holistic approach to the interpretation of section 28; utilising each subsection relating to the case at hand. That Yacoob J did not apply other sections of the Constitution could arguably be a piece of criticism levied against his judgment; especially since the rights enshrined in sections 28(1)(b) were so clearly relevant to the case at hand. It is submitted that should the premise of Skweyiya J not have been quite so radical- that is, that the unconstitutionality lay in the removal itself- the court may have reached a judgment with a larger majority.

As to the child-centredness of the judgment, Couzens questions as to whether it was not too much so. She illustrates that the rights of parents ought to play some kind of role in this discussion. She states that save for a few scant references to parents in respect of the rights surrounding a family life, that their rights were not dealt with. The applicants submitted that removing the child is "a limitation of the child and the parent's rights to dignity and privacy within the family"[136] Despite the fact that the right to family life is not enshrined in the Constitution, there have been cases which recognise it under the right to human dignity such as Dawood v Home Affairs.[137] According to Eekalaar, he rights of children *"should be respected no less but certainly no more"* than those of their adult counterparts.[138] Couzens, however counters thus by stating that;

> *[the] historical evolution of the rights of children, characterised by an on-going effort to include children in the world of rights, justifies the conclusion that giving*

[136] Couzens SALJ (2013) 130 p679.
[137] Dawood and Another v Minister for Home Affairs and Others; Thomas and Another v Minister for Home Affairs and Others 2000 (8) BCLR 837 (CC).
[138] Eekelaar "Beyond the welfare principle" CFLQ (2002) 14 237 p49.

increased legal value to the rights of children is not meant to dislocate the rights of others.[139]

It is submitted that given the provisions of section 28(2) of the Constitution,[140] and the content and nature of the case, that it stands to reason that the judgments would be about children rather than parents. An analysis surrounding their rights may have served to create valuable jurisprudence surrounding the rights of the family, but it is unlikely that it would have changed the outcome of the case.

As to the use of section 28(2), Skelton points out that this section has 3 functions as an interpretive tool for section 28(1), a mechanism by which other constitutional rights and the possible limitations they might have and a self-standing right. [141]

According to Couzens, it could be said that the judgments in the case at hand fulfil all three of these purposes[142]. Jafta J utililises section 28(2) as a means through which to assess the provisions of section 28(1),[143] Yacoob J used this section as a means through which to interpret section 34 of the Constitution[144] and both Yacoob and Sjweyiya JJ utilise section 28(2) as a self-standing right.[145] It is submitted that though one judgement employing all three of these functions would have been ideal, the utilisation of two of them to reach a positive outcome for children- that is, the judgments of Yacoob and Skweyiya JJ represents an extremely positive step in the development of "best interests" jurisprudence.

In the affidavit of the third applicants, the following was asserted:

…the requirement of judicial oversight regarding the removal of a child is set out in both the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child before one is allowed to separate children from their parents and deprive children of their right to parental care. Accordingly, children's right to parental care and not to be separated without such decision being subjected to judicial review is

[139] Couzens SALJ (2013) 130 680.
[140] Section 28(2) of the Constitution.
[141] Skelton "Constitutional Protection of Children's Rights" in T Boezaart (ed) *Child Law in South Africa* Juta 2009 265.
[142] Couzens SALJ (2013) 130 p684.
[143] Sections 28(2) and 28(1)(b) of the Constitution.
[144] Section 34 of the Constitution.
[145] Section 28(2) of the Constitution.

entrenched in international law. This is the broader context in which sections 28(1)(b) and 28(2) must be read.[146]

Skelton writes about the influence of the UNCRC in South African court cases, focusing on the Constitutional Court. She sets forth a view that the approach that the courts have taken to the utilisation of the treaty has been expansive."[147] This accords with the aforesaid *dicta* of *S v M*,[148] and indeed was largely derived from it. Skweyiya J referred to this international law in his analysis of the case. The UNCRC and ACRWC create a very strong protective veil over children so-situated. It is submitted that this reference to international law was one of the more persuasive factors in this matter because of the influence international law has in the interpretation of our own and because our own Constitution is derived from international law. Making use of international law is part of the role of the courts; ensuring that parties live up to their international obligations and do not shirk from that to which the state has committed.

The creation of an impact is one of the cardinal functions of the court. Courts exist to bring about changes. As far as impact is concerned, the most noteworthy change it has catalysed is change in legislation. The Children's Amendment Act 42 of 2017 was signed and Gazetted on the 19th of January 2017[149] and will come into force soon. In instances where the Constitutional Court declares something unconstitutional and makes an order of severance and reading in, the most concrete effect it can have is changes to the law itself. The relevant sections of the Amendment Act are a good reflection of the C and Others judgment. As set forth by the South African Human Rights Commission:

[We]…welcome the deference to the C and Others judgement…as it will afford caregivers and the affected children, where possible, an opportunity to make

[146] C and Others v Department of Health and Social Development 2012 (2) SA 208 (CC) para106.
[147] Skelton "South Africa" in Liefaard and Doek *"Litigating the rights of the child the UN Convention on the Rights of the Child in Domestic and International Jurisprudence* Springer 2015 p17.
[148]S v M (Centre for Child Law as Amicus Curiae 2008 (3) SA 232 (CC).
[149] Government Gazette 40564 1 available at https://www.gov.za/sites/www.gov.za/files/a17of2016Children'sAmendmentAct.pdf accessed on 24 September 2017.

meaningful representations before a court, to review a decision to remove a child from a particular environment.[150]

4.5 Conclusion

C and Others provided much-needed relief to the children concerned in the matter and children so-situated throughout the country. It served to ameliorate the plight of vulnerable of children and to ensure that family lives are not disturbed unnecessarily. Removal of a child is a drastic step and a last resort and ought to be used as a mechanism to prevent further harm rather than to cause harm. Failure to halt the process of a removal incorrectly made would subject a child to tremendous emotional turmoil, and review by a competent court will serve to solve this problem.

[150] South African Human Rights Commission presentation at parliamentary public hearing p4 September 2002. PMG minutes available at https://pmg.org.za/committee-meeting/21462/ accessed on 8 September 2017.

Chapter 5: Separation of children from their parents: study of S v M (Centre for Child Law as *Amicus Curiae*)[151]

5.1 Introduction

As illustrated in C and Others, separation from family or caregivers has an indisputably negative effect on the well-being of children. C and Others dealt with the physical removal of children. S v M (Centre for Child Law as *Amicus Curiae*) (S v M) dealt with instances where the parent is "removed" from the child- specifically when the parent is incarcerated for a crime they have committed. The Guidelines discussed in Chapter 2 illustrate that separation of children from their families should only occur in situations where there is no viable option other than for them to separate. S v M illustrates why this is the case and why the Constitution creates an imperative that separation ought not to occur through the primary caregiver being put in prison unless it is absolutely necessary.

5.2 Facts and Proceedings in the Lower Courts

M, a mother of three children was convicted of fraud in 1996. She was sentenced to a fine and a term of imprisonment suspended for five years. Three years later she was charged with the same offence and, while out on bail for this offence, committed further fraud. In 2002, she was `convicted in the Regional Court of various counts of fraud and theft. The court sentenced her to four years of direct imprisonment. She sought leave to appeal, which was granted, but the Regional Magistrate refused to grant bail. The High Court found she had been wrongly convicted on some of the counts and converted her sentence to one year of imprisonment. The effect of this sentence was after eight months the Commissioner for Correctional Services could authorise that she be released under correctional supervision. She then sought leave to appeal in the Supreme Court of Appeal, which was dismissed, and then she petitioned the Constitutional Court.

[151] S v M (Centre for Child Law as Amicus Curiae 2008 (3) SA 232 (CC).

5.3. Proceedings in the Constitutional Court

During the course of the proceedings in the lower courts, only scant reference had been made to the rights of M's three children and the consequences it would have for them should their mother receive a custodial sentence.

Following her application for appeal to the Constitutional Court the Chief Justice directed that the following questions be considered only:

I. *What are the duties of the sentencing court in light of section 28(2) of the Constitution and any relevant statutory provisions when the person being sentenced is the primary caregiver of minor children*
II. *Whether these duties were observed in this case.*
III. *If it was to hold that these duties were not observed, what order should this court make, if any.*

The applicant, *amicus curiae* and curator *as litem* all asserted that section 28(2) of the Constitution[152] required that the best interests of the children concerned be given *"specific and independent consideration"*[153] when sentencing a primary caregiver. They thus urged the court to impose a sentence of correctional supervision rather than direct imprisonment. The National Director of Public Prosecutions contended that the decision of the High Court already took this into account and that the sentence should not be tampered with. The Department of Social Development and the Department of Justice submitted a social worker's report, corroborating their position, which was the same as the National Director of Public Prosecutions.

Sachs J wrote the majority judgment. He approached the matter from the premise that the dispensation at that time regarding sentencing was unconstitutional because of its failure to see the rights of the children of the primary caregiver being sentenced as a separate and integral consideration.

He began by laying out the accepted approach to sentencing- that is, the Zinn Triad. According to this construct, the aspects to be examined in questions of sentencing were the *"nature of the crime, the personal circumstances of the criminal and the*

[152] Section 28(2) of the Constitution
[153] S v M (Centre for Child Law as Amicus Curiae 2008 (3) SA 232 (CC) para7.

interests of the community."[154] He articulated that it is also necessary to look at the aims of punishment, *"namely its deterrent, preventative, reformative and retributive aspects."*[155] He also added that the element of mercy also had to be added, and that it had to be taken into account that the Constitution had transformed the aims of punishment. He indicated that it was on the basis of this transformation that the case was centred.

The judgment then turned to section 28(2) of the Constitution.[156] He started this discussion by exploring the expansive nature of the section and how such an apparently all-encompassing statement may not be a self-standing right, but rather a general guideline. Sachs J illustrated that he disagreed and articulated that past cases have clearly illustrated that this was not so. He articulated that it clearly creates legally enforceable rules. He then commenced with an analysis of how these rules can be reasonably limited.

First of all, he highlighted that application of the law must always be child sensitive. Secondly, and as set forth in the analysis of *C*, he highlighted that section 28 responds to international obligations under the UNCRC. He illustrated that what unites the principles enshrined in the UNCRC with section 28, is *"the right of the child to be a child and enjoy special care."*[157] Thereafter, he discussed the all-important need to protect the dignity of a child as a right distinct from those of a parent or caregiver. He stated,

> *Every child has his or her own dignity. If a child is to be constitutionally imagined as ab individual with a distinctive personality, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children."*[158]

Next Sachs J spoke about the right of children to live in an environment free of trauma, in a secure environment. He stated that while nothing the law could do would enable

[154] S v M (Centre for Child Law as Amicus Curiae 2008 (3) SA 232 (CC) para10.
[155] As above.
[156] Section 28(2) of the Constitution.
[157] S v M (Centre for Child Law as Amicus Curiae 2008 (3) SA 232 (CC) para17.
[158] As above para18.

children to live in such an idyllic environment, that it could create conditions conducive to this, and could *"maximise opportunities for children to live happy and productive lives."*[159] On this basis, even if it is not possible for the state to repair ruptured family life, it is still possible for it to create a positive environment for repair to take place. Naturally, he argued, section 28[160] creates the inherent requirement that the law must seek to avoid, and minimise any possible interruption of family life.

He discussed the questions surrounding the reach of the best interests principle; that its expansiveness may make it seem as though it is vague and indeterminate, failing to provide guidance to those applying it. He countered this by saying that it is in the strength of its flexibility that its strength lies and that this flexibility is necessary as the best interests of the child will vary on a case by case basis. He stated,

> *A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.*[161]

He set out that there exists a danger to the principle being spread too thin and losing its effectiveness. He illustrates that it can be limited under section 36 of the Constitution;[162] that paramountcy of the child's best interests does not make the principle absolute and that they must be counterbalanced with other rights in the Constitution.

The question as to the proper approach to be taken when sentencing a primary caregiver was then posed. The State contended that since, when sentencing, the courts had to take into account the personal circumstances of the accused, that no change in sentencing practice was required. The *amicus* responded by stating that a child is not a "circumstance" but rather a person whose needs must necessarily be considered independently. The *curator ad litem* set forth four responsibilities a

[159] S v M (Centre for Child Law as Amicus Curiae 2008 (3) SA 232 (CC) para20.
[160] Section 28 of the Constitution.
[161] S v M (Centre for Child Law as Amicus Curiae 2008 (3) SA 232 (CC) para24.
[162] Section 26 of the Constitution.

sentencing court has when taking the decision as to whether to impose a custodial sentence on a primary caregiver. These are,

- *To establish whether there will be an impact on a child.*
- *To consider independently the child's best interests.*
- *To attach appropriate weight to the child's best interests.*
- *To ensure that the child will be taken care of if the primary caregiver is sent to prison*.[163]

Sachs J believed these to be practical, but he highlighted that this should not be a motivation for parents to begin using their children to avoid the otherwise fair consequences of their own unlawful actions. It is therefore not the actual sentencing of the primary caregiver that threatens the best interests of the children concerned and those so-situated, but rather the imposing of a sentence that fails to take such interests into account.

He dealt next with the issue of competing rights. First he articulated firmly that the decision to sentence a primary caregiver to a custodial sentence must be done on a case-by-case basis. He stated that it *"becomes a matter of context and proportionality."*[164] There are two competing factors that have to be balanced against each other. The first is "*maintaining the integrity of family care."*[165] The second is the *"duty on the state to punish criminal misconduct.*[166] Sachs J pointed out that the community has a great interest in crimes being punished, and indeed children should grow up in a world where criminality is repudiated. This is derived from the Zinn Triad. Despite this, the Zinn triad as it is generally applied, pays only scant attention to the rights of the children of the primary caregiver who is to be sentenced. But, as Sachs J articulated, *"separation from a primary caregiver is a collateral consequence of imprisonment that affects children profoundly and at every level."*[167] While the paramountcy principle does not override all considerations in sentencing a primary caregiver, it does require appropriate weight to be attached to the paramountcy of the best interests of the children concerned.

[163] S v M (Centre for Child Law as Amicus Curiae 2008 (3) SA 232 (CC) para32.
[164] As above para37
[165] As above para8.
[166] As above para39.
[167] As above para42.

Sachs J then turned his attention to the case in point and asked whether the duties concerning due regard being had to the best interests of the children concerned. He found they had not. He asked what order the courts should make. He concluded that the court should make an order regarding her sentencing. He found on the basis of the nature of the offence, that M had lived a law-abiding lifestyle for years since committing the offence, the disruptive effect a custodial sentence would have on the children concerned and various other factors that an order of correctional supervision would be appropriate. He discussed that correctional supervision was an innovative remedy with a restorative justice element which would be valuable to the rehabilitation of M.

Madala J drafted a minority judgement. He was in general agreement with parts of Sachs J's judgment. He agreed, for instance, with the factors Sachs J gave in determining whether the provisions of section 28(2) of the Constitution[168] were complied with. His judgment focused specifically on whether the sentence imposed by M in the High Court was justifiable as opposed to examining the content of section 28(2) of the Constitution.[169]. He agreed that the Magistrate's Court and the High Court did not adequately address the interests of the children concerned. He illustrated, however, that the children could be cared for by the family members of the accused, who had done so while M was in prison. He highlighted that the best interests of the children should not override other notable factors. He found that the Constitutional Court should not interfere with that of the High Court and moved to dismiss the appeal.

5.4 Analysis

In this case, the constitutional rights at issue were not so much those of M, but rather those of her three children. Far more important than the resultant remedy was the role played by the court in developing the understanding of the rights of children. Through its intervention, section 28(2) was thoroughly explored and fleshed out, and as will be shown below have had a monumental influence on other cases involving children so-situated and also other cases concerning the rights of children. Here, the role of the court was to shape and mould something that existed already, rather than develop anything new.

[168] Section 28(2) of the Constitution.
[169] Section 28(2) of the Constitution.

Although courts have long since applied the best interests principle in family law matters, in the Constitutional dispensation, the construct has been *"greatly enlarged."*[170] Skelton discusses the effect of Sachs J's interpretation of the best interests principle (as set out above) as giving *"children's rights a 'leg up'"*[171] This denotes the elevation of their rights to the appropriate standard; something much-needed considering their inherent vulnerability. It is most worthy to note that Sachs J highlights, however, that the paramountcy of the best interests of the child cannot be seen as a trump over all other rights, but rather as a right capable of limitation. He illustrates that seeing it in the former light would, in fact, lead to the devaluation of the principle overall. This is important because while it is vital to understand the content of a right, it is just as integral to know where its boundaries lie. As set out above, Sachs J set out what the law can and cannot do for children. It cannot protect them entirely from the perils of being out in the world, but it can create positive conditions to minimise the damage caused and to create a climate conducive to repair of such damage. This is demonstrative of the reality of a concomitant reality of what a legal system is and is not capable of.

An important component of the judgment is that is does not *"get entangled in a debate about the issues relating to the rights of the primary caregiver."*[172] The focus, instead is on the best interests of the child and the right to family and parental care. The issue was raised as to whether this would allow parents to use their children as the means through which to avoid the consequences of their actions. That, said the court, was not the question in this matter. Indeed, the court did not say there ought to be no consequences for the actions of errant parents, but rather that they ought to be tailored in accordance with the needs of the children. Erasmus compares the reasoning of S to that of Government of the Republic of South Africa v Grootboom.[173] This case was briefly discussed in Chapter 3. In S v M, section 28(1) of the Constitution was clearly hailed as a series of immediately enforceable rights. As articulated, in Grootboom, however, the court held that the right in section 28(1)(c) was not immediately enforceable and the duty of caring for children lay with their parents. The court in this

[170] Skelton "Severing the umbilical cord: a subtle jurisprudential shift regarding children and their primary caregivers" CCR 2008(1) p359.
[171] Skelton CCR 2008(1) p362.
[172] Skelton CCR 2008(1) p363.
[173] Grootboom and Others v Oostenberg Municipality and Others (6826/99) [1999] ZAWCHC 1 (17 December 1999).

case was of the view that the state only had such an obligation if parental care was lacking. The court alluded to the concern that parents would use their children as stepping stones to improve their circumstances.[174] It is submitted S v M was a welcome departure from the approach Grootboom because the court in the latter case, it is submitted, took somewhat of a purist approach to socio-economic entitlements without considering the lack of internal qualifiers in section 28(1)(c).[175] Sachs J also articulated that should there be no option but to impose a custodial sentence, that a criminal court should not be precluded from doing so. It is submitted that this is a balanced approach and that the court's focus was correct. It illustrates the imperative of the courts to utilise section 28,[176] but also its capability of limitation.

Sachs J illustrated the negative consequences of separating a child from his or her primary caregiver. Borrowing from other authors, and in support of the *dicta* espoused in S v M, Carnelly and Epstein illustrate precisely the effects such a separation can cause. They state that,

> *Incarceration of the primary caregiver creates serious emotional problems for the children concerned. The imprisonment has an independent effect on the emotional and behavioural development of the child…even though the child may already have suffered risk factors prior to the arrest…These children suffer from post-traumatic stress, depression, anger and aggression, eating disorders, anxiousness, sadness, guilt, low self-esteem, promiscuity, substance abuse, gang activity, and school-related problems…Children [with imprisoned primary caregivers] are also more vulnerable to neglect/abuse and there could be difficulties in visiting the imprisoned mother.*[177]

These are extremely serious ramifications and it would seem wholly appropriate that the Constitutional Court took them fully into account. What is impressive is that even though the children may have had family members to go to, these factors were still

[174] Erasmus D "'There is something you are missing: What about the children?": Separating the rights of children from those of their caregivers' (2011) 25 SAPL p124.
[175] Section 28(1)(c) of the Constitution.
[176] Section 28 of the Constitution.
[177] Carnelly and Epstein "Do not Visit the sins of the parents upon their children: Sentencing considerations of the primary caregiver should focus on the long-term best interests of the child" SACJ (2012) 1 p114.

correctly considered as being valid in the decision as to how primary caregivers ought to be sentenced.

As established above, Sachs J made specific reference to international law. One specific aspect utilised was Article 30 of the African Charter on the Rights and Welfare of the Child relating to imprisoned mothers and which was discussed in Chapter two. The UNCRC has no parallel section. As Skelton notes, this marks the development of jurisprudence specifically surrounding the ACRWC.[178] As Sachs J points out, and as set forth above, international law constitutes an interpretive tool for the Constitution. That this instrument provides such clear guidance is undoubtedly a factor that carried considerable weight in him arriving at his decision.

International instruments have also been inspired from the *dicta* in S v M*.* Subsequent to a Day of General Discussion, the Committee on the Rights of the Child utilised the case of *S v M.* In 2012, the Human Rights Council adopted a resolution which called upon States to advocate for the imposition of non-custodial sentences on primary caregivers where possible, considering the best interests of the child.[179] The African Committee of Experts on the Rights and Welfare of the Child issued a general comment on the subject in which *S v M* was quoted.[180]

The role played by the court has led to the swaying of the outcome of other cases. An example of this is S v Peterson*.*[181] In this case the appellant challenged the court's refusal to grant her bail. She was accused of murder and thus had to adduce evidence as to why exceptional circumstances existed that she should be released. One aspect relied upon was that she was the primary caregiver of a child. The court held that in determining whether such exceptional circumstances exist, one must have regard for the child's right to parental or alternative care. He also highlighted the importance of adhering to the child's best interests principle and relied heavily on the *dicta* of *S*. On

[178] Skelton "The development of a fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments" AHRJ 2009 9 p491.
[179] Skelton and Mansfield-Barry "Developments in South African law regarding the sentencing of primary caregivers" EJPI Winter 2015 p15.
[180] Skelton and Mansfield-Barry Winter 2015 p15.
[181] S v Peterson 2008(2) SACR 353 (C).

the facts at hand, however, the appeal was dismissed due to there being *"more than appropriate alternative care."*[182]

A further example of where *S* has been considered in the matter of the decision as to whether to imprison a primary caregiver and for how long came in the form of Noorman v S[183] In this matter the accused was convicted of murdering her husband and sentenced to 13 years in prison. The High Court illustrated that the magistrate in this case did not have due regard for section 28 of the Constitution[184] or the case of S v M. He held that while a custodial sentence was the only option in this matter; that the interests of the minor child had to be taken into account. He highlighted that the accused was now the only parent left to care for the child, and the child was very young. The Criminal Law Amendment Act 105 of 1997 illustrates that depending on the seriousness of an offence, a person ought to have a minimum punishment meted out to them by the courts save for instances in which there are "substantial and compelling circumstances."[185] The judge found that these clearly existed and held that her sentence ought to be reduced to four years of custodial imprisonment.

More recently, S v M was considered in the case of De Villiers v S,[186] where it was held that courts would be gravely misdirected to fail to consider the rights of minor children in imposing a custodial sentence. De Villiers had also committed fraud and pleaded guilty on all counts. She was sentenced to 8 years in prison, 3 of which were suspended. Neither the magistrate nor the High Court took the rights of the children concerned into account, indicating that it would be wrong to place emphasis on the personal circumstances of the accused. De Villiers successfully petitioned the Supreme Court of Appeal, in which S v M was utilised to illustrate the nature and function of section 28 of the Constitution.[187] It was highlighted that the rights of the children of the accused were not merely a component of her personal circumstances, but self-standing rights. It was also, however set forth that section 28(2)[188] is capable of reasonable limitation and thus should not negate the possibility of the imposition of

[182] As above para75.
[183] Noorman v S [2011] SAWHC para120.
[184] Section 28 of the Constitution.
[185] Criminal law Amendment Act 105 of 1997.
[186] De Villiers v S [2015] ZASCA 119 (11 September 2015)
[187] Section 28 of the Constitution.
[188] Section 28(2) of the Constitution.

a custodial sentence. As such, the accused's sentence was reduced to 3 years imprisonment, after which she would be placed under correctional supervision.

These are only three examples of instances in which the courts have applied *S v M*. As of 2015, a total of seventeen judgments have utilised the approach set forth in this case, the majority of which were appeals.[189] In various cases of theft or fraud (as was the case in S v M), where the mother was the primary caregiver, sentences were set aside or sent back to the lower courts for consideration taking into account the best interests of the child or, on the appeal, the sentences were reduced.[190] These cases highlight the importance of precedent-setting litigation and how through one decision an impact can be felt in subsequent matters. The role of the courts therefore is not only to make changes that affect that particular case, but rather to change the course of the decision-making process in future matters.

5.5 Conclusion

S v M was a pioneering judgement in the sense that is fully extrapolated on the ambit of section 28 in a way no other judgment had done before. The jurisprudence it created is utilised in just about all discussions surrounding the best interests of the child and, as illustrated above, the same principles have been used to arrive at an appropriate remedy time and time again. The case altered the way in which South African law functions in matters surrounding children and opened the door for viewing section 28(2) of the Constitution as a self-standing right. Should a child's primary caregiver be imprisoned, there is an increased chance that the child may enter the child care and protection system. This case and its *dicta* reduces this possibility, creating the imperative that sentences be differently crafted or at least that their durations be reduced.

[189] Skelton and Mansfield-Barry EJPI 2015 p14.
[190] Skelton and Mansfield-Barry EJPI 2015 p14.

Chapter 6: Conclusion

Litigation occurs within a framework. In South Africa, this framework is constituted of international and national norms and standards. These create a comprehensive matrix that serves to provide for and protect the rights of vulnerable children. When courts develop jurisprudence in this regard, the cases about children in the child care and protection system indicate that it is for one of two reasons- either enabling legislation does not accord with the Constitution and must be amended or that conduct is inconsistent with the law and must be altered. In doing so, the courts are given both the opportunity to fix the defect and to develop jurisprudence that increases the body of knowledge on the rights of the child, which will enable courts in future so solve problems and, in turn, continue to develop the law.

The cases analysed have all served to improve the lives of vulnerable children, but much remains to be done. An example of next steps is the probable litigation surrounding foster care, which seeks to both change the law and to arrest unlawful conduct. This case is undoubtedly aimed at solving the problem once and for all, as opposed to buying the Department of Social Development time in order to take the necessary steps.

The monitoring of the aftermath of the case of S v M indicates that efforts are being made to analyse the effect the case is having subsequent to its conclusion. This is undoubtedly positive, but there appears to be no substantial evidence as to whether this is the case with matters such as C and Centre for Child Law v MEC of Education and Others. With these cases, it is difficult to know if conditions have legitimately become better for these children or if they continue to suffer the same hardships. It is submitted that far more monitoring should be done to ascertain whether the remedies granted by the courts have truly resounded throughout the child protection sector.

The role of the courts has been substantial in protecting the rights of vulnerable children. It is through their intervention that both laws and behaviour patterns of parties have been altered. Child rights jurisprudence in relation to the care and protection system has grown from a fledgling and largely untested area to being rich, vibrant and substantial. Litigation should never be a first port of call, but when matters have gone to court, the results have been indisputably positive for the parties and potentially all

children so-situated. The remedies in the cases analysed have been innovative, striking and penetrating. They have heralded a brighter future for vulnerable children and have changed thinking around what a care and protection system is and how it ought to function.

Bibliography

1. Legislation:

Child Care Act 74 of 1983.

Child Justice Act 72 of 2008.

Children's Act 38 of 2005.

Criminal law Amendment Act 105 of 1997.

Social Assistance Act 13 of 2004.Supreme Court Act 59 of 1959.

2. South African Case Law:

C and Others v Department of Health and Social Development 2012 (2) SA 208 (CC).

Centre for Child Law & Others v MEC for Education, Gauteng and Others 2008 (1) SA.

Centre for Child Law & Others v MEC for Education, Gauteng and Others 2008 (1) SA

Centre for Child Law v Minister for Social Development and Others (North Gauteng High Court) Case Number 2176/11. Order 10 May 2011 Published in Government Gazette No.34303. Notice 441. 20 May 2011.

Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).

Minister of Welfare and Population Development v Fitzpatrick and Others 2000 (3) SA 422 (CC).

S v M (Centre for Child Law as Amicus Curiae 2008 (3) SA 232 (CC).

S v Peterson 2008(2) SACR 353 (C)

Thomas and Another v Minister for Home Affairs and Others 2000 (8) BCLR 837 (CC).

Treatment Action Campaign and Others v Government of the Republic of South Africa and Others (76/06/01) [2006] ZAKZHC 9 (28 August 2006).

3. Court documents

Annexure to urgent application to the High Court. In Centre for Child Law v Minister of Social Development and Others. Unreported Case 2176/11. Department of Social Development December 2014.

Founding affidavit Minister of Social Development in RE Centre for Child Law v Minister for Social Development and Others Case no 21726/2011.

Budlender and Griffiths "Opinion for Centre for Child Law concerning a legal analysis of the foster care crisis and its implications" 2017.

4. Books and chapters in books:

Boezaart T (ed) Child Law in South Africa Juta 2009.

Boezaart T (ed) Child Law in South Africa Forthcoming Juta 2018.

Currie I and De Waal J "Bill of Rights Handbook" 6th Ed Juta 2013.

Liefaardt T and Doek J "Litigating the rights of the child the UN Convention on the Rights of the Child in Domestic and International Jurisprudence Springer 2015.

Mahery P "The United Nations Convention on the Rights of the Child. Maintaining its Value in International and South African Child Law in Boezaart (ed)"Child Law in South Africa" Juta 2009.

Proudlock P "Children's socio-economic rights" in Boezaart (ed) Child Law in South Africa Forthcoming Juta 2018.

Skelton A "South Africa" in Liefaard and Doek "Litigating the rights of the child the UN Convention on the Rights of the Child in Domestic and International Jurisprudence Springer 2015 17.

5. Journal articles:

Carnelly M and Epstein C "Do not Visit the sins of the parents upon their children: Sentencing considerations of the primary caregiver should focus on the long-term best interests of the child" (2012) SACJ 164.

Couzens M “The Constitutional Court consolidates its child rights jurisprudence: The case of C v Department of Health and of Social Development, Gauteng (2013) SALJ.

Eekelaar J “Beyond the welfare principle” (2012) 14 CFLQ.

Erasmus D '"There is something you are missing: What about the children?" Separating the rights of children from those of their caregivers' (2011) 25 SAPL 124.

Rosa S and Dutschke M “Child Rights at the core: the use of international law in South African Cases on Children’s Socio-Economic Rights” (2006) 22 SAJHR 254.

Scott C and Alston P “Adjudicating constitutional priorities in a transnational context: A comment on Soobramoney’s legacy and Grootboom’s promise” (2000) 16 SAJHR 227.

Skelton A “Severing the umbilical chord: a subtle jurisprudential shift regarding children and their primary caregivers” (2008) CCR (1).

Skelton A “The development of a fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments” (2009) AHRJ.

Skelton A and Mansfield-Barry L “Developments in South African law regarding the sentencing of primary caregivers” EJPI Winter 2015.

6. Studies and reports:

Alternate Reporting Coalition- Children’s Rights in South Africa “Advocacy Brief 7: Social Assistance” 2017.

Breen N “Policy brief: foster care in South Africa: where to from here” Jo’burg Child Welfare 2014.

Hall and Skelton “Introducing a child support grant top-up for orphaned children living with family members” Child Gauge Children’s Institute and University of Cape Town 2014.

Save the Children “Guidelines on the Alternative Care of Children” Policy Brief 2012

Skelton “Strategic Litigation Impacts Equal Access to Quality Education” Open Society Justice Initiative and Open Society Foundations Education Support Program 2017.

Department of Women, Children and People with Disabilities "South Africa's Combined Second, Third and Fourth Periodic State Party Report to the Committee on the Rights of the Child (Reporting Period 1998- June 2012), 2012" DWCPD.

7. International Instruments:

African Charter on the Rights and Welfare of the Child.

Committee on the Rights of the Child General Comment 5 (2003).

United Nations Convention on the Rights of the Child.

United Nations Guidelines on the Alternative Care of Children 2010

8. Internet sources:

Davis R "Festering Indifference: Foster care grant mess has echoes of SASSA crisis" Daily Maverick 21 March 2017 available at https://www.dailymaverick.co.za/article/2017-03-21-festering-indifference-foster-care-grant-mess-has-echoes-of-sassa-crisis/#.WZ18cfkjHcs accessed on 23 August 2017.

Gordhan P "2017 Budget Speech" National Treasury 2017 available at http://www.treasury.gov.za/documents/national%20budget/2017/ accessed on 19 September 2017.

Government Gazette 40564 1 available at https://www.gov.za/sites/www.gov.za/files/a17of2016Children'sAmendmentAct.pdf accessed on 24 September 2017.

South African Human Rights Commission presentation at parliamentary public hearing 4 September 2002. PMG minutes available at https://pmg.org.za/committee-meeting/21462/ accessed on 8 September 2017.

Table of ratification available at www.achpr.org/instruments/child/ratification/ accessed on 21 July 2014

The Foster Care System is failing a million orphans: child rights NGO's call for a kinship grant, Press Release by the University of Cape Town, 23 October 2014 available at http://children.pan.org.za/node/9720 accessed on 17 September 2017.

Xi J "Over a million children fall through the foster care cracks" GroundUp 12 November 2014, available at www.groundup.co.za/article/over-million-children-fall-through-foster-care-cracks_2438 accessed on 8 January 2017.

9. Theses

Woolman "The Selfless Constitution: Experimentation and flourishing as the foundations of South Africa's Basic Law" LLD thesis University of Pretoria 2007