



2 September 2019

SECTION 2

1. LEGISLATIVE PROVISION AND CHALLENGES

Foster Care system as a form of alternative care is provided for in sections 150, 151, 152, 159 and Chapter 12 of the Children's Act. However, its implementation has encountered legislative challenges because of various understanding and interpretations of these sections. The section below outlines these challenges.

Section 150 (1)(a) - this sections provides a definition of a child in need of care and protection. It states that "a child is in need of care and protection if the child has been abandoned or orphaned and without any visible means of support". This is one of the requirements to place a child in foster care.

Challenge: challenges encountered in implementing this section resulted from different interpretations of the term "visible means of support". The South Gauteng High Court dealt with two cases pertaining to this matter.

- In a judgement to the case (appeal) between **SS vs Presiding Officer of the Children's Court: District of Krugersdorp, Minister of Social Development and Others** also referred to as *Stemele* case, the court found that the Commissioner of the Children's Court in the District of Krugersdorp erred in fact and interpretation of section 150(a) when he refused to place a child in foster care.

The Commissioner based his refusal on section 32 of the Children's Act which makes allowance for a voluntary care of children by persons who have no parental responsibilities and rights. He found that there was no need for the couple who had been taking care of a child to apply for a foster care order because they were already taking care of the child. The view of the Commissioner was that there was no need to legalise a placement which was a family related one because it was catered for in Section 32. In essence, the Commissioner held that the child in question was not a child in need of care and protection and therefore could not be placed into foster care. Therefore, a child who has a caregiver cannot be a child in need of care and protection.

The High Court dismissed the Commissioner's judgement on the grounds that it was based on a narrow definition of Section 32 without taking into consideration **Chapter 12 of the Children's Act**, which stipulates requirement for foster care, **Section 39(2) of the Constitution**, which makes a right for everyone who is unable to provide for themselves and their dependants to have access to social security and **Section 8 of the Social Assistance Act (No. 13 of 2004)**, which states that a foster parent qualifies for a foster care grant regardless of his/her income.

- The South Gauteng High Court also presided over an appeal case between **Manana family vs Presiding Officer of the Children's Court: District of Krugersdorp**,



Minister of Social Development and Others. In this matter the Commissioner refused to grant foster care placement to a caregiver **who owed** a legal duty of care over a child. It ruled that children in question had visible means of support and were not in need of care because they had a caregiver who is able and suitable to care for them.

This was different to the *Stemele* case in that the caregiver **did not owe** a legal duty of care. The High Court, however, based its ruling on the same legal prescripts it used in the *Stemele* case. Again, it found that the Commissioner limited his interpretation of Section 150(a) on the financial position of the caregiver. It therefore changed the order of the Children's Court and made a finding that the children were in need of care and protection and must be placed in foster care in terms of Section 186(2) of the Children's Act with their grandmother and foster grant must be paid. This ruling in essence made it a legal provision that persons who owe legal duty of care (in this instance the grandmother) are able to be foster parents.

Section 159 (1)(a)(b) – this section stipulates a duration of two (2) years before foster care orders granted by the Children's Court expire. It also requires that all orders issued by the Court to be extended by it.

Challenges: This section removed the aforementioned function (extension of court orders) from the Department of Social Development and placed it on the Children's Courts. This unfortunately resulted in a backlog as most the courts failed to cope with this function.¹ The department proposed for an amendment of this section to allow it to extend court orders as a solution.

The issue of extension of court orders was dealt with by the North Gauteng High Court when it presiding over a case between the **Centre for Child Law v the Minister of Social Development, SASSA and others** and made the following order:

- Notwithstanding the provisions of section 314 of the Children's Act 38 of 2005, any foster care order that was granted prior to 1 April 2010 that has not yet expired, shall, when it becomes due to expire, be dealt with under an administrative process following the procedure previously provided for in terms of the Child Care Act 74 of 1983 and the regulations thereto.
- The procedure set out in paragraph 1 will continue to be followed until **31 December 2014 or until such time as the Children's Act 38 of 2005 is amended** to provide for a more comprehensive legal solution, whichever happens first.
- All foster care orders that have expired since 1 April 2010 are deemed not to have expired and are hereby extended for a period of 2 (two) years from the date of the court order (10 May 2011).

¹ Department of Social Development presentation to the Portfolio Committee on Social Development, 13 August 2013



- All foster care orders that expired within a period of not more than 2 (two) years prior to 1 April 2011, are deemed not to have expired and are hereby extended for a period of 2 (two) years from the date of the court order (10 May 2011).
- The MECs for Social Development shall direct the relevant social workers to identify foster care orders referred to in paragraphs 3 and 4 that should be extended, and must extend them administratively following the procedure that was previously provided for in terms of the Child Care Act 74 of 1983 and the regulations thereto.
- The administrative extensions referred to in paragraphs 3 and 4 shall be communicated to the South African Social Security Agency as soon as they are effected.

Subsequent to the aforementioned ruling, the Department of Social Development submitted an application on **11 December 2014** to the same court requesting for a variation of the order mentioned above so as to extend the deadline from 31 December 2014 to **31 December 2017** because the department was **“experiencing systematic challenges with the management of foster care cases at provincial level”**. In the application the department reported that it had developed a Project Plan for Management of Foster Care Document in response to the 10 May 2011 court order, which was to be implemented by all provinces. It also reported that even though the department managed to reduce the backlog which was 299 076 as of 07 October 2010 the subsequent years reflected a recurring backlog. As of November 2014 there was a backlog of 169 329. The court amended the 10 May 2011 order by extending the deadline to **31 December 2017** or *“until such time as the Children’s Act is amended to provide for a more comprehensive legal solution or which ever happens first”*.

Issues to consider:

- The Department of Social Development submitted a Children’s Second Amendment Bill [14 of 2015] wherein it amended the definition of a child in need of care and protection as it appeared in Section 150(a) of the Principal Act. The amendment removed the wording “without any means of visible means of support” and replaced it with *“does not have the ability to support himself and herself and such inability is readily apparent”*. The Bill was signed into law by the President as Children’s Second Amendment Act (No.18 of 2016) on 18 January 2017.

Why there is still different interpretation of this section by magistrates as reported in slide 19 of the presentation? How is it being interpreted?

- The November 2017 court order stipulated that the department should report progress to it every six (6) months. **Has the department been reporting to the court on its progress in clearing the backlog of foster care orders every six (6) months as it was ordered by the court?**



- The backlog in the foster care system seems to be recurring and it seems interventions to eliminate it are not working. It remains very high. **What drastic interventions does the Department think are needed to eliminate and prevent it?**
- The shortage of social workers affects the implementation of almost all social development services of the department. **It is worrying that the department reports on slide 18 of the presentation that inadequate budget allocation for NGOs has forced some of them scaling down their services and transferring their cases to the department. How will the department address this?**
- Adding to the aforementioned, in its response to the 2011 court order the department stated in its Project Plan for Management of Foster Care that provincial departments would need to put measures to appoint canalisation officers to extend foster care orders until December 2014 or the amendment of the Children's Act. **Were these officers appointed? If so, many are they? How have they contributed towards eradication of the backlog?**