FOSTERING BY CAREGIVERS WITH NO COMMON-LAW DUTY OF SUPPORT: AT LAST, SOME CLARITY IN THE LAW

SS v Presiding Officer, Children's Court, Krugersdorp 2012 (6) SA 45 (GSJ)

1 Introduction

Some serious shortcomings in foster care law which adversely affected large numbers of children have been addressed recently in *SS v Presiding Officer, Children's Court, Krugersdorp* (2012 (6) SA 45 (GSJ), hereinafter *SS*) and *Manana v Presiding Officer, Children's Court, Krugersdorp* (SAFLI I (A3075/2011) [2013] ZAGPJHC 64 (12 April 2013), hereinafter *Manana*). For reasons of scope, and because the issues were somewhat different, the discussion below primarily offers an analysis of the former judgment. As will be seen, *SS* provided the first reported solutions to some severe problems affecting numerous children and is thus worthy of consideration in its own right.

By way of background, one consequence of the AIDS pandemic in South Africa is that many children are left to be nurtured by extended family members or non-relatives, rather than by biological parents (Ross "Foster Care in South Africa: Conversations with Representatives of Organisations Working with Children and Their Foster Parents" 2012 *The Social Work Practitioner-Researcher* 173 174). Substitute caregivers often have limited financial means and apply to children's courts to be designated as foster parents. Where they are successful they become eligible for monthly foster-care grants paid by the state. The best available legal ground for many foster-parent applications is contained in section 150(1)(a) of the Children's Act 38 of 2005 (the "Act"). Unfortunately, this provision has proved difficult for children's courts to interpret (Matthias "Applying the Children's Act in Care and Protection Cases: Some Lessons from the First 18 Months" 2012 *The Social Work Practitioner-Researcher* 159 164). It sets as a ground for a child being "in need of care and protection" and thus eligible for foster care: "if, the child has been abandoned or orphaned and is without any visible means of support". One uncertainty has been whether a child can be found to be abandoned in terms of this provision if currently receiving substitute care volunteered by a caregiver who has already replaced a parent. The phrase "without any visible means of support" has also been difficult to interpret (Matthias 2012 *The Social Work Practitioner-Researcher* 164). It is unfortunate that in selecting this phrase the legislature relied on a vague, centuries-old description by English vagrancy law (Garner *Black's Law*

Dictionary 7ed (1999) 1547). Children's court magistrates have understandably varied in their interpretations of section 150(1)(a) (*Manana* par 4). This has led to discrepancies in its application (see generally State Law Adviser *Legal Opinion on the Interpretation of Section 150(1)(a) Vis à Vis Section 45 and 46 of the Children's Act 38 of 2005* (File 414/2010, Department of Justice and Constitutional Development)). A negative consequence has been that impoverished carers whose nurturing skills render them suitable parent substitutes sometimes fail in attempts to achieve foster-parent status. Vulnerable abandoned and orphaned children are then left with neither foster-care grants nor caregivers who can properly exercise parental responsibilities. This unfortunate situation, which is obviously not in the best interests of children, has been a major concern for the department of social development (*Manana* par 4).

In *SS*, Saldulker J provided the first reported interpretation of section 150(1)(a). It will be shown that, although some issues were insufficiently dealt with, the judgment has brought much-needed clarity on several crucial aspects of foster-grant eligibility. It has also provided guidelines for eligibility of foster-parent applicants who do not have a maintenance obligation in respect of the child. It has additionally provided directions for practitioners (particularly children's court magistrates and social workers) on evidence requirements and stages of proceedings in foster-care applications.

2 The facts and judgment of the children's court

The child in *SS* had been left by his single mother with his maternal aunt and uncle in 2002. At the time, he was only one year old. He remained with them, and after his mother died in 2007 they asked to be screened as prospective foster parents by the department of social development (par 1 and 8. Unless indicated otherwise, all paragraph references are to the *SS* judgment). Although the child's father had never been identified and there were no other available potential carers to be considered, it was only in February 2010 that the department completed a suitability assessment of the maternal aunt and uncle. It found that they were suitable, but required a foster-care grant because their financial means were extremely limited (par 9). Their foster-parent application proceedings then commenced in the Krugersdorp children's court (par 2 and 8).

It was found in those proceedings that no foster-care order could be made because the child was "not in need of care as envisaged in section 150(1)(a) of the Children's Act" (par 2–3). The magistrate reasoned that the applicants had already chosen to care for the child as provided for in section 32(1) of the Act. The latter allows for persons who have not been allocated parental responsibilities and rights to "voluntarily" care for a child, either temporarily or indefinitely. Persons who take on such care are required in terms of this section to "(a) safeguard the child's health, well-being and development; and (b) protect the child from maltreatment, abuse, neglect, degradation, discrimination …" Since the applicants were already performing these functions, the child was *ipso facto* not in need of care and protection in the

sense required by section 150(1)(a). The child could certainly not be categorized as "abandoned or orphaned" (par 15).

In relation to the further requirement of a child having no "visible means of support" the magistrate decided that it would be illogical to "look at the child's own ability to support himself/herself in isolation". To do so would lead to a conclusion that "almost all children will in effect be without any means of support". One should therefore rather interpret "visible support" as including what any available caregiver is currently able to provide towards maintenance of the child. In terms of this approach "as soon as the child does receive some assistance from a caregiver, it cannot be said that the child has no visible means of support; even if the assistance is very basic, it amounts to visible support" (par 15). Since the applicants in the present case were providing the child with some limited financial support, it could not be concluded that he was without visible support.

And furthermore, since the applicants already had status as voluntary lawful carers in terms of section 32(1), they could not add a second and different form of lawful status by also becoming foster parents in terms of section150(1)(a) (par 13–14). Ironically therefore, the applicants' previous nurturing was found by the magistrate to exclude them from consideration as foster parents. It appears that part of the magistrate's motivation in adopting a restrictive approach was to protect children's courts from case overload in a situation in which about 70% of children's court hearing time is currently being devoted to familial foster-care applications (par 39). He did, however, rule that the applicants could in future again approach the court to try to change their status. What would be required to be "an alternative care order in terms of section 46(1)(a) or an adoption order in terms of section 45(1) of the Act". This was because such orders "could be granted without considering whether the child is in need of care in terms of section 150" (par 14).

3 Reasoning of the appeal court

The maternal aunt and uncle appealed to the High Court against the dismissal of their foster parent application. This court appreciated that the appeal provided a valuable opportunity to address the problem of discrepant interpretations of section 150(1)(a) by children's courts which were affecting large numbers of highly vulnerable children (par 12). It therefore welcomed an application to be joined as parties by some participants who were in a position to make helpful submissions. Both the national and Gauteng provincial ministers of social development were granted leave to intervene in the appeal as additional respondents.

In contrast to some other reported judgments addressing the consequences of inadequate care and protection provisions (*Chirindza v Gauteng Department of Health and Social Welfare* [2011] 3 All SA 625 (GNP); *C v Gauteng Department of Health and Social Development* 2012 (2) SA 208 (CC); 2012 (4) BCLR 329 (CC)), in *SS* Salduker J decided against ordering any modification of the wording of the Act (par 6). In so doing, she relied particularly on a holding in *Ngcobo v Van Rensburg* (1999 (2) SA 1057

(SCA) par 11) "that there must be compelling reasons why the words used by the legislature should be replaced". She reasoned that clarity in the law governing foster-parent eligibility should rather be sought through proper interpretation of section 150(1)(a) and other relevant legislative provisions (par 7). As a starting point, it was important to note that the intention of Parliament in promulgating the Act was to broaden State services for children (par 10). Also relevant was that in terms of section 27(1)(c) of the Constitution of the Republic of South Africa, 1996 "everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance". This needed to be read together with the paramountcy of the best interests of children standard in section 28(2) of the Constitution (par 11).

In relation to the Act itself, the court noted that section 180(3) allowed expressly for foster-care placements of children with family members who were not parents or guardians. Given all children's right to family care or parental care (s 28(1)(b) of the Constitution), and the intention behind the Act of strengthening family ties, section 180(3) had to be interpreted as including cases of orphaned or abandoned children. It would also be contradictory to the purposes of the Act to deny all familial carers foster-care grants (par 23). In relation to eligibility for such grants, it was important to note that paragraph 2 of Annexure C of the regulations published in terms of the Social Assistance Act 13 of 2004 stated that "[a] foster parent qualifies for a foster child grant regardless of such foster parent's income". Thus, once persons have been found eligible to be foster parents, their current means cannot be used as a reason to deny payment of a foster-care grant (par 24).

Salduker J also considered the magistrate's finding that the applicants could alternatively have approached a children's court for an order in terms of section 46 of the Act. On this she concluded "[t]he question whether a court may make an order that a child be placed in foster care in terms of section 46 of the Children's Act can easily be answered: a court may not". She found that this was not an alternative because "s 182(1) of the Act stipulates that before a Children's Court places a child in foster care, the court must follow the Children's Court processes stipulated in Part 2 of Chapter 9".

The court gave particular attention to the meaning and procedural implications of section 150(1)(a). As noted above this renders children found to be abandoned or orphaned and without visible means of support eligible for foster care. Salduker J decided "[i]t will not be in the interests of children to take a rigid, overly formalistic approach to the interpretation of section 150(1)(a)" (par 39). Rather "Children's Courts should take a flexible approach appropriate for the determination of the best interests of the child in each case" (par 39). In support he relied on a finding in *S v M* (2008 (3) SA 232 (CC) par 24) that "[a] truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved".

On procedure, Salduker J found that section 150(1)(a) applications required a two-stage inquiry. The first stage involves a factual determination by a children's court of whether the child is actually orphaned or abandoned as envisaged in the section. In her view, it should be relatively easy to establish this by simply applying the definitions of "orphaned" and "abandoned" in section 1 of the Act (par 28). This section defines an orphan as "a child who has no surviving parent caring for him or her". It defines an abandoned child as "a child that has obviously been deserted by the parent, guardian or caregiver" (see also reg 56 published in terms of the Act in GN R261 in *GG* 33076 of 2010-04-01). Salduker J stated that when magistrates considered reports of social workers and other evidence to decide whether a child is abandoned or orphaned they had to pay particular attention to "the current living arrangements of the child, the identity of the present and prospective caregivers, and the status of their relationship with the child" (par 29). Rather than adopting a dismissive or hasty attitude because of concerns about case overload, they must in every case carefully analyse the evidence to establish whether the child is in need of care and protection as a result of having been orphaned or abandoned in terms of section 150 read with section 1. If the answer is affirmative, then the second stage of proceedings requires an assessment by the court of whether applicants are suitable and legally eligible to be foster parents of the child. Concerning eligibility Salduker J stated "[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" (par 29). She thus chose to draw a clear distinction between foster-parent applicants who were potentially in line for common-law maintenance obligations, and those who were not.

The court then considered the phrase, "without any visible means of support", in section 150(1)(a). It held that magistrates had to firstly determine whether there was an identifiable family member who bore maintenance liability under the common law (par 30 and 32–34). They had to also establish whether the child had any other means of support. "Visible means" thus denotes all existing sources of finance currently available to be legally accessed on behalf of the child in terms of the rules of private law (par 30). In considering further the meaning of "visible means of support" the court noted that the ninth edition of *Black's Law Dictionary* defined the phrase as "an apparent method of earning a livelihood". And the seventh edition contains the explanation, "vagrancy statutes have long used this phrase to describe those who have no ostensible ability to support themselves". This led the court to conclude that the focus in foster-care inquiries had to be upon any visible means available for the child "rather than others upon whom he or she is dependant" (par 31). As Salduker J put it, "[t]wo questions to be asked to are: Does the minor child have the means to support him/herself and: Is the means of support readily evident, obvious or apparent? The inquiry into the means of the minor child is a factual one, focusing on the financial means of the minor child and not on the financial means of the proposed foster parents" (par 31). She was of the view that Annexure C to the regulations published in terms of the Social Assistance

Act 13 of 2004 showed clearly that the financial means of proposed foster parents were irrelevant. It is significant that this Annexure states in relevant part that "a foster parent qualifies for a foster child grant regardless of such foster parent's income" (par 31). Thus, in considering the visible means of support criterion, children's courts should focus only on the financial means available to the child, and not those of proposed foster parents.

Having found the financial means of proposed foster parents to be irrelevant, Salduker J concluded that the children's court magistrate had erred in deciding that the slender finances of the applicants constituted "visible means of support" for the child. And he was also mistaken in his interpretation that, once a person voluntarily cares for a child as contemplated in section 32 of the Act, the child was no longer abandoned and thus could not be categorized as in need of care and protection. Salduker J thus held that section 32 had not to be interpreted as constituting a barrier to the application of section 150(1)(a). To conclude that any child already receiving voluntary informal care could not benefit from a subsequent foster care placement would be illogical. It would mean that "many relatives who step in to care for children orphaned or abandoned will be cut off from social services *via* the foster care process" (par 38). This would be "completely at odds with the spirit of the Children's Act" (par 38). It would be "an implausible interpretation of section 150(1)(a) and could not have been the intention of the legislature" (par 38). It is also against the best interests of children to discourage family members from immediately stepping in to offer care for fear of disqualifying themselves as eventual recipients of foster-care grants (par 40).

In relation to the definitions of "orphaned" and "abandoned" in section 1 of the Act, Salduker J posed the hypothetical situation of a child currently motherless and with a father who "lives in another town". She opined that in such circumstances "foster care with the current caregiver may be the most suitable option" provided it is in the best interests of the child (par 34). He concluded more generally "even if there is a relative somewhere who has a legal duty of support, the court could still find that the child 'is orphaned or abandoned and without visible means of support' in certain circumstances, to be determined on the facts of each case" (par 36).

4 Discussion

It needs to be kept in mind that the appellants in *SS* were a maternal aunt and uncle of the child for whom foster care was being sought. Therefore, they were not under any common-law duty to provide maintenance (*Vaughan v SA National Trust* 1954 (3) SA 667 (C) 671; and see also Van Zyl *Handbook of the South African Law Maintenance* 2ed (2007) 13). As has been noted, Salduker J regarded the distinction between closely-related relatives who owe maintenance duties and other persons as a significant one. She limited most of her findings to the latter group. Within that arguably rather artificial limitation, the *SS* judgment does provide some much-needed guidance on four aspects of the law governing foster-care applications. It interprets the phrase "without visible means of support" in section 150(1)(a)

of the Act, throws light on how the main statutory provisions governing foster-care applications must be read together, indicates procedural steps to be followed in such applications, and improves clarity on eligibility for foster-parent status and grants. For convenience, each of these aspects will be discussed in turn.

The task of children's court magistrates in determining whether abandoned or orphaned children are "without visible means of support" will now often be simpler. Where applicants for foster-parent status do not have a maintenance obligation, magistrates do not need to assess or even take into account what financial means they possess. Even if they are extremely wealthy, this is irrelevant. Instead, it is the nurturing capabilities of such applicants that they must evaluate. However, financial resources that could be drawn upon to support the child from *other sources* besides the financial resources of the applicants must be considered. This might be understood as implying that discovery of such other means of support, however limited, prevents any finding by a children's court that a child is eligible for foster care in terms of section 150(1)(a). However, it will be remembered that Salduker J postulated the hypothetical examples of an abandoned child still being eligible, despite discovery of a father living in another town or a relative with a maintenance obligation. She unfortunately provided little detail in these examples, and so the issue of consequences resulting from availability of other sources of finance cannot be regarded as fully settled. Specifically, the question of whether availability of substantial maintenance from other sources besides the wealth of the applicants bars fostering is not properly answered in *SS*. What is clarified is that magistrates have some degree of discretion. This enables them to still find that a child is "orphaned or abandoned and without visible means of support" in a variety of circumstances, depending on whether this is in the best interests of the child. It is submitted that the implication, and what should have been expressly stated in the judgment, is that if sufficient other financial resources are available to maintain the child, applicants with suitable nurturing skills may still be appointed as foster parents. At most, only the foster-care grant should be withheld. A failure to follow this approach will continue to produce situations in which magistrates deny suitable alternative caregivers foster-parent status. It is irrational that this should occur for purely financial reasons. It is also obviously not in the best interests of children concerned. The ultimate solution will be to improve the Act so that it indicates that availability of financial resources is a factor relevant to eligibility for the grant, and not eligibility for foster-parent status. It is unfortunate that these two entirely different aspects have been conflated in section 150(1)(a).

Concerning reading together of legislative provisions, *SS* usefully clarifies that taking on voluntary care of a child as contemplated in section 32 of the Act does not prevent a carer's eligibility for appointment as the foster parent subsequently in terms of section 150(1)(a). This, and the associated ruling that prior receipt of voluntary care does not stop a child being found to be in need of care and protection, are to be commended. To have accepted the reasoning of the court *a quo* and found otherwise would have perpetuated most unfortunate consequences. Discouraging immediate voluntary

nurturing of abandoned and orphaned children for fear of losing foster-care grants is certainly not in their best interest. The delinking of sections 32 and 150(1)(a) has subsequently been followed with approval (*Manana* par 13).

Aside from resolving how sections 32 and 150(1)(a) should be read together, Salduker J also clarified that sections 46(1)(a) and 156(1)(e) each offer equal degrees of protection. Confusingly, they both provide similarly for foster-care placements. But only the latter expressly requires proof of a ground that the child is in need of care and protection. The conclusion that section 46(1)(a) cannot because of its silence on the point be used for a foster placement without proof of such a ground is significant. As has been pointed out, Salduker J decided that section 182(1) of the Act compelled proof of a care and protection ground, regardless of whether section 46(1)(a) or 156(1)(e) foster-care orders were requested. This is to be welcomed. Proof of a ground is essential for ensuring that children are not removed and placed under control of foster parents without good reason. To have allowed avoidance of the grounds requirement would have increased dangers of children being placed in the control of traffickers or other unsuitable persons posing as prospective foster parents. Again, this interpretation of the Act has been subsequently followed with approval (*Manana* par 15). Although only s 46(1)(a) was at issue, *SS* arguably provides authority for the broader proposition that no section 46(1) placement may be ordered in a care and protection matter if proof of a ground would be required for its equivalent in section 156(1).

Aside from illuminating several inadequately drafted provisions of the Act, the court in *SS* also considered how it should be read together with the Social Assistance Act. It will be remembered that the court relied on Annexure C of the regulations published in terms of the latter for a finding that existing financial resources of foster-parent applicants with no maintenance obligation are irrelevant in deciding whether foster grants are applicable. From the perspective of children's best interests, this is surely a correct approach. By taking on nurturing of children, foster parents spare the state the expense required for keeping them in congregate care institutions. Also, substitute familial environments provided by foster parents are almost always much better for child development than institutions, and should therefore generally be promoted as an alternative (Nelson, Zeanah and Fox "Cognitive Recovery in Socially Deprived Young Children: the Bucharest Early Intervention Project" 21 December 2007 318 *Science* 1937 1938–1940).

Concerning procedures, Salduker J's directive on the two basic steps to be followed by children's courts when evaluating foster-care applications is to be welcomed. Since the Act and regulations offer little detail on court processes, this will also be useful to magistrates. Deciding first whether a child has been orphaned or abandoned, and then secondly whether the applicants are suitable to serve as foster parents, is logical. Although the court did not do so, it could usefully have specified that a third step is to decide whether a foster-care grant is appropriate.

A criticism is that Salduker J apparently did not fully follow her own first step. She seems simply to have accepted that the biological father of the child in *SS* could not be found. Her judgment contains no interrogation of what steps, if any, social workers had followed before concluding that the father was untraceable (*cf* regulation 56 published in terms of the Act which specifies specific tracing requirements for social workers). Laxity on this aspect may have been encouraged by her view that it is relatively easy for magistrates to establish whether children have been orphaned or abandoned in the sense stipulated by sections 1 and 150 of the Act (par 28). This is somewhat optimistic. Because of the financial temptation foster care grants represent for impoverished families, fraudulent attempts to claim falsely that children have been orphaned or abandoned is a danger (Matthias and Zaal "The Child in Need of Care and Protection" in Boezaart (ed) *Child Law in South Africa* (2009) 163 181). In a society where corruption is rife, magistrates must always remain alert to the possibility of collusion between biological parents, applicants for foster-care grants and/or dishonest social workers taking kickbacks (see magistrates' experiences recorded in Zaal *Do Children Need Lawyers in the Children's Courts?* (1996) 20). However, Salduker J's directive for careful, in-depth children's court enquiries does represent what is probably the most practicable solution for uncovering fraud. By avoiding any rushing of cases, and dividing their process into logical steps, it should in most instances be possible for children's courts to establish whether children have really been orphaned or abandoned, and then whether foster-parent applicants are appropriate substitute carers genuinely motivated to use grants for the child, rather than merely for themselves.

Although it thus also makes a valuable contribution on procedure, *SS* is only partly helpful on eligibility for foster-parent status. The dictum that a child "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" (author's own emphasis added) is problematic. On the positive side, this is clearly authority for the proposition that at least those family members who do not have maintenance obligations are eligible for foster-parent status, even if the child is already living with them. So children's court magistrates must stop excluding them. But the statement seems to imply that other, more closely related family members who do have a common-law maintenance obligation are not eligible to be appointed as foster parents. This is an illogical admixture of what should be the separate considerations of foster-parent eligibility and foster-grant eligibility. Since the applicants in *SS* did not have any maintenance obligation, the comment concerning relatives who do is clearly an *obiter dictum.* As subsequently pointed out by Carelse J, the presence or absence of a private-law maintenance obligation should be irrelevant for determining foster-parent eligibility (*Manana* par 25–26). In its rejection of this criterion, *Manana* is to be preferred to *SS*.

5 Conclusion

As has been shown, the *SS* judgment is not without its shortcomings. In fairness, Salduker J had a difficult task in making sense of opaque wording in section 150(1)(a) of the Act – particularly the phrase, "without visible means of support". What has been achieved, is considerably greater protection for orphaned and abandoned children. It has been made clear that foster-parent applicants who do not owe a maintenance obligation cannot be excluded merely because they are sufficiently wealthy to maintain the child. In fact, children's court magistrates do not need to spend time investigating pre-existing financial resources of applicants in this category. Also, magistrates can no longer use the fact that would-be foster parents are already providing voluntary care as envisaged in section 32(1) of the Act as a reason for dismissing their applications. The danger of carers being deterred from providing immediate and urgently needed care for orphaned or abandoned children because of longer-term financial concerns has thus been ended. The equally dangerous idea that proof of a ground that a child is in need of care and protection can be avoided by bringing foster-care applications under section 46(1)(a) of the Act has also been laid to rest. In addition, some much-needed procedural guidance for magistrates has been provided. Although Salduker J was not sympathetic to this, the concern of the court *a quo* about children's courts being overloaded by foster-care cases is a real one (see Matthias 2012 *The Social Work Practitioner-Researcher* 167–168). Therefore, it does need to be addressed. Children's courts must be supplied with sufficient magistrates if they are to conduct rigorous foster-care hearings as required in *SS*.

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