



**PARLIAMENT**  
OF THE REPUBLIC OF SOUTH AFRICA

**LEGAL SERVICES**

PO Box 15 Cape Town 8000 Republic of South Africa  
Tel: 27 (21) 403 2911  
www.parliament.gov.za

Tel: (021) 403 2911  
Direct: (021) 403 2911  
Fax: (021) 403 2911  
E-mail: [sisaac@parliament.gov.za](mailto:sisaac@parliament.gov.za)

**LEGAL OPINION**

**TO:** Honourable Adv. SP Holomisa and  
Honourable Mr BA Mnguni  
Co-Chairpersons: Constitutional Review Committee

**CC:** Secretary to Parliament

**DATE:** 4 August 2011

**SUBJECT:** Annual Submission to the Joint Constitutional Review  
Committee  
Submission 8: Mr CHS Terezakis

**LEGAL ADVISER:** Ms SS Isaac

**REFERENCE:** 132/11



**MEMORANDUM**

**To: Honourable Adv. SP Holomisa and  
Honourable Mr BA Mnguni  
Co-Chairpersons: Constitutional Review Committee**

**Copy: Secretary to Parliament**

**From: Legal Services Office**

**Date: 4 August 2011**

---

**Subject: Annual Submission to the Constitutional Review Committee  
Submission 8: Mr CHS Terezakis**

---

1. Our Office was requested by the co-chairpersons of the Constitutional Review Committee to advise on the submission received from Mr Charalambos Harry Stylianos Terezakis (the submitter).
2. The submitter states that despite two Family Advocates' reports recommending joint parental responsibility and rights to his son; he has only had direct contact with him for half an hour since September 2008. Even telephonic access has been denied. As a result, he contends that various rights including civil, social, religious, language and cultural rights of his child are being violated. In light of this he proposes various amendments to the Constitution. This legal opinion is confined to the submitter's proposed constitutional amendments.

**Proposed amendment to section 28(1)(b) of the Constitution**

3. The submitter proposes an amendment to section 28(1)(b) of the Constitution. Currently this section provides that:

Every child has the right to-

- b) family care or parental care, or to appropriate alternative care when removed from the family environment;

4. The submitter proposes that the section be amended to state:

Every child has a right to-

family care or parental care, and when separated from one or both parents, to maintain personal relations and direct contact with both parents on a regular basis, or to appropriate alternative care when removed from the family environment.

## Law

5. Section 28 of the Constitution adopts a child centric approach to the protection of rights related to family care and responsibilities.<sup>1</sup> This is in keeping with the principle that the best interest of the child is of paramount importance.<sup>2</sup> Section 28(1) provides wide ranging protection for children and sets out the nature and scope of care that they should receive in our society.<sup>3</sup> The section must be read as a whole to understand the protections afforded as each protection is inter-related to the other.
6. Section 28(1)(b) 'is aimed at the preservation of a healthy parent-child relationship, and guards against intrusions of the family environment by unwarranted executive, administrative and legislative acts.' According to Friedman et al section 28(1)(b) and (c) must be read together. 'Subsection (b) ensures that children are properly cared for by their parents or families, and that they receive appropriate alternative care in the absence of parental or family care. Subsection (1)(b), therefore, defines those responsible for giving care. Subsection (1)(c) lists various aspects of the care entitlement.'<sup>4</sup>
7. The present wording of section 28(1) uses 'family care or parental care' and this includes care related to physical and emotional well-being. The proposal that when separated from one or both parents, a child must have personal relations and direct contact with both parents on a regular basis, fits into the broad categories of family or parental care. Therefore, when the Constitution envisions family care or parental care it includes direct parental contact by both parents on a regular basis. This obvious is not an absolute right and the application of this is determined in light of the circumstance of each situation.
8. In keeping with the constitutional protection of children, the Children's Act 38 of 2005 (the Act) provides detailed rights and responsibilities for children and parents. The Act now provides for parental responsibilities which encompasses access and custody of children. Chapter 3 of the Act provides for Parental Responsibilities and Rights and includes:  
  
Section 18 Parental Responsibilities and Rights<sup>5</sup>  
Section 19 Parental responsibilities and rights of mothers  
Section 20 Parental responsibilities and rights of married fathers  
Section 21 Parental responsibilities and rights of unmarried fathers  
Section 22 Parental responsibilities and rights agreements
9. Section 18(2)(a-b) provides that 'the parental responsibilities and rights that a person may have in respect of a child include the responsibility and the right to care for the child and to maintain contact with the child.

<sup>1</sup> Friedman, Pantazis and Skelton. Chapter 10: Children's Rights in Constitutional Law of South Africa.

<sup>2</sup> Section 28(2). This principle is now expressed in Section 9, Children's Act 38 of 2005.

<sup>3</sup> Friedman. P15

<sup>4</sup> Friedman. P15

<sup>5</sup> The relevant sections of the Act are set out in annexure A.

10. The parents of the child may enter in to Parental Responsibilities Agreement.<sup>6</sup> Further subject to subsection (6) of the Act, a parental responsibilities and rights agreement only takes effect if registered with the Family Advocate; or is made an order of the High Court, a divorce court in a divorce matter or the children's court on application by the parties to the agreement.
11. Where the matter is before a Court, the court is bound by the constitutional principle to act in the best interest of the child. While the Court may accept the recommendation of the Family Advocate, it is not bound by the recommendation. The Court will make any order it deems to be in the best interest of the child.<sup>7</sup>
12. Any amendment to legislation or the Constitution must have a clear purpose. An amendment must not be superfluous, as it would be the case where existing legal protections were wide enough to deal with issues proposed in the amendment. Any decision to amend the Constitution must therefore be considered in light of whether existing rights and laws are adequate to serve the same purpose as the proposed amendment.

### **Conclusion**

13. Whilst the decision to amend the Constitution is a policy matter to be decided by the Committee, we are of the view that existing legislation adequately covers matters proposed in amendment.
14. As discussed above, the Constitution provides extensive protection of the rights of children. Further, the Children's Act provides considerable rights and responsibilities for children and parents. These provisions serve the same purpose as proposed in the amendment.

### **Proposed Amendment to section 165 and section 182 of the Constitution**

15. The submitter further suggests an amendment to the provisions dealing with judicial authority in section 165(3) of the Constitution. Linked to this he also proposes an amendment to Section 182 of the Constitution with regard to the mandate of the Public Protector.
16. The submitter proposes that section 165(3) be amended to read:
  - (3) No person or organ of state may interfere with the functioning of the courts; unless the interference is deemed necessary to uphold the functions of the courts as described in the following sub-section.
17. He proposes that section 182(3) read:
  - (3) The Public Protector may not investigate court decisions; unless after the preliminary investigation of complaints, gross irregularities, unreasonableness and misconduct of judicial officers have occurred, and in the public interest, must be corrected and rectified.

---

<sup>6</sup> Section 22(1)

<sup>7</sup> Section 23(1) sets out all the consideration the Court must take into account in making a decision regarding family responsibility.



18. Currently Section 165 of the Constitution reads:

1. *The judicial authority of the Republic is vested in the courts*
2. *The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.*
3. *No person or organ of state may interfere with the functioning of the courts (emphasis added)*
4. *Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.*
5. *An order or decision issued by a court binds all persons to whom and organs of state to which it applies.*

19. Section 182 of the Constitution regarding the functions of the Public Protector reads:

- (1) *The Public Protector has the power, as regulated by national legislation-*
  - a) *To investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice.*
  - b) *To report on that conduct; and*
  - c) *To take appropriate remedial action*
- (2) *The Public Protector has the additional powers and functions prescribed by national legislation.*
- (3) *The Public Protector may not investigate court decisions. (emphasis added)*

20. Section 165(3) of the Constitution prohibits any person or organ of state from interfering in the functioning of the courts. Section 182(3) prohibits the Public Protector from investigating court decisions. Section 6(6) of the Public Protector Act states that the Public Protector is not empowered to investigate the performance of judicial functions by any court of law.

21. The above provisions entrenches the separation of powers principle implicit in our Constitution and are central to the independence of the judiciary. The doctrine of separation of powers requires that other branches of government or any person refrain from interfering with the functioning of the courts. The independence of the Judiciary is viewed as a fundament underpinning of our Constitution.<sup>8</sup> The doctrine of separation of powers creates a system of checks and balances where one branch of government is held account for the exercise of power. The importance of an independent judiciary is to ensure that it can freely and fairly exercise its authority.<sup>9</sup>

22. In *Ex parte Chairperson of the Constitutional Assembly*, (the Certification judgement), the Court stated:<sup>10</sup>

<sup>8</sup> Certification Judgment. Para123

<sup>9</sup> Seedorf and Sibanda. Constitutional Law of South Africa. p11

<sup>10</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of Constitution of RSA, 1996 (4) SA 744 (CC).* para123

*An essential part of the separation of powers is that there be an independent judiciary... What is crucial to the separation of powers and the independence of the judiciary is that the judiciary should enforce the law impartially and that it should function independently of the legislature and the executive...[S]ection 165 vests the judicial authority in the courts and protects the courts against any interference with that authority.*

23. In the recent judgment of *Justice Alliance of South Africa v President of South Africa*, the Court reinforced this conception of judicial independence:<sup>11</sup>

*Judicial independence is crucial to the courts for the fulfilment of their constitutional role. It is "foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law." What is vital to judicial independence is that "the Judiciary should enforce the law impartially and that it should function independently of the Legislature and the Executive.*

24. The functions of the Public Protector are set out in section 182 of the Constitution. The Public Protector has the power as regulated by national legislation to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; to report on that conduct; and to take appropriate remedial action. In terms of section 182(2) of the Constitution the Public Protector has the additional powers and functions prescribed by national legislation. The preamble of the Public Protector Act 23 of 1994 as amended reiterates these functions defined in the Constitution.

25. According to Bishop and Woolman, the limitation of the Public Protector's powers over the judiciary is 'something of a departure from internationally accepted best practices'<sup>12</sup> as countries such as Sweden, Finland, Austria, Spain, Venezuela and, to a certain extent Britain, permits such oversight.<sup>13</sup>

26. They further noted that:

*Many ombudsmen retain jurisdiction over maladministration, negligence or inappropriate conduct by judges and other court officials. The benefits that flow from this limited oversight of judicial administration by an ombudsman are said to include: (a) access (b) independence; (c) transparency; and (d) the ability to address 'minor and unintentional bungling, mistakes and delay.' Moreover, an ombudsman can only issue reports and recommendations. She cannot prosecute or punish.*

27. The Office of the Public Protector for its part as being willing to investigate systemic issues within the court system and has in the past accepted complaints related to delays in judicial decision-making, undertaken systemic investigations into prisoners' appeals and Maintenance Courts.<sup>14</sup> It has also investigated the conduct of the National Prosecuting Authority.<sup>15</sup>

<sup>11</sup> *Justice Alliance of South Africa v President of South Africa* [2011] ZACC 23

<sup>12</sup> Bishop and Stuart, Chapter 24A Public Protector, Constitutional Law of South Africa.p10

<sup>13</sup> Bishop and Stuart, Chapter 24A Public Protector, Constitutional Law of South Africa.p10

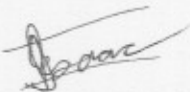
<sup>14</sup> Bishop and Woolman. p10

<sup>15</sup> Bishop and Woolman. .p10

28. Currently, the Judicial Service Commission Amendment Act 20 Of 2008 provides for a complaints mechanism against judicial misconduct. The Act establishes the Judicial Conduct Committee to receive and deal with complaints against judges. The Act also provides for a Code of Judicial Conduct which serves as the prevailing standard of judicial conduct.
29. Accordingly, the authors acknowledge that extending the jurisdiction of the Public Protector to judicial conduct may conflict with the powers accorded the Judicial Services Commission (JSC).<sup>16</sup> More importantly they note that such an extension of jurisdiction to enable the Public Protector to oversee the Courts may be seen as interference with the independence to the judiciary.<sup>17</sup>
30. Further, as the JSC provides for a complaints mechanism against judges, the proposed amendment to empower the Public Protector to investigate the decisions of judges will duplicate these functions.
31. The amendment also proposes that the Public Protector be empowered to correct and rectify judicial decision if after a preliminary investigation found there to be gross irregularities, unreasonableness and misconduct of judicial officers. The power to correct and rectify judicial decisions will allow the Public Protector to directly challenge the authority of the judiciary. There are existing mechanisms through which decisions viewed to be incorrect to be appealed or reviewed. This system has inherent checks and balances in that a higher court scrutinizes the decision of the lower court and makes a decision as to whether the judgment was correct. Allowing the Public Protector to interfere in this process would be direct interference in the independence of the judiciary.

## Conclusion

32. Extending the powers of the Public Protector to deal with grievances against judges is not without international precedent. However, our Constitution and legislation already has in place structures to deal with the issues identified in the submission.
33. In our view an extension of powers of the Public Protector to interfere with judicial decision will undermine the doctrine of separation of powers and is not in keeping with the principles of the Constitution. Further, we are of the view that the appeals and review of court decisions remain effective remedies to litigants not satisfied with court decisions.
34. Whilst the extension of the powers of the Public Protector remains a policy matter to be decided by the Committee, for the above mentioned reasons, we are of the view that it is not desirable to amend the Constitution as suggested.



---

**Ms SS Isaac**  
**Parliamentary Legal Adviser**

---

<sup>16</sup> Bishop and Stuart. p10

<sup>17</sup> Bishop and Woolman. p10



## Annexure A

[Date of commencement of s. 17: 1 July 2007.]

**CHAPTER 3  
PARENTAL RESPONSIBILITIES AND RIGHTS (ss 18-41)**

*Part 1*

*Acquisition and loss of parental responsibilities and rights (ss 18-29)*

**18 Parental responsibilities and rights**

(1) A person may have either full or specific parental responsibilities and rights in respect of a child.

(2) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right-

- (a) to care for the child;
- (b) to maintain contact with the child;
- (c) to act as guardian of the child; and
- (d) to contribute to the maintenance of the child.

(3) Subject to subsections (4) and (5), a parent or other person who acts as guardian of a child must-

- (a) administer and safeguard the child's property and property interests;
- (b) assist or represent the child in administrative, contractual and other legal matters; or
- (c) give or refuse any consent required by law in respect of the child, including-
  - (i) consent to the child's marriage;
  - (ii) consent to the child's adoption;
  - (iii) consent to the child's departure or removal from the Republic;
  - (iv) consent to the child's application for a passport; and
  - (v) consent to the alienation or encumbrance of any immovable property of the child.

(4) Whenever more than one person has guardianship of a child, each one of them is competent, subject to subsection (5), any other law or any order of a competent court to the contrary, to exercise independently and without the consent of the other any right or responsibility arising from such guardianship.

(5) Unless a competent court orders otherwise, the consent of all the persons that have guardianship of a child is necessary in respect of matters set out in subsection (3) (c).

[Date of commencement of s. 18: 1 July 2007.]

**19 Parental responsibilities and rights of mothers**

(1) The biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child.

(2) If-

- (a) the biological mother of a child is an unmarried child who does not



have guardianship in respect of the child; and

- (b) the biological father of the child does not have guardianship in respect of the child,

the guardian of the child's biological mother is also the guardian of the child.

(3) This section does not apply in respect of a child who is the subject of a surrogacy agreement.

[Date of commencement of s. 19: 1 July 2007.]

## 20 Parental responsibilities and rights of married fathers

The biological father of a child has full parental responsibilities and rights in respect of the child-

- (a) if he is married to the child's mother; or
- (b) if he was married to the child's mother at-
  - (i) the time of the child's conception;
  - (ii) the time of the child's birth; or
  - (iii) any time between the child's conception and birth.

[Date of commencement of s. 20: 1 July 2007.]

## 21 Parental responsibilities and rights of unmarried fathers

(1) The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child-

- (a) if at the time of the child's birth he is living with the mother in a permanent life-partnership; or
- (b) if he, regardless of whether he has lived or is living with the mother-
  - (i) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law;
  - (ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and
  - (iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.

(2) This section does not affect the duty of a father to contribute towards the maintenance of the child.

(3) (a) If there is a dispute between the biological father referred to in subsection (1) and the biological mother of a child with regard to the fulfilment by that father of the conditions set out in subsection (1) (a) or (b), the matter must be referred for mediation to a family advocate, social worker, social service professional or other suitably qualified person.

(b) Any party to the mediation may have the outcome of the mediation reviewed by a court.

(4) This section applies regardless of whether the child was born before or after the

commencement of this Act.

[Date of commencement of s. 21: 1 July 2007.]

## 22 Parental responsibilities and rights agreements

(1) Subject to subsection (2), the mother of a child or other person who has parental responsibilities and rights in respect of a child may enter into an agreement providing for the acquisition of such parental responsibilities and rights in respect of the child as are set out in the agreement, with-

- (a) the biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of either section 20 or 21 or by court order; or
- (b) any other person having an interest in the care, well-being and development of the child.

(2) The mother or other person who has parental responsibilities and rights in respect of a child may only confer by agreement upon a person contemplated in subsection (1) those parental responsibilities and rights which she or that other person has in respect of the child at the time of the conclusion of such an agreement.

(3) A parental responsibilities and rights agreement must be in the prescribed format and contain the prescribed particulars.

(4) Subject to subsection (6), a parental responsibilities and rights agreement takes effect only if-

- (a) registered with the family advocate; or
- (b) made an order of the High Court, a divorce court in a divorce matter or the children's court on application by the parties to the agreement.

(5) Before registering a parental responsibilities and rights agreement or before making a parental responsibilities and rights agreement an order of court, the family advocate or the court concerned must be satisfied that the parental responsibilities and rights agreement is in the best interests of the child.

(6) (a) A parental responsibilities and rights agreement registered by the family advocate may be amended or terminated by the family advocate on application-

- (i) by a person having parental responsibilities and rights in respect of the child;
- (ii) by the child, acting with leave of the court; or
- (iii) in the child's interest by any other person, acting with leave of the court.

(b) A parental responsibilities and rights agreement that was made an order of court may only be amended or terminated on application-

- (i) by a person having parental responsibilities and rights in respect of the child;
- (ii) by the child, acting with leave of the court; or
- (iii) in the child's interest by any other person, acting with leave of the court.

(7) Only the High Court may confirm, amend or terminate a parental responsibilities and rights agreement that relates to the guardianship of a child.

CR 8/11

24 May 2011

Gschwendtberg

Addr: S.F. Holzman and Mr. B.A. Mungin  
Co-Chairpersons - Constitutional Review Committee

c/o Ms. Fat Goyjaja  
Committee Section  
P.O. Box 15  
Cape Town  
8000

RE: INVITATION FOR PUBLIC SUBMISSIONS

Dear Sir/Madam,

As per our advert in the newspaper, enclosed.

I welcome, and take this opportunity, as a lay person to put forward this submission for your attention and time, and on behalf of myself CHARLAMBOS HARRY STYLIANOS TEREZAKIS ID 5805035034088 and my son EVANGELOS, a minor 4 1/2 years old, and in the general public interest.

The specific sections of the Constitution which I feel need to be reviewed are as follows, together with my reasoning.

May I be allowed to start by quoting the Founding Provisions in Chapter 1 Section 2, regarding the supremacy of the Constitution in our Republic which states that any law or conduct inconsistent with it is invalid, and that the



Please consider adding alternative (3) to read.

### SECTION 165 JUDICIAL AUTHORITY.

regarding the rights of the child.

I have also made allusions to the original Convention in the early 1990's and also handed in a substantial document to the Human Rights Commission in July 1996

My reasons for the above are because contrary to and despite the Family Advocate's reports recommending our joint parental responsibility and rights to my son during ongoing divorce proceedings, I have only had direct contact with our son for only half-an-hour since September 2008! Even telephone access has been denied. Numerous civil, social, religious, languages and cultural rights of our child EVANGELOS are being ignored and violated. Please read my enclosed letter published in THE CITIZEN newspaper on 30 March 2011.

removed from the family environment.

REGULAR BASIS, or to appropriate alternative care when

RELATIONS AND DIRECT CONTACT WITH BOTH PARENTS ON A

FROM ONE OR BOTH PARENTS, TO MAINTAIN PERSONAL

"to family care or parental care, AND WHEN SEPARATED

Please consider adding this alternative (1)(b) to read.

### SECTION 28 CHILDREN.

The problematic sections in my humble opinion are :-

obligations imposed by it must be fulfilled.

(3) No person or organ of State may interfere with the functioning of the courts; UNLESS THIS INTERFERENCE IS DEEMED NECESSARY TO UPHOLD THE FUNCTIONS OF THE COURTS AS DESCRIBED IN THE FOLLOWING SUB-SECTION.

My reasons for the above will be elaborated on when I mention the Public Protector.

### SECTION 182 Functions of Public Protector.

Please consider adding alternative (3) to read:

(3) The Public Protector may not investigate court decisions; UNLESS AFTER PRELIMINARY INVESTIGATION OF COMPLAINTS, GROSS IRREGULARITIES, UNREASONABLENESS AND MISCONDUCT OF JUDICIAL OFFICERS HAVE OCCURRED, AND IN THE PUBLIC INTEREST, MUST BE CORRECTED AND RECTIFIED.

My reasons are; my estranged spouse of questionable mental health status deserts and abandons our marital home, for no reason, and takes our son away with her. She files for divorce. Judicial Officers are not in my opinion properly trained and educated in certain matters, and make most generous awards, on highly exaggerated claims without proof, which are most unreasonable and challenge ones' ability to pay. This financial burden granted via a RULE 43 of the Divorce Act which is supposed to be of a temporary nature, and non-appealable, now becomes indefinite due to a <sup>5</sup>3 year waiting period to get a trial date. She refuses to go and work too! This is an abuse of the legal process. The judge concerned orders the opposing attorney to apply for condemnation, for