CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 55/11
[2012] ZACC 1

In the matter between:

C	First Applicant
M	Second Applicant
CENTRE FOR CHILD LAW	Third Applicant
and	
DEPARTMENT OF HEALTH AND SOCIAL DEVELOPMENT, GAUTENG	First Respondent
CITY OF TSHWANE METROPOLITAN MUNICIPALITY	Second Respondent
ITERELENG RESIDENTIAL FACILITY FOR THE DISABLED	Third Respondent
DESMOND TUTU PLACE OF SAFETY	Fourth Respondent
PABALELO PLACE OF SAFETY	Fifth Respondent
MINISTER FOR POLICE	Sixth Respondent
MINISTER FOR SOCIAL DEVELOPMENT	Seventh Respondent

Heard on : 16 August 2011

Decided on : 11 January 2012

JUDGMENT

SKWEYIYA J (Froneman J concurring):

Introduction

[1] This case concerns the confirmation of a declaration of constitutional invalidity of sections 151 and 152 of the Children's Act.[1] The North Gauteng High Court, Pretoria (High Court) declared these sections unconstitutional to the extent that they provide for a child to be removed from family care by state officials and placed in temporary safe care, but do not provide for the child to be brought before the children's court for automatic review of that removal.[2] In terms of section 172(2)(a) of the Constitution, an order of constitutional invalidity by a High Court must be referred to this Court for confirmation, without which it will have no force.[3] More precisely, therefore, this case concerns the constitutionality of the statutory framework for the removal of children from their family environment and their placement in temporary safe care at the instance of the state.

Statutory framework

[2] It is necessary first to set out the current statutory framework for the removal of children from family care by state officials. Chapter 9 of the Children's Act regulates

[1] Act 38 of 2005.

[2] *Chirindza and Others v Gauteng Department of Health and Social Welfare and Others*, North Gauteng High Court, Pretoria, Case No. 47723/2010, 27 May 2011; [2011] 3 All SA 625 (GNP) (High Court judgment).

[3] Section 172(2)(a) of the Constitution provides:

> "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

the treatment of children deemed to be in need of care and protection.[4] This Chapter contemplates two routes for the removal of these children to temporary safe care: section 151 provides for removal by court order, while section 152 provides for removal without a court order in certain circumstances.

[3] Section 151(1) empowers the children's court, if it appears from testimony before it that a child is in need of care and protection, to order that a social worker investigate the matter and report back within 90 days.[5] Section 151(2) further empowers the court, before receiving the report, to order that the child be removed and placed in temporary safe care, if this appears necessary for the safety and well-

[4] Section 150(1) and (2) describes the circumstances in which a child is deemed to be in need of care and protection:

> "(1) A child is in need of care and protection, if the child—
> (a) has been abandoned or orphaned and is without any visible means of support;
> (b) displays behaviour which cannot be controlled by the parent or care-giver;
> (c) lives or works on the streets or begs for a living;
> (d) is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;
> (e) has been exploited or lives in circumstances that expose the child to exploitation;
> (f) lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being;
> (g) may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;
> (h) is in a state of physical or mental neglect; or
> (i) is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is.
>
> (2) A child found in the following circumstances may be a child in need of care and protection and must be referred for investigation by a designated social worker—
> (a) a child who is a victim of child labour; and
> (b) a child in a child-headed household."

[5] Section 151(1) provides:

> "If, on evidence given by any person on oath or affirmation before a presiding officer it appears that a child who resides in the area of the children's court concerned is in need of care and protection, the presiding officer must order that the question of whether the child is in need of care and protection be referred to a designated social worker for an investigation contemplated in section 155(2)."

being of the child.[6] Section 151(3) preserves the court's general powers in respect of investigations.[7] Section 151(4) requires a removal order to identify the child in sufficient detail for the order to be executed.[8] Section 151(5) and (6) affords authorised people and accompanying police officials extensive powers to effect the removal of a child.[9] Section 151(7) requires the person who has removed a child to

---

[6] Section 151(2) provides:

> "A presiding officer issuing an order in terms of subsection (1) may also order that the child be placed in temporary safe care if it appears that it is necessary for the safety and well-being of the child."

[7] Section 151(3) provides:

> "When referring the question whether the child is in need of care and protection in terms of subsection (1) or when making an order in terms of subsection (2), the children's court may exercise any of the functions assigned to it in terms of section 50(1) to (3)."

Section 50(1) to (3) in turn provides:

> "(1) A children's court may, subject to section 155(9), before it decides a matter, order any person—
> (a) to carry out an investigation or further investigation that may assist the court in deciding the matter; and
> (b) to furnish the court with a report and recommendation thereon.
>
> (2) An investigation or further investigation must be carried out—
> (a) in accordance with any prescribed procedures; and
> (b) subject to any directions and conditions determined in the court order.
>
> (3) The court order may authorise a designated social worker or any other person authorised by the court to conduct the investigation or further investigation to enter any premises mentioned in the court order, either alone or in the presence of a police official, and on those premises—
> (a) remove a child in terms of sections 47 and 151;
> (b) investigate the circumstances of the child;
> (c) record any information; and
> (d) carry out any specific instruction of the court."

[8] Section 151(4) provides:

> "An order issued in terms of subsection (2) must identify the child in sufficient detail to execute the order."

[9] Section 151(5) and (6) provides:

> "(5) A person authorised by a court order may, either alone or accompanied by a police official—
> (a) enter any premises mentioned in the order;
> (b) remove the child from the premises; and
> (c) on those premises exercise any power mentioned in section 50(3)(a) to (d).
>
> (6) A police official referred to in subsection (5) may use such force as may be reasonably necessary to overcome any resistance against the entry of the premises contemplated in subsection (5)(a), including the breaking of any door or window of such premises: Provided that the police official shall first audibly demand admission to the premises and notify the purpose for which he or she seeks to enter such premises."

give notice of that fact to the child's parent, guardian or care-giver and the provincial department of social development.[10] Section 151(8) requires the court to consider all relevant facts, with the best interests of the child being the determining factor in any decision regarding removal.[11]

[4] Section 152(1) empowers a social worker or police official to remove a child and place the child in temporary safe care, without a court order, if it is reasonably believed that: (a) the child is in need of care and protection and needs immediate emergency protection; (b) the delay in obtaining a court order may jeopardise the child's safety and well-being; and (c) removal is the best way to secure the child's safety and well-being.[12] Thereafter notice of that removal must be given to the child's parent, guardian or care-giver, the clerk of the children's court and the provincial

[10] Section 151(7) provides:

> "The person who has removed a child in terms of the court order must—
> (a) without delay but within 24 hours inform the parent, guardian or care-giver of the child of the removal of the child, if that person can readily be traced; and
> (b) within 24 hours refer the matter to a designated social worker for investigation in terms of section 155(2); and
> (c) report the matter to the relevant provincial department of social development."

[11] Section 151(8) provides:

> "The best interests of the child must be the determining factor in any decision whether a child in need of care and protection should be removed and placed in temporary safe care, and all relevant facts must for this purpose be taken into account, including the safety and well-being of the child as the first priority."

[12] Section 152(1) provides:

> "A designated social worker or a police official may remove a child and place the child in temporary safe care without a court order if there are reasonable grounds for believing—
> (a) that the child—
> (i) is in need of care and protection; and
> (ii) needs immediate emergency protection;
> (b) that the delay in obtaining a court order for the removal of the child and placing the child in temporary safe care may jeopardise the child's safety and well-being; and
> (c) that the removal of the child from his or her home environment is the best way to secure that child's safety and well-being."

department of social development.[13] Section 152(4) requires the removing authority to consider all relevant facts, with the best interests of the child being the determining factor.[14] Section 152(5), (6) and (7) imposes serious penalties for misuse of the power to remove a child without a court order,[15] and section 152(8) requires compliance with a prescribed procedure.[16]

---

[13] Section 152(2) and (3) provides:

> "(2) If a designated social worker has removed a child and placed the child in temporary safe care as contemplated in subsection (1), the social worker must—
>
> (a) without delay but within 24 hours inform the parent, guardian or care-giver of the child of the removal of the child, if that person can readily be traced; and
>
> (b) not later than the next court day inform the relevant clerk of the children's court of the removal of the child; and
>
> (c) report the matter to the relevant provincial department of social development.
>
> (3) If a police official has removed a child and placed the child in temporary safe care as contemplated in subsection (1), the police official must—
>
> (a) without delay but within 24 hours inform the parent, guardian or care-giver of the child of the removal of the child, if that person can readily be traced; and
>
> (b) refer the matter to a designated social worker for investigation contemplated in section 155(2); and
>
> (c) without delay but within 24 hours notify the provincial department of social development of the removal of the child and of the place where the child has been placed; and
>
> (d) not later than the next court day inform the relevant clerk of the children's court of the removal of the child."

[14] Section 152(4) provides:

> "The best interests of the child must be the determining factor in any decision whether a child in need of care and protection should be removed and placed in temporary safe care, and all relevant facts must for this purpose be taken into account, including the possible removal of the alleged offender in terms of section 153 from the home or place where the child resides, and the safety and well-being of the child as the first priority."

[15] Section 152(5), (6) and (7) provides:

> "(5) Misuse of a power referred to in subsection (1) by a designated social worker in the service of a designated child protection organisation—
>
> (a) constitutes unprofessional or improper conduct as contemplated in section 27(1)(b) of the Social Service Professions Act, 1978 (Act No. 110 of 1978) by that social worker; and
>
> (b) is a ground for an investigation into the possible withdrawal of that organisation's designation.
>
> (6) Misuse of a power referred to in subsection (1) by a designated social worker employed in terms of the Public Service Act or the Municipal Systems Act constitutes unprofessional or improper conduct as is contemplated in section 27(1)(b) of the Social Service Professions Act, 1978 (Act No. 110 of 1978) by that social worker.

[5] Section 155(1) requires that the children's court must decide whether a child, who was removed in terms of section 151 or section 152, is in need of care and protection.[17] Section 155(2) provides that a social worker must investigate and compile a report on the matter within 90 days, before the child is brought before the children's court.[18] Section 155(6), (7) and (8) enumerates the orders the children's court may make once the child has been brought before it.[19]

---

(7) Misuse of a power referred to in subsection (1) by a police official constitutes grounds for disciplinary proceedings against such police official as contemplated in section 40 of the South African Police Service Act, 1995 (Act No. 68 of 1995)."

[16] Section 152(8) provides:

"Any person who removes a child must comply with the prescribed procedure."

[17] Section 155(1) provides:

"A children's court must decide the question of whether a child who was the subject of proceedings in terms of section 47, 151, 152 or 154 is in need of care and protection."

[18] Section 155(2) provides:

"Before the child is brought before the children's court, a designated social worker must investigate the matter and within 90 days compile a report in the prescribed manner on whether the child is in need of care and protection."

[19] Section 155(6), (7) and (8) provides:

"(6) The children's court hearing the matter may—
(a) adjourn the matter for a period not exceeding 14 days at a time; and
(b) order that, pending decision of the matter, the child must—
(i) remain in temporary safe care at the place where the child is kept;
(ii) be transferred to another place in temporary safe care;
(iii) remain with the person under whose control the child is;
(iv) be put under the control of a family member or other relative of the child; or
(v) be placed in temporary safe care.

(7) If the court finds that the child is in need of care and protection, the court may make an appropriate order in terms of section 156.

(8) If the court finds that the child is not in need of care and protection, the court—
(a) must make an order that the child, if the child is in temporary safe care, be returned to the person in whose control the child was before the child was put in temporary safe care;
(b) may make an order for early intervention services in terms of this Act; or
(c) must decline to make an order, if the child is not in temporary safe care."

[6] In summary, the current statutory framework for the removal of children from their families at the instance of the state contemplates two procedural routes for removal. Firstly, a person may testify to the children's court that a particular child is in need of care and protection, and the court may order the immediate removal of the child if this appears necessary for the child's safety and well-being.[20] Secondly, a designated social worker or police official may remove a child without a court order, if there is reason to believe that this is required urgently.[21] In both cases, a social worker will be required to compile a report on whether the child is in need of care and protection, within 90 days, after which the child must be brought before the children's court for a determination of whether she or he is indeed in need of care and protection.[22] There is no provision for automatic court review before compilation of the report.

Factual background

[7] The first and second applicants are, respectively, Mr C, father of a girl aged three, and Ms M, mother of two girls aged one and four. The third applicant is the Centre for Child Law, a law clinic established by the University of Pretoria,

[20] Section 151(1) and (2).

[21] Section 152(1).

[22] Section 155(1) and (2).

participating in this matter as an institutional applicant, in the public interest and in the interests of children in similar circumstances to the children of Mr C and Ms M.[23]

[8] The first respondent is the Department of Health and Social Development, Gauteng (Department). The second respondent is the City of Tshwane Metropolitan Municipality (City). The third, fourth and fifth respondents are, respectively, Itereleng Residential Facility for the Disabled, Desmond Tutu Place of Safety and Pabalelo Place of Safety, which are care facilities under the direction of the Department. They play no part in these proceedings. The sixth respondent is the Minister for Police and the seventh respondent is the Minister for Social Development, who is responsible for the administration of the Children's Act. The first, sixth and seventh respondents have jointly made submissions in these proceedings and are referred to collectively as the state.

[9] On Friday 13 August 2010, Mr C was conducting his trade of repairing shoes at a prominent intersection in Pretoria, as he does daily, but he was accompanied on that day by his daughter. His partner, who usually looked after her during the day, was in hospital giving birth. Ms M, who begs for her living, was present at the same

[23] Section 38 of the Constitution provides in the relevant part:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
>
> . . .
>
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
>
> (d) anyone acting in the public interest".

intersection that day, accompanied by an assistant, as she is blind, and by her two daughters.

[10] Social workers employed by the Department, together with officials from the City, had planned, for that day, an operation involving the removal of children from people found to be begging while accompanied by children. This operation was well-planned and publicised, but no court order had been sought for the removal of these children. In execution of the operation, social workers removed Mr C's and Ms M's children from their care, and placed them in the Department's care facilities, without notifying the parents of where they were.

Proceedings in the High Court

[11] Mr C and Ms M, together with the Centre for Child Law, promptly approached the High Court with a two-part application. In Part 1, they applied, on an urgent basis, for an order to restore their children to their care. On 24 August 2010, the High Court (per Preller J) ordered that Mr C's daughter be returned immediately to his care and that Ms M's children remain at the place of safety for five weeks, pending an investigation into whether they needed alternative care.[24] By order of the children's court, they have since been returned to Ms M's care, under the supervision of a social worker.[25]

[24] High Court judgment above n 2 at para 4.

[25] Id.

[12] In Part 2, the applicants sought, among other things: (a) a declaratory order in relation to the conduct of the social workers; and (b) a declaration of constitutional invalidity of sections 151 and 152 of the Children's Act, to the extent that they fail to provide for judicial review of removal and placement decisions made by social workers or police. This relief was initially opposed by the state, but subsequently was the subject of agreement between the parties, resulting in a draft order handed up to the High Court on 20 January 2011. Nevertheless, written argument was filed and oral argument was heard on 13 May 2011.

[13] On 27 May 2011, the High Court (per Fabricius J) observed that, if a child is removed in terms of section 152 of the Children's Act, the matter will be heard for the first time by the children's court after the 90 days within which the social worker is required to investigate and compile a report.[26] In contrast, its predecessor, section 12 of the repealed Child Care Act,[27] required that a child removed without a warrant had to be brought before a court within 48 hours for a formal determination of whether that removal was justified, which would also allow a parent to appear and to challenge the removal.[28] The High Court found that, although section 152 does require the person conducting a removal to notify the parent, guardian or care-giver of the child, as well as the clerk of the children's court, this does not amount to a notice to appear in court, as was required under the repealed Child Care Act.[29]

[26] High Court judgment above n 2 at para 12.

[27] Act 74 of 1983.

[28] High Court judgment above n 2 at para 12.

[29] Id.

[14] The High Court held that this clearly does not create an opportunity for automatic review of the removal within a reasonable timeframe, and that the lacuna created by the Children's Act renders the legislation procedurally deficient, with inadequate protective mechanisms in place to ensure that drastic interference with the child's right to parental care is not arbitrary, unreasonable or unjust.[30] The lacuna is compounded by section 155, which strongly implies that there will be no review of the removal until after the receipt of the social worker's report, and that the issue at that stage would not be whether the removal was justified, but rather whether the child is in need of care and protection and, if so, what the best outcome would be.[31] The High Court concluded that the state has a duty to put in place measures that ensure the best interests of the child at all times, and that specific provision for the review of removals is a minimum requirement of that duty.[32]

[15] Consequently, the High Court declared sections 151 and 152 of the Children's Act unconstitutional to the extent that they fail to provide for a child, who has been removed in terms of those sections and placed in temporary safe care, to be brought before the children's court for a review of the removal and placement in temporary safe care.[33] The Court further made an interim order, pending confirmation of the order of constitutional invalidity by this Court, to the effect that certain words would be read in to the impugned provisions to remedy the unconstitutionality, as follows:

[30] Id at para 13.

[31] Id at para 14.

[32] Id.

[33] Id at para 17.

The High Court declined to make any order in respect of the conduct of the social workers who removed the children of Mr C and Ms M from their care. Id at para 19.

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

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

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

18.2.1. 'without delay but within 24 hours' immediately before the word 'refer'; and

18.2.2. 'to place the matter before the children's court for review as contemplated in section 152(2)(d)' immediately before the words 'for investigation'

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

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

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

Proceedings in this Court

[16] On 20 June 2011, the applicants approached this Court under rule 16(4),[34] seeking an order confirming the High Court's order of constitutional invalidity, but

[34] Constitutional Court Rule 16(4) provides:

"A person or organ of state entitled to do so and desirous of applying for the confirmation of an order in terms of section 172(2)(d) of the Constitution shall, within 15 days of the making of such order, lodge an application for such confirmation with the Registrar and a copy thereof

varying it to correct certain typographical errors in the original order. Confirmation is not opposed by any party. An application was made from the bar by the applicants and the state, seeking an amendment of Form 36 of the Regulations to the Children's Act to include a notice to the parents or family of a child, removed in terms of section 151 or 152 of the Children's Act, to appear in the children's court for a review of the removal.

[17] The applicants submit that the absence of a provision for automatic review of the removal and placement in temporary safe care of a child is in breach of children's constitutional rights to family care or parental care, the best interests of the child being considered paramount and the rights to dignity and privacy to the extent that they include and protect the right to family life. The balancing of these rights is necessary. But a critical part of this balancing is automatic review of the removal of the child. This requirement, which was provided for in the repealed Child Care Act, is also a cornerstone of international law relating to the removal of children. Its absence from the Children's Act, it is argued, thus represents a retrogressive step.

[18] The applicants contend that the inherent right of review of administrative actions, enshrined in section 33 of the Constitution,[35] is insufficient to provide

---

> with the Registrar of the court which made the order, whereupon the matter shall be disposed of in accordance with directions given by the Chief Justice."

Section 172(2)(d) of the Constitution provides:

> "Any person or organ of state with sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

[35] Section 33 provides:

adequate protection of the best interests of the child for four reasons: (a) section 155(2) of the Children's Act strongly implies that there will be no review of the removal; (b) even if there is such a right, it would require an application to be brought by the parent or child, which is too onerous a burden; (c) the removal of a child from parental care is a serious infringement of important rights, which gives the state an additional duty to take steps to ensure the best interests of the child, a minimum requirement of which is automatic review; and (d) given the number of people affected by the provision, it must make expressly clear that automatic review is required in all cases. Thus, the order of constitutional invalidity must be confirmed.

[19] The applicants urge that, subject to the correction of the error identified in the notice of motion, the order of the High Court is sufficient to cure the constitutional invalidity.[36] Parliament would be entitled to amend the provisions at a later stage should it seek a different solution.

[20] The state associates itself with the applicants' submissions. However, in addition to the reasons advanced by the applicants, the state contends that the

---

"(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must—
(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
(c) promote an efficient administration."

Parliament has enacted the Promotion of Administrative Justice Act 3 of 2000 to give effect to these rights.

[36] See the reading-in order of the High Court, quoted in [15] above.

impugned sections are unconstitutional because they infringe section 34 of the Constitution,[37] in that they oust the jurisdiction of the children's court for a period of 90 days, during which time nobody may access the court. Further, the limitation of constitutional rights is neither reasonable nor justifiable under section 36 of the Constitution.

Condonation

[21] The applicants requested condonation for their failure to comply with rule 16(4), as they had not annexed the correct High Court order to their main application papers. I would grant condonation.

Issues for determination

[22] The following broad issues arise for determination:

(a) Are any rights limited by the impugned provisions?

(b) If so, are these limitations reasonable and justifiable?

(c) If not, what are the appropriate remedies?

Are any rights limited by the impugned provisions?

[23] The coercive removal of a child from her or his home environment is undoubtedly a deeply invasive and disruptive measure. Uninvited intervention by the state into the private sphere of family life threatens to rupture the integrity and

[37] Section 34 provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

continuity of family relations, and even to disgrace the dignity of the family, both parents and children, in their own esteem as well as in the eyes of their community. Both sections 151 and 152 of the Children's Act authorise removals, yet neither section subjects removals to automatic review, which would enable the affected family, including the removed child, to make representations on whether removal was in the best interests of the child. Accordingly, it must be determined whether the impugned provisions impose limitations on any rights enshrined in the Constitution.

[24] The removal of a child from the reach of her or his family clearly constitutes a limitation of the child's right to "family care or parental care" in terms of section 28(1)(b) of the Constitution.[38] Although section 28(1)(b) itself also contemplates "appropriate alternative care when removed from the family environment", this is a secondary right, not an equivalent alternative right. It does not necessarily render a removal constitutionally compatible with the primary right to family care or parental care. If that were the case, the primary right would be entirely superfluous and legally meaningless, and section 28(1)(b) would entrench only a right to appropriate care, irrespective of environment. In my view, Van Dijkhorst J was correct in his interpretation of section 28(1)(b) in *Jooste v Botha*,[39] namely that it envisages—

[38] Section 28(1) provides in the relevant part:

> "Every child has the right—
>
> . . .
>
> (b) to family care or parental care, or to appropriate alternative care when removed from the family environment".

[39] 2000 (2) SA 199 (T).

> "a child in [the] care of somebody who has custody over him or her. To that situation every child is entitled. That situation the State is constitutionally obliged to establish, safeguard and foster. The State may not interfere with the integrity of the family."[40]

[25] This interpretation is fortified by the formulation of the right in international law, which we are bound by section 39(1)(b) of the Constitution to consider.[41] The African Charter on the Rights and Welfare of the Child (ACRWC)[42] provides that "[e]very child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents", [43] while the United Nations Convention of the Rights of the Child (UNCRC)[44] guarantees every child's right "to know and be cared for by his or her parents",[45] and "to preserve his or her identity, including . . . family relations as recognized by law without unlawful interference".[46]

[26] That section 28 creates distinct rights that are not subject to a single internal qualification is also apparent from this Court's decision in *Fitzpatrick*:[47]

---

[40] Id at 208F.

[41] Section 39(1) provides in the relevant part:

> "When interpreting the Bill of Rights, a court, tribunal or forum—
>
> . . .
>
> (b) must consider international law".

[42] OAU Doc CAB/LEG/24.9/49 (1990). The ACRWC was adopted on 11 July 1990 and entered into force on 29 November 1999. South Africa signed the ACRWC on 10 October 1997 and ratified it on 7 January 2000.

[43] Article 19(1) of the ACRWC.

[44] 28 *ILM* 1456 (1989). The UNCRC was adopted on 20 November 1989 and entered into force on 2 September 1990. South Africa signed the UNCRC on 29 January 1993 and ratified it on 16 June 1995.

[45] Article 7(1) of the UNCRC.

[46] Article 8(1) of the UNCRC.

[47] *Minister for Welfare and Population Development v Fitzpatrick and Others* [2000] ZACC 6; 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC).

> "Section 28(2) requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1)."[48]

[27] In my view, therefore, the impugned provisions also impose a limitation on the "expansive guarantee",[49] in section 28(2) of the Constitution, that "[a] child's best interests are of paramount importance in every matter concerning the child." In *S v M*,[50] this Court held:

> "The paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely, the interests of children who may be concerned."[51]

Section 28(2) of the Constitution requires an appropriate degree of *consideration* of the best interests of the child. Removal of a child from family care, therefore, requires adequate consideration. As a minimum, the family,[52] and particularly the child

---

[48] Id at para 17.

[49] *Sonderup v Tondelli and Another* [2000] ZACC 26; 2001 (1) SA 1171 (CC); 2001 (2) BCLR 152 (CC) at para 29.

[50] *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC).

[51] Id at para 42.

[52] See the analogous case of *New Brunswick (Minister of Health and Community Services) v G (J)* [1999] 3 SCR 46 at para 73, in which the Supreme Court of Canada held:

> "Effective parental participation at the hearing is essential for determining the best interests of the child in circumstances where the parent seeks to maintain custody of the child. The best interests of the child are presumed to lie within the parental home. However, when the state makes an application for custody, it does so because there are grounds to believe that is not the case. A judge must then determine whether the parent should retain custody. In order to make this determination, the judge must be presented with evidence of the child's home life and the quality of parenting it has been receiving and is expected to receive. The parent is in a

concerned, must be given an opportunity to make representations on whether removal is in the child's best interests. Accordingly, the impugned provisions of the Children's Act inflict a limitation on the right in section 28(2), in that they do not provide for adequate consideration of the best interests of the child.

[28] In addition to the limitation of the right to family or parental care, removal without automatic judicial review also infringes the right of access to courts under section 34 of the Constitution.[53] Although section 45(1) of the Children's Act provides that the children's court "may adjudicate any matter" relating to the care, protection or well-being of a child,[54] and section 53 entitles any person acting in the interest of the child to approach the children's court,[55] this does not mean that the right

---

unique position to provide this information to the court. If denied the opportunity to participate effectively at the hearing, the judge may be unable to make an accurate determination of the child's best interests."

[53] Quoted in full above n 37.

[54] Section 45(1) provides:

"Subject to section 1(4), a children's court may adjudicate any matter, involving—
(a) the protection and well-being of a child;
(b) the care of, or contact with, a child;
(c) paternity of a child;
(d) support of a child;
(e) the provision of—
(i) early childhood development services; or
(ii) prevention or early intervention services;
(f) maltreatment, abuse, neglect, degradation or exploitation of a child, except criminal prosecutions in this regard;
(g) the temporary safe care of a child;
(h) alternative care of a child;
(i) the adoption of a child, including an inter-country adoption;
(j) a child and youth care centre, a partial care facility or a shelter or drop-in centre, or any other facility purporting to be a care facility for children; or
(k) any other matter relating to the care, protection or well-being of a child provided for in this Act."

[55] Section 53 provides:

"(1) Except where otherwise provided in this Act, any person listed in this section may bring a matter which falls within the jurisdiction of a children's court, to a clerk of the children's court for referral to a children's court.

(2) The persons who may approach a court, are:

of affected families to access to courts is not impaired in practice. Although their access to courts is not denied, it is no doubt delayed. This Court has held before that an affected party's right of recourse to a court of law after the limitation of a right "does not cure the limitation of the right; it merely restricts its duration."[56]

Are these limitations reasonable and justifiable?

[29] Having found that the impugned provisions impose limitations on the rights of children to family care or parental care and to paramount consideration of their best interests, as well as the right of access to courts, it must now be considered whether these limitations pass constitutional muster. Section 36(1) of the Constitution states:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

[30] Children's rights, and the rights relating to family life, bear tremendous importance in a caring constitutional democracy. It is for this reason that—

(a) A child who is affected by or involved in the matter to be adjudicated;
(b) anyone acting in the interest of the child;
(c) anyone acting on behalf of a child who cannot act in his or her own name;
(d) anyone acting as a member of, or in the interest of, a group or class of children; and
(e) anyone acting in the public interest."

[56] *Chief Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at para 20. See also *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 90.

> "section 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk. Similarly, in situations where rupture of the family becomes inevitable, the State is obliged to minimise the consequent negative effect on children as far as it can."[57]

In *Du Toit*,[58] this Court held that "[i]t is clear from section 28(1)(b) that the Constitution recognises that family life is important to the well-being of all children",[59] and in *S v M*, it emphasised "the importance of maintaining the integrity of family care."[60]

[31] The purpose of the impugned provisions is a legitimate one, namely "to protect children from discrimination, exploitation and any other physical, emotional or moral harm or hazards",[61] and "to provide care and protection to children who are in need of care and protection".[62] The serious circumstances described in the definition of a "child in need of care and protection", in section 150 of the Children's Act,[63] testify to the importance of affording the state the power and procedures to remove children from the family environment to ensure their care and protection. This is indeed required of the state by the right of every child "to be protected from maltreatment,

[57] *S v M* above n 50 at para 20.

[58] *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* [2002] ZACC 20; 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC).

[59] Id at para 18.

[60] *S v M* above n 50 at para 38.

[61] Section 2(f) of the Children's Act.

[62] Section 2(g) of the Children's Act.

[63] See above n 4.

neglect, abuse or degradation" in section 28(1)(d) of the Constitution,[64] and is contemplated in the second part of section 28(1)(b) of the Constitution.[65]

[32] In determining the appropriate relationship between the limitation and its important purpose, it is helpful to consider the applicable international law. Article 19(1) of the ACRWC provides that "[n]o child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law that such separation is in the best interest of the child." Furthermore, Article 9 of the UNCRC sets specific requirements in respect of the removal of children from their families:

> "(1) States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. . . .
>
> (2) In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known. . . ."[66]

[33] In *S v M*, this Court considered the interpretive influence of the UNCRC on section 28 of the Constitution:

---

[64] Section 28(1) of the Constitution provides:

> "Every child has the right—
>
> (d) to be protected from maltreatment, neglect, abuse or degradation".

[65] Section 28(1) of the Constitution provides:

> "Every child has the right—
>
> (b) to family care or parental care, or to appropriate alternative care when removed from the family environment".

[66] Article 9(1) and (2) of the UNCRC.

> "[S]ection 28 must be seen as responding in an expansive way to our international obligations as a State party to the [UNCRC]. Section 28 has its origins in the international instruments of the United Nations. Thus, since its introduction the [UNCRC] has become the international standard against which to measure legislation and policies".[67] (Footnote omitted.)

[34] The right to parental care or family care requires that the removal of children from the family environment must be mitigated in the manner described in the UNCRC, in order to satisfy the standard set for the limitation of rights in section 36(1) of the Constitution. The requirements that the removal be subject to automatic review and that all interested parties, including the child concerned, be given an opportunity to be heard, in my view, stand as essential safeguards of the best interests of the child.

[35] Despite the importance of the purpose of the limitation, the removal and separation of children from their families, for up to 90 days, cannot be taken lightly. This separation may rupture the family unit and hamper the development of a child. It is imperative, therefore, that the statutory framework for the removal of children provides for an appropriate degree of judicial oversight of the removals.

[36] The removal measures would be much less restrictive of the rights concerned if they were subject to automatic judicial review within a reasonable time. An appearance in the children's court soon after the removal would allow the family, including the child, to make representations, and would allow the court to consider whether the removal is in the best interests of the child. If they fail to afford this

[67] *S v M* above n 50 at para 16.

opportunity, the impugned provisions, despite the importance of their purpose, are too restrictive of the rights of the child and the family, and therefore cannot survive constitutional scrutiny. This is so in the light of the availability of a less restrictive alternative, namely provision for an automatic appearance in the children's court within a certain reasonable time after the removal, in order for the court to review the removal. It is noteworthy that section 12 of the repealed Child Care Act required a child removed without a warrant to be brought before a court within 48 hours for a formal determination of whether that removal was justified.[68]

[37] It might be argued that this remedy is already available, since no provision precludes the family from approaching a court with an urgent application, in the exercise of their rights under sections 33 and 34 of the Constitution.[69] Although this may be true in a formal sense, it is not true in a functional sense. It is unfair for the law to empower the state to initiate the removal of a child from her or his family, but to place the onus on the affected family to initiate the review of that removal. By requiring the family to bear, at least initially, the cost of pursuing review proceedings, the impugned provisions are too restrictive of children's rights protected under section

[68] Section 12(2) of the Child Care Act provided:

> "The policeman, social worker or authorized officer who has so removed a child shall as soon thereafter as may be—
>
> (a) inform the parent or guardian of the said child or person in whose lawful custody the child is of his removal if such parent, guardian or person is known to be in the district from where the child was removed and can be traced without undue delay;
>
> (b) inform a children's court assistant concerned of the reasons for the child's removal; and
>
> (c) bring the child or cause him to be brought before the children's court of the district in which is situate the place from where the child was removed."

[69] See above n 35 and n 37.

28(1)(b) and (2), as well as the right of access to courts in section 34 of the Constitution.

[38] I have considered whether the limitations on section 28(1)(b) and (2) and section 34 of the Constitution brought about by sections 151 and 152 of the Children's Act are reasonable and justifiable. I conclude that the limitation cannot be justified. Accordingly, the impugned provisions are inconsistent with the Constitution to the extent that they fail to provide for a child, who has been removed in terms of those provisions, to be brought before the children's court for a review of that removal. It follows that the declaration of constitutional invalidity by the High Court falls to be confirmed.

[39] I have read the separate judgment prepared by my colleague Yacoob J and I find myself unable to agree with his analysis of the limitation of rights and the question of its justification. Yacoob J sees the limitation in the lack of automatic review of removals. I find the limitation in the removal itself. In my view, the coercive removal of children from their family environment, irrespective of the reasons for that removal, indeed limits the children's rights to parental care or family care and to paramount consideration of their best interests, as well as the right of the children and their families to access the courts. The fact that there are strict requirements for removal to take place does not mean that no rights are limited. Rather, it serves to render the limitation less restrictive of those rights, and therefore

more justifiable.[70] In this case, I find that the requirements are not strict enough, since they do not include an automatic appearance in the children's court for a review of the removal, and therefore that the limitation is too restrictive of the rights concerned. Accordingly, the limitation is unjustifiable and the impugned provisions, in terms of which the limitation takes place, are unconstitutional.

[40] It is, however, necessary for this Court to determine what just and equitable relief it ought to grant.

What are the appropriate remedies?

[41] Having determined that sections 151 and 152 of the Children's Act are unconstitutional, I now turn to the remedy sought in relation to the merits.

[42] It is curious that the High Court did not declare section 155(2) unconstitutional, despite issuing an order striking certain words from it.[71] If the provision is not unconstitutional, a court surely would not, and indeed could not, cure it by any means. In my view, however, the High Court was correct not to declare section 155(2)(b) unconstitutional. Section 155 relates to the children's court's consideration of the social worker's report, and the determination of whether the child in question is in need of care and protection, prospectively.[72] The introductory words "[b]efore the

[70] Likewise, the setting of strict requirements for the use of lethal force by police officers, in terms of section 49 of the Criminal Procedure Act 51 of 1977, does not mean that the right to life is not limited when such force is used. Rather, it means that the limitation is less restrictive of the right to life and therefore more justifiable.

[71] High Court judgment above n 2 at para 18.4.

[72] See section 155(1), (2), (6), (7) and (8) of the Children's Act, quoted in full above n 17, n 18 and n 19.

child is brought before the children's court" need not, and constitutionally cannot, be construed so as to preclude a prior appearance before the children's court for a review of the removal itself. Section 155(2)(b) is accordingly not unconstitutional in this respect and requires no remedy.

[43] Section 172 of the Constitution empowers this Court to declare a law that is inconsistent with the Constitution invalid to the extent of its inconsistency. In that event the Court is required to make an order that is just and equitable, including an order suspending a declaration of invalidity to allow a competent authority to correct the defect. The decision that we should make is whether this Court should itself undertake a course that would remedy the defect or leave it to Parliament to do. This, of course, brings into question, among other things, the doctrine of the separation of powers in our constitutional democracy.

[44] How a court exercises its duties to remedy the constitutional invalidity of a statute calls for a degree of restraint in appropriate circumstances,[73] The extent to which a court should refrain from interfering in the legislative realm, however, will largely be determined by the facts and circumstances of each case, for which reason it would be undesirable to lay down a general rule as to when or how a court should do so.[74]

[73] *Glenister v President of the Republic of South Africa and Others* [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) at para 42 and *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) (*National Coalition*) at para 66.

[74] *National Coalition* above n 73 at para 66.

[45] The applicants pray for the remedies of reading-in and severance. The state and the remaining respondents associate themselves with the request. Both remedies are sought in relation to section 155(2), while only reading-in is sought in relation to sections 151(7) and 152(2). As I have already determined that section 155(2) is not unconstitutional, the question of the appropriate relief in relation to it falls away, and only the question of reading-in in relation to sections 151(7) and 152(2) remains.

[46] In the ordinary course, where reading-in can provide an effective remedy, it will generally be preferable to a bald declaration of invalidity[75] and to a suspensive order, coupled with interim relief.[76] This preference of remedies, however, is not strict, but simply indicates the relative suitability of remedial options. For one to gain a full appreciation of all remedial options, it is useful to evaluate each possibility on its own merits.

[47] It is clear that a legal framework for the removal of children from the home is of significant import to vindicating the rights of children, to protecting them from harm, to securing the rights of parents and for specifying how the state's duties in relation to children ought properly to be discharged in appropriate circumstances. This framework is undoubtedly necessary.

[75] *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa intervening)* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) at para 88.

[76] *J and Another v Director General, Department of Home Affairs, and Others* [2003] ZACC 3; 2003 (5) SA 621 (CC); 2003 (5) BCLR 463 (CC) at para 22.

[48] It is possible to order a suspension of invalidity to give the Legislature an opportunity to cure the statutory defect.[77] Indeed, where there exists a host of possibilities for curing the constitutional invalidity and a court is able to provide appropriate interim relief to the affected litigant, it will generally be best to permit the Legislature to determine in the first instance how the unconstitutionality should be cured.[78]

[49] However, the interests of children and their parents, particularly those who are indigent, like Mr C and Ms M, should bear no risk of undue infringement, insofar as possible. If a suspensive order is granted, then the offending provisions will remain intact and will continue to permit unjustifiable incursions into the rights of children.

[50] When reading words into a statute, the relevant considerations to be borne in mind are what the consequences of the order would be and whether they would amount to an unconstitutional intrusion into the legislative realm.[79] A court must therefore define the reading-in in a sufficiently precise manner,[80] which is in keeping

[77] Section 172(1)(b)(ii) of the Constitution.

[78] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 64.

[79] *National Coalition* above n 73 at para 68.

[80] Id at para 75; *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) at para 61; and *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (*Khosa*) at para 88.

with the legislative scheme, so as to impair "the legislative purpose as little as possible while removing the constitutional complaint."[81]

[51] Reading-in is most commonly used to cure unconstitutionality based on the under-inclusiveness of a statutory provision that unjustifiably infringes the rights of identifiable groups that are excluded from certain benefits.[82] However—

> "reading in is not necessarily confined to cases in which it is necessary to remedy a provision that is under-inclusive. There is no reason in principle why it should not also be used as part of the process of narrowing the reach of a provision that is unduly invasive of a protected right."[83]

[52] I have found that sections 151 and 152 of the Children's Act are unconstitutional insofar as they do not provide for automatic judicial review of the removal process and thereby lack a method for determining whether there was just cause for the removal. To cure the deficit, something must be added to these sections. Reading-in offers this solution. What is now required is to assess whether the reading-in, as suggested, cures the defect and is framed with sufficient economy and precision, and, if not, then what the preferable alternatives would be.

---

[81] *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board, and Others* [2006] ZACC 7; 2009 (1) SA 565 (CC); 2006 (8) BCLR 901 (CC) at para 37.

[82] *National Coalition* above n 73; *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others* [2005] ZACC 19; 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC); *Khosa* above n 80; and *Satchwell v President of the Republic of South Africa and Another* [2002] ZACC 18; 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC).

[83] *S v Manamela and Another (Director-General of Justice intervening)* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at para 57.

[53] The applicants and the state submit that the insertion into both sections 151(7) and 152(2) as subsection (d) of the following words would cure the unconstitutionality:

> "within 48 hours place the matter before the children's court having jurisdiction for a review of the removal and continued placement of the child, give notice of the date and time of the review to the child's parent, guardian or care-giver, and cause the child to be present at the review proceedings where practicable."

[54] Related to the reading-in of the abovementioned subsection (d), a reading-in of the words emphasised below into section 152(3)(b) is also sought, so that it would provide:

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

[55] At the hearing the applicants and the state also submitted orally from the bar that provision should be made in Form 36 of the Regulations to the Children's Act, to include a notice to the parents or family of a child, removed in terms of section 151 or 152, to appear in the children's court for a review of such removal. It was submitted that, in contradistinction, Form 4 of the Regulations to the repealed Child Care Act made adequate provision in this regard. This application, regrettably, was made without having furnished the Court with copies of the relevant documentation. I need not decide this issue.

[56] I agree with the amendments to sections 151 and 152, as proposed by Yacoob J in his judgment.[84]

[57] By making a final order of this kind, however, I do not suggest that the Court has crowded-out Parliament's role in further investigating how best to serve the interests of children, for whom a removal from the home is necessary, and in enacting appropriate legislation. Indeed, a final order of reading-in does not give the judiciary the ultimate word on pronouncing on the law. Instead it initiates a conversation between the Legislature and the courts, for Parliament's legislative power to amend the remedy continues to subsist beyond the granting of the relief, and may be exercised within constitutionally permissible limits at any future time.[85] I would therefore encourage the Legislature to exercise its entitlement to alter the remedy, should it see fit to do so, in view of its specialist expertise and, of course, subject to its constitutional mandate.

Costs

[58] No argument has been advanced on why we should interfere with the costs made by the High Court. That order stands. These being confirmatory proceedings the applicants were obliged to come to this Court and are thus entitled to costs.

[84] See [92]-[94] below.
[85] *National Coalition* above n 73 at para 76.

YACOOB J (Moseneke DCJ, Khampepe J, Nkabinde J and Van der Westhuizen J concurring):

Introduction

[59] The North Gauteng High Court declared sections 151 and 152 of the Children's Act[1] unconstitutional only to the extent that the Act does not provide for a child removed from family care[2] to be brought before the Children's Court for automatic review of the removal.[3] We are required to decide whether to confirm this declaration of invalidity.[4]

[60] I have read the judgments of Jafta J and Skweyiya J with considerable interest. I do not agree with the reasoning and conclusion by Jafta J. Although I agree with Skweyiya J's conclusion that the High Court order should be confirmed in substance, the approach preferred in this judgment is sufficiently different to warrant writing. I do however also agree with the reasoning and the conclusion that condonation for non-compliance with Rule 16(4) should be granted.

Removals authorised by the Act

[61] Removals authorised by sections 151 (section 151 removal) and 152 (section 152 removal) of the Act must first be briefly described.

---

[1] Act 38 of 2005 (the Act).

[2] Sections 151(2) and 152(1) of the Act.

[3] *Chirindza and Others v Gauteng Department of Health and Social Welfare and Others*, North Gauteng High Court, Pretoria, Case No. 47723/2010, 27 May 2011; [2011] 3 All SA 625 (GNP) (High Court judgment).

[4] In terms of section 172(2)(a) of the Constitution.

[62] Three provisions of section 151 are central to a decision of this case. The first[5] empowers a Children's Court to refer the question whether the child is in need of care and protection to a designated social worker for investigation, if it appears from evidence before it that a child residing within its area of jurisdiction is in need of care and protection. But a court making this referral may go further: it may place the child in temporary safe care, but only if this course is necessary for the safety and well-being of the child.[6] Finally, in making its decision the court is enjoined to ensure that the best interests of the child is "the determining factor in any decision whether a child in need of care and protection should be removed and placed in temporary safe care".[7] The court must also take into account "the safety and well-being of the child as the first priority."[8]

[63] The section 152 removal is not effected by a court but by a designated social worker or police official, both of whom are empowered to place the child in temporary safe care in certain circumstances. The social worker or police official may do so only if there are reasonable grounds for believing that three pre-requisites are met. These are that: first, the child is not only in need of care and protection but needs immediate emergency protection; second, the delay in obtaining a court order may jeopardise the child's safety and well-being; and third, the removal of the child from

[5] Section 151(1) of the Act provides:

> "If, on evidence given by any person on oath or affirmation before a presiding officer it appears that a child who resides in the area of the children's court concerned is in need of care and protection, the presiding officer must order that the question of whether the child is in need of care and protection be referred to a designated social worker for an investigation contemplated in section 155(2)."

[6] Section 151(2) of the Act.
[7] Section 151(8) of the Act.
[8] Id.

the home environment is the best way to secure the child's safety and well-being.[9] Like in section 151 removals, the social worker and police official are also mandated to ensure that the best interests of children is the determining factor in the decision whether to remove the child, and to take into account the safety and well-being of the child "as the first priority."[10] It must also be mentioned that the misuse of this power by a social worker is "unprofessional or improper conduct";[11] misuse by a police official is ground for disciplinary proceedings against that official.[12]

[64] Additionally, the Act places certain reporting and referral duties upon the person removing the child pursuant to a section 151(2) court order,[13] the designated social worker[14] and the police official[15] who remove the children in terms of section 152. Each of these people who effect the removal has a duty to inform the parent, guardian or care-giver of the child's removal without delay but within 24 hours and

[9] Section 152(1) of the Act provides:

> "A designated social worker or a police official may remove a child and place the child in temporary safe care without a court order if there are reasonable grounds for believing—
>
> (a) that the child—
>
> (i) is in need of care and protection; and
>
> (ii) needs immediate emergency protection;
>
> (b) that the delay in obtaining a court order for the removal of the child and placing the child in temporary safe care may jeopardise the child's safety and well-being; and
>
> (c) that the removal of the child from his or her home environment is the best way to secure that child's safety and well-being."

[10] Section 152(4) of the Act.

[11] Sections 152(5)(a) and 152(6) of the Act.

[12] Section 152(7) of the Act.

[13] Section 151(7) of the Act.

[14] Section 152(2) of the Act.

[15] Section 152(3) of the Act.

only if that person can be readily traced.[16] The person effecting the removal is also required to report the matter to the relevant provincial Department of Social Development.[17] The person who removes the child pursuant to a court order[18] and the police official[19] who makes the removal pursuant to section 152 are required to refer the matter to a designated social worker for investigation. A designated social worker and the police officer who remove the child, are both obliged to inform the clerk of the Children's Court having jurisdiction of the removal "not later than the next court day".[20]

[65] It will have been noted that children can only be removed if, amongst other things, they are found in need of care and protection. The Act defines that a child is deemed in need of care and protection if the child:

> "(a) has been abandoned or orphaned and is without any visible means of support;
> (b) displays behaviour which cannot be controlled by the parent or care-giver;
> (c) lives or works on the streets or begs for a living;
> (d) is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;
> (e) has been exploited or lives in circumstances that expose the child to exploitation;
> (f) lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being;
> (g) may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be

[16] Sections 151(7)(a), 152(2)(a) and 152(3)(a) of the Act.

[17] Sections 151(7)(c), 152(2)(c) and 152(3)(c) of the Act.

[18] Section 151(7)(b) of the Act.

[19] Section 152(3)(b) of the Act.

[20] Sections 152(2)(b) and 152(3)(d) of the Act.

> exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;
>
> (h) is in a state of physical or mental neglect; or
>
> (i) is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is."[21]

[66] The person who removes the child in terms of a court order and the police official who removes the child on an urgent basis must refer the matter for investigation. That investigation is prescribed elsewhere in the Act.[22] The provision[23] obliges a designated social worker within 90 days of the section 151 or section 152 removal[24] to compile a report on whether the child is in need of care and protection. The Children's Court must then hear the matter and make an appropriate order.[25]

[67] In summary, it must be said that the conditions that must be fulfilled before a child can be removed are indeed stringent. A child can never be removed unless a court concludes or the designated social worker or police official reasonably believes that the child is in need of care and protection. And that term is carefully expanded in the Act. Once this requirement has been established the Children's Court may order removal of the child only if this is necessary for the safety and well-being of the child. A court cannot do so if removal is merely desirable.

---

[21] Section 150(1).

[22] Section 155(2).

[23] Id.

[24] This also applies to children who are subject to proceedings in terms of section 47 and section 154 of the Act.

[25] Section 155(6), 155(7) and 155(8).

[68] A social worker or police official can similarly only effect a removal if, in their reasonable belief, immediate emergency protection is so necessary that the delay in obtaining a court order may jeopardise the child's safety and well-being, and then only if the removal of the child is the best way to secure that child's safety and well-being. If there is time to obtain a court order the designated social worker and police official must take steps to get one. The designated social worker and police official are precluded from doing what they think is better for the child: removal must be best for the child's safety and security. Finally, there are important after-removal duties and prescribed penalties for social workers or police officials who misuse their removal powers.

In the High Court

[69] The High Court accepted the submissions of the parties in relation to the reasons why the absence of an automatic court review process after the removal had been effected rendered the provision inconsistent with the Constitution. The Court emphasised that the social worker's report would be available only in 90 days and that poor, illiterate and young people "would not be able generally speaking, to provide proper instructions to anyone, even if they were ultimately assisted by an organisation".[26] The Court also said pertinently "[i]t would simply be too onerous to expect a parent, guardian or caregiver of a child . . . subjected to a removal . . . to bring an application of their own accord to either the Children's Court or the High

[26] High Court judgment above n 3 at para 14.

Court."[27] It was also stressed that the "removal relates to the liberty of a child and to an intrusion into family life."[28]

[70] The Court accordingly held that the provisions were inconsistent with the Constitution to the extent that there was no provision for automatic review by a court in the presence of the child as well as the parents, guardian or care-givers (I will refer to parents, guardians and care-givers as parents). There was neither evidence nor submission before the High Court on whether the limitation was justifiable, and the Court does not refer to this aspect in its judgment. The Court granted the remedy set out in an agreed draft order.

[71] The High Court accordingly made the following order in relation to the constitutionality of the provisions:[29]

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

Evaluation

[72] This Court will confirm the declaration of invalidity of section 151 and section 152 of the Act if it has been established that these provisions limit rights in the

[27] Id.

[28] Id.

[29] The order of the High Court on remedy is set out later at [85] below when remedy is considered.

Constitution and that the limitation is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. If the declaration of invalidity falls to be confirmed, the appropriateness of the remedy granted by the High Court must be investigated.

[73] In my view, the rights that are limited by the failure to provide for automatic review by a court in the presence of the child and parents are those set out in section 28 of the Constitution concerning children and section 34 of the Constitution concerning access to courts. I deal first with section 28.

[74] Section 28, to the extent relevant, provides:

> "(1) Every child has the right—
>
> . . .
>
> (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
>
> (c) to basic nutrition, shelter, basic health care services and social services;
>
> (d) to be protected from maltreatment, neglect, abuse or degradation;
>
> (e) to be protected from exploitative labour practices;
>
> (f) not to be required or permitted to perform work or provide services that—
>
> (i) are inappropriate for a person of that child's age; or
>
> (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
>
> . . .
>
> (2) A child's best interests are of paramount importance in every matter concerning the child."

[75] The fact that these removal provisions have been enacted to give effect to section 28 cannot be gainsaid. It can never be in the interests of children for their safety or well-being to be endangered. The removal provisions are aimed precisely at preventing this and ensuring that the interests of the children are positively catered for. One has to do no more than compare the circumstances in which children can be found in need of care and protection[30] as well as the circumstances in which a Children's Court, a designated social worker or a police official may remove children, on the one hand, with the detailed protection afforded to children in section 28(1), on the other, to be driven to the conclusion that the purpose of the provisions is to protect, secure and prevent the violation of the constitutional rights of children. It is neither necessary nor appropriate to enter into a mechanical comparison. It is in this context that a vex question comes up: how can the legislative provisions here in issue that are palpably designed to protect the constitutional rights of children be inconsistent with section 28?

[76] As I see it the answer is apparent. Despite the tightly defined circumstances in which children can be removed, there exists always the possibility that a removal would be wrongly made. The High Court proceedings demonstrate this.[31] Mr C who was repairing shoes on a street corner had his daughter with him because his partner, who normally looked after the child, had been hospitalised. Ms M, a blind person, was accompanied by her two daughters while begging. Designated social workers

[30] Set out in [65] above.

[31] In proceedings before Preller J in a different part of the application heard by the High Court before the constitutionality issue was argued. That aspect of the case is not before us.

removed the children from both Mr C and Ms M. The High Court ordered that Mr C's daughter be returned to his care, but that Ms M's children remain at the place of safety. If not for the application made with the assistance of Lawyers for Human Rights and the Centre for Child Law, Mr C and his daughter would have been separated. The little child would probably have been housed in a departmental care centre for about 90 days. It is unlikely that he would have been able to sustain an application to the High Court. And there may be many parents and children in this position.

[77] It is in the interests of children that an incorrect decision by a court made without hearing the child or the parents, or by a designated social worker or police official be susceptible to automatic review by a court, in the ordinary course, in the presence of the child and the parents. It follows from this that sections 151 and 152 do not provide for this and are therefore constitutionally wanting. Sections 151 and 152 of the Act, though their positive provisions are aimed at the best interests of children fall short of achieving this result. They carry the potential of being counter-productive because they fail to provide for a Children's Court automatic review in the presence of the child and the parents. In this sense, and to this extent, the laws are not in the best interests of children. They therefore limit the rights contained in section 28(2).

[78] I evaluate the law against the requirements of section 34 of the Constitution:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[79] The child has the right to challenge the appropriateness of his or her removal. Parents, in the exercise of their duty to care for the child, have a duty to challenge the correctness of the removal. Whether a removal has been rightly ordered or effected is a justiciable issue. The fact that the parents have the right to challenge the correctness of the decision is, in my view, neither here nor there. It is in the interests of children for any law that effects the removal of children to provide, at the same time, for proceedings in which the correctness of the removal is tested by a Children's Court in the presence of the child and parents. Section 34 is limited in the section 151 court order because neither the parents nor the children would have had the opportunity to argue that the removal order should not be made, and they would probably not have an opportunity to do so for 90 days. When designated social workers or police officials remove children, section 34 is again limited, perhaps to a somewhat greater extent. This is so because the removal has occurred without any court order, akin to a situation where there is statutory authorisation for people to take the law into their own hands without a court order.[32]

[32] *Chief Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC).

Justification

[80] The justification analysis in this case is not riddled with complexity. Section 36(1) of the Constitution provides:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

[81] I stress that it is the limitation that must be justified and not the entire removal provision. There is nothing wrong with these provisions in so far as they authorise removal in the tightly defined circumstances prescribed. The difficulty with these sections lies in the fact that they do not provide for automatic judicial review in the presence of the child and parents. The question to decide is whether there can be any purpose legitimate or otherwise, that can begin to afford some basis on which a justification analysis can begin. To my mind there is none.

[82] It is therefore not surprising that the state, represented by the Minister for Police and the Minister for Social Development, ultimately offered nothing in justification both in the High Court and in this Court. I can think of no justification either.

[83] The limitation cannot be justified. Sections 151 and 152 of the Act are inconsistent with the Constitution because they infringe the rights of children and parents in that they fail to provide for automatic review by a court of any removal ordered or effected in terms of these provisions in the presence of the children and parents concerned.

Remedy

[84] It will be useful to set out those provisions of the impugned sections that are relevant for purposes of determining an appropriate remedy:

a. Where a court orders removal, section 151(7) provides:

> "The person who has removed a child in terms of the court order must—
>
> (a) without delay but within 24 hours inform the parent, guardian or care-giver of the child of the removal of the child, if that person can readily be traced; and
>
> (b) within 24 hours refer the matter to a designated social worker for investigation in terms of section 155(2); and
>
> (c) report the matter to the relevant provincial department of social development."

b. Where a designated social worker effects removal, section 152(2) provides:

> "If a designated social worker has removed a child and placed the child in temporary safe care as contemplated in subsection (1), the social worker must—

(a) without delay but within 24 hours inform the parent, guardian or care-giver of the child of the removal of the child, if that person can readily be traced; and
(b) not later than the next court day inform the relevant clerk of the children's court of the removal of the child; and
(c) report the matter to the relevant provincial department of social development."

c. Where a police official effects removal, section 152(3) provides:

"If a police official has removed a child and placed the child in temporary safe care as contemplated in subsection (1), the police official must—

(a) without delay but within 24 hours inform the parent, guardian or care-giver of the child of the removal of the child, if that person can readily be traced; and
(b) refer the matter to a designated social worker for investigation contemplated in section 155(2); and
(c) without delay but within 24 hours notify the provincial department of social development of the removal of the child and of the place where the child has been placed; and
(d) not later than the next court day inform the relevant clerk of the children's court of the removal of the child."

[85] It was agreed in the High Court that a reading-in order was appropriate. The draft order submitted by the parties in relation to this aspect was made an order of Court:

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

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

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

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

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

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

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

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

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

[86] The judgment of the High Court was concerned only with the removal procedures set out in section 151 and section 152. It is not clear to me, and there is no explanation in the High Court judgment, why a reading-in remedy concerned with section 155(2)(b) of the Act was considered necessary. In the circumstances the

remedy ordered by this Court should not, in my view, concern itself with section 155 of the Act.

[87] The High Court granted a reading-in remedy by agreement between the parties. In my view, reading-in is in principle the only appropriate remedy in the circumstances of this case. The parties before the Court were wise to request it and the Court cannot be faulted for granting it, as distinct from any other remedy.

[88] This Court is enjoined to make a just and equitable order.[33] It cannot be just and equitable, without qualification, either to declare section 151 and section 152 inconsistent with the Constitution and invalid, or to suspend the order of invalidity to allow the legislature to remedy the defect. The former option is unthinkable because, in that event, the removal provisions aimed at protecting the best interests of children as well as their other constitutional rights will not be available until Parliament rights matters. This consequence will militate against justice and equity as well as the interests of the children to an extent that cannot be countenanced by this Court. The latter option is equally untenable. A suspension of the declaration of invalidity, without more, will most likely result in parents and children, like Mr C and his young daughter, being separated from each other without warrant for a period of up to 90 days. This Court cannot take this consequence lightly.

[33] Section 172(1)(b) of the Constitution.

[89] In my view therefore the only feasible way forward is reading-in. This course will not unduly intrude into the domain of Parliament because Parliament can amend the statute at any time. Nor can it be said, in the light of the nature of the infringement found, that there are numerous options available to Parliament by which to cure the defect. It is now necessary to examine the reading-in ordered by the High Court in detail to test its appropriateness.

[90] It will have been noticed that the reading-in is directed at increasing the responsibilities of the person who in fact removes the child pursuant to a court order as well as the designated social worker or police official who removed the children. This general approach is beyond criticism. But the High Court order reveals two technical errors. In the first place, the order inadvertently refers to section 152(7) which deals with something different. The order I propose will therefore not refer to section 152(7) at all. Secondly, while the High Court order made reference to section 152(3) which is concerned with the removal by a police official, no additional duty to facilitate automatic review is placed on the designated social worker who effects the removal by some reading-in in relation to section 152(2). This must be provided for.

[91] We must now evaluate the reading-in ordered by the High Court in substance. The reading-in of an additional paragraph (d) into section 151(7) poses two difficulties. The first is that the person effecting the removal is to place the matter before the Children's Court. But we do not know who the person effecting the removal will be and whether that person will possess the expertise to place the matter

before the Children's Court. I think the answer lies in the substance of the order of the High Court in relation to section 152(3)(b) in which the police official effecting the removal is obliged to refer the matter to a designated social worker to place the matter before the Children's Court. In my view, it will be appropriate for the court making the removal order to refer the matter to a designated social worker.

[92] The second difficulty revolves around the use of the 48 hour period which might commence say on Friday evening and end on Sunday evening. And if the obligation of the police official is to refer the matter to a designated social worker we need to specify two time limits: one within which the matter must be referred to the designated social worker and another time by which the social worker must place the matter before the Children's Court. In the circumstances, it is appropriate to read in a new subsection to be numbered 2A into section 151 reading 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 as the case may be are, unless this is impracticable, present in court."**

[93] We must now concern ourselves with section 152(2) which was not dealt with by the High Court and which is about the duties of a designated social worker who removes the child. I would add a sub-paragraph (d) reading:

> **"(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 or care-giver as the case may be are, unless this is impracticable, present in court."**

[94] The following reading-in into section 152(3)(b) is appropriate. I would suggest that the duty of the police official to refer the matter to a designated social worker in section 152(3)(b) of the Act should be modified. However reading-in alone will render the section difficult to understand. Accordingly a combination of severance and reading-in must be used. In my view, the appropriate modification is to ensure that the duties of the police official bring about the same result as the court order referring the matter to a designated social worker as described in paragraph [91] above. This can be accomplished by severing the words "for investigation contemplated in section 155(2); and"; reading in the words "of the removal before the end of the first court day after the day of the removal" and "who must ensure that"; and reading in subsections (i), (ii) and (iii). The reformulation of section 152(3)(b) that I would propose reads as follows:

> **"(b)** refer the matter **of the removal before the end of the first court day after the day of 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 care-giver as the case may be are, unless this is impracticable, present in court; and**
>
> **(iii) the investigation contemplated in section 155(2) is conducted."**

Costs

[95] Attorneys' fees are determined by our Rules and are calculable irrespective of whether the matter is opposed.[34] However, the appropriateness of counsel fees must be assessed on the basis of the agreement between the parties that counsel would charge as if the matter was unopposed. Our order must reflect this.

Order

[96] The following order is made:

1. Condonation is granted.
2. The declaration of invalidity of section 151 and section 152 of the Children's Act 38 of 2005, made on 27 May 2011 by the North Gauteng High Court under Case No. 47723/2010, is confirmed.
3. The orders of the High Court in paragraph 18 of its judgment are set aside and replaced with the orders in paragraphs 4 to 6 below.
4. An additional paragraph to be numbered 2A is read-in to 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:

[34] Constitutional Court Rule 22 read with Supreme Court of Appeal Rules 17 and 18.

(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 as the case may be are, unless this is impracticable, present in court."

5. An additional paragraph to be numbered (d) is read in to 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 or care-giver as the case may be are, unless this is impracticable, present in court."

6. Section 152(3)(b) is severed and replaced by a section reading:

"(b) refer the matter of the removal before the end of the first court day after the day of 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 care-giver as the case may be are, unless this is impracticable, present in court; and

(iii) the investigation contemplated in section 155(2) is conducted."

7. The Minister for Police and the Minister for Social Development are ordered to pay the applicants costs jointly and severally.

8. The taxing master must assess the reasonableness of counsel fees as if the matter before this Court was not opposed.

JAFTA J (Mogoeng CJ concurring):

Introduction

[97] The issue raised sharply in this case is whether the Constitution requires a provision that authorises a removal of a child from parental care to provide for automatic judicial review. More precisely whether section 28 of the Constitution requires that the removal of children from parental care should always be subject to automatic review. If this is not what the Constitution demands, then the impugned provisions cannot be held to be inconsistent with it for the sole reason that they fail to provide for automatic review. This is the only ground on which the constitutional challenge was mounted.

[98] I have had the benefit of reading the judgments of Yacoob J and Skweyiya J, which find that sections 151 and 152 of the Children's Act[1] are inconsistent with the Constitution. For reasons that follow I am unable to agree with the finding of constitutional inconsistency and the concomitant declaration of invalidity. Instead I find that on the ground raised the applicants have failed to prove that the impugned provisions are inconsistent with the Constitution.

[99] Since these are confirmation proceedings, this Court may confirm the declaration of invalidity made by the High Court only if it is satisfied that the impugned provisions are inconsistent with the Constitution. This finding must be based on the ground raised by the applicants. In an application for an order declaring legislation to be invalid for being inconsistent with the Constitution, the onus is on the applicant to prove the inconsistency relied upon.[2]

Proceedings in the High Court

[100] The applicants launched an urgent application in the High Court for the return of the children. They also sought an order declaring sections 151 and 152 of the Children's Act constitutionally invalid to the extent that they fail to provide for an automatic review of the removal of children, done in terms of these sections.

[1] 38 of 2005.
[2] *S v Lawrence; S v Negal; S v Solberg* [1997] ZACC 11; 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) at para 107; *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 969 (CC) at para 116; *Bernstein and Others v Bester and Others NNO* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at paras 2 and 155; and *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 45.

[101] The Department of Health and Social Development, Gauteng and other entities were cited as respondents. None of them opposed the granting of the relief sought by the applicants. The case came before Preller J on 24 August 2010. He issued an order directing that the first applicant's daughter be returned to her father immediately and that the daughters of the second applicant be kept at a place of safety pending an investigation on whether they were in need of care and protection. These children were subsequently returned to their parents in terms of an order issued by the Children's Court.

[102] The determination of the issue relating to the constitutional validity of the impugned provisions was deferred to a later date. On that date the case came before Fabricius J and the parties presented him with a consent draft order which sought to declare the impugned provisions unconstitutional. The learned Judge directed that written argument be filed and the parties were asked to present oral argument at a later hearing. Having heard argument, the High Court was satisfied that the parties' draft should be made an order of court.

[103] Consistent with the draft, the High Court issued an order in the following terms:

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

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

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

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

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

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

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

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

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

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

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

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

> 19.2 In the context of Part B of the notice of motion each party is to bear its own costs.
>
> I do not deem it appropriate or justified to grant the prayer sought against the particular (but unidentified) social workers."

[104] However, it is unclear from the High Court's judgment whether the impugned provisions were in fact found to be inconsistent with the Constitution. Bearing in mind the ground on which the validity of these provisions was challenged, neither the judgment nor the order shows against which section of the Constitution the validity of the provisions was tested. In short the judgment does not reveal the section of the Constitution the impugned provisions were found to be inconsistent with.

[105] Section 172 of the Constitution empowers the courts to declare an Act of Parliament to be invalid only if it is inconsistent with the Constitution and the power to so declare is limited to the extent of the inconsistency.[3] It follows that if the High Court did not find that an inconsistency exists, it could not competently declare the invalidity. The difficulty is that this cannot be determined from its judgment. In these circumstances this Court may confirm the High Court's order if it is satisfied that the

[3] Section 172(1) of the Constitution provides:

> "When deciding a constitutional matter within its power, a court—
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

impugned provisions are inconsistent with the Constitution, owing to their failure to provide for automatic review.

[106] Any inconsistency between the impugned provisions and the Constitution must be established with reference to the ground on which the challenge was based. In its affidavit the Centre for Child Law asserted:

> "There is no requirement that there be any form of judicial oversight during the 90 day investigation period. Moreover, there is no return date provision or opportunity for a parent to obtain access to the Children's Court for the parent to oppose the removal and show reasons why removal was not necessary. As is illustrated by this matter, the parent must approach the High Court to have the decision to remove set aside.
>
> As stated above, 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 of 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 entrenched in international law. This is the broader context in which sections 28(1)(b) and 28(2) must be read.
>
> I therefore submit that sections 151 and 152 are unconstitutional insofar as they fail to provide an appropriate mechanism for judicial review."

[107] The applicants rely on section 28 of the Constitution[4] as the benchmark against which the validity of the impugned provisions must be tested. While accepting that section 28(1)(d) authorises the removal of a child from parental care, the applicants argue that the removal constitutes a limitation of the right to parental care entrenched

[4] The full text of section 28 is quoted in [108] below.

in section 28(1)(b) of the Constitution. They submit that the tension between these two provisions of section 28 may be managed by striking a proper balance which may be achieved through automatic review. Relying on the United Nations Convention on the Rights of the Child (Convention) and the African Charter on the Rights and Welfare of the Child (Charter) the applicants submit that automatic review is an entrenched standard applicable to the removal of children.[5]

Does section 28 require that legislation permitting the removal of children must provide for automatic review?

[108] Section 28 deals with the rights of children. It provides:

> "(1) Every child has the right—
>
> (a) to a name and a nationality from birth;
>
> (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
>
> (c) to basic nutrition, shelter, basic health care services and social services;
>
> (d) to be protected from maltreatment, neglect, abuse or degradation;
>
> (e) to be protected from exploitative labour practices;
>
> (f) not to be required or permitted to perform work or provide services that—
>
> (i) are inappropriate for a person of that child's age; or
>
> (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
>
> (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—
>
> (i) kept separately from detained persons over the age of 18 years; and

[5] South Africa ratified the Convention in June 1995 and the Charter in January 2000.

(ii) treated in a manner and kept in conditions, that take account of the child's age;

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section 'child' means a person under the age of 18 years."

[109] Section 28 does not refer to automatic review at all. Therefore the requirement for judicial review in the Convention does not form part of the section. Nor can it be incorporated into the section. Consequently, it cannot be used as a constitutional standard for determining the validity of legislation. This is so despite the fact that the Convention and the Charter were ratified and are binding on South Africa.[6] International law may form part of our law if it is not inconsistent with the Constitution or an Act of Parliament. This illustrates that where there is an inconsistency between international law and an Act of Parliament, the latter prevails.

[110] There is a basic principle concerning constitutional invalidity that bears repeating. Legislation can be declared invalid only if it is shown to be inconsistent with a specific provision of the Constitution. Accordingly, the impugned provisions can be so declared owing to their failure to provide for automatic review if section 28 requires that they should provide for automatic review. Properly constructed, the section does not require automatic review. It follows that the impugned provisions

[6] See sections 231 and 232 of the Constitution and *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) at paras 87-92.

cannot be declared invalid for failing to provide for automatic review because there is no constitutional benchmark requiring automatic review.

Do sections 151 and 152 limit the right to parental care?

[111] The question whether these provisions limit the right to parental care turns on the interpretation of the right, its content and scope. The right to parental care is one of three rights entrenched in section 28(1)(b). The others are the right to family care and the right to appropriate alternative care. The inclusion of the right to appropriate alternative care indicates the recognition in the Constitution that there are circumstances in which the rights to family care or parental care may not be enjoyed.

[112] In determining the scope of the right to parental care, section 28 must be read as a whole. Each provision must be read in conformity with the other provisions and effect must be given to all of them.[7] Section 28(1)(d) confers on every child the right to be protected from maltreatment, neglect, abuse or degradation. This section binds the state to adopt legislative and other measures designed to protect children from neglect or abuse.[8] This is in addition to the general obligation to "respect, protect, promote and fulfil" the rights entrenched in the Bill of Rights.[9]

---

[7] *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae) (No 2)* [2002] ZACC 21; 2003 (1) SA 495 (CC); 2002 (11) BCLR 1179 (CC) at para 83 and *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) at para 61.

[8] *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 78.

[9] Section 7(2) of the Constitution provides:

> "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

[113] This Court is duty-bound to construe various provisions of the Constitution in a harmonious manner that gives effect to all provisions. The courts cannot interpret the Constitution in a way that renders some of its provisions redundant. In *United Democratic Movement* this Court said:

> "A court must endeavour to give effect to all the provisions of the Constitution. It would be extraordinary to conclude that a provision of the Constitution cannot be enforced because of an irreconcilable tension with another provision. When there is tension, the courts must do their best to harmonise the relevant provisions, and give effect to all of them."[10]

[114] Section 28(2) plays a vital role in determining the scope of the right to parental care. The section obliges this Court to construe the right to parental care in a manner that protects and advances the interests of children. It decrees that the best interests of a child must always be dominant in every decision that involves a child.

[115] In the context of section 28(1)(b) read with section 28(1)(d) and section 28(2), the scope of the right to parental care cannot include parental care that is harmful or detrimental to the safety and well-being of a child. It cannot be claimed that section 28(1)(b) entitles a child to parental care that is harmful to its safety and well-being. To read this right in a manner that includes harmful care would be inconsistent with section 28(1)(d) and would legitimise the abuse of children, something which is not countenanced by the Constitution.

[10] Above n 7 at para 83.

[116] It follows that the right to parental care envisaged in section 28(1)(b) is limited to parental care that is beneficial to a child. In other words, this section does not protect harmful parental care. Consequently, legislation which authorises a removal of a child from harmful parental care cannot limit the right in section 28(1)(b). Instead that legislation would be consistent with section 28(1)(d) and section 28(2).

Do sections 151 and 152 apply to parental care contemplated in section 28(1)(b)?

[117] The relevant part of section 151 of the Children's Act reads:

> "(1) If, on evidence given by any person on oath or affirmation before a presiding officer it appears that a child who resides in the area of the children's court concerned is in need of care and protection, the presiding officer must order that the question of whether the child is in need of care and protection be referred to a designated social worker for an investigation contemplated in section 155 (2).
>
> (2) A presiding officer issuing an order in terms of subsection (1) may also order that the child be placed in temporary safe care if it appears that it is necessary for the safety and well-being of the child.
>
> . . . .
>
> (8) The best interests of the child must be the determining factor in any decision whether a child in need of care and protection should be removed and placed in temporary safe care, and all relevant facts must for this purpose be taken into account, including the safety and well-being of the child as the first priority."

[118] This section empowers the Children's Court to grant an order for the removal of a child to a temporary place of care only if it is necessary for the safety and well-being of the child concerned. The need for removal must be established by means of

evidence given under oath. Even then, the determining factor must be the best interests of the child and the priority must be the safety and well-being of the child.

[119] In part, section 152 provides:

> "(1) A designated social worker or a police official may remove a child and place the child in temporary safe care without a court order if there are reasonable grounds for believing—
>
> (a) that the child—
>
> (i) is in need of care and protection; and
>
> (ii) needs immediate emergency protection;
>
> (b) that the delay in obtaining a court order for the removal of the child and placing the child in temporary safe care may jeopardise the child's safety and well-being; and
>
> (c) that the removal of the child from his or her home environment is the best way to secure that child's safety and well-being.
>
> . . . .
>
> (4) The best interests of the child must be the determining factor in any decision whether a child in need of care and protection should be removed and placed in temporary safe care, and all relevant facts must for this purpose be taken into account, including the possible removal of the alleged offender in terms of section 153 from the home or place where the child resides, and the safety and well-being of the child as the first priority.
>
> (5) Misuse of a power referred to in subsection (1) by a designated social worker in the service of a designated child protection organisation—
>
> (a) constitutes unprofessional or improper conduct as contemplated in section 27 (1)(b) of the Social Service Professions Act, 1978 (Act No. 110 of 1978) by that social worker; and
>
> (b) is a ground for an investigation into the possible withdrawal of that organisation's designation.
>
> (6) Misuse of a power referred to in subsection (1) by a designated social worker employed in terms of the Public Service Act or the Municipal Systems Act constitutes unprofessional or improper conduct as is contemplated in section

> 27(1)(b) of the Social Service Professions Act, 1978 (Act No. 110 of 1978) by that social worker.
>
> (7) Misuse of a power referred to in subsection (1) by a police official constitutes grounds for disciplinary proceedings against such police official as contemplated in section 40 of the South African Police Service Act, 1995 (Act No. 68 of 1995)."

[120] Section 152 empowers designated social workers and police officials to remove children in need of care and protection to a temporary place of care. They can do this only in cases where the child is in need of "immediate emergency" protection and the delay in obtaining a court order for the removal may jeopardise the child's safety and well-being. If the child is removed from its home environment, the removal must be the best way to secure its safety and well-being. The best interests of the child must be the determining factor in reaching the decision to remove.

[121] The section imposes stringent requirements for the exercise of the power to remove and only children who are in need of care and protection may be so removed. It forbids the misuse of the power by declaring that the abuse of the power it confers would constitute unprofessional or improper conduct which would lead to disciplinary action taken against the offending official.

[122] It is apparent from the text of both sections that they do not apply to parental care envisaged in section 28(1)(b). Instead they constitute legislative measures that are consistent with section 28(1)(d) and section 28(2). It cannot be gainsaid that the impugned provisions amount to measures which the state is constitutionally obliged to

put in place for the benefit of children. In *Government of the Republic of South Africa and Others v Grootboom and Others*[11] Yacoob J said:

> "[T]he State must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by section 28. This obligation would normally be fulfilled by passing laws and creating enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation, and the prevention of other forms of abuse of children mentioned in section 28."[12] (Footnote omitted.)

[123] As measures designed to protect children from harmful parental care, the impugned provisions do not limit the right to parental care. On the contrary, they advance children's interests which are paramount to any decision involving a child.

[124] Yacoob J finds that the impugned provisions limit the rights in section 28(2) because they do not provide for automatic review of an incorrect decision by a court or a police official or a designated social worker. I am unable to agree. Any removal of a child who is not in need of care and protection would fall outside the ambit of the impugned provisions. These provisions cannot be invoked to justify the removal, nor can they be faulted for conduct they do not authorise. I conclude that the impugned provisions are consistent with section 28 of the Constitution.

[125] Section 34 of the Constitution cannot, in my view, be invoked to test the validity of the impugned provisions because the applicants did not rely on this section

[11] Above n 8.

[12] Id at para 78.

in the High Court and we are concerned with the confirmation of the order granted by that Court. A party who challenges the constitutional validity of a statute must state the grounds on which the attack is based in its founding papers.[13] In this Court too, the applicants did not rely on section 34 in seeking confirmation of the order granted by the High Court. Section 34 was mentioned for the first time in the written argument filed in this Court by the respondents. It was argued that the impugned provisions preclude the Children's Court from considering a removal before the expiry of 90 days. But this requirement is contained in section 155(2) of the Act, the validity of which is not challenged.

[126] For these reasons I would not confirm the order issued by the High Court.

[13] *Prince v President, Cape Law Society and Others* [2000] ZACC 28; 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) at para 22.

For the Applicants:	Advocate AM Skelton instructed by Lawyers for Human Rights.
For the First, Sixth and Seventh Respondents:	Advocate SK Hassim and Advocate MPD Chabedi instructed by the State Attorney, Pretoria.