REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT JOHANNESBURG

CASE NO: A3075/2011

DATE: 12/04/2013

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

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DATE SIGNATURE

In the matter between:

NCM	Appellant
MM	Child 1
OM	Child 2
OM	Child 3

and

THE PRESIDING OFFICER OF THE CHILDREN'S COURT, DISTRICT OF KRUGERSDORP	1st Respondent

MINISTER OF SOCIAL DEVELOPMENT 2nd Respondent

MEC FOR HEALTH AND SOCIAL DEVELOPMENT, GAUTENG 3rd Respondent

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J U D G M E NT

CARELSE, J:

[1] An order in terms of s 150(1)(a) of the Children's Act 38 of 2005 ("the Act") was sought in the Children's Court by the appellant, the grandmother of the M children ("the children"), that the children be found to be in need of care and protection; that they be placed in her foster care and that a foster care grant be made available to her in order to take care of the children. A social worker's report was compiled recommending the aforegoing. On 26 April 2011, the Commissioner of the Children's Court, Krugersdorp ordered *inter alia* that the children are "not in need of care" on the basis that "they have visible means of support and that they have a caregiver who is able and suitable to care for them".

[2] This appeal lies against the whole of the judgment and orders that were made by the Commissioner of the Children's Court, Mr Du Plessis.

[3] This appeal concerns the correct interpretation of s 150(1)(a) of the Act. Before determining the merits of this appeal it is necessary to deal with 2 preliminary issues.

The first preliminary issue

[4] It is apparent from a number of conflicting orders and reasons emanating from the Children's Court that confusion reigns insofar as the interpretation of s 150(1)(a) of the Act is concerned. As a result hereof the Minister of Social Development, the second respondent, sought to intervene in these proceedings on the basis that a proper interpretation and application of s 150(1)(a) of the Act is required in order to foster uniformity in the various Children's Courts who deal with many applications for foster care and foster care grants. Both counsel for the appellant and for the second respondent submitted that an authoritative judgment is required to end the confusion around the interpretation of s 150(1)(a) of the Act. In the view I take of this matter, it is not necessary to grant an order for intervention since the Minister of Social Development has been cited as a party and has accordingly been joined. In any event the issue at hand is of considerable importance and the participation of the Minister is important. The second respondent does not oppose the appeal, instead she supports the appeal.

The second preliminary issue

[5] The appellant raised a point *in limine*. The appellant was legally represented by Legal Aid South Africa. Nowhere on the record does it appear that the Commissioner of the Children's Court was too concerned about legal representation on behalf of the children. The question that arises is whether or not there is a duty upon the Commissioner of the Children's Court to instruct legal representation for the children or to inform the appellant that she may approach the Legal Aid Board for legal representation for the children.

[6] Both Counsel for the appellant and the second respondent agreed that there is a duty upon the Commissioner for the Children's Court to at the very least inform the appellant that she may approach the Legal Aid Board for assistance for the children. These are minor children whose rights must be jealously guarded particularly in matters which may adversely affect them as it has in this case. More so s 28(1)(h) of the Bill of Rights in the Constitution of the Republic of South Africa provides:

> "Every child has the right 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."

[7] In my view there is a duty on the Commissioner of the Children's Court to at the very least inform the appellant that she could approach the Legal Aid Board for assistance for the children. To set aside these proceedings would result in the matter starting *de novo* in the Children's Court. In my view that would not be in the interests of justice. The delay in determining the correct interpretation of s 150(1)(a) of the Act will result in substantial injustice given

the conflicting orders emanating from the Children's Court. Furthermore in this case "substantial injustice" will not occur if the children in this instance were not provided legal representation because the outcome of this appeal is in favour of the children's interest which makes it unnecessary to appoint legal representation for them.

[8] The interpretation of s 150(1)(a) of the Act has been dealt with by this Court on appeal in the case of SS v Presiding Officer, Children's Court Krugersdorp and Others 2012(6) SA 45 (GSJ) ("the *Stemele* matter") which was delivered in August 2012 in which the Court held:

> "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.[1]"

[9] This appeal is similar to the *Stemele* appeal insofar as it deals with the interpretation of s 150(1)(a) of the Act. The issue in this appeal is simply whether a caregiver who does owe a legal duty of care may be appointed a foster care parent. Also whether a foster care grant may be granted by the first respondent. The facts in this case are distinguishable from the facts in the *Stemele* matter to the extent that the caregiver in the *Stemele* matter did not owe a legal duty of care to the children the caregiver wished to foster and receive a foster care grant.

Relevant background facts

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[1] ad par 29

[10] According to the social worker's report, the biological mother of the three minor children who were born on 21 November 2000, 7 March 2006 and 7 March 2006 (twins), died on 17 October 2008. Ms NC M, the appellant is the maternal grandmother of the children. Initially the biological father was identified as I R. However, DNA tests excluded him from being the father. Sadly, the biological father is unknown. The children are orphaned. Hence, the children together with their biological mother have lived with the appellant since birth. The three minor children continue to live with her, the appellant, in Kagiso. The children have bonded well with the appellant as well as the extended family.

[11] The appellant receives a disability grant of R1 010.00, a foster care grant of R710.00 for one of the other grandchildren and a child support grant of R750.00 for the three children concerned, totalling R2 470.00.The appellant's expenses include groceries of R1000. 00, electricity of R400.00, water of R200.00, insurance of R150.00, school fees of R440.00, transport costs of R660.00. The total expenses are R2 850.00. The appellant has a clear shortfall. According to the social worker's report the children need to be taken care of by the appellant who does not have adequate financial means to support the children.

[12] The social worker recommended that the children were in need of care and protection in terms of s 150(1)(a) of the Act. The social worker further recommended that the children be placed in the foster care of the appellant

and that a foster care grant be paid to the appellant. This would amount to R2 130.00 in respect of the three minor children. The Commissioner of the Children's Court disagreed.

[13] I turn now to deal with the judgment of the Commissioner of the Children's Court who relied on s 32 of the Children's Act on the basis that there was no need for the appellant to apply for a foster care order because the appellant was already taking care of the children and the children were therefore not in need of care and protection. As a result hereof the Commissioner of Children's Court found that there was no reason to legalise the placement of the children. This finding in our view is misplaced for the following reasons: the Commissioner should firstly have enquired whether the children are in need of care and whether they have any visible means of support; the Commissioner erred by collapsing the two inquiries into one; because the children were in the care of a *de facto* caregiver there was no need to place them in foster care as they were not in need of care; and the children have visible means of support because they have a caregiver who is able and suitable to care for them; and in the determination of the question of visible means of support the commissioner was required to consider whether the children have visible means of support and not whether the caregiver has visible means of support. The inquiry into whether the caregiver has the means of support is a secondary inquiry.

[14] There was a concerted effort by the Commissioner in this case as was done in the *Stemele* case to address the financial position. The Commissioner

referred to the Social Assistance Act No 13 of 2004 in particular s 4(c) which makes provision under what circumstances a foster grant is ordered.[2] The court of Appeal in the *Stemele* matter with respect correctly held:

> "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 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."

[15] In the *Stemele* matter the court held that a court cannot make an order that a child be placed in foster care in terms of s 46 of the Children's Act because before a court can do so a court must follow the Children's Court processes contained in Part 2 of Chapter 9 of the Act.

[16] Having regard to the aforegoing the findings of the Commissioner can only lead to untold hardships for the many children who are in the care of their grandparents. This is the reality of our society. To perpetuate these hardships will be to defeat the objects and spirit of our Constitution and will not be in the best interests of children. As a result hereof, the appellant has brought this appeal on behalf of the three minor children.

The relevant statutory provisions and legal principles

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[2] s 8 of the Social Assistance Act 13 of 2004

[17] Section 150(1) (a) of the Children's Court Act 38 of 2005 provides:

"**S 150 Child 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 …" (my emphasis)

[18] S 28 of the Constitution of the Republic of South Africa provides that:

"(1) Every child has the right –

(a) …

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

(c) to basic nutrition, shelter, basic health care services and social services ..

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

[19] It is settled law that when interpreting any legislation a purposive approach must be followed and regard must be had to the spirit, purport and objects of the Bill of Rights[3]. Section 181 of Chapter 12 of Act 38 of 2005 provides:

> "**181. Purposes of foster care**
>
> The purposes of foster care 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 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."

[20] On a proper reading of the judgment of the court *a quo* in the *Stemele* matter as well as in this matter, the court found that because the appellant had visible means of support, the children were not in need of care. This approach was criticised on Appeal in *Stemele supra.* In the *Stemele* matter

[3] S 39(2) of the Constitution Act 108 of 1996

the Court of Appeal adopted a two stage inquiry when interpreting s 150(1)(a) of the Children's Court Act. With respect we agree with this approach and intend to follow it in the determination of this matter.

[21] It was held in *Stemele supra* that "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")".[4] Insofar as the first stage of the inquiry is concerned the Court of Appeal in the *Stemele* matter held:

> "The 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 well-being.[5]"

Insofar as the second stage of the inquiry is concerned the Court of Appeal further held:

> "… 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

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[4] Stemele supra page 14 par [27]

[5] ad par 29

> the status of being orphaned or abandoned, the child has the means currently, or whether the child has an enforceable claim for support."

Need of care and protection inquiry

[22] In the determination of this issue the court must have regard to the social worker's report which contains the following information: the current living arrangements of the children, the identity of the present and prospective caregivers and the status of their relationship to the children as well as the children's emotional, physical and psychological wellbeing[6] which must be applied in a way 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 Court of Appeal in the Stemele matter held that:

> "Should the first stage of the inquiry reveal that the child is in need of care and protection, as/he 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."

[23] The Court of Appeal in the *Stemele* matter *supra* further held:

> "A child who has been orphaned or abandoned, and who is living with a care giver who does not have a common law duty of support towards such a child may be placed in foster care with that care giver."

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[6] *Stemele supra* ad par [29]

[24] The facts in the *Stemele* matter relate only to those children who are living with caregivers who do not have a common law duty of support towards the children. This case however, relates to children who are living with caregivers who do owe them a common law duty of support. On this basis the facts in the *Stemele* matter are clearly distinguishable from the facts of this case. Counsel for the respondents submitted that the above finding[7] should not be limited only to those children who are living with caregivers who do not have a common law duty towards the children. The inquiry should also extend to those children who are living with caregivers who owe children a duty of support. It is trite law that grandparents like parents have a common law duty of support towards the children. This legal position is consistent with our Constitution. Counsel for the respondents submitted that the effect of the aforegoing finding in the *Stemele* matter would exclude the appellant from becoming the foster parent of the children in this case. Such a conclusion would exclude children in the care of their grandparents who are found to be abandoned or orphaned from accessing government source of support. To do so would be to distinguish and create various categories of children, for example, children who have grandparents will be treated differently from those who do not. Nowhere in any of the aforegoing provisions with particular reference to s 150(1) of Act 38 of 2005 is any such distinction made. Unfortunately, the literal interpretation of the *Stemele* decision may result in untold hardships for children who end up being classified into groups of those who have caregivers who have a legal duty of support and those who do not. Such constitutes unjustified discrimination which is contrary to section 7 of the

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[7] Par[16] *supra*

Bill of Rights. This is surely not in keeping with the spirit of Ubuntu and it will certainly not be in the best interest of children if this distinction is to persist. All orphaned children are to be treated equally before the law.

[25] Counsel for the respondents further submitted that the inquiry relating to caregivers who owe a duty of support as opposed to those who do not should be dealt with in the second stage of the inquiry in the determination of the question of "visible means of support". We agree.

[26] Section 156(1)(e) of the Children's Act provides:

> "If the child has no parent or care giver or has a parent or care giver 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;
>
> (ii) …"

This section specifically provides for caregivers to become foster care parents whether or not they owe the children a duty of support. Having regard to the aforegoing there can be no rational basis for the distinction.

[27] Therefore, the court *a quo* in this case erred when it found that the "children in question have a caregiver Mrs M. She is able and suitable to care for the children (This is common cause). For this reason it is clear that a foster care order cannot be granted in terms of section 156(1) (e)[8]."

[8] Magistrate's findings page 9

[28] If the finding in the *Stemele* matter is to be followed then the appellant will be excluded, which will not be in the best interests of the children. When interpreting s 150(1)(a) of the Children's Act no discrimination should be made between those caregivers who owe the children a duty of support and those who do not. This interpretation would be in the best interests of the children and the children will be afforded equal protection before the law. The approach we take in the matter will avoid patterns of discrimination and disadvantage.

[29] It is common cause that the minor children are orphaned. In this case the appellant, the grandmother has applied for the minor children to be placed in her foster care. They have been living for some time with their grandmother. Their biological father is unknown. Having regard to the aforegoing and in the best interests of the children this court finds that they are in need of care and protection.

Visible means of support inquiry

[30] Turning to the second stage of the inquiry which involves a determination into whether or not the minor children are "without visible means of support". There are two steps to this inquiry. The first step is for the Commissioner of the Children's Court to enquire whether or not the children have the means to support themselves. If not, the Children's Court must enquire whether the children have an enforceable claim for support. At this stage the focus should be on whether or not the children have the necessary financial resources, for

example, they may have received an inheritance or an insurance policy. At this stage of the inquiry the Commissioner of the Children's court must not investigate the financial position of the caregiver, but rather that of the minor children.

[31] In *Stemele supra the* court held that the Legislature intended the inquiry to focus on the financial means of the child. The court further held that neither the Children's Act nor the Social Assistance Act nor the relevant regulations require an examination of the foster care giver's income. We agree[9] with these conclusions.

[32] If the Commissioner of the Children's Court finds that the children do not have the financial means to support themselves the question that arises is: are the children in a position to enforce their claim against those who owe them a legal duty of support. Counsel for the respondents submitted if the persons against whom this legal duty of support is enforceable are not in a financial position to support the children, then the caregivers should be able to apply for a foster care grant. The fact that a duty of support exists, does not mean that the matter ends there; a further inquiry into whether the caregiver has the financial means to support the children must be done. On the facts of this case according to the social worker's report the appellant receives R2 470.00 per month. Her expenses amount to R2 850.00. There is a clear deficit. Having regard to the aforegoing the appellant does not have the

[9] Stemele supra ad par [31]

financial means to support the children. In our view the appellant should be able to apply for a foster care grant.

[33] In the result the following order is made:

33.1 The appeal is upheld.

33.2 The finding of the Commissioner of the Children's Court is substituted with the following order:

> "The minor children are found to be in need of care and protection and are to be placed in foster care in terms section 186(2) of the Children's Act 38 of 2005 with their grandmother Ms NCM ("the foster care parent") and a foster care grant in relation to the three minor children is to be paid to the foster care parent."

33.3 This order is antedated to 26 April 2011.

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Z CARELSE
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree:

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R MATHOPO
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

Appearances:

For the Appellant : Mr Motaung

For the Respondent : Mr Mokhari SC and Ms Ali