e-MANTSHI

A KZNJETCOM Newsletter

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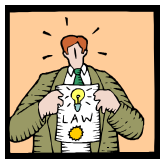
Welcome to the seventy first issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.
Your feedback and input is key to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1.The *Protection from Harassment Act, Act 17 of 2011* was published in Government Gazette no 34818 dated 5 December 2011.The Act was assented to by the President on 2 December 2011.The purpose of the Act is to provide for the issuing of protection orders against harassment; to effect consequential amendments to the Firearms Control Act, 2000; and to provide for matters connected therewith. The Act was enacted in order to:

(*a*) afford victims of harassment an effective remedy against such behaviour; and

(*b*) introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act,

It will only and come into operation on a date fixed by the President by proclamation in the Gazette. Some of the definitions which are of importance are the following:

"harassment" means directly or indirectly engaging in conduct that the respondent knows or ought to know—

(a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably—

(i) following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;

(ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or

(iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to, or brought to the attention of, the complainant or a related person; or

(b) amounts to sexual harassment of the complainant or a related person;

"sexual harassment" means any—

(a) unwelcome sexual attention from a person who knows or ought reasonably to know that such attention is unwelcome;

(b) unwelcome explicit or implicit behaviour, suggestions, messages or remarks of a sexual nature that have the effect of offending, intimidating or humiliating the complainant or a related person in circumstances, which a reasonable person having regard to all the circumstances would have anticipated that the complainant or related person would be offended, humiliated or intimidated;

(c) implied or expressed promise of reward for complying with a sexually-oriented request; or

(d) implied or expressed threat of reprisal or actual reprisal for refusal to comply with a sexually oriented request;

Recent Court Cases

1. DPP, North Gauteng v Thabethe 2011(2) SACR 567 (SCA)

Restorative Justice is not always an appropriate sentence for serious offences.

“[20] Although restorative justice received a somewhat lukewarm reception by the

judiciary starting tentatively in *S v Shilubane* 2008 (1) SACR 295 (T) it has in the last few years grown in its stature and impact that it has even received the approval of the Constitutional Court in *Dikoko v Mokhatla* 2006 *(b)* SA 235 (CC), *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC),*The Citizen 1978 (Pty) Ltd v McBride (Johannesburg and others, Amici Curiae)* 2011 (4) SA 191 (CC). Restorative justice as a viable sentencing alternative has been accorded statutory imprimatur in the Child Justice Act 75 of 2008, in particular s 73 thereof. I have no doubt about the advantages of restorative justice as a viable alternative sentencing option provided it is applied in appropriate cases. Without attempting to lay down a general rule I feel obliged to caution seriously against the use of restorative justice as a sentence for serious offences which evoke profound feelings of outrage and revulsion amongst law-abiding and right-thinking members of society. An ill-considered application of restorative justice to an inappropriate case is likely to debase it and make it lose its credibility as a viable sentencing option. Sentencing officers should be careful not to allow some overzealousness to lead them to impose restorative justice even in cases where it is patently unsuitable. It is trite that one of the essential ingredients of a balanced sentence is that it must reflect the seriousness of the offence and the natural indignation and outrage of the public. This is aptly captured in the trite dictum by Schreiner JA in *R v Karg* 1961 (1) SA 231 (A) at 236A-C where he stated:

'While the deterrent effect of punishment has remained as important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing. But the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment. SNYMAN AJ, was bringing home to the appellant and other persons the seriousness of the offence and the need for a severe punishment, and I can find nothing in his remarks to show that he gave undue weight to the retributive aspect.'"

From The Legal Journals

Garber, M M

"Anomalies in the new magistrates' courts rules"

De Rebus December 2011

Hawkey, M

"Mandatory mediation rules to shake up justice system"

De Rebus December 2011

Snyman, W

"Debt Collection: No justice!"

De Rebus December 2011

(Electronic copies of any of the above articles can be requested from gvanrooyen@justice.gov.za)

Contributions from the Law School

Admissibility of a Confession/Evaluation of Evidence

1. Issue

The case of *S v Mkhize* 2011 (1) SACR 554 (KZD) dealt with the admissibility of a confession obtained from the accused during his unlawful detention by the police.

The accused was charged with two counts of murder, the first arising out of an incident on 1 November 2008, and the second from an incident on 5 February 2009. The accused pleaded not guilty to both charges.

The prosecution called witnesses to support their case, but the main evidence against the accused was the confession he had allegedly made to one Captain Eva. The accused objected to the admission of the confession on the basis that he had been forced to make the confession by threats and assaults (at [12]).

2. Evidence

A trial within a trial was (correctly) held to determine the matter.

Five witnesses testified for the prosecution.

2.1 Inspector Shandu was initially seized with the matter relating to the first incident in November 2008, and relating to the second incident in February 2009.

When he heard that the accused had been detained in connection with an unrelated matter on 27 August 2009, he immediately arrested him, and had him detained. On 3 November 2009, he interviewed the accused, and informed him of the charges against him. A 'warning statement' was taken from him. He testified that the accused indicated he wanted to make a statement in connection with the crimes, and that he explained his rights to him, and that he could make his statement either to a police officer or to a magistrate. He chose to make it to a police officer, and he was therefore taken to Captain Eva to do so. The interview took place in isiZulu and lasted an hour (at [14-15]). Inspector Shandu conceded that the accused should have been charged and taken to court within 48 hours of his arrest (at [15]).

2.2 Captain HF Delport was the commander who oversaw Inspector Shandu's work. He assisted Inspector Shandu in making arrangements for the statement to be made to Captain Eva. He booked the accused out of his cell for 'further investigation' (at [18]), drove him to Cato Manor and handed him over to Captain Eva. He and Warrant Officer Geyser drove around the area until the statement was finished, then fetched the accused (at [17]). The trip took 15-20 minutes, and the statement was completed within an hour. He testified that the accused was not under any undue influence to make the statement (at [17]), and alleged that they were not with Captain Eva when the statement was made (at [18]).

2.3 Warrant Officer Geyser worked under the command of Captain Delport. He testified that he was with Captain Delport when the accused was taken to Captain Eva, and that he collected the accused after they received a call from Captain Eva telling them that they could fetch the accused as the statement was done. He testified that this was about one and a half hours later. He testified that he was not present when the statement was taken. He testified that the accused appeared to be in the same mental and physical state (calm and quiet) before and after the statement (at [20]).He denied that any documents were handed to Captain Eva on their arrival (at [20]).

2.4 Captain Eva testified that he took the statement from the accused, who appeared calm and collected, in the presence of an interpreter (at [22]). He testified that he used a pro forma document to do this, and that the four and a half page statement was given in isiZulu, interpreted in English, then back into isZulu before the accused signed and initialled it (at [21]).He denied that Geyser was present, denied that a statement in English was given to him by Geyser, and denied that Geyser assaulted the accused by placing a rubber-glove like tube over his head (at [22]).

2.5 Inspector JMK Ngcongo testified (on commission) that he had acted as the interpreter in the matter. He confirmed Captain Eva's evidence as to the manner in

which the statement was taken (at [24]). He denied threatening the accused, and denied that the accused was threatened or assaulted by anyone else (at [25-26]).He testified that the statement was made freely and voluntarily, that the accused appeared relaxed, and that all his rights were explained to him (at [26-27]).

2.6 The accused testified that Inspector Shandu had not explained his rights to him, that he had not wanted to make a statement to a police officer, and that he had not known why he was being taken to Captain Eva. He testified that when they arrived at Captain Eva, a document was handed to Captain Eva by one of the police officers. The document was then interpreted to him, but whenever he denied it reflected the truth, he was choked by Geyser pulling a rubber tube like glove over his face (at [30]). He denied that his rights were explained to him, and asserted that Delport and Geyser were present (at [31]).

This was the evidence on which the court had to decide whether the alleged confession was admissible

3. Judgment

3.1 Background

The court started by referring to section 35 of the Constitution of the RSA Act 108 of 1996, which sets out the rights of an arrested person, and section 50(1) of the Criminal Procedure Act 51 of 1977 (CPA) which provides that an accused has the right to be brought to court within 48 hours of his arrest. The court held that this was the background against which the case should be assessed (at [39]).

The court noted that the most shocking thing about the case was the fact that the accused was not brought to court within 48 hours of his arrest on 27 August 2009, nor within 48 hours of 3 November 2009 when his warning statement was taken (at [39]). The court held that the ‘enormity of his unlawful detention was compounded by obtaining a confession from him on 5 November 2009, when he should rather have been before a court (at [42]). The court held the police’s conduct was reminiscent of the dark days of apartheid, and had no place in the present democratic order (at [52]).

The court held that the explanations tendered for failing to bring the accused to court within 48 hours of his arrest ‘made no sense whatsoever,’ and that as experienced police officers they should have known better (at [41]). The court held that the evidence did not show that any of the exceptions to the 48 hour rule applied (at [43]), and that the accused’s rights were flagrantly violated, and his constitutional protections made a mockery of (at [43]). The court held that this conduct called into question the police’s motives, and reflected poorly on their credibility and reliability (at [42]).

Against this background, the court proceeded to evaluate the evidence.

3.2 Evaluation of the evidence

3.2.1 Credibility

The court held that the fact that the police officers had flagrantly disregarded the accused's rights was a strong factor indicating that the accused had a stronger claim to credibility than they did (at [63]). The police officers' credibility, reliability and bona fides was called into question by virtue of their flouting the procedures designed to protect the accused against improper police conduct (at [42]),which at best revealed poor and shoddy police work and at worst was suspicious (at [71]). In contrast, the accused's evidence was satisfactory (at [72]).

In addition, the court noted numerous improbabilities in the state's version, and found that there were aspects of the state's evidence which supported the version put forward by the accused (at [69]).

3.2.2 Probabilities

The court noted the following improbabilities in the state's version:

3.2.2.1 It is strange that the accused was booked out of his cell for 'further investigation' when in fact he was being taken to record his statement with Captain Eva (at [65],[69]). This supports the version of the accused that he did not know why he was being taken out of his cell on that day, and that he had not requested to make a statement (at [69]).

3.2.2.2 It is improbable that the accused would choose to make his statement to Captain Eva rather than to a magistrate (at [61]). In addition, the version of the state lacked credibility because there was a contradiction between the evidence of Inspector Shandu and Captain Eva , with the former saying the accused had requested to make his statement to Captin Eva (at [58]), and the latter saying he had waived his right to make his statement to a magistrate (at [58]). The court also stressed that it was not enough to simply record on the form that the accused had chosen to make his statement to an officer, because the form specifically required them to detail the steps they took to secure the services of a magistrate to take the statement (at [61]).

3.2.2.3 It is improbable that the statement could have been properly taken down in accordance with the required procedures in less than one hour (at [65]). This supports the accused's version that his rights were not explained to him, and that a pre-prepared statement was used as the basis for his confession.

3.2.2.4 It is improbable that Captain Delport and Warrant Officer Geyser would drive around to 'kill time' during the time the statement was taken given that they were on duty and there was so much police work to be done (at [66]).

3.2.2.5 It is 'suspicious' that the statement from the main witness in relation to the first charge was taken one year and five months after the incident (at [67]), and that the accused's warning statement was only taken from him on 3 November 2009 (at [71]).

3.2.2.6 It is 'strange' that Captain Delport proceeded to take the statement from the accused rather than immediately taking him to court, as he must have known that

the accused had not been taken to court as required by law, in view of the fact that he was Inspector Shandu's commanding officer (at [68]).

Therefore the court concluded that the version of the accused was reasonably possibly true, and was accepted over that put forward by the state (at [72]).

4. Admissibility of Confession

The court then had to consider whether the confession should be excluded from the evidence. The court added (in a somewhat self-evident statement) that 'great caution should be exercised before deciding whether the contents of a confession should be admissible or not' (at [53]).

There are three possible bases for the exclusion of an accused's confession. Firstly, on the basis that it was unconstitutionally obtained, in terms of section 35(5) of the Constitution. Secondly, on the basis that the requirements set out in section 217 of the CPA have not been met. Thirdly (possibly) in terms of the court's general common law discretion to exclude illegally or improperly obtained evidence. Unfortunately, while the court deals with – or at least alludes to - each of these possibilities, it does not do so clearly, nor does it distinguish carefully between the different possibilities.

4.1 General common law discretion

The court held that because the confession was obtained during the accused's unlawful detention, it could not be said to have been properly and legally taken (at [48]).

The court distinguished the case of *S v Shabalala and another* 1996 (1) SACR 627 (A), where the court held that confessions taken during the accused's unlawful detention were admissible, on the basis that there was no constitutional challenge to the admissibility of the evidence in terms of the interim constitution in that case, and that the appellants in that case had not persisted in their contention that the confessions had been illegally obtained (at [47]).

However, the court does not take this argument any further, which is a pity because it raises the interesting issue of whether the court retains a general discretion to exclude confessions other than for non compliance with section 217 of the CPA, or a violation of the Constitution. The issue is however probably mostly academic, because most illegality outside of non compliance with section 217 of the CPA is subsumed within constitutional grounds for attacking the admissibility of a confession (See *S v Khan* 1997 (2) SACR 611 (SCA)). However, in *S v Zurich* 2010 (1) SACR 171 (SCA), the court held that there was no doubt that it retained its common law discretion to exclude improperly obtained evidence on the grounds of unfairness and public policy.

4.2 Unconstitutionally obtained evidence

The court referred to section 35 (1) (d) of the Constitution, and 'the imperative on all criminal trials to be conducted in accordance with the notions of basic fairness and justice' (at [49]), and found that 'the evidence, obtained in violation of the accused's fundamental rights, is inadmissible' (at [50]).

The court referred to the case of *S v Viljoen* 2003 (4) BCLR 450 (T), and held that it was in agreement with Patel J that 'there is no discretion afforded to a judicial officer when he/she is confronted with a situation where evidence is obtained unconstitutionally. To admit such evidence, contaminated as it is, will be a violation of the accused's rights and, above all, will be prejudicial to the administration of justice' (at [51]).

The court also referred to *S v Burger and others* 2010 (2) SACR 1 (SCA), to the effect that the rights in section 35 are not to be flouted, and that such conduct should be dealt with decisively by the relevant authorities' (at [52]).

It is remarkable that the court only refers to section 35 (1) (d) of the Constitution, which affords an arrested person the right to be brought to court within 48 hours, as supporting its assertion that the confession is inadmissible.

There are several other provisions of the Constitution that relate significantly to the question of the admissibility of the confession, on the central facts of the case. Section 35(1)(c) provides that every accused person has the right not to be compelled to make a confession. Sections 35(1)(a) and (b), read with section 35(4), also give such a person the right to remain silent as well as to be informed promptly of that right and of the consequences of not remaining silent, in a language that the person understands. Section 35(2) provides that arrested persons have the right to choose, and to consult with, a legal practitioner, and to be informed of this right promptly, in a language that he understands. Last but not least, section 35(3)(j) provides for the right to a fair trial, which includes (but is not limited to) the right not to be compelled to give self-incriminating evidence.

It is also of concern that the court refers to the case of *S v Viljoen* 2003 (4) BCLR 450 (T), as authority for its position, when that case was overturned and severely criticized on appeal (*Director of Public Prosecutions,Transvaal v Viljoen* 2005 (1) SACR 505 (SCA)). One of the questions which the SCA had to determine was whether a violation of an accused's fundamental rights rendered evidence obtained as a result ipso facto inadmissible at his trial – to which the SCA answered 'No.' Thus, the statement of Patel J which the court *in casu* specifically aligns itself with, was found to be incorrect.

In any event, a reading of section 35 (5) of the Constitution shows that it is fallacious to argue that there is no discretion to include unconstitutionally obtained evidence. In *Key v Attorney-General,Cape Provincial Division, and Another* 1996 (2) SACR 113 (CC) at para 13, the court held that '[a]t times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.' The obligation to exclude such evidence only arises when it has been

found that there has been a violation of a constitutional right, that there is a sufficiently close causal link between the violation and the procurement of the evidence and that to include the evidence would render the trial unfair or be otherwise detrimental to the interests of justice. These issues must be decided on the facts (*Director of Public Prosecutions,Transvaal v Viljoen* supra at [37]).

Inevitably, where the accused's fundamental rights have been violated, the inclusion of evidence obtained as result will result in an unfair trial, and thus must be excluded. In casu, on the facts as found by the court, the exclusion of the confession on the basis of section 35(5) was clearly required.

4.3 Section 217, CPA

The court held that 'assuming the confession could not be attacked on a constitutional basis' it was necessary to evaluate the evidence of the witnesses to assess whether the requirements of section 217 of the CPA were met (at [53]). In fact, the evidence of the witnesses had also to be evaluated to assess whether and the extent to which the accused's constitutional rights had been violated.

In any event, the court held that the evidence showed that the confession had not been made freely and voluntarily, and without undue influence, and that it was therefore inadmissible in terms of section 217 (1) of the CPA (at [75]).

Having found the confession to be inadmissible, the court then proceeded to analyse the other evidence for the prosecution, to assess whether proof beyond a reasonable doubt had been established (at [77-87]). The court noted that the state's case was based almost entirely on the inadmissible confession, and noted its concern that invariably, when the evidence implicating the accused was insufficient to sustain a conviction, an alleged confession was pulled out of the hat. The court reaches the conclusion that 'something must be wrong with police investigation, notwithstanding some of the difficulties which the police authorities face on a daily basis in our country' (at [89]).

In casu, the court concluded that the evidence was not sufficient to meet the burden of proof, and the accused was acquitted (at [90-93]), despite the fact that the court harboured a suspicion that the accused was involved in the commission of the offences with which he was charged (at [91]).

The outcome of the case is undoubtedly correct, but it is regrettable that the reasoning of the court is so murky. Nevertheless, an important principle to emerge from the case is that police officers' disregard for the law may lead to adverse credibility findings against them. Also, that at least one judge suspects that confessions are manufactured to mask inadequate investigation by the police.

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Matters of Interest to Magistrates

The Views of the Child in the application for extension orders and the North Gauteng High Court decision in case number 21726/11 of 08 June 2011 (unreported): A Step Forward and Two Steps Backwards!

E B Ngubane Senior Magistrate, Ntuzuma

Introduction

Once a right has been conferred upon and exercised by any person,any attempt to reverse such a right without a proper investigation of other methods in which an imminent challenge can be addressed, is frowned at. This contribution will highlight the rights of a child to have his or her views heard before any legal or administrative decision is taken about that child. Cultural traditions, international conventions, the 1996 Constitution of the Republic of South Africa and the Children's Act, 38 of 2005, in respect of the views of the child, will be discussed. The practical application of the child's right to have his/her views heard will be clarified as a step forward. The decision of the North Gauteng High Court in case number 21726/11, in respect of the views of the child, will be discussed as two steps backward. The approach that may be considered as appropriate in solving expiring foster care orders will be highlighted.

Cultural traditions

In most cultural traditions, it was common to regard the child as property.[1] The Roman Law of *pater potestas* allocated the authority over the life and death of the child to the father.[2] The Child's rights, other than those of welfare, that is, to be maintained, did not exist. Eventually a culture of recognising the rights of the child was instilled in the whole world through famous writers[3] and international conventions.

International conventions

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[1] KE Knutson 'Recognizing the citizen child' in (1997) *Children: Noble Causes or Worthy Citizen*? 122,128.
[2] Ibid.
[3] MDA Freeman 'Introduction: Rights, Ideology and Children' in MDA & P Veerman (eds) (1992) *The Ideologies of Children's Rights*, 3 : The early concerns for children and their rights were voiced by child savers who advocated for separate institutions for children like juvenile courts, distinct penal systems and compulsory education. This was an exclusive protection of the children. On the other hand, liberationist movement in 1960s emerged and they advocated for the autonomy, self determination of children and justice.

The latest, but the most recognised convention which was ratified by most state parties in the world, was the 1989 United States Convention on the Rights of the Child (the CRC).[4] The CRC widely recognised that children are as entitled as adults to demand recognition for their rights.[5] It further required communities to develop a culture of listening to children[6] when they express their views and that such views should be given due weight in accordance with their age and maturity.[7] It reversed the previous notion of a child being regarded as property by considering the child as a subject of protection, rather than object of protection.[8]

The 1990 African Charter on the Rights and Welfare of the Child (the African Charter) also expresses that a child who is capable of communicating his/her own views should be afforded an opportunity for his/her views to be heard in all judicial or administrative proceedings affecting that child.[9] Although the African Charter does not direct that more weight must be given to the views of older and more matured children, both the CRC and the African Charter express the fundamental point of hearing the voice of the child.[10]

The Constitution of the Republic of South Africa Act 108 of 1996 (the 1996 Constitution)

The Bill of Rights in the 1996 Constitution provides that every child has the right to appropriate alternative care when he/she is removed from the family environment [11] and further states that a child's best interests are of paramount importance in every matter concerning that child.[12] The child's interests include his/her autonomy, as well as his/her interest in his/her views being afforded respect and consideration during his/her period of developing autonomy.[13] Domestic legislation which was going to include the right of the child to have his/her views heard in matters affecting the child, was enacted.

The Children's Act, 38 of 2005 (the Children's Act)

The Children's Act provides that all organs of state in any sphere of government and all officials, employees and representatives or an organ of state must respect, protect and promote the rights of children contained in the Children's Act.[14] It confirms the provisions of 1996 Constitution in respect of the best interests of a child

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[4] Ibid 12; J Fortin (2005) *Children's Rights and the Developing Law*, 607-623.
[5] Ibid ; A Barrat 'The best interests of the child: Where is the child's voice?' in S Burman (ed) (2003) *The Fate of the child: legal Decisions on Children in the New South Africa* 145, 149.

[6] G Van Bueren 'the United Nations Convention on the Rights of the Child: An Evolutionary Revolution' in CJ Davel (ed) (2000) *Introduction to Child Law in South Africa*, 202.
[7] Article 12; T Kaime 'The Convention on the Rights and the Cultural Legitimacy of children's rights in Africa: Some reflections' (2005) 5 *African Human Rights Law Journal* 221.
[8] A Barrat op cit note 5.
[9] Article 4(2).
[10] N Zaal 'Hearing the voices of children in court: A field study and evaluation' in S Burman (ed) (2003) *The Fate of the child: Legal Decisions on Children in the New South Africa* 158, 159.
[11] Section 28(1)(b) of the 1996 Constitution.
[12] Section 28(2) of the 1996 Constitution.
[13] A Barrat op cit note 5, 156.
[14] Section 8(2) of the Children's Act.

by stating that in all matters concerning the care, protection and well-being of a child, the standard that the child's best interest is of paramount importance, must be applied.[15] It also summarises the child's participation by stating that every child that is of such an age and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.[16]

The right of the child to express his/her views was clearly stated in the Children's Act, when consideration of the period of extension in foster care extensions is made by the presiding officer of the children's court.[17] It is compulsory for a presiding officer to consider the child's views under such circumstances.[18] This was a step forward in the South African legislation. It was a victory for academics; namely, Professors Carmel Matthias and Noel Zaal[19] who some years back stated as follows:

"*If it was the children's court which had the power to alter, extend, or terminate its own orders (rather than officials under Ministerial direction) then there would be more accountability, transparency and efficiency. The child and parent's voices could be heard, the child could be legally represented and a formal record of proceedings would be readily available. From a due-process perspective, alteration, extension or termination of a children's court order are likely to be such significant events in the life of a child that the protection for a proper hearing before a legally trained officer is called for. … All in all, there seem to be grave doubts about consigning children in need of care to have vital decisions about their future made by administrators working under the direction of the Ministers.*"[20]

These academics, amongst other issues, criticised the previous extensions of foster care orders by the then Ministers of Welfare, for failure to formally consider the views of the child, the parents or care givers and for entrusting such judicial functions to administrators working under the direction of Ministers.

The Children's Act in practice

The Children's Act was fully operational from 1 April 2010. A short research was conducted to establish the challenges that presiding officers encountered when applications for extension orders and contested children's court inquiries, without the children's court assistants, were dealt with.[21] Children's court presiding officers in two courts, where a research was conducted, welcomed the duty of extending foster care orders and were comfortable with the provisions of the Children's Act. The first presiding officer stated as follows:

"Initially I wondered why they did that, that is, extensions to be authorized by the children's court, now that I have thought about it and I am working with it, I am

[15] Section 9 of the Children's Act.
[16] Section 10 of the Children's Act.
[17] Section 159(2)(a) of the Children's Act.
[18] Ibid.
[19] C Matthias & N Zaal 'Can we build a better children's court? Some recommendations for improving the processing of child –removal cases' in R Keightley (ed) (1996) *Children's Rights* 51, 65.
[20] Ibid 66.
[21] EB Ngubane 'Practical challenges in the implementation of the Children's Act 38 of 2005' (2010).

hundred per cent in favour of it because the child is not a piece of paper on someone's desk. Rather let us have a look and you will pick up lot of things when a child walks into your office, starting from how the child is dressed, and skin child, I am not being funny, but you can tell when the child is healthy, it just glows to the child's skin and you see this immediately; and the minute you see it is otherwise, then you know you must start looking, questioning and you never tell that on a piece of paper on someone's desk without seeing the child in front of you."[22]

The second presiding officer stated as follows on this issue:

"Social workers did not understand the provisions of the Act. They were not bringing the children and foster parents. They were surprised when we told them that they had to bring the children and foster parents concerned. We do ask children about their well being, whether everything is still fine." [23]

The third presiding officer stated as follows on this issue:

"The purpose of section 159 is that the child should be brought back so that you can assess and see whether the interests of the child are being looked after properly. Otherwise there will be no purpose in the presiding officer extending the children's court orders."[24]

In both courts there was no backlog and social workers were geared in bringing expiring foster care orders for extension by the children's courts. A sudden change which was brought about by the decision in North Gauteng High Court was a surprise to most of the children's court presiding officers and social workers.

Two Steps Backwards on 10 May and 8 June, 2011

The North Gauteng High Court decision in case number 21726/11 (unreported) (the high court), brought drastic changes in foster care extension orders.[25] The order of the high court provided in paragraph 3 that all foster care orders which expired from 1 April 2010 up to 8 June, 2011, were deemed not to have expired and were extended for a period of two years from 8 June, 2011, that is, up to 8 June, 2013. All foster care orders that expired due to the children turning 18 years of age were excluded but social workers could in terms of the children's Act, process their extension applications through the Minister if they were still completing their education or training. Paragraph 4 provided that all expired foster care orders from 1 April, 2009 to 1 April, 2011 (within a period of not more than two years prior to 1 April, 2011) were deemed not to have expired and were extended till 8 June, 2013, with the exception of those orders where children were 18 years of age. Where the children were 18 years of age and were still in training or educational institutions, social workers could take appropriate actions.[26]

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[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] The initial order dated 10 May 2011 was subsequently amended on 8 June 2011 and was published in the Government Notice No. 585 through Government Gazette No. 34472 dated 19 July 2011.
[26] Section 176 of the Children's Act.

So, all orders which expired from 1 April, 2009 up to 8 June, 2011, were automatically extended until 8 June, 2013. All foster care orders which expired from 9 June, 2011 onwards were not covered by paragraph 3 and 4 of the high court order.

Paragraphs 1 and 2 of the order read as follows:

1 "*Notwithstanding the provisions of section 314 of the Children's Act, 38 of 2005, any foster care order that was granted prior to 1 April 2010 that has not yet expired, shall, when it becomes due to expire, be dealt under an administrative process following the procedure previously provided in terms of the Child Care Act of 1983 and the regulations thereto.*

2 *The procedure set out in paragraph 1 will continue to be followed until 31 December, 2014 or until such time as the Children's Act, 38 of 2005 is amended to provide for a more comprehensive legal solution, whichever happens first."*

Paragraphs 5 and 6 read as follows:

5 "*During the two year period allowed in paragraphs 3 and 4 the MECs for Social Development shall direct the relevant social workers to identify and investigate foster care orders referred to in paragraphs 3 and 4. Subsequent to the investigation, in the case of each foster care order identified, the social worker must decide whether the foster care order must remain extended for the full two year period ordered in paragraphs 3 and 4. If a foster care order should not remain extended for the two year period ordered in paragraphs 3 and 4, or should be extended for longer than 2 years, the social worker may approach the Children's Court for an appropriate order in terms of the Children's Act.*

6 *Nothing in this order shall prevent the Children's Court from hearing a matter and making an appropriate order in terms of the Children's Act when approached by a social worker with an application concerning a foster care order falling within the ambit of this order, which may include terminating or varying the foster care order in terms of section 159 or extending the foster care order in terms of section 186 of the Children's Act."*

In view of the contents of paragraph 6 of the order, it was necessary to obtain clarity from the drafters of the orders [27] on how to deal with foster care orders which were not covered by paragraphs 3 and 4 of the high court order; that is, those orders which expired from 9 June, 2011 onwards. The drafters of the order responded and stated that paragraph 6 confers a discretion on social workers, either to bring those newly expired foster care orders to the children's court or to deal with them administratively. Social workers can choose whether to bring the matter before the presiding officer of the children's court or to take the matter to the Minister's office to be extended in terms of the repealed Child Care Act No 74 of 1983 (the Child Care Act). Social workers will continue to choose, to apply their discretion in dealing with

[27] E-mail from Carina Du Toit dated 02 August 2011.

foster care extensions until 31 December, 2014 or until the Children's Act is amended, whichever comes first.

According to the High Court decision, social workers are no longer compelled to bring foster care applications to the children's court in terms of Section 159 of the Children's Act, but they can exercise their discretion whether to bring such matters to the children's court or deal with them administratively, through the Minister's office. This has resulted in a step backward, in that the views of the child are not automatically heard by 'a legally trained officer,'[28] in terms of Section 159(2) of the Children's Act.[29] The second backward step is the revival of the repealed Child Care Act, in so far as dealing with extension applications is concerned. The method of dealing with a child 'on a piece of paper without seeing the child,'[30] has been revived.

Critical discussion of the high court case

The initial order of the high court was dated 10 May 2011. It was shortly thereafter, amended and the amended order was dated 8 June 2011. It is the amended order which is now in operation. The founding affidavit of Carina Du Toit in the first application which necessitated the order dated 10 May 2011, reflects that the Centre for Child Law was informed of an impending crisis relating to children in foster care. She stated that the person who provided the information was Dr Jackie Loffel, who is a senior social worker employed by Johannesburg Child Welfare. Dr Jackie Loffell had received information about the crisis in foster care orders when he attended the National Child Care and Protection Forum in Birchwood, Johannesburg.[31] It is apparent that this information about the crisis in respect of each province, was not based on any formal research which could have been conducted in various offices in all the provinces. Her explanation of the challenges in foster care extensions in her affidavit is summarised as follows:

"Par.32: There was a systematic collapse which was caused by a combination of backlogs at various Provincial Departments of Social Development, the children's courts and the child protection organisations. The backlogs were caused by a general shortage of social workers to fill vacant positions and a lack of capacity to process the extension of foster care orders at the Departments. The volume of foster care orders that had to be extended by the children's court could not be accommodated on the children's court roll.

Par.38 The South African Social Security Agency (SASSA) confirmed that approximately 123 236 foster care orders had lapsed by 31 January, 2011 and of that number some children were no longer receiving the foster care grants.

Par.40 She attended the quarterly meeting of Family Court Magistrates Forum in Johannesburg, which was also attended by children's court presiding officers from

[28] C Matthias & N Zaal op cit note 19 at 66.
[29] Section 159(2) reads as follows: 'When deciding on an extension of the period of a court order in terms of subsection (1), the court must take cognisance of the views of
(a) The child; ...'
[30] EB Ngubane op cit note 21.
[31] C Du Toit Founding Affidavit dated 7 April 2011, par 31

South Gauteng, including Krugersdorp, Heidelberg, Germiston, Vereeniging and Johannesburg. According to her, magistrates confirmed that the foster care system was in a crisis, since social workers were not submitting reports timeously to facilitate applications for extension.

Par.41 Magan Briede, Director: National Programme, Child Welfare South Africa (CWSA) informed her that many organisations were experiencing difficulties in the renewal of foster care orders. Magan Briede was also concerned about the extensions which were not being handled in a consistent manner by courts.

Par.42 She was concerned that child protection organisations and departmental social workers were spending all their resources on resolving the foster care crisis and that other essential child protection services were no longer prioritized."

In her main application, after she had requested the high court to extend foster care orders retrospectively, she requested that social workers be empowered to extend foster care orders administratively, as an interim solution until a permanent solution could be developed, which, according to her, will be the amendment of the Children's Act.[32] Although her draft order was made an order of the High Court on 10 May 2011, it met with severe criticism from children's court magistrates and other institutions. Consequently, an amendment of the order was made, to correct a number of omissions and to retain the power of the children's court to extend children's court orders, if such expired orders are brought before children's court presiding officers. The discretion to either bring the application for extension of orders to the children's court or to deal with such orders administratively, was given to social workers according to the amended order dated 8 June, 2011.

The right of the child to his/her views heard by a legally trained officer in an application for extension, can now only be exercised if a social worker decides to bring the matter before the court. If he/she decides to deal with such application administratively, the child loses his/her right to have his/her views heard by a legally trained officer. Such discretion can, either be correctly or incorrectly exercised by social workers. The fate of the child in so far as expressing his/her views before the children's court presiding officer , is now in the hands of social workers. Short interviews were conducted with some of the social workers in one court, before the amendment of the order on 8 June, 2011 could be effected:

"*We are now used to the system, at first, we had problems but later we picked up.We realized that the extensions in the children's court were faster than those which were done administratively through the Minister's office. Sometimes, one would process the second application for extension of an order whilst the papers of authority in the first application had not been received from the Director's office."*[33]

[32] Ibid, par 51 at 17
[33] First Social worker who was interviewed.

"The new system of bringing foster care orders for extension to the children's court is fast. You get the extension order there and then and it is immediately forwarded to SASSA for processing of the payment.[34]

The presiding officer in the children's court insists on production of school reports to see the progress of a child at school. Previously, we had challenges with certain foster parents who could not encourage foster children to go to school or attend to their school homework. Since the introduction of the new system in terms of the Children's Act, foster parents ensure that they help the foster children in their homework and they further encourage them to go to school. They now do that since they are aware that, besides being monitored y us, the children's court presiding officer will enquire from them the reasons for poor performance of the child at school. They are also aware that when they tell lies, the presiding officer has a skill of enquiring from the children who then tell the truth. The foster parents are now co-operating, they are aware that it will not just be a report that will be compiled by us but they will have to appear before the presiding officer in the children's court.[35]

The children are very happy about this system. They have found the second 'Gogo' (which means the grandmother but in actual fact the presiding officer is a male so it should be 'Umkhulu' the grandfather. Children use the words 'Gogo' since they spend most of their times with them and are hardly having opportunities to spend time with their grandfathers) who is the presiding officer of the children's court. They tell all the stories as he has a way of talking to them. He normally jokes with them and make the environment user-friendly. Children find it easy to reveal information that was not revealed to us when we interviewed them. If the presiding officer has discovered a certain abnormality in the upbringing of the children, he issues orders in terms of the Children's Act which address such abnormality. Sometimes he extends the foster care order for a short period in order to monitor the situation which needs urgent attention or order the social worker to submit a report regarding the progress in the matter within a specific period.[36]

We did not have any backlog of extension of foster care orders. Everything went well. We are now worried because extension of foster care orders are going to be delayed in the Minister's office, our regional Office, as it happened in the past. Furthermore, foster parents were warned by the presiding officer to approach the social workers sixty days before the expiry date of the order for the preparation of applications for extension orders. They respected the presiding officers more than us and complied with what they were told in court. Such warnings will no longer be there. We are short-staffed, others resign and files remain unattended and would only be attended if foster parents come to the offices. The fact that we are no longer going to be assisted by the children's court is a set-back."[37]

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[34] Ibid.
[35] Second social worker who was interviewed.
[36] Ibid.
[37] Third social worker who was interviewed.

Most of the presiding officers who were approached in KwaZulu-Natal in connection with the amendment of procedures for extension of foster care orders stated that they had no backlogs and they were acquainted with dealing with extension orders.[38]

From the above discussion, it may be noted that the high court decision affected the areas where there were no backlogs . In fact, it disturbed the smooth running of the children's court and deprived the child of having his/her views heard by a presiding officer before his/her foster care order could be extended, since social workers have now a discretion whether to bring the applications to the children's court or to the Minister. Not all social workers in different offices will exercise their discretion in favour of promoting the views of the child to be heard by a presiding officer in the children's court, before an extension order is issued. Inputs of a section of presiding officers in Gauteng were considered and those of other presiding officers in the whole country were never invited, in fact, they were not even aware of such a high court application. The high court order came as a surprise to them. Even the Minister of the Department of Justice and Constitutional Development's inputs, through his State Law Advisors, were not obtained.[39]

The Director-General of the Department of Justice and Constitutional Development (the DOJ & CD) requested a legal opinion on the interpretation and possible effect on the DOJ & CD of the North Gauteng High Court decision on extension of foster care orders. The opinion of the Chief State Law Advisor, unfortunately, did not deal with the concern of deprivation of the child's right to have his/her views heard by the legally trained officer or even to participate in such extension orders. Further, it did not deal with the orders which were still going to expire after the date of the amended order of the High Court, that is, after 8 June 2011. It is the orders which expired from 9 June 2011 which were not covered by the High Court order in paragraphs 3 and 4 where, in terms of paragraph 6 of the amended order, social workers can apply their discretion whether to deal with such applications for extension administratively or refer them to the children's court. Other than to expose the concern of DOJ &CD of not being part of the respondents in the North Gauteng High Court decision or of not obtaining the DOJ & CD inputs, the opinion is irrelevant to this work.

The High Court order has deprived the child of having his/her challenges in his/her upbringing by a foster parent identified and addressed by presiding officers where social workers decide to extend foster care orders administratively. The administrative extensions are made in terms of the repealed Child Care Act which was specifically revived for administrative extensions, despite an outcry by International Bodies and academics about the deprivation of the children's rights to have their views heard by legally trained officers.[40] The Minister, in terms of the repealed Child Care Act, can only extend foster care orders for a fixed period of two years, nothing more and nothing less, except where the child reaches the age of majority before the expiry of two years and is not schooling. Children's court

[38] A survey was conducted in three magistrate's offices in Durban area and another one which includes all magistrates' offices in KwaZulu-Natal has been forwarded after which a proper research on certain specific offices will be conducted.
[39] Judicial Head: Administrative Region 6 Circular letter 20 of 2011.
[40] Article 12; T Kaime op cit note 7 & C Matthias & N Zaal op cit note 19.

presiding officers can extend orders for a shorter period or for a period of more than two years to ensure stability in the placement.[41] Although the amended order allows presiding officers to extend orders for more than two years or for a shorter period, such powers of the children's court are excercised only after a social worker has applied his/her discretion to bring the matter before the children's court. Social workers must make a choice first and if they have made a wrong choice, such matter will not come before the court. Prior to the High Court order, social workers were compelled, in terms of the Children's Act, to bring all matters which were due for extension to the Children's court.[42] It was then the court which was exercising its discretion after considering the views of the child, social workers, foster parents or managers of certain institutions, whether to extend the order for more or less than two years.

A more appropriate approach in solving expiring foster care orders

Whilst the High Court order of extending all expired orders retrospectively is welcomed, the order of extending foster care orders which expired after 8 June, 2011 administratively; is not welcomed. The discretion given to social workers, either to bring applications for extension to the children's court or to deal with them administratively, is also not welcomed. The High Court order would have been welcomed if for purposes of orders which were going to expire after 8 June, 2011, only the children's court would have been allowed to deal with them. It would also have been welcomed if presiding officers were allowed to exercise their discretion in extending lapsed orders retrospectively, on good cause shown for such lapsing of foster care protection orders and if it is in the best interests of the child. The High Court would then have allowed the Legislature to amend Section 159 of the Children's Act, within a period of two years.

There is no doubt that the Constitutional Court would have confirmed that order. This approach would have guaranteed the child's rights to have his/her views heard by the presiding officer of the children's court and would have empowered him/her to apply his/her discretion in extending lapsed orders, without even using section 28 of the 1996 Constitution, which is an overriding section where the court finds that there is no specific section in any legislation allowing an order that will be in the interests of the child which are paramount.[43] The approach would also address the lapsed orders where there were good causes shown for such lapsing of the orders.

Conclusion and recommendation

It has been established that the present High Court order allowing social workers to have a discretion in bringing applications for extension of foster care orders, is detrimental to the child, since it deprives him/her of his/her rights to have his/her views heard by a legally trained officer, before an important decision on him/her is

[41] Section 186 of the Children's Act.
[42] Section 159 of the Children's Act.
[43] EB Ngubane op cit note 21.

made. The high court has allowed this situation to exist until December 2014 or until the Children's Act is amended.[44]

It is therefore, necessary that the Legislature should consider amending the Children's Act, as a matter of urgency, as follows:

Section 159: Duration and extension of orders

(1) An order made by the children's court in terms of section 156

(a) lapses on the expiry of

(i) two years from the date the order was made; or

(ii) such shorter period for which the order was made; and

(b) may be extended by a children's court for a period of not more than two years at a time;

(c) a lapsed order may be extended retrospectively by the children's court

(i) on good cause shown for such lapsing of a foster care order; and

(ii) if, to do so, will be in the best interests of the child.

The regulations should include a specimen form which can be used by social workers to address issues which are required in applications for extension of foster care orders and which is shorter than the one which is used when the opening or opening and finalisation of children's court inquiries are dealt with in terms of Section 155 and 156 of the Children's Act which more or less resembles Appendix 1 attached hereto. The regulations can also include a specimen form which can be used by presiding officers in dealing with applications for extension orders which is more or less similar to Appendix 2 attached hereto.

Bibliography

Books

KE Knutson 'Recognizing the citizen child' in (1997) *Children: Noble Causes or Worthy Citizen*? 122,128.

J Fortin (2005) *Children's Rights and the Developing Law*, 607-623.

S Burman (ed) (2003) *The Fate of the child: Legal Decisions on Children in the New South Africa* 145, 149.

[44] Par. 2 of the High Court order in Government Notice No.585 published in the Government Gazette No. 34472 dated 19 July 2011.

MDA & P Veerman (eds) (1992) *The Ideologies of Children's Rights*, 3.

CJ Davel (ed) (2000) *Introduction to Child Law in South Africa*, 202.

R Keightley (ed) (1996) *Children's Rights* 51, 65.

Acts

The Child Care Act 74 of 1974.

The Children's Act 38 of 2005.

The Constitution of the Republic of South Africa 108 of 1996.

Conventions

The United Nations Convetion on the Rights of the Child.

The African Charter on the Rights and Welfare of the Child.

Case

North Gauteng High Court Case No. 21726/11 (Unreported).

Government Gazette

Government Notice No. 585 published in Government Gazette No. 34472 dated 19 July 2011.

Journal

T Kaime 'The Convention on the Rights and the Cultural Legitimacy of children's rights in Africa: Some reflections' (2005) 5 *African Human Rights Law Journal* 221.

Circular Letter

Judicial Head: Administrative Region 6 Circular letter 20 of 2011.

Research work and e-mail

EB Ngubane 'Practical challenges in the implementation of the Children's Act 38 of 2005' (2010).

E-mail from Carina Du Toit dated 02 August 2011.

APPENDICES.

APPENDIX 1: SECTION 159 / 186 REPORT BY DESIGNATED SOCIAL WORKER TO BE CONSIDERED BY THE CHILDREN'S COURT

FORM 38

SECTION 159 / 186 REPORT BY DESIGNATED SOCIAL WORKER TO BE CONSIDERED BY CHILDREN'S COURT

File no. …… Court file no. …….

Department of …… or Welfare Organisation

PROFESSIONAL REPORT

BY

FULL NAMES: ……..

SIGNATURE: ……...

QUALIFICATIONS: …….

REGISTRATION NO.: ……

REGISTERED SOCIAL WORKER

ADDRESS: ……

……

……

TEL. NO.: …….

DATE: ……

SUPERVISOR'S OR SENIOR'S SIGNATURE:

……

DATE: ……

A. INTRODUCTION (Nature of report; outline of what report attempts to achieve)

1. The child/ren was/were placed in the care and protection of a foster parent / place in a child youth care centre on _____ under order of the children's court.

2. This is an application in terms of Section 159 / Section 186 for an extension of the aforementioned order.

B. IDENTIFYING DETAILS OF CHILD/CHILDREN FORMING SUBJECT OF REPORT

FULL NAME(S)	GENDER	DATE OF BIRTH/ ESTIMATED AGE/ IDENTITY

		NUMBER

Residential address: ……

Home language: ……..

Religious affiliation (if applicable): ……

Present care-giver (name and address): ……

……

C. FAMILY COMPOSITION

Biological parents

	NAME	I.D.	STATUS
Moth er			
Father			

Siblings

NAME	I.D.	AGE

D. SOURCES OF INFORMATION (Persons from whom information had been obtained to compile report – indicate names, addresses, contact numbers and relationship to the child/children)

……

E. FAMILY PROFILE

1. (Indicate any changes in the family profile not disclosed in previous reports).

……

Family structure (all persons living in household)

……

2. Relationships within the family (any problems?)

……..

3. Physical factors and health (relating to foster parent):

……..

4. Psychological factors (relating foster parent)

……..

5. Housing and environment (type, size, ownership, impression):

……..

6. Religious and cultural aspects (affiliation, participation, role):

……

7. Socio-cultural aspects (community activities, status, norms and values)

……...

8. Financial aspects (income and expenditure of foster parents):

……

F. CHILD/CHILDREN CONCERNED (Any relevant supporting documents to be attached as annexure)

Physical factors and health (also indicate any disabilities and/or substance abuse):

.....
..

Psychological factors (also indicate any mental disabilities):

……...

Relationships with parents, siblings or peers:

……

Schooling (abilities, problems, difficulties and achievements):

……

G. SPECIAL CIRCUMSTANCES FOR CONSIDERATION

(other than those already mentioned eg lack of self esteem/confidence, school bulling etc)

……

Children with special needs (could benefit from which programmes / intervention)

……..

H. VIEWS OF THE CHILD/CHILDREN CONCERNED

(Reflect emotions, feelings, preferences, personal needs and any other relevant observations by child/children)

……

I. RESULTS OF PREVIOUS INTERVENTION/S iro THE CHILD

(name the intervention and the result)

……

ANY NEW EVIDENCE OF ANY ABUSE/NEGLECT

(allegations of abuse/neglect; incidents; claims after placement – affidavits and any other supporting documents to be attached as annexure):

……

Medical evidence (In cases of assault or abuse; any supporting documents to be attached as annexure):

……

J. MEASURES TO ASSIST FAMILY

Steps taken to improve family situation (counseling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behaviour modification, problem solving, referral)

……

K. EVALUATION

(evaluation of measures taken)

……

L. RECOMMENDED MEASURES TO ASSIST CHILD'S FAMILY

(Mark with an "x" and substantiate)

□ counseling ……

□ mediation ……..

□ prevention and early intervention services ……..

□ family reconstruction and rehabilitation ……

□ behaviour modification ……..

□ problem solving……..

□ referral to another suitably qualified person or organization ……

□

other.....

.

M. RECOMMENDED MEASURES TO ASSIST CHILD

(Mark with an "x" and substantiate)

□ therapeutic needs …….

□ educational need …….

□ cultural needs ……

□ linguistic needs ……..

□ developmental needs (attach separate forms as Annexures if required)……..

……..

□ socio-economical needs……..

□ spiritual needs …….

□ other needs …….

N. CONCLUSION (Finding by social worker whether child is in need of care and protection)

In view of the above information I am of the opinion that the aforementioned child/ren is/are* still in need of care and protection/not in need of care and protection* as described in section 150(1)……../150(2)……of the Children's Act 38 of 2005.

O. RECOMMENDATION (Indicate which order or orders in terms of section 159 / 186 of the Act, would be appropriate to the child.

(why the order should be extended by 2 years, 3 years, etc

.....
.....

APPENDIX 2: RECORD OF PROCEEDINGS IN THE APPLICATION FOR EXTENSION

FORM 17 (Application for Extension)

RECORD OF PROCEEDINGS IN THE CHILDREN'S COURT IN TERMS OF THE

CHILDREN'S ACT, 2005 [ACT NO. 38 OF 2005]

REGULATIONS RELATING TO CHILDREN'S COURTS AND INTERNATIONAL

CHILD ABDUCTION, 2010

[Regulation 33]

File No.:……

REPUBLIC OF SOUTH AFRICA

IN THE CHILDREN'S COURT FOR THE DISTRICT OF: ……

HELD AT: ……

IN THE MATTER OF PROCEEDINGS OF THE CHILDREN'S COURT, IN TERMS OF THE CHILDREN'S ACT, 2005, IN RESPECT OF THE FOLLOWING CHILD[REN]:

FULL NAME[S] OF CHILD[REN	**GENDER**	**ID NUMBER/ DATE OF BIRTH**	**PRESENT AT PROCEEDINGS**	**NOT PRESENT AT PROCEEDINGS**

BEFORE PRESIDING OFFICER:

……..

On the …… 20……

The abovementioned child[ren] was / were

☐ brought before the court ☐ not brought before the court

Reasons why the child[ren] was / were not brought before the court ……..
.....

AND THERE APPEARED:

Social Worker : ……

Interpreter :……

Clerk of the court : ……

Mother / Guardian / caregiver : ……

Father / guardian / caregiver : ……

Respondent : ……..

Other appearance in terms of Section 159(2) (c) ……..

Party[ies] allowed to join proceedings:

……..

Legal representative[s]:

……..

Witnesses:……..

The Clerk of Court informs the court that this is an application in terms of Section 159(1)(b) read with paragraph 6 of the North Gauteng High Court order issued on 8 June 2011 in case number 21726/2011, for extension of the foster care order for a period of not more than two years or for a period of more than two years in terms of section 186 of the Children's Act 38 of 2005.

OR

The Clerk of Court informs the court that this is an application for variation in terms of Section 48 of the Children's Act 38 of 2005 of the foster care order which was extended by North Gauteng High Court in paragraph 3 and 4 of its general order issued on 8 June 2011 and for extension of the said order for a period which is more than two years in terms of Section 186 of the Children's Act 38 of 2005 read with paragraph 6 of North Gauteng High Court order issued on 8 June 2011 in case number 21726/2011 published per Government Notice in Government Gazette number 34472 dated 19 July 2011.

OR

The Clerk of Court informs the court that this is an application for variation in terms of Section 48 of the Children's Act 38 of 2005 of the foster care order which was extended by North Gauteng High Court in paragraph 3 and 4 of its general order issued on 8 June 2011 and for extension of the said order for a period which is less than two years in terms of Section 159(2) of the Children's Act 38 of 2005 read with paragraph 5 and 6 of the North Gauteng High Court order issued on 8 June 2011 in case number 21726/2011 published per Government Notice in Government Gazette number 34472 dated 19 July 2011.

The nature, purpose and the consequences of the enquiry are explained – understood.

The rights to legal representation are explained to the child/ren. No such legal representation is required. Due to the child/ren's age/s, no explanation of rights to legal representation is made. No prejudice will be suffered by the child/ren if they/ he/ she/ are / is not legally represented.

The rights to legal aid and legal representation explained to the adult parties present. They understand and inform: ……

Court calls the designated Social Worker.

……D/S/S

[The designated Social Worker has no objection to taking the prescribed oath. Regards the oath to be binding on his / her conscience]

I am a registered Social Worker employed by ……

…… and stationed at ……

I obtained the following qualification/s ……..

…… and I have …….. year/s /months experience in the field.

I have reviewed this matter and I have compiled a report which I signed. I confirm my signature as well as the contents of the report. I have read the contents of this report to the parties and they understood.

I have nothing to add / I have the following to add / ……

……
……

The report is read and is considered. It is accepted as Exhibit "……."

Cross Examination by the child/ren

[The purpose is explained]

……
.....

Cross Examination by other interested parties [purpose explained]

……
.....

The Court has no further witness to call.

The rights to adduce evidence and to call witnesses are explained to the child/ren / other interested parties and they/ she/ he understand/s, ……child/ren still young cannot understand.

……
……
.....

Cross Examination by other interested parties (purpose explained)

.....
.....

Other in terms of Section 159(2) (b) to (d)
……
.....

Cross Examination by the child/ren (purpose explained)

……
……

Questions by the Presiding Officer

……
……

Observations of the child/ren by Presiding Officer

……
……

Address by the child/ren (purpose explained)

……
……

Address by other parties –Section 159(2)(b) to (d) (purpose explained)

……
……

APPLICATION DISMISSED

THE ORDER OF THE NORTH GAUTENG HIGH COURT STANDS

Whereas the **initial court order** was granted on …….

And having heard the application for variation and extension, the court is not satisfied that the application ought to be granted;

Therefore,

the North Gauteng High Court order in case number 21726/11 dated 8 June 2011 is applicable , consequently, the order remains extended until……..

OR

ORDER IN TERMS OF SECTION 159 READ WITH SECTION 186 OF ACT 38 OF 2005 AND FURTHER READ WITH PARAGRAPH 6 OF THE NORTH GAUTENG HIGH COURT ORDER IN CASE NUMBER 21726/11 DATED 8 JUNE 2011.

Whereas the **initial court order** was granted on …….. .and previously extended until……

And *whereas* the North Gauteng High Court order in case 21726/11 dated 8 June 2011 is applicable to this matter,

And *whereas* paragraph 6 of the aforementioned order awards joint jurisdiction to the children's court to hear this application for extension,

And after due consideration, the application for the extension of the aforesaid order is

approved,

therefore

[1] the initial court order is hereby extended for a period of …… until ……

OR

[2] the initial court order is hereby extended until …….. 20……..……on which date the child shall attain 18 years of age;

(only to be used if the child attains 18 years in less than 2 years) with the following variations (if any) made in terms of Section 48(1)(b) of Act 38 of 2005

.....

OR

(3) the extended foster care order by the High Court is in terms of Section 48 of the Children's Act 38 of 2005 varied

(i) by extending it to …… years;

or

(ii) by shortening the period of extension from 2 years to ……

months/ year/ years(e.g.1½);

The expiry date of the court order shall be……/20…… subject to the provisions of Section 176(1) of Act 38 of 2005 where applicable.

OR

(iii) by terminating the period on which this order was extended.

FURTHER:

The child/ren and foster parent are informed:

(1) That if either person encounters any problems or difficulties with this placement or the order, he/she / they are entitled to approach the social worker or the clerk of court to seek assistance.

(2) The child is further advised that he/she/they are entitled to approach the social worker or the clerk of court with the assistance of an adult or unassisted.

Both parties indicate that they understand.

It is further explained to the foster parent / child/ren the importance of approaching the social worker at least 60 days before the expiry date of the above order, should the parties wish to extend such order.

Consequences of failure to do so explained as is /are the consequences of failure to extend the order before the child/ren attain/s 18 years of age while they/she/he are/is completing their/her/his education or training (Section 176)

_____ _____

PRESIDING OFFICER **DATE**

A Last Thought

Article on 'Corruption at the courts is eating into our justice system'

The contents of the article with the above headline (2011 (Nov) DR 51), apparently written by an attorney attached to the Law Society of the Northern Provinces, are a cause of concern. We, the Judicial Officers Association of South Africa (JOASA), are extremely worried by the allegations of corrupt activities, especially when they are attributed to our colleagues in Pretoria. We are not aware of the allegations made in the article and if there is any credence to such allegations, we condemn the activities alleged. We believe, however, that lower court judicial officers uphold the law without fear, favour and prejudice in accordance with the oath each one of us took and we account to the Constitution and the public. We are opposed to corrupt activities and it saddens us when such a picture of (unproven) corrupt judicial officers is painted by just one person. While we understand the reason the author of such an article chose to remain anonymous, we encourage him or any other person with information about the commission of crime (such as alleged corruption) to get out of the shadows and declare same under oath and have criminal investigations instituted against the suspects, which would then lead to the conviction of the guilty parties. For the law society to raise this (as he recommends) in forums where we (JOASA) are not even represented would come to nil while our good name continues to be tarnished in

public. If he is an ‘ethical attorney’ as he claims to be, there would be no loss suffered compared with remaining unknown and mum while he watches members of his profession indulge in corrupting the judges. Until such claims are made under oath, we will treat the contents of the article as allegations, which they are after all.

Vincent Ratshibvumo,

President, JOASA

(The above letter appeared in the December issue of *De Rebus*.)