



**RULES BOARD FOR COURTS OF LAW  
REPUBLIC OF SOUTH AFRICA**

**MEMORANDUM ON OBJECTS OF THE DRAFT CHILDREN'S COURT RULES**

**1. BACKGROUND**

1.1. The Rules Board for Courts of Law, hereinafter referred to as ("Rules Board"), empowered by section 6(1) of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), may with a view to the efficient, expeditious and uniform administration of justice in the Supreme Court of Appeal, the High Court of South Africa and the Lower Courts, from time to time on a regular basis review existing rules of court and, subject to the approval of the Minister, make, amend or repeal rules for the Supreme Court of Appeal, the High Court of South Africa and the Lower Courts.

1.2. The Children's Act, 2005 (Act No. 38 of 2005), (hereinafter referred to as "Children's Act"), came into operation on 1 April 2010. There are two sets of regulations promulgated under the Children's Act, namely:

1.2.1. the Regulations Relating to Children's Courts and International Child Abduction, 2010 (published under GN R. 250 in GG 33067 of 31 March 2010) hereinafter referred to as ("Justice Regulations"), administered by the Department of Justice and Constitutional Development; and

1.2.2. the General Regulations Regarding Children, 2010 (published under GN R. 261 in GG 33076 of 1 April 2010) hereinafter referred to as ("General Regulations"), administered by the Department of Social Development.

1.3. On 17 and 28 January 2016 the Department of Social Development hosted a Consultative Workshop on the Development of the Child Protection Policy, at which it was proposed that the Rules Board should consider developing rules which will assist the processes and procedures unique to the Children's Courts across the country.

- 1.4. Currently, the Children's Act and its two sets of the regulations seemingly do not provide adequately for processes and procedures to be followed in the Children's Court proceedings. For instance, there is no clear indication as to how certain matters are to be brought before the court, what procedure should be followed during enquiries and how child participation should be dealt with in court.
- 1.5. It is generally accepted by Presiding Officers and legal practitioners that all matters are brought before the Children's Court by way of proceedings envisaged in section 53 read with Justice Regulations 6 and 7. However, the provisions of sections 151 and 152 read together with General Regulations 53 and 54 are seemingly irreconcilable with the practice used in the Children's Courts.
- 1.6. In addition, no distinction is made between different Chapters of the Children's Act. Chapter 3, for example, deals with parental responsibilities and rights, whereas Chapter 7 deals with the protection of children. Chapter 3 matters are brought on application while an enquiry is held in respect of Chapter 7 matters. Failure to distinguish between these processes causes confusion and uncertainty for Presiding Officers, practitioners and parties to the proceedings.
- 1.7. Further, it was established during Judicial Quality Assurance Assessments at various Magistrates' courts that in some instances children are not afforded the opportunity to participate at the hearing as required by the Children's Act. In some instances, courts fail to conduct an age estimation of the child, where the birth of such child was not registered. Such failure has a negative impact on the child's constitutional rights of access to education, medical, social and other services. There is no uniformity in the application of the provisions of Justice Regulations 6 and 7, as well as sections 151 and 152 of the Children's Act by the courts.
- 1.8. The Children's Act read together with two sets of the regulations, and a set of the proposed rules would inevitably create more confusion, hence it was agreed in principle to excise certain provisions from the two sets of the regulations and to include them in the rules, with some variations and adjustments where necessary.
- 1.9. Therefore, in order to create certainty in the Children's Courts, it seemed necessary to develop the rules in order to establish uniformity in the processes and procedures in the Children's Courts of the country.

## **2. APPROACH IN THE DEVELOPMENT OF RULES**

- 2.1. In order to fulfil the mammoth task of developing the Children's Court rules, the Rules Board established a Task Team for that purpose, which is constituted of professionals with expertise in the field of Child Law. These professionals were nominated by their respective institutions, and have offered their services on a *pro bono* basis.
- 2.2. Various meetings were scheduled and attended by the Task Team and, in the process, it was resolved that some provisions be extracted from the Justice and General Regulations for insertion into the rules. This approach was agreed to at a consultative meeting held on 27 July 2017, between some officials from the Rules Board, the Department of Justice and Constitutional Development and the Department of Social Development.
- 2.3. It was agreed at that meeting that some provisions of the regulations (including the accompanying forms) dealing with court processes will be imported into and form part of the rules with necessary variations and adjustments. Attempt was made to not discard the existing provisions of the regulations, but to rather to retain them with necessary adjustments to the language where necessary, and to also subdivide lengthy provisions. In a nutshell, the provisions imported from the regulations have been adjusted to conform with the current approach to legislative drafting in terms of style and simple language.
- 2.4. The imported provisions of the regulations will in due course be repealed from the relevant Justice and General regulations by the Minister responsible. The effect would be that the rules and forms required for court processes and procedures will be contained in one document, thereby enhancing access to justice.
- 2.5. There appears to be a difference of interpretation of the provisions of section 52(1) of the Children's Act, particularly in relation to the extent of the making of the rules for the Children's Court by the Rules Board. The Office of the Chief State Law Adviser has been briefed to provide an opinion and clarity in this regard. Recommendations may in due course be made for the amendment of the Children's Act to address any limitation that the Rules Board may have in drafting comprehensive rules.

2.6. If any amendment is necessary and required, we anticipate simultaneous publications in the *gazette* of the following:

2.6.1. the rules for Children's Court;

2.6.2. the amendments of section 52 of the Children's Act to remove any possible doubt as to the extent of the powers of the Rules Board to develop the rules for the Children's Court;

2.6.3. the amendment of relevant sections of the Children's Act to authorise the repeal of certain provisions from the Justice and the General regulations, and the insertions of those provisions in the rules developed for the Children's Court;

2.6.4. the repeal of the specific regulations and forms from the Justice and the General regulations; and

2.6.5. generally, the amendment of any section of the Children's Act that create restrictions or inhibitions in the functioning of the Children's Courts.

### **3. PURPOSE OF THE RULES**

The purpose of the draft rules is to streamline the processes and procedures in the Children's Courts, and to make the practise in the Children's Courts of the country accessible and uniform.

### **4. OBJECTS OF THE RULES**

4.1. The main objects intended to be achieved through the proposed rules and its accompanying forms are the following, *inter alia*:

4.1.1. the rules and forms will create certainty and uniformity in relation to the procedures to be followed in the Children's Courts throughout the country. As such parties involved in a matter will know which documents are required to be lodged at court and in relation to which type of a matter;

4.1.2. it will be known at what stage and under what circumstances and how a child should be afforded an opportunity to participate at the hearing;

4.1.3. the Children's Courts of the country will have only one set of rules, and will not have to rely on the provisions contained in the Children's Act, two sets of regulations and rules;

4.1.4. lay-persons will be able to better understand and apply the rules of court;

4.1.5. to place matters before the presiding officer at the earliest opportunity;

4.1.6. to ensure that presiding officers are able to, at the earliest stage, apply effective case flow management and case manage the matter in order that matters are finalised speedily and without delay;

4.1.7. to provide for procedures that have not previously been provided for by the regulations, and thereby introduce practical rules which will enhance access to the Children's Courts.

## **5. CONTENTS OF THE RULES**

### **5.1. Chapter 1: Definitions, purpose, application and interpretation of rules**

5.1.1. This chapter contains the definitions, purpose, application and interpretation of rules.

5.1.2. The aim was to stick to the definitions as contained in the Children's Act, and to introduce others which are used in practise such as "respondent".

5.1.3. Other definitions are a duplication of what is contained in the Children's Act, and that was done for a purpose. It was considered that these terms be inserted in the rules so as to be closer to the rules-users, rather than having to be looked for in the Children's Act.

### **5.2. Chapter 2: General**

5.2.1. This is a general chapter which contains provisions for participation of the child and management of cases.

5.2.2. Uniform provisions are stipulated to give guidelines in dealing with child participation in the proceedings, as well as guidelines pertaining to case management by Judicial Officers.

### **5.3. Chapter 3: Clerk of court**

The chapter regulates additional functions, powers and duties of the clerk of the court. The aim of this chapter is to ensure that other normal and day to day functions, powers and duties of the clerk are specifically stipulated to avoid any possible uncertainty.

### **5.4. Chapter 4: Children's courts**

5.4.1. In Part 1 of this chapter, court proceedings are dealt with and particularly the manner of bringing a matter to court, the types of applications, attendance of hearings, service of process and related aspects.

5.4.2. Part 2 of the chapter deals with investigations, conferences and forums and the ultimate hearing of the matter.

### **5.5. Chapter 5: Parental responsibilities and rights**

5.5.1. Part 1 of this chapter provides generally for application regarding parental responsibilities and rights. In particular the chapter sets out the types of applications that may be brought to court and the rule in terms of which any such application may be brought.

5.5.2. Part 2 governs the general requirements pertaining to parental responsibilities and rights agreement, as well as mediation and participation of child in respect thereof.

5.5.3. Parts 3 and 4 of the chapter make provisions for preparation and registration of a parenting plan respectively.

### **5.6. Chapter 6: Child in need of care and protection**

5.6.1. Part 1 of this chapter deals with a variety of aspects relating to the child in need of care. It covers the processes of obtaining of an order to remove the child to a temporary safe care, the processes of removal of the child with or without a court order, the review of removal of the child with or without a court order.

5.6.2. The part also provides for investigation to determine whether the child is in need of care and protection, the hearing in respect thereof as well as abandoned or orphaned child.

5.6.3. Part 2 of this chapter makes provisions associated with extension of foster care order.

## **5.7. Chapter 7: Application for adoption**

5.7.1. The chapter regulates application for adoption, the placement of the child in the care of the prospective adoptive parent, the procedure to be followed when a freeing order is sought.

5.7.2. The chapter also covers the preliminary hearing of and consideration of an adoption application, who should consent to the adoption, the giving of notice of proposed adoption and the withdrawal of consent. Other related aspects relating to adoption are also covered, such as the manner of recording of information in the adoption register and the rescission of adoption order.

5.7.3. A Form 24: How to adopt a child in South Africa has been designed to provide a useful guide on issues revolving around adoptions.

## **5.8. Chapter 8: Applications for inter-country adoption**

5.8.1. This chapter makes provisions for the accreditation of an organisation to provide inter-country adoption services, report on person applying for adoption of a child and report on a child to be adopted.

5.8.2. Provisions for the return of the child to the Republic, following the withdrawal of consent to adoption of such child, are also covered.

#### **5.9. Chapter 9: General matters**

This chapter deals with general matters including settlement agreements and the questioning of the child through an intermediary.

#### **5.10. Chapter 10: Miscellaneous**

Miscellaneous matters are covered in this chapter, such as keeping of and access to records, as well as contribution orders.

#### **5.11. Chapter 11: Costs**

This chapter regulates the costs of proceedings, which provisions are entirely taken from the civil court practice on costs.

#### **5.12. Chapter 12: Additional matters**

5.12.1. This final chapter deals with additional matters such as contempt of court proceedings, monitoring of court orders and non-compliance, the proceedings for committal for contempt of court.

5.12.2. The chapter also covers the withdrawal, suspension, amendment or replacement of order of court, appeals, referral of a matter to the Children's Court by any other court, as well as declaratory order.

#### **5.13. Annexure 1: Forms**

5.13.1. This annexure contains the prescribed forms used in practise. Only the forms mainly linked to court processes and procedures have been imported from the Justice and General regulations and inserted into the rules, with some adjustments where necessary.

5.13.2. Two of these forms, namely Form 3: Notice of motion and Form 5: Edictal citation and substituted service are the relevant forms currently used in the civil courts.

5.13.3. Each form is linked to a specific rule, and as such no form exists in a vacuum. Consequently, the provisions of the relevant rule have to be considered in order to determine which form must be used for a particular matter.

#### **5.14. Annexure 2: Tariff of court fees**

5.14.1. This annexure is intended to contain the tariff of court fees. In terms of section 48(1)(d) of the Children's Act, the court has the power to make appropriate orders as to costs in matters before the court.

5.14.2. The specialist Costs Committee of the Rules Board will in due course develop a tariff of fees for use in the Children's Courts.