

‘The South African Child’s Right to Maintenance – a Constitutionally Enforceable Socio-Economic Right?’

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ABSTRACT

The article highlights the lack of resources for the protection of children as a central issue of concern in South Africa, especially in the light of the HIV/AIDS pandemic and the resulting emergence of child-headed families. This paper concerns the position of all poverty-stricken children in South Africa, not only those affected by HIV/AIDS and the paper maintains that there should be no substantive distinction drawn between the different groups of destitute children, whether affected by HIV/AIDS or not. Against this background, the article considers the implications of the South African ratification of the United Nations Convention on the Rights of the Child (CRC) and the constitutionalisation of children’s rights, critically focussing on the inadequacy of the present South African judicial maintenance system and the problems in the enforcement of maintenance claims. The article suggests that new approaches towards the fulfilment of children’s basic socio-economic rights are required in South Africa. The Constitution enables persons to approach the courts on public issues by means of a class action to ensure the public administration adheres to the fundamental principle of legality in the exercise of public power. Failure to implement a clear policy in line with the Constitution and the CRC in this regard could lead to the institution of some type of class action on behalf of children deprived of any form of maintenance or social security. In respect of both private and public maintenance claims, the beginning of a period of children’s rights public interest litigation may follow. The Constitutional Court should not only require a plan from the Government to implement the progressive realisation of socio-economic rights, particularly where children are affected, but also the courts’ orders should aim to ensure the implementation of those plans to ensure that progress is made towards the progressive and reasonable realisation of those plans to ensure that the South African Constitution is based on actual and not merely illusory rights.

1 INTRODUCTION

The lack of resources for both the prevention of abuse and neglect, and for the protection of children is a central issue of concern in South Africa (Streak (2004:9-49). South Africa has a population of about 44 million. Of that figure, there are approximately 20 million children under the age of 18 in South Africa, a figure which constitutes almost half of the population (Streak 2004:9-49). Two thirds of these children live in fairly remote rural areas, and half of these children do not even possess birth certificates (Burman, 2003). Poverty is widespread, largely due to unemployment and the effects of the HIV/AIDS pandemic (Liebenberg, 2004). It is estimated that 40 per cent of the population in South Africa are unemployed (Burman, 2003). The absolute definition of child poverty categorises a child as poor if he or she has income per month below the level estimated necessary to ensure a secure existence or where individuals, households or communities are unable to command sufficient resources to satisfy socially acceptable minimum standards of living (Children’s Institute, 2003). The current situation of South African children living in extreme poverty indicates that 75 percent of children live in poverty (Streak, 2004). This situation has been exacerbated by the impact of HIV/AIDS. It is estimated that by 2010 there will be more than 2 million children under the age of 16 who have been orphaned by HIV/AIDS (Sloth-Nielsen, 2003). Family patterns are changing

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dramatically in South Africa: there are children between the ages of 12 and 18 who are 'heads of households', largely as a result of maternal deaths due to the disease.

Furthermore, it would appear that there is a worrying degree of administrative fraud and corruption with social grants being paid for deceased persons and public servants who generate "ghost beneficiaries" and open accounts through the banks. In several cases, especially in the Eastern Cape Province, the court has held that incidents of administrative inefficiency on the part of the Department of Social Development in this province were not isolated, but were "the tip of the iceberg" (see e.g. *Mahambela v MEC for Welfare, Eastern Cape* 2002 1 SA 342 (SE) ; *Mbanga v MEC for Welfare, Eastern Cape* 2002 2 SA 359 (SE)). The creation of the South African Social Security Agency in April 2005 may ameliorate this situation by hastening the delivery of social grants, cutting down on corruption and lifting the burden of administration in the country's nine provinces. However, at present, it would appear that the extent to which poverty-stricken children in South Africa are given priority is greater on the policy front than on the budget and service delivery fronts.

Debate rages in South Africa about the appropriate social security provision for destitute South African children, especially in the context of the HIV/AIDS pandemic. The state has, in some cases, encouraged the use of formal care system to address poverty related needs of orphans as well as considering other alternatives. However, a danger in the construction of formal institutions for children is the accompanying destruction of the family and community held values and beliefs. It could also be argued that more attention should be given to the extended family as an innate form of protection to receive orphaned children, where it is possible (Sloth-Nielsen, 2003). However, in many cases, the extended African family is no longer able to assume a welfare role towards orphaned children. Despite this, a sensitive approach is required to ensure that the maintenance of family and community systems are not overlooked or undermined so as to upset or neglect the families and children in child-headed households already providing care for these children in their communities. To some extent, the State has an obligation, where possible, to restore confidence in the traditional family system. While the HIV/AIDS pandemic may be so devastating as to require a generalised response to the magnitude of its problems, any existing culture of care should, where possible, be supported financially and the creation of formal institutions should be a last resort after careful consideration of the protection which already exists.

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

The United Nations Convention on the Rights of the Child (CRC) has been described as the Magna Carta of children's rights, set to guide the struggle for children's rights in this century. As the most highly ratified international human rights treaty in the world, it embodies principles such as the best interests of the child. It emphasises the State's obligation to support parents in their child-rearing duties. Article 18 (2) requires States to 'render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and to ensure the development of institutions, facilities and services for the care of children.' It also supports the right of a child who is deprived of family to alternative care, protection and assistance. Article 20 provides that a child 'temporarily or permanently deprived of his or her family environment, shall be entitled to special protection and assistance provided by the State.' It also states that, when considering solutions, 'due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background'. Articles 26 to 31 of the CRC deal with the right of the child to social welfare. Article 26 protects the child's rights to social security, whilst taking into account "the resources and the circumstances of the child and persons having responsibility for the maintenance of the child." Article 27(1) requires States to recognise the "right of every child to a standard of living adequate for the child's physical, mental, moral and social development."

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

In this regard, the United Nations’ Committee on the Rights of the Child has expressed dissatisfaction with the current Child Support Grant and concern about vulnerable children, especially child-headed households which inter alia consist of large numbers of children who are orphaned through maternal deaths due to HIV/AIDS.(see CRC/C/15/Add. 122 Concluding Observations of the Committee of the Rights of the Child: South Africa 23/02/2000 – 26 January 2000). For these children, this Committee emphasised the need to give greater financial aid and support, whilst allowing such children to remain within their communities. However, primary research as well as demographic and economic projections indicate that providing grants specifically for orphaned children as a category of children as distinct from other children is not a viable option. A social security system which attempted to do this would be in danger of misdirecting resources, would be inequitable to other poverty-stricken children, risk further burdening the system and it is not a cost-effective way of supporting poverty-stricken children. This paper is arguing for a unified approach towards all children affected by poverty in South Africa.

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

Although South Africa ratified the CRC in June 1995 and still not much has been done to alleviate the poverty-stricken state of many children, it is arguable that the rights contained in the CRC could never be enforced as legal rights by individual children in the courts. The rights are progressive and dependent on the availability of resources of the various countries (Bainham, 2005:67). Although the CRC, and hence the Committee, carries considerable moral force, it has weak enforcement mechanisms. The approach of the Committee on the Rights of the Child to the promotion and protection of children’s rights is advisory and non-adversarial in nature. Its successes rely on diplomacy rather than legal sanction. However, the General Committee on the Rights of the Child could strengthen its general comment to provide interpretive guidance to the South African government and courts in implementing their obligations under the CRC. Furthermore, in South Africa, the CRC enjoys a heightened status because its major features have been constitutionalised in section 28 of the South African Constitution. Children’s rights as outlined in Articles 26 and 27 of the CRC have thus acquired direct legal significance. Such rights have been awarded a special status relative to the other rights in the Constitution. The force of the CRC is further augmented by the fact that South African courts have an obligation to have regard to relevant international law (Section 39).

3 THE EFFECT OF THE CONSTITUTIONALISATION OF CHILDREN'S RIGHTS

The Constitutional Court has not thus far in its jurisprudence referred in any depth to the CRC in its interpretation of children's socio-economic rights, although certain provisions of the Constitution have developed the jurisprudence in this regard. The South African Constitution provides that everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance (Section 27(1) (c)). Section 28(1)(c) of the Constitution refers directly to the child's rights to basic social services, and it has been acknowledged that there is a close link between rights to social security and rights to social services (Liebenberg and Pillay, 2000). Where parents cannot meet their obligations, children's rights focus on the State to fulfil its international and constitutional commitments to its children. Section 28(1) (c) places an obligation on the State to provide children with access to shelter, basic nutrition, basic health care and social services.

In the landmark decision of *The Government of the Republic of South African v Grootboom and Others*, 2001 1 SA 46 (CC) the Constitutional Court of South Africa acknowledged the need for the South African government to develop a policy to ensure that every effort is made to comply with its constitutionally incorporated socio-economic rights. However, the Constitutional Court was at pains to stress that the carefully constructed constitutional scheme for the progressive realisation of socio-economic rights would make little sense if it could be trumped in every case by the rights of children to get shelter from the State on demand. The Constitutional Court was careful to emphasise that the children's rights clause did not create independent rights. In the view of the court, all the children's rights clause did was to ensure that children were properly cared for by their families and that they received appropriate alternative care in the absence of family or parental care; the State did not have the primary obligation to provide shelter for children if the children were being cared for by their families.

The *Grootboom* case illustrates the relationship between every person's right to housing, contained in s26 of the South African constitution, and children's right to shelter, as provided for in s28(1)(c). The court held that there was an obvious overlap between the rights. Section 28(1) (c) and s26 could not be regarded as establishing separate and distinct entitlements. The court held that s28 (1) (c) did not normally create a "direct and enforceable" claim upon the State by children. However, section 28(1) (b) of the Constitution gives every child the right to "family care or parental care or to appropriate alternative care when removed from the family environment". This wording suggests that children living in child-headed households have a right to be provided with substitute parental or family care, or alternative care (such as institutional care). Thus, although the court stressed that the primary responsibility for supporting children rested on parents and families, it also emphasised that, where children are abandoned or lack a family environment, the State does bear the primary responsibility for providing for them. If one were to widen the context, this would imply that urgent measures need to be taken to provide State support and social services to children orphaned by HIV/AIDS. *Grootboom's* case requires that accessibility should be progressively realised through the provision of facilities. It is only the pace of progressive realisation that is dictated by available resources.

However, two years after the judgment was given, research indicated that the government was failing to comply with the order (Ten Year Review, 2003) This failure is attributed largely to the fact that the Constitutional Court omitted, not only to lay down any time frame for the government, but also to maintain any sort of supervisory role to ensure that its order was correctly interpreted and implemented with the appropriate urgency. In the South African context, such orders need not only to be followed up, but also to include a supervisory role for the court. (Bilchitz, 2003:25-6). The problem facing destitute children is at present thus one of

both incapacity on the part of the Government and legal impediments in accessing a grant (Davis, 2004:6).

4. CURRENT MAINTENANCE AND SOCIAL SECURITY PROVISIONS FOR CHILDREN

The South African maintenance system rests, on the one hand, on the judicial maintenance system which is based on the legal duty to support one's dependants, determined judicially where there is dispute while, on the other hand, there is the State maintenance system, which is meant to act as a safeguard by providing support where the procedures of the judicial maintenance system fail to do so. Insofar as the private maintenance system is concerned, the Maintenance Act 99 of 1998 is a comprehensive piece of legislation which was designed to provide a speedy and effective remedy at minimum cost for the enforcement of parents' obligation to maintain their children and provides important mechanisms to give effect to the rights of children in terms of section 28 of the Constitution. However, there is evidence that the system is not functioning effectively. In *Bannatyne's case* 2003 2 BCLR 363 (CC) para 29, the Constitutional Court expressed concern for the difficulties experienced by women and children in enforcing their rights under this system. Failure to ensure their effective operation amounts to a failure to protect children against those who attempt to benefit from the deficiencies in the operation of the Act, such as defaulting parents (usually fathers).

Service delivery to children in terms of the private maintenance position would appear at present to be in a parlous position. The South African courts dealing with family-related matters are fragmented. Special Maintenance courts deal only with child and spouse support claims and special Children's Courts deal only with child welfare matters. It is generally recognized in South Africa today that there is a need for specialized family courts, which would have jurisdiction to deal with all family-related issues (see Commission of Enquiry, 1983). The Maintenance Courts are the most extensively used courts within the legal system dealing with family law. The problems in these courts caused by overcrowding, inefficiency and bureaucracy have been well documented to the extent that the Constitutional Court has stated that the administrative problems within the maintenance system constitute a denial of children's rights (see *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC)). The courts have a constitutional duty to develop mechanisms of ensuring that the constitutional rights of parties are honoured. In this regard, the courts have a particular responsibility to forge new tools and develop innovative remedies, if need be, to achieve effective relief and remedies for parties. The Constitutional Court in *Bannatyne's case* held that the State was under an obligation to provide the legal and administrative structure necessary to achieve the realisation of children's rights under the Constitution. The function of the State in this area is to create not only a procedural structure for the protection of children's rights, but also to create a system which ensures that such a structure operates effectively. Resources are urgently required to improve these facilities and the quality of South African legal remedies in this field. These resources do not appear to be forthcoming at present.

As far as the State maintenance system is concerned, there are three main types of child grant: Child Support Grants, Foster Care Grants and Care-Dependency Grants. The Child Support Grant was implemented in 1996. Initially, it was only payable to primary caregivers of children who were under seven years old. A primary caregiver is defined as a person (whether related to the child or not) who takes primary responsibility for meeting the daily care needs of the child, but excludes a person who is paid (or an institution which received an award) to care for the child and also excludes a person who does not have the (express or implied) consent of the parent, guardian or custodian of the child. Children up to the age of 14 now qualify for the grant. The Department of Social Development estimates that this will bring the total number of South African children receiving grants to roughly seven million. Child support grants are now paid at an amount of approximately £16 per month (May 2006).

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

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

In order to claim a Child Support Grant, it is necessary to produce an identity document with a valid 13-digit identity number and a birth certificate. Many children living in child-headed households do not have this documentation. Therefore, unless children are aged under 14 and living with a primary caregiver who can apply for a Child Support Grant, or placed in formal foster care in order for the Foster Care Grant to be payable, there is no monetary support available for many categories of poverty-stricken children. Furthermore, in terms of the current Children's Bill (as amended), the main structure for the delivery of child protection is the children's courts, which are given the power to order a wide variety of necessary services. Children's courts are at the magisterial level and are fairly accessible, even to people living in rural areas. However, some important functions of the children's court have been moved to the High Courts or divorce courts, which are often inaccessible to many due to their cost or scarcity. Additional accessible remedies are required to supplement or replace those based on a court inquiry. A range of services is needed which could be provided by social workers and community development workers to children and families where the child is in need of care but where court intervention is not needed (Jansen van Rensburg, 2005). This legislation thus fails to provide adequately for children in such positions.

In 2001, further decisions of the courts were handed down on the major issues of the increasing socio-political conflict over the government's handling of South Africa's HIV/AIDS pandemic. In January 2001, the South African government at last agreed (tentatively) to the free treatment of HIV pregnant women and the provision of free anti-retroviral drugs for these women, but only as a pilot project in eighteen training pilot centres which would only reach 10 percent of the population. The gains made by this were offset by the announcement by the Department of Health that it would appeal against a court ruling brought by the Treatment Action Campaign ordering the government to provide the anti-retroviral drug Nevirapine to all HIV positive pregnant women giving birth at State institutions. Anti-AIDS campaigners, such as the members of the Treatment Action Campaign (TAC), accused the government of deliberately hampering efforts to combat AIDS in South Africa, a country which has one of the highest number of persons infected in the world. In December 2001, the Transvaal Provincial Division, in response to an application brought against the Minister of Health by the TAC, ordered that the government had a duty to provide Nevirapine to pregnant women who were HIV-positive, giving birth in State institutions, where it was medically indicated and where there was capacity to do so (see *Minister of Health v Treatment Action Campaign (No 1)* unreported TPD case 21182/2001).

This court also ruled against the present system of providing the medication only at certain pilot sites and ordered the government to present an outline of how it planned to extend provision of the medication to its birthing institutions countrywide.

The State did not implement the order, despite the convincing evidence that a comprehensive “Mother to Child Transmission Programme” would result in a saving of resources in the public sector when compared to the costs associated with the illnesses and death of HIV positive children. The case went on appeal to the Constitutional court. The Constitutional Court’s order represented a direct engagement with the right to health care enshrined in section 27(1)(a) of the Constitution (see *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC); 2002 10 BCLR 1033 (CC) at 735C para [22.14]. The court applied the test of reasonableness to determine whether the government’s programme was consistent with its obligation in terms of section 27. In this regard, the court held that legislative action is insufficient and must be accompanied by appropriate, well-directed policies and programmes implemented by the Executive. However, the Government’s failure to implement orders clearly indicated that, where survival interests are in jeopardy, as in the TAC case, the court should maintain some form of supervisory control to ensure that its orders are in fact carried out and the momentum of the decision sustained (Bilchitz, 2003). Although the ratio of this case is to be lauded, it seemed to miss an opportunity to provide some clarity and definition to the foundation for future socio-economic rights cases. The court’s development of the content of the right laid down in s27 could have been made with reference to international rights instruments such as the United Nations Committee on Economic Social and Cultural Rights (General Comment 14). The court seemed to avoid an engagement with and analysis of the minimum core approach as so carefully outlined by the amici curiae in the case (Liebenberg 2004). Instead, the court adopted an overall ‘reasonableness’ approach which failed to provide concrete indications of possible avenues of relief in future cases, especially for destitute children deprived of any source of support (Bilchitz, 2002).

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

In *The Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuzza* 2001 4 SA 1184 (SCA), the Supreme Court of Appeal of South Africa acknowledged that the poverty of many would-be litigants and the technicalities of legal procedures had led to the creation in the South African Constitution of the express entitlement that anyone asserting a right in the Bill of Rights could litigate as a member of or in terms of the interest of a group or class or person. The Constitution has thus radically extended the capacity for standing to sue, such that a group or class actions are now possible and actions in the public interest are given constitutional locus standi. The Supreme Court of Appeal also adopted a generous interpretation to this section of the Constitution in order to give disadvantaged and poor people a chance to approach the courts on public issues to ensure the public administration adheres to the fundamental principle of legality in the exercise of public power. An important precedent has been established in such cases and might well lead to the institution of some type of class action on behalf of children deprived of any form of maintenance. This could have a very far-reaching impact on the development of human rights litigation in South Africa and opens the way for further action in South Africa on behalf of hitherto “invisible litigants” such as children who are suffering from malnutrition as a result of bureaucratic inability to deliver the required (albeit inadequate) Child Support Grant.

The Child Support Grant is plagued by problems of access and bureaucratic difficulties in terms of lodging and proving a claim. It is suggested that this grant should be extended to all children in South Africa and the means test should be removed in the form of a guaranteed

minimum support grant- removing the administrative details of application. The provision of an easily accessed, guaranteed minimum basic support grant for all children would be a way of complying with the special socio-economic rights of many destitute South African children. This would have the effect of drawing all children into the social security net and would greatly reduce the administrative burden resting on the state at present in administering the Child Support Grant systems.

It is further suggested that failure to do this could result in a class action brought on behalf of destitute children with no access to social grants and no ability to make those claims. Such a class action could require the government to improve the grant system and to provide a time frame and supervisory programme for its practical implementation for as many destitute children as possible. If such a class action were to be brought, the *amici curiae* would need to be particularly efficient in providing evidence of the importance of this class action. The Constitution guarantees legal representation for children to cases where substantial injustice would result (without any indication of the process that should be followed when assigning a legal practitioner to the child) (section 28(1) (h)). When adequate child grants are not available and children's socio-economic rights are challenged, there is a core need for the State to provide access to litigation. Legal aid should be available where rights are threatened and a member of the Bar should be encouraged to come to the aid of children on a *pro amico* basis. The case will often start with non-governmental organisations and care will be required in the accurate citation of parties with *locus standi*. Although litigation may not be the best means of challenging breaches of children's rights, it may still be a last resort to attempt to ensure that the government is compliant with international minimum standards.

New approaches towards child maintenance are urgently required in South Africa, including the identification of a minimum core of the government's obligations in relation to this right. The benefit to society as a whole and to children of having clearly defined standards for the provision of socio-economic rights to children and their care-givers is clear (Liebenberg, 2004). The South African Government's failure to implement reform in this regard may well lead to the beginning of a period of children's rights public interest litigation, especially in areas such as health, access to nutrition and enforcement of the government's welfare responsibilities. As the criticism of the *TAC* case indicates, the courts are also now required to assist in that implementation by setting out time plans and assisting in the practical implementation of reform. The Constitutional Court should not only require a plan from the Government to implement the progressive realisation of socio-economic rights, particularly where children are affected, but also the courts' orders should aim to make sure that those plans are implemented. There must be real indications that progress is being made towards the progressive and reasonable realisation of those plans to ensure that the South African Constitution is based on actual and not merely illusory rights (Corder, 2004).

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