REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CHILDREN'S COURT CASE NO: 14/1/4-206/10
APPEAL COURT CASE NO: A3056/11

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/ NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

SS — Appellant

and

THE PRESIDING OFFICER OF THE CHILDREN'S COURT: DISTRICT OF KRUGERSDORP — First Respondent

MINISTER OF SOCIAL DEVELOPMENT — Second Respondent

MEC FOR HEALTH & SOCIAL DEVELOPMENT, GAUTENG — Third Respondent

CHILDREN'S INSTITUTE — Amicus Curiae

JUDGMENT

SALDULKER, J:

INTRODUCTION

[1] Children are the soul of our society. If we fail them, then we have failed as a society. Mr Mbuzeli Bennet Lamani and Mrs Nontobeko Elizabeth Lamani, did not fail SS, the minor child, and the appellant in this matter. He was brought to live with them in 2002 by his mother, Ms Pheliwe Stemele, during her lifetime when he was just over one year of age. They raised him as their own child, supporting him from their meagre earnings. After the minor child's mother died on 18 June 2007, Mrs Lamani reported the matter on 8 November 2007 to the Department of Social Development in Krugersdorp. However, it appears from the social worker, Ms Natanya Kriel's report that because of the serious backlog in the casework of social workers, the case was unattended until it was brought to her attention in February 2010. It was then that the relevant investigation into the background and foster screening process to assist the Lamanis in their foster care application for the minor child, began.

[2] An application for a foster care order was brought by the Centre for Child Law on behalf of the minor child and set down in the Children's Court in the District of Krugersdorp. Pursuant to the inquiry in terms of s155(1) of the Children's Act 38 of 2005 ("the Children's Act"), on 20 January 2011, the Child Commissioner, Mr M Du Plessis, delivered judgment including the order that the minor child was *inter alia*, "*not in need of care as envisaged in the Children's Act no 38 of 2005. No foster care order is made. It is recommended that the applicants give consideration to the alternative mentioned earlier in my judgment"*.

[3] This appeal is against the judgment and order of the Child Commissioner. It is specifically directed against the finding by the Child Commissioner that the minor child is not in need of care and protection as envisaged in s150(1)(a) of the Children's Act and the consequent refusal to place the child in foster care. As a result of the findings made by the Child Commissioner, the second respondent, the Minister of Social Development, sought to intervene in this appeal. The intervention of the Minister in this appeal centres on the issue that a proper interpretation and application of the Children's Act is fundamental to foster uniformity in the orders of judicial officers in the Children's Courts who deal with many applications for foster care and foster grants.

[4] An application at the outset of this appeal for the Children's Institute to be admitted as an *Amicus Curiae* was also granted. It was common cause

in this appeal amongst the parties that the Child Commissioner committed several misdirections when he found that the minor child was not a child in need of care and protection as envisaged in s150(1)(a) of the Children's Act. There was a commonality of views expressed by all the parties that the Child Commissioner erred both on the facts and the law in interpreting s150(1)(a) and that the appeal should be upheld and that the minor child be recognised as a child who is in need of care and protection in terms of the Children's Act, and that the Lamanis be admitted as his foster parents and that the minor child be granted a foster care grant.

[5] Furthermore, all the parties accepted in this appeal that the minor child can obtain a foster child grant if he falls within the meaning of s150(1) (a) of the Children's Act, which provides that "*A child is in need of care and protection if, the child has been abandoned or orphaned and is without any visible means of support*". Although much was made by all the parties in regard to the question whether "and" in the latter part of the section should read "or", this interpretation was abandoned by all the parties at the outset of the hearing of the appeal.

[6] In my view, the Legislature carefully chose the word "and", suggesting a careful deliberation to choose language that is consistent with the intention of the Children's Act. The choice of the word "and" was not casual or arbitrary but intentional. The approach of the Minister of Social Development in this

regard was the correct one. The "and" should remain as an "and"[1] and the focus should be on the words "without any visible means of support".

[7] The question that needed to be addressed was the proper interpretation of the words "without any visible means of support", and whether the words pertained solely to the means of the child and not the caregiver. All the parties were of the view that the Child Commissioner erred in his interpretation of the phrase "without any visible means of support". The interpretation of the clause in s 150(1)(a) must be in accordance with s39(2) of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution") and in keeping with the spirit, purport and the objects of the Bill of Rights and the best interests of the child.

BACKGROUND

[8] The child in this matter is an orphan and is presently 12 years of age. He was born on 26 February 2000 in the Eastern Cape where he lived with his mother and grandmother. In 2002, after his grandmother died, his mother came to Krugersdorp to her maternal aunt and uncle, the Lamanis,

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[1] *Investigating Directorate: Serious Economic Offences and Others* v *Hyundai Motor Distributors (Pty) Ltd and Others* : In re *Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001(1) SA 545(CC) at para 24;*Equity Aviation Services (Pty) Ltd v Commission for Conciliation , Mediation and Arbitration and Others* 2009(1) SA 390 (CC) at para 41; *Preddy and Another v Health Professions Council of South Africa* 2008(4) SA 434(SCA) at para12;*Ngcobo and Others v Salimba* CC; *Ngcobo v Van Rensburg* 1999 (2) SA 1057 (SCA), at para11 : 'it seems to me that there must be compelling reasons why the words used by the legislature should be replaced; In casu why 'and' should be read to mean 'or' or vice versa. The words should be given their ordinary meaning'…unless the context shows or furnishes very strong grounds for presuming that the Legislature really intended' that the word not used is the correct one…'Such grounds will include that if we give 'and' or 'or' their natural meaning, the interpretation of the section under discussion will be unreasonable, inconsistent or unjust….or that the result will be absurd…or, I would add, unconstitutional or contrary to the spirit, purport and objects of the Bill of Rights (s 39(2) of the 1996 Constitution)'.

who are the present caregivers of the minor child, and left the minor child in their care. Ms Stemele accompanied Ms Lamani to the police station where an affidavit was attested to, to enable Ms Lamani to receive a child support grant. Over the years she returned to visit the minor child. However, in 2007, she became ill and on 18 June 2007, she passed away. She was never legally married, and did not appoint a guardian to the minor child in the event of her death, nor did she disclose who the father of the minor child was, nor did any one acknowledge paternity.

[9] It is common cause that the Lamanis cared for and protected the minor child since he was a baby, providing for his emotional, psychological, physical and economic needs. They have done so from their meagre earnings since 2002. It is not in dispute that their present financial circumstances are dire. According to the social workers' report the minor child has developed a secure and positive relationship with the Lamanis. Ms Kriel screened the Lamanis and found them to be suitable foster parents. Her report concluded that he was a child in need of care and protection in terms of s150(1)(a) of the Children's Act. She recommended that he be placed in foster care with the Lamanis in terms of s156 of the Act, and that a foster care grant be paid to the Lamanis and that the Department of Health and Social Development render supervision services to the family.

[10] This appeal centres on the proper interpretation of s150(1)(a) of the Children's Act. It is settled law that in the interpretation of statutes a

purposive approach must be adopted, enquiring into the purpose for which the provision was enacted, and interpreting the provisions in cases of doubt in such a manner as to advance and give effect to the purpose of the legislation. According to the Parliamentary Monitoring Group, the Children's Act of 2005 was intended to achieve the following:

"*Overall, the Children's Act extended the responsibility of the State, and regulated a wider range of services than those covered by the Childcare Act. In practice, this created the need for greater State capacity for the registration and monitoring of a range of new services, as well as a responsibility on the state to create such new services where they did not exist… Chapter 9 dealt with the child in need of care and protection, provided for the identification of such children and provided for actions to be taken with regard to children.*"

[11] S 150(1)(a) of the Children's Act reads as follows: "*a child is in need of care and protection if the child has been abandoned or orphaned and is without any visible means of support*". Axiomatically any interpretation of s 150(1)(a) must be in keeping with the constitutional rights of children as embodied in the Constitution. S27(1)(c) of the 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*". S 28(2) of the Constitution provides that "*a child's best interests are of paramount importance in every matter concerning the child*".

[12] At the outset the Child Commissioner regarded the minor child's case as "*a test case*", because of numerous factors, the main gravamen being the different interpretations of s150(1)(a) of the Children's Act, by presiding officers generally. The Child Commissioner rejected the social workers' report where they had after an investigation concluded that the minor child was a child in need of care and protection as described in s150(1) of the Children's Act in that the child "*has been abandoned or orphaned and is without any visible means of support"*.

[13] The Child Commissioner relied on s32[2] of the Children's Act in finding that there was no need for the Lamanis to apply for a foster care order because they were already taking care of the minor child, and thus the minor child was not in need of care as envisaged in the Children's Act. According to the Child Commissioner there was no need to legalise a placement which was a family related one because it was catered for by s32. In my view, the Child Commissioner misconstrued the meaning of s32 of the Children's Act.

[14] The Children's Court found that "*the main reason for the inquiry is to alleviate the parties' financial position by a foster care order and receipt of a foster grant"*. Much reliance was placed on s32 which makes provision for the voluntary care of children by persons who have no parental

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'32 Care of child by persons not holding parental responsibilities and rights-
(1) A person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, including a caregiver who otherwise has no parental responsibilities and rights in respect of a child, must , whilst the child is in that person's care-
(a) safeguard the child's health, wellbeing and development; and
(b) protect the child from maltreatment, abuse, neglect, degradation, discrimination, ….

responsibility and rights in respect of the child. Such a person may or may not be a relative of the minor child. Whether the minor child is a relative or not cannot be regarded as a decisive factor. S32 clearly does not cater for a similar situation as foster care. The Child Commissioner found that the present situation of the minor child was that he was being cared for by the Lamanis, who voluntarily cared for him, and that his present "*care situation is in accordance with the law and there is no reason to have it legalised. Such caregivers rights and responsibilities are similar to those of a foster parent set out in Regulations 65 and 66 in terms of the Act*". The Children's Court held that the minor child was therefore not a child in need of care and protection and could not be placed into foster care. The court held that there were other options available to the Lamanis to "*confirm the legality of their care situation, they may apply for an alternative care order in terms of s46(1)(a) or an adoption order in terms of s45(1) of the Act*". These orders, according to the presiding officer, "*could be granted without considering whether the child is in need of care in terms of section 150*".

[15] According to the Child Commissioner the terms "abandoned" and "orphaned" are defined in s 1 of the Children's Act and must be read with Regulation 56. In terms of this regulation the Lamanis have claimed "responsibility" and this must include the "*responsibility to support the child and the child will then have visible means of support*". In the Child Commissioner's view his "*interpretation of section 150(1)(b) is therefore that a child is in need of care and protection if the child has been abandoned or orphaned and has no caregiver who is willing to support the*

child". Furthermore, he stated that the argument "*that one must look at the child's own ability to support himself/herself in isolation and should not take the caregivers support in account*, …*does not hold water because when one does not take the caregivers support in consideration (whether the parent is a caregiver or not) then almost all children will in effect be without any means of support. My opinion therefore is that as soon as the child does receive some assistance from a caregiver, it cannot be said that the child has no visible means of support, even if the assistance is very basic, it amounts to visible support".*

[16] The aforegoing view by the Child Commissioner, is a very short-sighted and narrow interpretation of s150(1)(a) of the Children's Act and does not properly take into account Chapter 12 of the Children's Act. On the Child Commissioner's interpretation a child who has a caregiver cannot be a child in need of care and protection and therefore cannot be placed in foster care. On his interpretation a child is in need of care and protection if he has been abandoned or orphaned and has no caregiver, and that if any person claims or takes responsibility then the child has "visible means of support," and thus cannot be a child in need of care and protection in terms of s150(1)(a) of the Children's Act, and cannot be placed in the foster care of the caregiver. This interpretation by the Child Commissioner is misplaced and completely ignores the existing legislation regulating foster care, in particular the provisions of s156[3] of the Children's Act.

[3] "156. Orders when child is found to be in need of care and protection – (1) If a children's court finds that a child is in need of care and protection the court may make any order which is in the best interest of the child, which may be or include an order – (a) to (k) and (2), (3) and (4)…. "

[17] According to section 156(1)(e) of the Children's Act, if a court finds that a child is in need of care and protection, the court may make any order which is in the best interests of the child, which may be, or include, an order- (e) *"if the child has no parent or caregiver or has a parent or caregiver but that person is unable or unsuitable to care for the child, that the child be placed in - (i) foster care with a suitable foster parent".* (my emphasis)

[18] The purposes of foster care according to s181 of the Children's Act are to –

(a) protect and nurture children by providing a safe, healthy environment with positive support;

(b) promote the goals of permanency planning, first towards family reunification, or by connecting children to other safe and nurturing family relationships intended to last a lifetime ; and

(c) respect the individual and family by demonstrating a respect for cultural, ethnic and community diversity.

[19] According to s182 (1) of the Children's Act: "*Before a children's court places a child in foster care, the court must follow the children's court processes stipulated in Part 2 of Chapter 9 to the extent that the provisions of that Part are applicable to the particular case*". The Children's Court processes stipulated in Part 2 of Chapter 9 are comprised of section 155 to 160, which consist of the following:

155. Decision of question whether child is in need of care and protection;

156. Orders when a child is found to be in need of care and protection;

157. Court orders to be aimed at securing stability in child's life;

158. Placement of child in child and youth care centre;

159. Duration and extension of orders;

160. Regulations (my emphasis)

[20] The "child's court process", will include a thorough investigation by social workers, which will include recommendations, *inter alia* to assist the family, including counselling, mediation, family reconstruction, and to provide protection and care services in the placement of children into alternative care, including foster care. If the court finds that the child is in need of care and protection, the court may make an appropriate order in terms of s 156. The section contains safety mechanisms, as children are at risk and are especially vulnerable to abuse, neglect, exploitation or trafficking.

[21] An inquiry has to be undertaken in every case as per Chapter 9 of the Children's Act, to decide the question of whether a child is in need of care and protection. A designated social worker must investigate the matter and compile a report. When deciding the question of whether a child is in need of care and protection, the court must have regard to the report of the social worker.

[22] Moreover, in terms of s186(2) of the Children's Act :

"*A children's court may …. having considered the need for creating stability in the child's life, place a child in foster care with a family member for more than two years, extend such an order for more than two years at a time or order that the foster care placement subsists until the child turns 18 years, if-*

(a) *The child has been abandoned by the biological parents; or*

the child's biological parents are deceased…"

[23] Chapter 12 (ss 180-190) of the Children's Act sets out the provisions governing "Foster Care". S180(3) provides that a Children's Court may place a child in foster care with a person who is not a family member of the child, and also with a family member who is not the parent or guardian of the child. Therefore, to exclude children who are in placement with families who are related to them from receiving foster care grants, if circumstances permit, would be contradictory to the terms of the Children's Act. For the purposes of the Children's Act, clearly relatives may be eligible foster parents for abandoned or orphaned children, as "*every child has the right to family care or parental care*". To include the possibility of family members or other caregivers who have taken on the task of caring for a child being considered as foster parents of abandoned or orphaned children would be consistent with the tenor of the Children's Act, taking into account its emphasis on permanency, the preservation and the strengthening of family ties.

[24] S8 of the Social Assistance Act 13 of 2004 ("the Social Assistance Act"), provides that a foster parent[4] is, subject to section 5, eligible for a

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foster child grant for as long as the child needs such care, if - (a) the foster child is in need of care; and (b) he or she satisfies the requirements of the Child Care Act (now the Children's Act). S5 of the Social Assistance Act is headed "*Eligibility for Social Assistance*" and s5(2) provides that the Minister may prescribe income threshold; and means testing. However, s18 of the Social Assistance Act indicates that the financial criteria in terms of which applicants for a grant qualify are set out in Annexures A-D of the Regulations. Annexure C, which applies specifically to foster child grants, significantly states the following: (2) "*A foster parent qualifies for a foster child grant regardless of such foster parent's income*". The Children's Act does not set out a means test to be applied nor does it provide for an investigation into the earnings of foster parents. In fact the Children's Act provides only that a court determine whether a child is in need of care and protection, and after making such a finding, may make an order placing a child in foster care. The Social Assistance Act categorically states that a foster parent qualifies for a foster care grant regardless of his/her income.

[25] The question whether a court may make an order that a child be placed in foster care in terms of s46 of the Children's Act can easily be answered: A court may not. The reason is that s182(1) of the Act stipulates that before a Children's Court places a child in foster care, the court must follow the Children's Court processes stipulated in Part 2 of Chapter 9 (supra).

S7 of the Ministerial regulations of the Social Assistance Act states:'(a) In addition to the requirements contemplated in section 8 of the Act, a foster parent is eligible for a foster care grant if the child is placed in his or her custody in terms of the Child Care Act 1983; (b) child remains in his or her custody; and (c) foster parent is a south African citizen…

THE APPLICATION OF S150(1)(a)

[26] In setting out the guidelines which follow, this court has been assisted by the submissions of the parties. This court has borrowed substantially from their heads of argument in the preparation of this judgment, and extends its appreciation to all the parties involved in this matter, including the *amicus curiae*.

[27] The application of s 150(1)(a) of the Children's Act involves a factual inquiry that enables a determination that is consistent with the best interests of the child, abides by the spirit of the Children's Act and is consistent with the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution).

[28] The first stage of inquiry under s150 is for presiding officers to determine whether the child is in need of care and protection, if the child falls under the definitions of "orphaned" or "abandoned". The Children's Act limits the categories of children to orphans and those who are abandoned. This is a factual inquiry which can be easily determined. S1 of the Children's Act defines an orphan as "*a child who has no surviving parent caring for him or her",* and abandoned means "*a child that has obviously been deserted by the parent, guardian or caregiver*" *or* "*has for no apparent reason had no contact with the parent, guardian or caregiver for a period of at least six months*".

[29] This first stage of the inquiry into the minor child's situation, will be reliant on reports of the social workers who are deployed to carry out an investigation, which must necessarily include an investigation into the current living arrangements of the child, the identity of the present and prospective caregivers, and the status of their relationship to the child, whether familial or otherwise. It will entail taking into account a conspectus of factors pertaining to the minor child's emotional, physical and psychological wellbeing. Should the first stage of the inquiry reveal that the child is in need of care and protection, as he/she has been abandoned or orphaned, then the child may become a ward of the state and may be assigned to the care of foster parents. A child who has been orphaned or abandoned, and who is living with a caregiver who does not have a common law duty of support towards such child, may be placed in foster care with that caregiver.

[30] The Child Commissioner must then turn to the second stage of the inquiry and determine whether the minor child is "without any visible means of support". This inquiry includes a consideration of whether there is a legal duty of support resting on someone in respect of the child and whether, in addition to the status of being orphaned or abandoned, the child has the means currently, or whether the child has an enforceable claim for support. The focus of the inquiry at the second stage, is on the child and therefore the Child Commissioner must look at the minor child's personal financial resources.

[31] The word "visible" plays a critical role in s150(1)(a) of the Children's Act. "Visible" is to be given its ordinary grammatical meaning. The Oxford English dictionary ("The New Shorter Oxford English Dictionary on historical principles 1993") describes the relevant meaning of "visible" as: "clearly or readily evident"; "apparent"; "obvious". Black's Law Dictionary[5] 9th Edition defines the phrase "visible means of support" as "*an apparent method of earning a livelihood*". Black's Law dictionary further explains that "*vagrancy statutes*[6] *have long used this phrase to describe those who have no ostensible ability to support themselves*". The phrase suggests that the individual in question is the focus of the inquiry into visible means of support, rather than others upon whom he or she is dependant. The questions to be asked are: Does the minor child have the means to support him/herself and: Is the means of support readily evident, obvious or apparent? The inquiry into the means of the minor child is a factual one, focusing on the financial means of the minor child and not on the financial means of the proposed foster parents. The fact that Annexure C to the Regulations to the Social Assistance Act states that "*a foster parent qualifies for a foster child grant regardless of such foster parents income*', makes it abundantly clear that it cannot be the foster parent's means of support that is under scrutiny. Furthermore, neither the Children's Act nor the Social Assistance Act nor the appended Regulations require an examination of the foster parent's income.

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5 9th Edition, Thomson West , p1602

6 Black's Law Dictionary – Seventh Edition p 1547 – Bryan A Garner. Vagrancy is defined as "The state or condition of wandering from place to place without a home, job, or means of support. "See *Smith v Drew*, 26 P.2d 1040 (Wash. 1933). Many state laws prohibiting vagrancy have been declared unconstitutionally vague".

[32] It is necessary in carrying out the second stage of the inquiry to examine whether there is any obligation on any person to provide a duty of support to the minor child, including the current caregiver. If the minor child is not readily able to access any means of support, then s150(1)(a) of the Children's Act will apply, in that the child is in need of care and protection, is without visible means of support and in addition to being in the care of foster parents, is in need of a foster care grant. The foster care grant will then be accessed by the minor child's foster parents.

[33] The law relating to the duty of support can be summarised as follows: Biological parents of children, whether married or unmarried, have a duty of support.[7] Adoptive parents are considered the parents of a child once the adoption is concluded, and have a duty of support.[8] This is also true of children conceived by artificial fertilisation[9] and surrogacy arrangements.[10] Both maternal and paternal grandparents, regardless of whether the mother and father were married,[11] have a duty of support. Siblings have a duty of

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7 This common law principle is now also reflected in section 18(2)(d) of the Children's Act 38 of 2005 which lists "*to contribute to the maintenance of the child*" as among parental responsibilities and rights.

8 This common law principle is also reflected in the Children's Act. Section 242(2) sets out the effect of adoption which confers full parental responsibilities and rights in respect of the adopted child upon the adoptive parent, and 242(3) which states that "*An adopted child must for all purposes be regarded as the child of the adoptive parent, and an adoptive parent, must for all purposes be regarded as the parent of the adopted child*".

9 Section 40(1)(a) of the Children's Act provides that the child born as a result of the artificial insemination of one spouse must "*for all purposes be regarded to be the child of those spouses*".

10 Section 297(1)(a): "[*A]ny child born of a surrogate mother in accordance with the agreement is for all purposes the child of commissioning parents from the moment of the birth of the child concerned*".

11 N van Schalkwyk "*Maintenance for children*" in T Boezaart (ed) *Child Law in South Africa* (2009) 44-45. The case of *Barnes v Union and South West Africa Insurance Co Ltd* 1977 (3) SA 502 (E) held that there is an order of priority, and if parents are not able to support their children, the duty falls first on paternal and maternal grandparents. In *Petersen v Maintenance office, Simon's Town Maintenance Court and Others* 2004 92) SA 56 (C) the court recognised that paternal grandparents also have a duty of maintenance towards a child whose parents were not married.

support.[12] Step-parents generally do not have a duty of support, but have been found to have a limited duty of support in narrowly defined circumstances.[13] Aunts and uncles bear no responsibility to support their nieces and nephews.[14] In determining whether any person has a legal duty of support in respect of a minor child, cognisance must also be taken of customary law.[15]

[34] Fathers and mothers, whether married or unmarried, have a legal duty of support to support their children. However, the definitions of "orphan" and "abandoned" reduce the number of situations where the father or mother of a child will be "readily evident" as a source of support. If the whereabouts of the father are easily ascertainable, but the child is not being cared for by the father, for example where the father lives in another town, then foster care with the current caregiver may be the most suitable option, depending on the facts. In such instances, the Children's Courts may be assisted in their determination by considering the factors set out in s 7[16] of the Children's Act, to determine the best interests of the child.

[35] Siblings also have a duty of support. However, if they are also children, they would not have the means, and if the children are living in a child

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12 According to Van Shalkwyk (44), Voet (25.3.7) set a hierarchy of duty of support, which requires grandparents, and failing them, great grandparents in the direct line to support a child, before those in the collateral line eg brothers and sisters.

13 In *Heysteck v Heysteck* 2002 (2) SA 754 (T) the mother had remarried in community of property, and the court awarded maintenance *pendente lite*, as a result of the shared responsibility. In *MB v NB* 2010 (3) SA 220 (GSJ) the child was not formally adopted, but used the surname of the stepfather. The stepfather was found liable for school fees as he had held himself out to be "*the father*" on the school application form.

14 N van Schalkwyk in T Boezaart (ed) 47.

15 See: *Kewana v Santam Insurance Co Ltd* 1993(4) SA 771 (Tk AD).; *Maneli v Maneli* 2010 (7) BCLR 708 (GSJ)

16 Best interests of child standard. – (1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely – (a) to (n) and (2)…"

headed household that is in itself a ground on which a finding of "*in need of care and protection*" can be made in terms of s150(2)(b).

[36] It should be borne in mind that even if there is a relative somewhere who has a legal duty of support, the court could still find that the child "*is orphaned or abandoned and without visible means of support*" in certain circumstances, to be determined on the facts of each case.

[37] In order to resolve the problem the State would then be taking over the responsibility for the child by placing him or her in foster care, which is a form of alternative care. S161, dealing with contribution orders, provides that a Children's Court may make an order instructing a respondent to pay a sum of money or a recurrent sum of money as a contribution towards the maintenance of a child placed in alternative care, which has the effect of a maintenance order.

[38] In the case before us, the minor child is an orphan, is 12 years of age, has neither parents nor siblings nor grandparents. The Lamanis, the present caregivers of the minor child, are the minor child's aunt and uncle and not his parents. They owe him no parental duties and responsibilities nor do they have a legal duty to support him. S32 therefore cannot be an adequate substitute for foster care. The Child Commissioner erred in finding that because the minor child was in the care of *defacto* caregivers, the Lamanis, he therefore had "visible means of support", and this meant that he was not in need of care and protection, and therefore could not be placed into foster care. On the Child Commissioner's interpretation, many

relatives who step in to care for children orphaned or abandoned will be cut off from social services via the foster care process. The Child Commissioner found that because the minor child had a caregiver he could not be placed in foster care, a finding which is completely at odds with the spirit of the Children's Act. The Child Commissioner erred in finding that the words "visible means of support" meant that the orphaned or abandoned child had no person to care for him. The conclusion by the Child Commissioner that because the Lamanis had in fact stepped in to look after the minor child at a tender age, he therefore had "visible means of support" and was thus excluded from foster care services, is an implausible interpretation of s 150(1)(a) of the Children's Act, and could not have been the intention of the legislature.

[39] It will not be in the interests of children to take a rigid, overly formalistic approach to the interpretation of s 150(1)(a). With reference to the guidelines set out above, the Children's Courts should take a flexible approach appropriate for the determination of the best interests of the child in each case. It must be emphasised that the role of the judicial officers is to interpret s150(1)(a) of the Children's Act in a constitutionally compliant way and not to concern themselves with "*reducing the number of children's court cases with more or less 70%*"[17]. As observed by the Constitutional Court in *S v M (Centre for Child Law as Amicus Curiae*),[18] "*[a] truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved.*

[17] Judgment of the Child Commissioner, p 14

[18] 2008 (3) SA 232 (CC) para 24.

To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned."

[40] Reading the phrase "visible means of support" as relating to the caregiver's means runs contrary to the best interests of the child in that, if family members that are current caregivers are excluded from being eligible for foster care grants, then this may dissuade them from stepping in to help to support the minor child early in the orphanage of that child. It would appear that the intent of the legislature was for judicial officers to read s150(1)(a) of the Children's Act as requiring two stages of inquiry, and the application and examination of the phrase "without any visible means of support" being confined to the child without regard to the caregiver. This would be consistent not only with the plain meaning of the statute, but also with the legislative intent. Interpreting the phrase in the aforegoing way, will also promote familial caregivers.

[41] I find that the Child Commissioner erred in the interpretation of the phrase "without visible means of support" in s 150 (1)(a) to mean that " a child is in need of care and protection if the child has been abandoned or orphaned and has no caregiver who is willing to support the chid". He should have interpreted the words "without visible means of support" in the manner set out above and should accordingly have found the minor child to be in need of care and protection, and placed him in the foster care of the Lamanis.

[42] In this case, as the minor child is related to his foster parents, he should be placed in their foster care until he turns 18 years. This is so because he qualifies in terms of s 186(2) of the Children's Act for foster care of extended duration, due to the fact that he is an orphan as defined by the Children's Act and there is no possibility of reunifying him with either of his biological parents.

[43] Having regard to all of the aforegoing, I find that in terms of s150(1)(a) of the Children's Act the minor child who is an orphan, is in need of care and protection and is without any visible means of support, and is placed in the foster care of the Lamanis.

[44] In the result, the following order is made:

[4]

(a) The appeal is upheld.

(b) SS born 26 February 2000, is found to be in need of care and protection and is placed in foster care in terms of section 186(2) of the Children's Act 38 of 2005, with his aunt and uncle, Mrs Nontobeko Elizabeth Lamani and Mr Mbuzeli Bennett Lamani (hereinafter referred to as the foster parents)

(c) A foster care grant in relation to SS is to be paid to the foster parents for the duration of the foster care order, backdated to 20 January 2011, when the Children's Court handed down its judgment.

(d) Although the full names of the parties are included in this order to facilitate the payment of the foster care grant, no information that identifies or may identify the minor child is to be published, in accordance with section 74 of the Children's Act.

(e) There is no order as to costs.

_____
H SALDULKER
JUDGE OF THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

I agree

_____
MVR POTGIETER
ACTING JUDGE OF THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG

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JUDGMENT RESERVED	*19 APRIL 2012*
DATE OF JUDGMENT	*29 AUGUST 2012*