

(11 January 2012 - to date)

CHILDREN'S ACT 38 OF 2005

(Gazette No. 28944, Notice No. 610)

(Commencement date of certain sections: 1 July 2007 [Proc. No. R13, Gazette No. 30030])

(Commencement date of remaining sections: 1 April 2010 [Proc. No. R12, Gazette No. 33076])

CONSTITUTIONAL COURT JUDGMENT

Government Notice 301 in Government Gazette 35246. Commencement date: 11 January 2012.

On 11 January 2012 the Constitutional Court of the Republic of South Africa gave judgment in a case concerning the confirmation of a declaration of constitutional invalidity of sections 151 and 152 of the Children's Act No. 38 of 2005. The North Gauteng High Court declared these sections unconstitutional to the extent that they provide for a child to be removed from family care by state officials and placed in temporary safe care, but do not provide for the child to be brought before the children's court for automatic review of that removal.

The Constitutional Court found that sections 151 and 152 of the Children's Act are unconstitutional insofar as they do not provide for automatic judicial review of the removal process and thereby lack a method for determining whether there was just cause for the removal. The Court decided that it is appropriate to read in a new Subsection to be numbered (2A) into section 151 of the Children's Act of 2005 as follows:

"(2A) The court ordering the removal must simultaneously refer the matter to a designated social worker and direct that social worker to ensure that:

- (i) the removal is placed before the Children's Court for review before the expiry of the next court day after the removal; and
- (ii) the child concerned and the parents, guardian or care-giver as the case may be are, unless this is impracticable, present in court."

1. An additional paragraph to be numbered (d) is added to section 152(2) of the Children's Act and reads as follows:

"(d) ensure that:

- (i) the removal is placed before the Children's Court for review before the expiry of the next court day after the removal; and
- (ii) the child concerned and the parents, guardian or caregiver as the case may be are, unless this is impracticable, present in court."

2. Section 152(3)(b) of the Children's Act is deleted and replaced by the following:

- "(b) refer the matter of the removal before the end of the first court day after the day of the removal to a designated social worker who must ensure that:
- (i) the removal is placed before the Children's Court for review before the expiry of the next court day after the referral;
 - (ii) the child concerned and the parents, guardian or caregiver as the case may be are, unless this is impracticable, present in court; and
 - (iii) the investigation contemplated in section 155(2) is conducted."