



## CONSTITUTIONAL COURT OF SOUTH AFRICA

**C and Others v Department of Health and Social Development, Gauteng and Others**

**Case No.: CCT 55/11  
[2012] ZACC 1**

**Date of Hearing: 16 August 2011**

**Date of Judgment: 11 January 2012**

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### MEDIA SUMMARY

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

On Wednesday 11 January 2012 the Constitutional Court gave judgment in a case that required it to decide whether certain provisions of the Children's Act that authorise the removal of children in certain circumstances are consistent with the Constitution. The High Court had held that they were not because the provisions authorising removal did not say that the removal must be automatically reviewed by a court in the presence of a parent, care-giver or guardian of the child. The Constitutional Court had to decide if the High Court declaration should be confirmed.

In a judgment written for the majority of the Constitutional Court, Yacoob J confirmed the declaration of invalidity. He found that the provisions were aimed at catering for the best interests of children in an effort to comply with the Constitution. However, the Constitutional Court held that the laws did not provide sufficient safeguards for circumstances where a social worker or a police officer removed children wrongly or where the Children's Court makes an order on incorrect evidence. The provisions were accordingly found to be inconsistent with the Constitution.

Yacoob J concluded that the appropriate remedy was to read into the provisions a requirement that all these removals should be automatically reviewed by the Children's Court shortly after the removals had taken place.

Writing for the minority, Skweyiya J, with Froneman J concurring, also concluded that the impugned provisions were unconstitutional and agreed in the majority's remedy. The minority reasoned, however, that the impugned provisions of the Children's Act impacted squarely on the rights of the child and obliquely on the right of access to courts, which was not absolutely denied

in form, but hampered in substance. South Africa's international law obligations under the African Charter on the Rights and Welfare of the Child (ACRWC) and the United Nations Convention on the Rights of the Child (UNCRC) were also relevant to the inquiry. Unlike in the majority, *Skweyiya J* and *Froneman J* do not see the limitation as the lack of automatic review; but in the removal provisions themselves, as the mere presence of strict requirements for removal does not mean that a right has not been limited, but that the limitation is more justifiable.

In a dissenting judgment, *Jafta J*, with *Mogoeng CJ* concurring, disagreed with the finding of constitutional invalidity on the basis that the section on children's rights in the Constitution does not refer to automatic review and does not contain the requirement for judicial review or supervision from the ACRWC and UNCRC. In determining the scope of the right to parental care, the section on children's rights in the Constitution cannot be interpreted to include parental care that is harmful or detrimental to the safety and well-being of a child. It follows that the impugned provisions are consistent with the Constitution.