FEATURE

From Regulations to Courts: An Evaluation of the Inclusive and Exclusive Criteria on Children with Co-Caregivers in the Era of Covid-19

Robert Doya Nanima

At the time of writing, more than 5.2 million persons have been infected by Covid-19, leading to 340,000 deaths, while about 2.2 million people have recovered (WHO 2020). South Africa has reported 23,000 infections and 481 deaths (DoH 2020). On 27 March 2020, South Africa declared a national state of disaster and effected a national lockdown. This greatly affected the provision of services across the entire country, save for the provision of essential services.

While South Africa should be commended for the use of a tiered system of five levels for easing restrictions during the lockdown, a certain category of people remain substantively affected in the enjoyment of their rights. The child holds a special place in the human rights discourse as he or she is a rights-holder in his or her own right. This was reiterated by the Supreme Court in ***S v M,*** where it stated that the child is not a mere extension of his or her parents but a person with rights that can be enforced in courts of law. It is important to take cognizance of this position at a time when rights have been significantly restricted to mitigate the spread of Covid-19.

The Constitution of South Africa provides for the limitation of rights where it is reasonable in a free and democratic society. Before the lockdown, however, the courts have, in cases such as ***S v Manamela and Another (Director-General of Justice Intervening)*** (***Manamela***), hastened to find that even if a limitation to a right is rationally connected to the purpose of fighting crime, it may not be recognised if it is not the least restrictive means of achieving that purpose. This position seems to have changed, as highly restrictive measures have been adopted to mitigate the spread of the coronavirus. For instance, in the ***Exparte application of Karel Willem Van Heerden,*** the Mpumalanga High Court had to decide on the possibility of exempting a private individual from the lockdown restriction to go and bury his father. The Court dismissed the application because allowing the application amounted to breaking a decree. It stated, in addition, that despite the care and diligence of the applicant, he would still expose himself to unnecessary risk and possible death. Other applications, such as ***Hola Bon Renaissance (HBR),*** were struck out by the Court because they did not have any prospect of success. In the case of ***Muhammed Mohammed and others v The President of South Africa and others***, the court held that the limitations on rights imposed by the Regulations are reasonable and justifiable under the Constitution.

In all these cases, the position of children was not at issue. In the subsequent case of ***CD and MD,*** the court allowed the applicant to travel from Cape Town to Bloemfontein and back to collect his or her children from the grandparents. While the reasoning that informed this position is important, other intricate dimensions that create inclusion and exclusion criteria are instructive to look at as well.

Child protection in the Regulations

Following the executive's decision to adopt a lockdown to mitigate the spread of Covid-19, regulations were adopted to be enforced. These were provided for the Disaster Management Act Regulations (Regulations), published in Government Gazette No. 43199. They were passed by the Minister of Cooperative Governance and Traditional Affairs under section 27(2) of the Disaster Management Act 57 of 2002 (DMA 2002). To this end, Regulations 3(b)(i) and (iii) prohibit the movement of persons and goods between provinces and between metropolitan and district areas. The Regulations state that 'every person is confined to his or her place of residence' unless he or she is performing an essential service, attending a funeral or collecting a social grant.

It was evident that this regulation excluded any sort of protection to children who were not staying with both or one of their parents or caregivers. This regulation excluded any sort of protection to children who were not staying with both or one of their parents or caregivers. This exclusion extended where children were with a different person (where movement was necessary) other than their caregiver or parent at the time the Regulations came into force.

This position changed with the amended directions to the Regulations that came into force on 7 April 2020. According to the amended directions, Direction 1(c) allows for the movement of children between co-holders of parental responsibilities. The co-holders of parental responsibilities should have either 1) a court order or 2) a parental responsibilities or parenting plan, registered with the family advocate. These documents have to be certified and in the physical possession of the co-caregiver. This is an indication that for children to be moved between co-holders of parental responsibilities, the latter have to have a court order or a parental responsibilities and rights agreement/parenting plan. In addition, the document has to be certified. As such, the physical possession of any of these duly certified documents remains a condition precedent to the movement of a person (Directions 2020).

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Concerning possible benefits to children, two points were established by the amended directions. First, in the narrow perspective, the amended directions either included or excluded children who were subject to co-parenting arrangements depending on their possession of either a court order or the parenting agreement or plan. Secondly, and in a wide perspective, all children whose parents or caregivers did not need a court order or a parenting plan before the lockdown were automatically excluded.

Two pertinent questions arise from the amended regulations. The first is whether the court order and the agreements have to be in existence before one invokes the application of Direction 1(c). The second is whether the courts would deal with the narrow and wide forms of inclusion and exclusion. Before considering these questions, this article contextualises the case of ***CD and MD.***

Contextualising CD and MD

This article focuses on the decision in ***CD and MD*** in particular because, as of 27 May 2020, it was the only case so far that has been decided that deals with the rights of children who are staying with caregivers. This section unpacks the facts and judgment as well as the latter's implications.

Facts and judgment

On 6 April 2020, the applicants applied under the Regulations to dispense with the restrictions on the movement of persons to enable them to travel from Cape Town to Bloemfontein and back to collect their children from the grandparents. The children had travelled to visit the grandparents for the school holidays, but could not move from Bloemfontein due to the lockdown. At the time of applying, the regulations of 30 March 2020 were in force. The amended directions were released only a day later.

It is for this reason that the respondent objected to the application on the grounds that the regulations did not provide for the movement of children between caregivers. The facts are silent on whether the application was amended before the judge handed down the decision. Furthermore, while the amended directions provided for the existence of either a court order or parenting agreements, they are silent on whether the latter had to pre-exist them (the amended directions).

The most pertinent fact was that the application was filed a day before the new regulations came into force on 7 April 2020. The key issue identified by the Court was whether the applicants would be allowed to travel to Bloemfontein to collect their children, and if so whether the Court would dispense with the regulations in force on 30 March or subject the application to the amended directions of 7 April 2020.

The Court held that there was no prohibition on the movement of the children because their circumstances were within the exception of amended Direction 1(c). According to the Court, the order from an earlier decree of divorce had arrangements in place for the movement of the children between the applicants. On this basis, the applicants were given an order to travel from Cape Town to Bloemfontein to fetch their children. In regard to the silence of the amended directions on the pre-existence of an order or parenting plan, the Court added insight to a limited extent. It stated that a court order need not be in existence at the time of the lockdown. As a result, co-caregivers are at liberty to apply for the requisite order to legalise their movements.

The Court also stated that the children would only be allowed to travel from the first applicant's address to the second when the latter was confirmed to have tested negative for the Covid-19 virus. It added that it was common cause that the grandparents were caregivers, as defined in section (1)(i) of the Children's Act, as they cared for the children with the express permission of the parents. While the movement of the children between their caregiver grandparents and parents was prohibited, a court order or parenting plan was instructive. Once the requisite document was concluded, the movement of children would be legalised.

Implications of the judgment

First, the use of section 36 of the Constitution has been limited to instances where the applicants want the court to find that the restrictions are irrational and not proportional to the purpose they seek to serve. As indicated by ***Van Heerden*** and ***Hola Bola Renaissance***, this approach has not yielded results. However, where one seeks to satisfy the inclusion criteria in the amended directives, the court may be indulged.

It should be recalled that while the application was brought under the March regulations, the Court decided the matter using the April amended directions. If the Court were to use the March Regulations, it would have to subject the measures by the government to the limitation clause in section 36 of the Constitution. This would entail an evaluation of the nature of the restrictions and the state's rationality in using them. There is no doubt that this would entail the application of the principles in the earlier case of ***Home Affairs v NICRO.***

For instance, in the latter, the Court was tasked to establish whether the changes to the Electoral Act curtailed the constitutional right of prisoners to vote, and if so, whether this limitation was not justified by section 36 of the Constitution. While this

case did not deal with the Covid-19 pandemic, it questioned the application of the limitation clause. This would strike a balance between ensuring or disregarding public health initiatives to meet the various needs of the South Africa population.

The Court called for a subjective evaluation of facts that could not be readily proved objectively. It restrained itself from engaging a fact-finding mission that was not supported by evidence. In ***CD and MD***, the Court diverted from this approach although the application was filed under the March Regulations.

Secondly, it can be inferred from the language of the Court that it opted to evaluate the subjective facts before it against the objective principles of the law. It weighed an exercise of discretion to either allow or deny the orders sought by an applicant, based on various reasons. In this case, the Court evaluated the best interests of the children in the circumstances. The factual finding that the co-caregivers had other underlying medical conditions and were strained informed the grant of the order to travel. One may question why the Court used a law that was not in existence at the time the facts unfolded. This can be inferred from the Court's reliance on the best interests of the children in the subsequent paragraph.

Thirdly, the best-interests principle plays a crucial role in matters concerning children (Tostensen et al. 2011). It should be noted that the Court used the best-interests principle as a 'gap-filling' tool in ensuring the wellbeing of the children (Tostensen et al. 2011). This principle may be used to resolve conflicts and the competing rights of children, and it enables courts to balance legal technicalities and arrive at a good decision for a child (Alston 1994).

With this principle in mind, the decision in ***CD and MD*** casts light on the exclusion/inclusion procedure. It should be recalled that, first, in the short run, an excluded co-caregiver had an opportunity to obtain an order to move and help a child. This is in line with the Committee on the Rights of the Child's General Comment 14 that recognises the application of the best interests' principle in informing the enjoyment of a substantive right, interpreting legal principles and rules of procedure (CRC, 2013). It

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should also be noted that section 28 of the South African Constitution states that the best interests of the child should be of paramount importance in every matter concerning him or her. The use of this principle enabled the possible engagement of excluded caregivers in the narrow and wide perspective. However, the Court's silence on the conclusion of parental plans leaves a question as to whether they can be made and registered to legalise movements.

Fourthly, a look at the applicant's use of digital means to satisfy the Court as to the merits of the application shows that the Court can operate in the digital age. As such, the modes of operation of court processes need to be addressed. The case shows that counsel for the applicants satisfied the Court that the caregivers were not suited to continuing to look after the children due to their pre-existing conditions. Also, the record showed that Counsel for the Applicants used video-conferencing to ensure that the co-caregivers were heard through online video systems. This represents the new normal in conducting business in courts. Conversations with attorneys indicate that courts are embracing the use of CCTV and other online platforms to hear applications and urgent matters.

Conclusion

Two questions were raised above – first, in regard to whether the court order and the agreements have to be in existence before one invokes the application of direction 1(c), and, secondly, in regard to how the Court would deal with the different inclusive and exclusion criteria at both the narrow and wider level. According to the Court, an order need not pre-exist the regulations or amended directions. The effect of this flexibility in the possible application for the order by co-caregivers helps to narrow the gap between excluded and included children. The Court's decision was silent on the pre-existence of parenting plans duly registered with a family law advocate. This calls for an academic debate on whether a family advocate may conclude this agreement.

An evaluation of the decision shows that the effect of the lockdown regulations on children requires that the applicant has a court order or a parenting plan. The other children who do not benefit include those with no existing family plans. The dangers of Covid-19 need to be balanced against the best interests of vulnerable children.

Dr Robert Doya Nanima is a post-doctoral research fellow with the Children's Rights Project of the Dullah Omar Institute, University of the Western Cape.

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