

## CHILD LAW MATTERS

ISSUE 15

THURSDAY 17 APRIL 2008

In this issue, we are going to look at children's access to court and the enforcement of children's rights. Sections 14 and 15 of the Children's Act provide the framework for children to initiate action to enforce their rights, or for others to do so on their behalf.

Section 14 Access to court reads:

Every child has the right to bring, and to be assisted in bringing, a matter to a court, provided that matter falls within the jurisdiction of that court.

The right of access to court is guaranteed under South African Constitution. Section 34 of the Constitution protects everyone's right to have their legal dispute settled in an appropriate court or other independent and impartial tribunal or forum. The first part of Section 14 resonates with that. However, it goes beyond simply providing access to court. The section states that children have the right to bring as well as 'be assisted in bringing' a case to court. A similarly worded right is also guaranteed under section 28(1)(h) of the Constitution, which reads:

[every child has the right ] to have legal practitioners assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result

The right to representation is further protected under section 35(2)(c) and 35(3)(g). Whereas section 35(2)(c) concerns with the right to representation of detained persons, section 35(3)(g) provides for the right to representation of accused persons in criminal proceedings. Section 35(3)(g) is equally applicable to children. The interesting point with section 14 of the Children's Act is that it does not include the 'substantial injustice' criterion like other Constitutional provisions broadening the scope of its application. Under section 14 of the Act, Professor Davel writes, children may directly apply to the Legal Aid Board, although they may not have the opportunity to choose their lawyers.<sup>1</sup> A recent case brought by the Legal Aid Board in Kwa Zulu Natal confirms this, and will be subject of an issue later this year.

Section 15 should be read together with section 14, as it deals with enforcement of rights. The wording of section 15 of the Act is similar to that of section 38 of the Constitution.

Section 38 of the Constitution lists five categories of people who may approach a court:

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<sup>1</sup> C J Davel, 'General Principles', C J Davel & A M Skelton (ed) *Commentary on the Children's Act*, JUTA (2007) 2-24.

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interests of its members

The list under section 15 of the Act is similar, except that it specifically includes 'a child who is affected by or involved in the matter to be adjudicated' and 'anyone who is acting in the interest of the child'. One of the examples of public interest litigation involving children's right is *Centre for Child Law and others v MEC for Education (Gauteng)* 2008 (1) SA 233 (T). The case concerns the rights of pupils at a school of industry, JW Luckhoff High School for children in need of alternative care. The Court held that the appalling conditions of the school and lack of psychological support violated a number of constitutional rights, including the right to appropriate alternative care (section 28(1)(b)), right to shelter, basic health care and social services (section 28(1)(c)) and right to dignity (section 10).

Providing children with the right of access to court and to be assisted in bringing the case is one of the ways to implement the children's right to participation under article 12 of the CRC. Article 12 of the CRC protects not only children's right to be heard in all matters affecting the child, but also obliges all the stake holders to give 'due weight in accordance with the age and maturity of the child.' Although section 14 and 15 are welcome advancement, children's ability to challenge the decisions regarding parental responsibilities and rights is limited by section 22(6)(a)(ii) & (iii), 22(6)(b)(ii)&(iii), 28(1)(c)&(d) and 34(5)(b)&(c). In those sections, children or anyone acting in children's interests are required to obtain "leave of the court" to bring the application before they can make such applications. Furthermore, it is not only the child but anyone acting in children's interests that need to obtain the court's approval, which can directly as well as indirectly affect the effectiveness of child participation. However, in practice one could probably bring the application to obtain the court's leave at the same time as bringing the substantive application, as prayer one in the notion of motion.

The significance of section 14 and 15 allowing children to litigate in their own right is a practical affirmation that children are rights-holders and should be respected as such. In order for section 14 and 15 to make a real impact on advancement of children's rights, education and dissemination of the provisions and other children's rights is vital.