



**CHALLENGES EXPERIENCED BY CHILDREN IN CHILD HEADED
HOUSEHOLDS (CHH) IN SOUTH AFRICA.**

By

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**Thesis submitted in partial fulfilment of the requirements for the Master's in Child
Care and Protection Degree in the School of Law, University of KwaZulu-Natal,
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November 2021

DECLARATION

I Jabulisile Precious Bhengu declare that:

That this is my own and personal work except where otherwise indicated.

This research has not been submitted for any other examination before.

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Signature: Date: 20/10/2021.....

ACKNOWLEDGEMENT

I would like to thank the Almighty God for giving me the strength to pursue my dream through studying towards my LLM degree and also to enable me to complete my research notwithstanding the difficulties that I encountered.

A special gratitude to my supervisor for believing in me and also giving all the support I needed through this journey. Advocate Victoria Balogun-Fatokun, may the Lord keep you so that you will continue do what you have done for me and other students.

To Xolile Precious Bhengu, thank you so much for all the encouragement you have been a great sister and a support system to me.

SUMMARY/ABSTRACT

The civilization of society from inception has always been accompanied by unintended consequences. Such as the disorientation of families. Subsequently, the prevalence of minors assuming duties of parents within households is increasingly becoming a concern in this modern age. Researchers have coined the term Child Headed Household to contemporary refer to households headed by a child/children younger than 18 years. The phenomenon is seemingly not adequately recognised as a social problem since there is little literature available on the matter. Therefore, this has propelled this research to precisely examine the legal elements and the extent in which the rights of children living in child headed household are protected. The causes and possible remedies to prevent this anomaly of minors having to assume responsibilities of parents in a household. And the legislations together with government policies effectiveness or the lack thereof, in addressing the challenges faced by the children acting as heads of households.

Ukuhlaliswa komphakathi kusukela ekuqaleni bekuhlala kuhambisana nemiphumela ebingahlosiwe. Njengokudideka kwemindeni. Ngemuva kwalokho, ukwanda kwezingane ezithatha imisebenzi yabazali emindenini kuya ngokuya kukhathaza kule minyaka yobudala. Abaphenyi baqambe igama elithi i-Child Headed Household ukuze libhekise emakhaya anamuhla aphethwe yizingane / izingane ezingaphansi kweminyaka eyi-18. Lo mkhuba ubonakala unganele ngokwanele njengenkinga yezenhlalo, ngoba kuncane izincwadi ezitholakalayo ngalolu daba. Ngakho-ke lokhu kuqhubekise lolu cwaningo ukuthi luhlolisise kahle izici zomthetho nokunwetshwa kwamalungelo ezingane ezihlala ezindlini eziphethwe yizingane. Izimbangela namakhambi akhona okuvimbela lokhu kungalungi kwezingane okumele zithwale imithwalo yemfanelo yabazali ekhaya. Nemithetho kanye nezinqubomgomo zikahulumeni ezisebenza ngempumelelo noma ukuntuleka kwayo, ekubhekaneni nezinsalelo ezingane ezihlangabezana nazo njengezinhloko zemindeni.

ACRONYMS/ABBREVIATIONS

| | |
|----------|--|
| CHH | Child Headed Household |
| UN | United Nations |
| UNCRC | United Nations Convention on the Rights of a Child |
| UNICEF | United Nations Children’s Education Fund |
| SADC | Southern African Development Community |
| DRC. | Democratic Republic of Congo |
| HIV | Human Immune Virous |
| AIDS | Acquired Immune Deficiency Syndrome |
| NGO | Non-governmental organization |
| CBO | Community Based Organizations |
| FBO | Faith faith-based organizations |
| UNCRC | United Nation Child Rights Charter |
| ACRWC | Africa Charter on the Rights of the Child |
| SALRC | South African Law Reform Commission SALRC |
| CSG | Child Support Grant |
| FC | Foster Care |
| CDG | Care Dependency Grant |
| NACCW | National Association of Child Care Workers |
| NSFAS | National Student Financial Aid Scheme |
| DSD | Department of Social Development |
| MAC | Minimum Age Convention |
| WHO | World Health Organization |
| MEC | Member of Executive Council |
| RSA | Republic of South Africa |
| COVID 19 | Coronavirus disease 2019 |

| | |
|-----------|-------------------------------------|
| OVC | Orphans and Vulnerable Children |
| Stats SA. | Statistics South Africa |
| SCA | Supreme Court of Appeal |
| NSNP | National School Nutrition Programme |

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CHAPTER ONE

BACKGROUND TO THE STUDY

1.1 Introduction

The increasing rate of orphan and child vulnerability in South Africa has been attributed to the rise in morbidity and mortality rates among adults as a consequence of such factors as HIV/AIDS, poverty, violence, and motor vehicle accidents.¹ The children who have lost parents may experience challenges after the loss of the parents. This dissertation provides a background to some of their experiences and the challenges facing child headed households (CHH) in South Africa (RSA). South Africa has over 100 thousand children living in child-headed households looking after themselves and their younger siblings.² UNICEF report that there are 3.7 million orphans in South Africa, with 150 000 children believed to be living in CHH.³ This statement affirms that there are still CHH in South Africa. Having highlighted the plight of CHH and the existence of these groups, what are the possible challenges faced by the children heading such households?

According to a Stats SA survey males and females between the ages of 7–18 were found to not attend school because one-fifth (21,6%) of learners did not have the money while 22,6% reportedly fell out due to poor academic performance. Subsequently 8,6% of learners left their studies as a result of family commitments (i.e., getting married, minding children and pregnancy). It is noted that females were much more likely to offer these as reasons than males (17,1% compared to 0,3%). In addition, 8,0% of individuals felt that education was useless with a higher percentage of males (9,8%) than females (6,1%) believing this.⁴

There are various reasons children have to live without parents in South Africa, and one reason is the untimely death(s) of parent(s). South Africans have created their arrangements regarding the care and residence of children without parents. Often, in an event where parents

¹ U Ngconjana, A.S Kwizera and I Umejisi, Livihoods in child headed households and state intervention: a case study of the orphans and vulnerable children (OVC) in East London, 2017., South Africa. *Gender and Behaviour*, 15(1), 8160-8180. Available at www.saflii.org accessed 20 November 2021

² Thousands-of-SA-children-live-in-child-headed-households—2016 available at www.hdl.handle.net accessed 16 October 2021

³ Kellerman dreams to reality in , September 10, 2014. Available at www.dreamstoreality.co.za/orphans-and-child-headed-households. accessed 11 June 2017.

⁴ Stats SA General Household Survey 2019. Page 15. Available at www.statssa.gov.za accessed on the 21 November 2021

are deceased, extended family members would assume semi-parental responsibilities to the orphans.⁵ Nevertheless this kind of supervision arrangement by extended family members is not adequate to serve as an alternative to deceased parents.

In the past, where young relatives are involved with CHH care, the elders would make sure that minors are placed in households where an adult can take care of them. But today, with the high frequency of adult deaths, the traditional safety nets no longer suffice. The extended family system can no longer absorb all the children who have lost their biological parents. Child-headed households are therefore increasingly prevailing and subsequently becoming a problem; nevertheless, how to deal with the CHH issue is debatable.⁶ Due to a high standard of living and people being unemployed, the ability to absorb affected children has become a challenge, even if they are able to take them. Government must have a strategy on how affected children can be assisted as this will prevent them from being exposed to various situations that may lead to litigations.

A General Household Survey conducted by Stats SA in 2015 recorded about 50 000 CHH; while this figure is not significant in relation to the total number of children in the country, this is still a cause for concern.⁷ CHHs are often exposed to dangerous conditions derived from meagerness that characterises the spatial environment of these households.⁸ To support this statement, Meintjes *et al*; reported that children in CHHs live in conditions that are worse than those in mixed generations, it is therefore rare to find them in formal dwellings consisting of adequate sanitation and water, rather they are found outside of cities in informal dwellings with of poor service delivery⁹. In addition, this vulnerable group has to deal with emotional difficulties and is more likely to be abused and exploited.¹⁰

⁵ Mthethwa. M.S., *Challenges faced by child-headed families at Mahlabathini in KwaZulu Natal KwaZulu Natal* (Doctoral dissertation, University of Zululand). Page 22.

⁶ Mturi, A.J, Child-headed households in South Africa: What we know and what we don't. *Development Southern Africa*, 2012. 29(3).508. available at www.tandfonline.com accessed on the 21 November 2021

⁷ Parliamentary Monitoring Group –PMG, 2017 Available at <https://pmg.org.za/page/Child-%20and%20youth-headed%20households%20%E2%80%8B> accessed 13 June 2019.

⁸Parliamentary Monitoring Group –PMG, 2020 Available at <https://pmg.org.za/page/Child-%20and%20youth-headed%20households%20%E2%80%8B> accessed 13 June 2020.

⁹ H,Meintjes, K,Hall, D.H,Marera, and A,Boulle,Child-headed households in South Africa: *A statistical brief 2009*, 3 available at www.repository.up.ac.za accessed on the 21 November 2021

¹⁰ S'lungile K. Thwala. "Experiences and Coping Strategies of Children From Child-Headed Households in Swaziland", *Journal of Education and Training Studies*, 2018 available at www.researchgate.net/publication/326033853_Experiences_and_Coping_Strategies_of_Children_From_Child-Headed_Households_in_Swaziland accessed on the 21 November 2021

‘Absent parent(s)’ is a phenomenon whereby a parent is alive but has opted to disconnect physically, financially and psychologically from a child. Consequently, children with absent parents often struggle with self-actualisation. Orphans of CHHs experience various challenges and undergo traumatic experiences; thus, CHH’s psychological wellbeing is of great concern as it is mostly affected by the loss of their parents together with the overwhelming duties they are burdened with after the death of their parent(s).¹¹

Given the nature of CHHs in South Africa and the problems they face, this thesis seeks to look at the challenges experienced by children acting as the head in CHHs in RSA. Firstly, the thesis defines the term “child”, explores different definitions of CHHs, and describes what it entails. According to the South Africa Children’s Act 38 of 2005 ss1, “a child is a person under the age of 18 years”.¹² Article 1 of the United Nations Convention on the Rights of a Child (UNCRC) defines a “child” as “a person below the age of 18, unless the laws of a particular country set the legal age for adulthood younger”. The Committee on the Rights of the Child, which is the monitoring body for the Convention, has encouraged States to review the age of majority if it is set below 18 and to increase the level of protection for all children under 18.¹³ A CHH is a household where both parents or an alternate adult caregiver/s is/are permanently absent, and the person responsible for the day-to-day management of the entire household is less than 20 years of age.¹⁴ However, the definition may have different meaning for different people and also depends on the culture. A CHH may also be defined as a family living under the same roof, which is headed by a person under the age of 18.¹⁵ This entails that a CHH is where the oldest person within that family is below the age of eighteen (18) years and that child takes care of the needs of other children in that particular family.

Furthermore, a CHH is also defined as a situation where the parent or primary caregiver of the household is deceased or incapacitated, and there is no adult in the house to cater for the basic needs or to take care of the children except the oldest child in that household who has to assume the role of that parent or the primary caregiver. This definition states clearly that even if the head of the household is not deceased but terminally ill, that house is similar to those

¹¹ Lethale & Pillay, Resilience against all odds: A positive psychology perspective of adolescent-headed families. *Africa Education Review* 2013,580 available at www.uir.unisa.ac.za accessed on the 21 November 2021

¹² Children Act 38 of 2005 ss1

¹³ Committee on Rights of Children available at www.unicef.ca accessed on the 21 November 2021

¹⁴ Submitted to Southern Business School available at www.unicef.ca accessed on the 21 November 2021

¹⁵ Committee on Rights of Children available at www.vanbreda.org accessed on the 21 November 2021

headed by children. For the purpose of this research, a child-headed household is where the house is headed by a child younger than 18 years old, meaning a household consisting of only children.¹⁶ The thesis also explores some of the coping mechanisms available to assist CHHs whether from the public or private sectors. Reasons for children to act as heads in the CHH will also be explored further, together with a possible resolution to prevent the causes.

1.2 Research problem

The contemporary reality faced by society in this century is that households are no longer headed by parents. Nuclear families have disintegrated due to changing political and economic environment. According to stats SA 14,4% of children are orphans, having lost one or both parents. Whilst 81,9% of all households resided in formal dwellings in 2019, over 13 % of households still live in informal dwellings in South Africa. 62,2% of households nationally received grants compared to salaries as a source of income.¹⁷ Furthermore the survey found that 3,1% of children lost their mothers, 9% of children had lost their fathers, and 2,4% of children lost both parents. The percentage of orphaned children was highest in KwaZulu-Natal and Eastern Cape (both 18,7%), Free State (16,0%) and Mpumalanga (15,5%), and lowest in Western Cape (8,3%).¹⁸

This thesis explores the challenges children acting as head in CHH are experiencing. Are there any coping resources available to them? Is there anything the Government or Non-Governmental organisations can do to assist them in coping with their challenges? Does being in a CHH have any effect(s) on the child's education and wellbeing? The demanding role by CHH in assuming the responsibilities of a caregiver. The biggest challenge presented by CHHs is children fulfilling the role of parents yet themselves require parenting. Children and adolescents requires care and emotional support.¹⁹

Considering various impediments, namely the death of parents, an absent parents, migration, inadequate family support and substances abuses withing families, the children are then required to have a survival strategy. Simply, the absence of an adult in a CHH is likely to be

¹⁶Available at www.hdl.handle.net accessed on the 21 November 2021

¹⁷ Stats SA General household Survey 2019. Page 2 available at www.statssa.gov.za accessed 21 November 2021

¹⁸ Stats SA Page 10 available at www.statssa.gov.za accessed 21 November

¹⁹ Botha, the challenges and coping resources of youth heading households in South Africa. *Commonwealth Youth and Development*, 2014, 35-48

exposed to abuse and starvation.²⁰ Psycho-social support is needed for these children in order to ensure that they are always at ease and able to support their siblings.

In Zimbabwe, many orphaned children encounter the eminent reality of food insecurity, inadequate educational opportunities, material needs, and inadequate psycho-social support, inadequate skills and knowledge, inadequate support with limited contact with extended family members, lack of protection from abuse and exploitation, poor housing conditions and poor access to health care which are discussed below.

Food security: Relying on food donation and support from external sources is not easy. CHHs normally depend on assistance from third parties, people from their communities or outside their community.

Educational opportunities: A dictatorship of circumstances results in children not having an opportunity for better training which may offer them a better life. With regard to educational facilities and material needs, the child experiences a very short supply of clothing and household items and leisure.

Skills and knowledge: The children are not exposed to opportunities of learning life skills nor have access to cultural understanding, which parents teach.

Support and contact with extended family: No matter how close the extended family is to the CHH, they might not have contact with family members due to severe economic and emotional stress faced by the extended family members and also the stigmatisation and exploitation the orphan may face with their extended family.

Protection from abuse and exploitation: Children from CHHs are most vulnerable and exposed to abuse in a number of ways.

Poor housing conditions: CHHs are sometimes crowded or living in non-hygienic environments.

Poor access to health care: Children in CHHs may not have access to adequate health care since they do not have knowledge about health care services and because there is no adult to monitor their health.²¹

²⁰ Lobi & Kheswa, Exploring Challenges of Adolescent Females in CHH in South Africa. *Journal of Human Ecology*, 2017, 98-107

Likewise, there are many similarities between Zimbabwe and South Africa with regard to CHHs. According to Stats SA children rely on their families and households for their physical, social and economic well-being as well as their survival. Furthermore, children consider families and households as their most important social institutions and reference groups. Although traditional family structures are changing, they remain very important in South Africa where large proportions of the population are subject to debilitating poverty and unemployment and institutional support is inadequate.²²

1.3 Aims and Objectives

The aim is to determine what communities and organisations can do to support children in CHHs and to investigate the extent in which Government and NGOs can assist them. The rights of CHHs will be looked at and how children assuming duties of parents can be protected under South African law and international instruments applicable in the country. Considering the existence of CHHs deprives children of their constitutional rights,²³ henceforth the significant tasks of this thesis are to:

- To explore the legal trials and managing tactics of a CHH;
- To analyse literature concerning the CHH in South Africa;
- To understand the basic contributors of CHH in South Africa.
- To explore the legal measures available for CHHs.

1.4 Research Question

Challenges experienced by children in CHHs are not adequately explored. Therefore, the researcher aimed to investigate the challenges experienced by these children and the head of the household. The main question is whether children are given any support by relevant South African Government departments. Furthermore, to pose the question that seeks to explore the role of non-state actors such as extended families and NGOs. Henceforth, the writer aimed to understand if there is anything that can be done to improve the current support systems for CHHs. Likewise, this research has developed specific questions below:

1. What extend is the South African constitution is mitigating CHHs?
2. What is the legal framework aimed at protecting the rights and interest of CHHs?

²¹ www.sarpn.org › Country analysis › Zimbabwe – accessed: 11 June 2021

²² Stats SA Page 06 available at www.statssa.gov.za accessed 21 November

²³ J.W Creswell,. And C.N. Poth,. *Qualitative inquiry and research design: Choosing among five approaches*. Sage publications,2017, 155

3. Is there any literature available on CHHs and what research work and research findings have been found regarding CHHs?
4. To what extent are the factors of the economy directly or indirectly cause CHHs?
5. What can the government and non-governmental institutions do to ameliorate challenges faced by CHHs?

1.5 Focus of the study

Children heading CHHs find themselves in stressful situations due to their roles as heads of CHHs; these roles are not suitable for them as children. The thesis will focus mainly on their experiences and assess how accessible the resources are to children. Therefore, the focus is on children living in the CHH and how they experience being headed by a child. Focus on the legislation, for instance, to see what it tells us about CHHs and to see if the law protects the children in CHHs.

1.6 Research Limitation

The literature available on CHHs is reported to be limited in South Africa and other countries, and often the available statistics are unreliable and lacking.²⁴ Furthermore, this research has committed itself to the legal factors surrounding a CHH and other key aspects such as commerce and psychology which likely bear on the CHH have not been adequately explored.

1.7 Preliminary Literature Review

It is stated that not every thesis has a literature review, but every thesis has to write about the literature, showing how his or her work relates to others.²⁵ Children without any form of parental supervision are prone to be exposed to poverty. The absence of parental care subsequently leads to disorientation and malfunction, especially in relation to access to government documents and access to social grants, education, and healthcare. In essence, those who grow without parental supervision are likely to abandon school in favour of

²⁴ D Van Dijk, And F van Driel, Supporting child-headed households in South Africa: Whose best interests?2009 , pg 918

²⁵ Murray, How to Write a Thesis. Maidenhead.2002

performing house duties.²⁶ There is a rapid growth in the number of orphans leading to the increase in the number of CHHs around South Africa. Mushayi states that all the stakeholders has to take a stand in assisting CHH by ensuring that they are supported in their behavioural challenges and educational challenges²⁷.

If all stakeholders can avail themselves to assist affected children, they will not feel any burden over their shoulders. The writer, further elaborates that children who head CHH become adults in their families and miss out their childhood as they grow up without any adult to teach them the basic values of life. This is absolutely true because the child does not have time to express themselves or to play as he or she is faced with so many responsibilities for his or her siblings. The child does all the duties without being guided by an adult about basic values.²⁸The Department of Social Development is in the process of compiling CHH and Youth Headed Households in order to have a standardized procedure for assisting these households, legislative mechanisms, and policies to protect these children are put into place.²⁹

There are 3.7 million orphans in South Africa and most of them have lost their parents to sexually transmitted diseases and other related illnesses. The statistics shows that there are about 150 000 children who are believed to be residing in CHHs.³⁰ CHH is defined as child-only households. Jardin *et al* state that there is concern that the number of child-only households are increasing and that the households are not primarily the result of orphaning. An analysis of national household surveys to examine the circumstances of children in CHH in South Africa reveals that most children in child-only households are not orphans.³¹Some of the CHHs may not consist of orphans as some children may be abandoned by their parents and end up living in a CHH.³²

²⁶ Dreams to reality by Kellerman, Available at www.dreamstoreality.co.za/orphans-and-child-headed-households accessed 11 June 2021

²⁷ Mushayi, *Addressing behavioural challenges of orphaned learners who head households: a psycho-educational programme to enhance learning*,2013

²⁸ Mushayi, *Addressing behavioural challenges of orphaned learners who head households: a psycho-educational programme to enhance learning*,2013

²⁹ <https://pmg.org.za/page/Child-%20and%20youth-headed%20households%E2%80%8B-> accessed 26 September 2020

³⁰https://www.unicef.org/southafrica/protection_6631.html- accessed 26 September 2020

³¹ https://www.unicef.org/southafrica/protection_6631.html- accessed 26 September 2020

³² K Hall,HMeintjes. and W Sambu, , Demography of South Africa's children. *South African child gauge*, 2014, 90-93.

Grandparents normally take over after the death of the parents; however, some of their problems start not only when the parents are absent but compounded when the aged caregiver becomes incapacitated and unable to look after the children. The children become vulnerable to exploitation, because they live without adult supervision, are also likely to face poverty or be trafficked.³³Coping strategies that the CHH employs are normally short term and do not take into account the long term consequences of these approaches. The author submits that children in CHH are unable to access social grants because by law, a primary caregiver of every child should be an adult. This emphasises that the law excludes the most vulnerable group of children.³⁴Section 137 of the Children's Act 38, 2005 provides that an adult should be designated by the Children's Court, a Government Organisation or an NGO and all decisions must be made via the head of the CHH.

The role of the Supervisor is outlined by the Department of Social Development (DSD) to assist the children with medical issues and access to health care facilities when needed. It is clear that the head of the CHH takes over the roles of the parents fully as the supervisor cannot do anything without consulting with the head.³⁵It is therefore important to emphasise that the head of the CHH does not only suffer from the psychological trauma of losing parents and the ensuing social stigma but also suffers from poverty, malnutrition, high levels of psychological and emotional strains and anxiety. They also have a very low level of education as they are sometimes forced to drop out of school due to their demanding duties and responsibilities. These are some of the challenges that the head of the CHH experience, and they sometimes have no control over them, they reported that they feel challenged by their responsibilities.³⁶

CHH are faced with various challenges which may hinder them from pursuing their studies, as well as a change in responsibilities is the main challenge affecting the CHH³⁷. Simply

³³ Geremann an exploratory study of quality of life and coping strategies of orphans living in CHH in the high HIV-prevalent city of Bulawayo, Zimbabwe, Southern Africa.2005,

³⁴ Marus2005 cited in Moffet, *Parentification in CHH within the context of HIV & AIDS* (Doctoral dissertation).2008

³⁵ Act 38 of 2005, s 137

³⁶ N,Mkhatshwa,. The gendered experiences of children in child-headed households in Swaziland. *African Journal of AIDS Research*, 2017.368

³⁷ <https://www.news24.com/.../Children-from-child-headed-households-will-fail-without-special-attention-20140314-> accessed 20 September 2018

because they have to assume the responsibility of being a parent who entails to drop out of school to look for employment in order to take care of younger siblings.³⁸

The living conditions of children in CHH are deplorable. The CHH are recognised as a social problem, and the needs of these children are not sufficiently met. Further, their rights are not protected, they lack access to basic facilities like sanitation, water, income and very few attain a matric level of education. Female heads of CHHs sometimes trade in sex to get money to support their siblings and as a result they are exposed to sexual exploitation³⁹

Children in CHH are vulnerable in such a way that even their relatives take advantage of their circumstances. The following case study demonstrates that extended family members can be so cruel and not treat the children as a family, especially if there is money involved. This is the case even if the social worker supervises the use of foster care grant can keep a close eye on their cases, extended family members tell the children not to report them to the social workers and pretend as if everything is well. They even dressed them up nicely when the social worker comes to render supervision to the families and they threaten them if the children want to speak the truth.

Marc and Janine were both 13 years old in 2004. They had lived alone since their grandmother had died six months earlier. They did not know many relatives, but they knew of a 'Granny' who was their grandmother's sister and was living in another town with her boyfriend. A few months after a first meeting, Granny moved in and applied for a Foster Care Grant (FCG) for both children. In 2006, Granny was receiving these grants. However, Janine claimed that they were not cared for properly, and argued that Granny spent the money on outstanding debts and alcohol. Hence, it seems that Granny's motives for moving in with Marc and Janine was not to care for them, but rather to receive the FCGs.⁴⁰

In Zimbabwe, NGOs are providing much-needed services, such as health, education, and welfare services, and in some cases, psychosocial support. Zimbabwean NGOs have gone a step further to provide affected households with shelter and material support, especially those impacted by HIV/AIDS. They are also involved in assisting school-going children with

³⁸ Z, Maqoko, and Y, Dreyer, Child-headed households because of the trauma surrounding HIV/AIDS. *HTS Theologiese Studies/Theological Studies*, 2007. 718

³⁹ J.E Ibebuike, C Belkum, and MM Todd, The Lived experiences and needs of children in child headed households in resource poor communities in Soshanguve, South Africa. 2014. 62.

⁴⁰ D Van Dijk, And F van Driel, Supporting child-headed households in South Africa: Whose best interests? 2009, 923 available at www.tandfonline.com accessed on the 21 November 2021

school fees and providing supplementary food requirement. The community is also taking an important role in support of CHH. They help in the provision of food, paying school fees, and giving social support to reduce the impacts of stigmatisation associated with CHH, especially to those affected by HIV & AIDS.⁴¹ This shows that the CHH in Zimbabwe are less affected due to the support given to them. South Africa needs to assimilate the systems that occur in Zimbabwe with regard to CHH support systems. This will also reduce the number of children dropping out of school due to the overload of duties.⁴²

1.8 Conceptualising the role of ‘*Isibindi* Model’

The DSD mainly assists child and youth headed households through the *Isibindi* Model. *Isibindi* Model is an initiative that deploys trained community-based child and youth care workers in communities in an innovative team outreach program providing care, protection and developmental support to vulnerable children and families. During the 2013/14 financial year, the *Isibindi* Model reached nearly 90 000 orphaned and vulnerable children with its services.⁴³ The *Isibindi* Model is a good strategy for ensuring that the head of the CHH, is coping well with his or her duties and for ensuring that the child is punctual to school because the community-based care workers are tasked to come as early as possible to assist the children with school preparations. The DSD is in the process of compiling a Child and Youth-Headed Household Register to formalise assistance for CHH.

Further, the DSD began this campaign in 2014 where it asked South Africans to assist in ensuring that currently existing and new child and youth-headed households receive the necessary support from the government by informing the department where they are. To date, 3 214 CHH and 6 522 youth-headed households have been identified and assisted by this DSD programme in South Africa. Once identified, an assessment of the needs of the child and youth-headed households is completed and thereafter, linked to the necessary therapeutic interventions and resources.⁴⁴ This analysis shows that the Government is hands-on and trying, by all means, to support the CHH by ensuring that all their needs are met.

⁴¹ Kurebwa, coping strategies of CHH in Bindura urban of Zimbabwe, 2014 .239. available at www.jsd-africa.com accessed on the 20 November 2021

⁴² Kurebwa, Page 239.

⁴³ <http://www.sanews.gov.za/south-africa/reaching-out-child-headed-households> -accessed: 13 June 2021

⁴⁴ Parli999+qq22amentary Monitoring Group –PMG, 2017. Available at <https://pmg.org.za/page/Child-%20and%20youth-headed%20households%E2%80%8B> – accessed 13 June 2020

1.9 Rationale of the study

The main reason for the selection of the topic is because the writer believes that the community does not give children in a CHH enough attention and assistance, and the Government response is low. CHH consist of children acting as parents. Therefore, children assume duties of parents without being equipped with legal support to perform these duties. In CHHs, the responsibility to provide food, shelter, emotional support and financial support rest on the shoulders of a child. This is undesirable arrangement and the children's right to freedom of being children are infringed upon. Furthermore, the rational aims to explore the extent in which child headed household are not adequately empowered. CHHs cannot access social grant without the supervision of an adult. Therefore, often the CHH need an older adult to look after them and receive the grant on their behalf. Nowadays, considering a poor economic climate, one may find that the extended family members may decline the responsibility to provide for a CHH. Even if an extended family member takes in the orphan, they often misuse their grant or abuse the children.

In this thesis, the researcher aims to apply her practical knowledge gathered from years of experience with dealing with children in this category. Therefore, this thesis explores the children's challenges, the ways of coping with their roles and see if the wellbeing of CHHs is conducive enough with regard to education, health and employment. Should the condition deem not to be conducive, what can be done to ameliorate the challenges faced by CHHs and how to ensure that the best rights of a CHH is not violated.

1.10 Research Design and Methodology

Research design is all about determining how a researcher is going to conduct a study. It is a plan or a strategy of how the researcher will conduct his or her investigation in order to obtain answers to research questions or problems.⁴⁵ The researcher adopted a qualitative method. The research methodology is desktop based. The research explores documented facts and the available literature on the challenges experienced by children heading in their CHH in South Africa. Information used in this research is collected from books, peer-reviewed journals, articles, research reports, legal case studies and newspaper articles together with internet sources. This research will analyse documents and material from primary and secondary sources. Legal frameworks for the rights of CHH will also be analysed. The study

⁴⁵ Kumar, Research methodology: A step-by-step guide for beginners,2011.pg34

adopts a human rights approach which enables children in child-headed households to be empowered and to have a greater understanding of their rights.

1.11 Structure of the Research

The study is divided into five chapters as follows:

- **Chapter 1**

This chapter contains and discusses the introduction and background of the study conducted. Further, it includes the research question, problem statement, rationale, the aims and the objectives of the study, the methodology, including a preliminary literature review and factors fueling CHH.

- **Chapter 2**

This chapter focuses on examining the hierarchy of law applicable to the CHH. In doing so, the United Nations as an international body is discussed. The AU as a continental body is discussed and SADC as a regional body. This chapter also consists of case laws relevant to the CHH.

- **Chapter 3**

In this chapter, the research focuses on addressing the legal framework, policy background on the challenges experienced by children in CHH in South Africa e.g., what does the law say about children and their rights? Law or policies addressing children in child-headed households will be looked at, including the efficacy of such responses.

- **Chapter 4**

This chapter focuses on a literature review on the CHH. Coping resources and strategies for the children as heads of their household are explored in this chapter, and if the Government or NGOs are supporting the families, the accessibility of the resources are also analysed. Further, the challenges relating to education is explored to establish whether the situation at home is affecting their education and schooling. Legislations are also discussed to the extent that they purport to protect the children living in CHH. Further, the last part of this chapter will look at possible causes of the children becoming orphans and heads of households.

- **Chapter 5**

This chapter looks at the human rights implications of the violated socio-economic rights likely to happen when the rights of a CHH are infringed upon.

- **Chapter 6**

Consists of a conclusion and recommendations derived from the research literature.

1.12 Factors fuelling CHH in South Africa

The prevalence of CHH seems to be the fundamental barrier to the effective integration of CHH within the extended family. The increasing morbidity and mortality rates among adults as a result of the HIV/AIDS pandemic, poverty, violence, crime and motor vehicle accidents and, more recently, the COVID-19 complications have resulted in growing numbers of orphans and vulnerable children (OVC).⁴⁶ Children are forced to think independently, provide for their needs financially, drop out of school, become vulnerable to different forms of abuse, forcing some to look for employment to care for their siblings.⁴⁷ Being a child and forced to head a family has various implications and can violate the rights of that particular child in many ways. Some of these violated rights are the best interests of the child, a child's right to meaningfully participate in decisions impacting on their interest; the right to non-discrimination; the right to dignity, development and survival; the right to property and education, the right to basic nutrition and health care, shelter, freedom from inhuman and degrading treatment and torture and access to medico-legal and social services. It is therefore paramount to adopt, among others, a human rights response to addressing the CHH problem in South Africa. These are the immediate impact of living in a CHH.

Children in child-headed households encounter financial, educational, psychosocial and medical problems including poor access to health care services. CHHs are characterised by a lack of the well-structured 'well-being system'.⁴⁸ People used to assume that there was no such thing as CHHs because it was generally accepted that orphans would be easily accommodated by members of the extended family. However, due to the advent of HIV/AIDS scourge, and prevailing pandemics as well as the unemployment rate in South Africa have seemingly made it hard to provide the necessary assistance to orphans. Therefore, CHHs are increasingly being exposed to a significant number of societal problems such as teenage pregnancy and teenage substances abuse just to name a few and these social

⁴⁶ CHH report, Available at <http://www.sanews.gov.za/south-africa/reaching-out-child-headed-households> accessed:13 June 2017

⁴⁷ Maqoko, *HIV/AIDS orphans as heads of households: A challenge to pastoral care*,2006 ,14

⁴⁸ Gumede, *An Analysis of Health Behaviour of Children from CHH in a Selected Health District in KwaZulu-Natal: An Ethnographic Study* 2013, pg 6

problems presented by CHH has almost become a permanent feature of our society.⁴⁹ The phenomenon is puzzling for educators in schools who are left with not knowing how best to deal with affected learners.

Equal Education went to court on an urgent basis to ask for a declaratory order forcing the Department of Basic Education to feed all eligible children irrespective of whether they have returned to school or not. The nutrition programme was suspended when schools closed during the hard lockdown in 2020. Due to the outcomes of the court, the School Nutrition Programme is expected to continue while schools are closed amidst rising Covid-19 infections. New directives that were gazetted by the Department of Basic Education states schools must make the necessary arrangements to continue providing meals.⁵⁰

EQUAL EDUCATION V MEC OF EDUCATION Case Number: 22588/2020. The applicants hereby are on an urgent basis seeking declaratory orders against the Minister of Basic Education and the MEC's of Education of eight provinces of South Africa declaring that they are in breach of their constitutional and statutory duty to ensure that the National School Nutrition Programme [NSNP] provides a daily meal to all qualifying learners whether they are attending school or studying away from school as a result of the Covid-19 pandemic.

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The applicants submit that the Minister and MEC's have failed to fulfil their duty in terms of s29(1)(a) of the Constitution.12 and s28(1)(c) a child's right to basic nutrition read with s27(1)(b) 13 by suspending the NSNP.

The court therefore after deliberating on the matter made a following ruling:

103.8 The MECs are ordered forthwith to implement the NSNP in their respective provinces in such a manner that it provides a daily meal to all qualifying learners whether they are attending school or studying away from school as a result of the Covid-19 pandemic.

⁴⁹ N,Marongwe, R,Sonn,. and M.W.NMashologu, , Dealing with Children from CHH: How Prepared Are the Teachers,2016

⁵⁰ News24 School Nutrition Programme to continue while schools closed for Level 4 lockdown. <https://www.news24.com/news24/southafrica/news/school-nutrition-programme-to-continue-while-schools-closed-for-level-4-lockdown-20210702>. Accessed 10 July 2021

⁵¹ EQUAL EDUCATION v MINISTER OF BASIC EDUCATION Case No 22588/2020 available at www.saflii.org accessed on the 21 November 2021

103.9 The Minister is ordered within 10 days to file at this Court under oath, and provide to the applicants, a plan and programme which she will implement without delay so as to ensure that the MECs carry out without delay their duties referred to above, and which address the following matters:

- 103.9.1 What steps she has taken to ensure that the MECs continue to provide food to all qualifying learners during a State of Disaster without delay
- 103.9.2 What further steps she will take in that regard
- 103.9.3 When she will take each such step.
- 103.10 The Minister is ordered to file reports with this Court under oath, and provide copies to the applicants, every fifteen days from the date of this order until the order is discharged by this Court, setting out the steps she has taken to give effect to this order, when she took such steps, what the results of those steps have been, what further steps she will take, and when she will take each such step.⁵²

It is also commendable that the South African Government has not only identified the problem but has established the school nutrition feeding scheme which seeks to ameliorate the challenges experienced by teachers in schools.

Nowadays, it is common to perceive CHH as a liability simply because it comprises a huge responsibility to meet the needs and interest of a child from an extended family. For many CHHs, medical care and even their psychosocial support needs are not the same as those children with a more stable background.⁵³ Educators' attitudes play a significant role in the experiences of students, and they predict a learner's scholastic achievement. Schools are encouraged to prompt and motivate learners who cope well in class, since they are more likely to be inspired to achieve, despite the many challenges they face.⁵⁴

If all educators can adopt a positive attitude towards all students regardless of their socio-economic backgrounds, more learners will excel. Schools may be the platform for CHH

⁵² EQUAL EDUCATION v MINISTER OF BASIC EDUCATION Case No 22588/2020 available at www.saflii.org accessed on the 21 November 2021

⁵³ Le Roux-Kemp CHH in South Africa: The Legal and Ethical Dilemmas when Children are the Primary Caregivers in a Therapeutic Relationship, 2015

⁵⁴ Lethal & Pillay, Resilience against all odds: A positive psychology perspective of adolescent-headed families. *Africa Education Review*. 2013, 590

students to change their lives and how they view things.⁵⁵ Parents are often the primary caregivers, and they are the ones who are responsible for ensuring that children uphold good family values; thus, in their absence, it is likely to raise a question about the acquisition of values, beliefs and other practices of children, this is supported by research indicating that children who head families struggle with issues of self-confidence, low self-esteem, emotional stability, poverty, group sociability and a weak moral compass, the author further elaborates that educational institutions will experience absenteeism and an increase in school dropout because children need to take care of other household duties and their younger siblings.⁵⁶ These are some of the challenges that CHHs experience; they end up dropping out of school, which negatively affects their future, and their right to education is taken away by their circumstances.

In South Africa, HIV & AIDS, novel diseases and poverty seem to be the major influences of the phenomenon of CHH. In South Africa, for example, it is estimated that the average age of people dying as a result of HIV & AIDS is 37 years of age.⁵⁷ While in the Democratic Republic of Congo (DRC), things like war are the predominant causes of CHH in the country.⁵⁸ The lives and futures of more than 3 million displaced children are at risk in the Democratic Republic of the Congo (DRC).⁵⁹

The writer's personal interest is to analyse the existing data and existing challenges on the subject matter. The impediments experienced by these children are the lack of resources available to assist them in coping with their roles as the head of the CHH. This effects their development and the main factors contributing to them heading households and government's role in assisting them.⁶⁰

1.13 Conclusion

This chapter discussed the introduction and background of the study conducted. Further, it included the research question, problem statement, rationale, the aims and the objectives of the study, methodology, including a preliminary literature review and factors fuelling CHH.

⁵⁵ Phillips 2011 *CHH: A Feasible Way Forward, or an Infringement of Children's Right to Alternative Care* ; Mturi 2012.pg 5

⁵⁶ Pillay, Problematising CHH: The need for children's participation in early childhood interventions. South African Journal of Childhood Education,2011.Page 21

⁵⁷ Pharoah: 2004 cited in Van Breda, AD, the phenomenon and concerns of CHH in Africa, 2010, 259.

⁵⁸ Maqoko, HIV/AIDS orphans as heads of households: A challenge to pastoral care2006

⁵⁹ [Militia violence threatens 3 million displaced children in Democratic Republic of Congo: UNICEF](https://www.unicef.org) available at www.unicef.org accessed 21 October 2021

⁶⁰ D van Dijk, and F van Driel,. Supporting child-headed households in South Africa: Whose best interests?. Journal of southern African studies, 35(4), 2009.915-927

For the purpose of this research, a child-headed household is where the house is headed by a child younger than 18 years old, meaning a household consisting of only children.

This chapter has accordingly pointed out that Stats SA survey has discovered that the males and females in the age 7–18 have been found to not attend school as more than one-fifth (21,6%) of learners cited a lack of money while 22,6% reportedly fell out due to poor academic performance. Subsequently 8,6% of learners left their studies as a result of family commitments (i.e., getting married, minding children and pregnancy), it is noticeable that females were much more likely to offer these as reasons than males (17,1% compared to 0,3%). In addition, 8,0% of individuals felt that education was useless. A higher percentage of males (9,8%) than females (6,1%) believed education was useless.⁶¹

⁶¹ Stats SA available at www.statssa.gov.za accessed on 21 November 2021

CHAPTER TWO

PERTINENT LAW OF CHILD HEADED HOUSEHOLD

2.1 Introduction

The application of law often determines the extent to which a society progresses in general. The deficiency of law enforcement measures in society erode morality and brings dysfunctional, debilitating and a chaotic state of affairs. Therefore, this chapter examines the relevant apparatuses' responsible with providing stability and the rule of law in society. In doing so, the international, continental, regional and national statutes are discussed. In addition, this chapter discussed applicable case laws relevant to the subject of Child Headed Housed.

2.2 Universal Law of Child Headed Household

Global hierarchy of legal governance subsequently impact the application of law in South Africa with regards to Child Headed Household's. Below is the discussion of the hierarchy.

2.2.1 The United Nations Guidelines for the Alternative care for the children

United Nations is a global organisation. Paragraph 37 of the United Nations Guideline states that support services should be provided to children who have lost their parents and choose to remain in their households, and this entails that the CHH should be provided with necessary support mechanisms. They should be protected from all forms of exploitation and abuse; protection is expected from all parts of the local community; different stakeholders, and other local authorities must provide support in ensuring that the head of the CHH retains all the rights he or she has as a child.⁶²

2.2.2 United Nations Convention on the Rights of the Child 1989 (CRC)

Article 22 States that parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall be protected. Children ought to be protected whether unaccompanied or accompanied by his or her parents or by any other person. They shall equally receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international

⁶² United Nations. General Assembly. Guidelines for the alternative care of children. 2010.

human rights or humanitarian instruments to which the states are parties.⁶³ South Africa is bound simply because it is a member state of the United Nations.⁶⁴

Article 24 of the CRC provides that the children shall have the right to quality health care, safe drinking water, nutritious food, a clean and safe environment. However, in South Africa, considering the high poverty standards accompanied by high population growth.⁶⁵ Decent life is often unattainable in a child-headed household. Although there are primary health sectors providing free services to various communities, but the children from a CHH may have difficulty in accessing facilities since such facilities are far from their homes because travelling might be challenging. Furthermore, Article 32 of the CRC prohibits child labour; it provides that the government shall protect children from work that is dangerous or might be harmful to their health or education. In child-headed households, this is impossible as children are perpetually exposed to various forms of work that is not suitable for their age as there is no adult in their family to cater for them. It is easy for the children to be exploited or exposed to child labour.⁶⁶

2.2.3 African Charter on the Rights and Welfare of the Child 1990 (ACRWC)

Article 18 of the African Charter expressly provides for the protection of families and states that families are the natural units and basis for a society and should therefore enjoy special protection. A child-headed household is also a family and should therefore receive such protection. Furthermore, Article 20 of ACRWC provides that States are responsible for ensuring that a child has an adequate standard of living (his/her physical, mental, spiritual, moral and social development) when parents cannot provide this.⁶⁷

2.2.4 Southern African Development Community (SADC)

South African Development Community is an African regional organisation. SADC refers to a regional structure constituted by southern hemisphere countries. Its member state consist of

⁶³ United Nations Convention on the Rights of the Child 1989. Article 22

⁶⁴ Phillips, *CHH: Feasible Way Forward, or an Infringement of Children's Right to Alternative Care?*, 2011, pg18

⁶⁵ Stats SA General Household Survey 2019. Page 1

⁶⁶ United Nations Convention on the Rights of the Child 1989, article 24 & 32 available at www.hdl.handle.net accessed 21 November 2021

⁶⁷ African Charter on the rights and welfare of the child 1990, article 18 & 20
Phillips, *CHH: A Feasible Way Forward, or an Infringement of Children's Right to Alternative Care?*, 2011, 88.
Available at www.caregivingchildren.org accessed 21 November 2021

South Africa; Swaziland; Lesotho; Mozambique; Zimbabwe; Botswana; Namibia; Zambia; Angola; Malawi; Democratic Republic of Congo; Tanzania and Mauritius. SADC is part of the wider continental and global communities, and as such, it is one of the key building blocks of integration at the continental level. This makes it imperative to ensure that all the organisation's strategies, policies, programmes, and activities are being implemented with the view of contributing towards the continental ideals espoused in the AU's Agenda 2063.⁶⁸ With regard to tackling CHH, SADC has promulgated the Youth Employment Promotion Policy Framework and the Strategic Plan. This were developed and approved in 2016. Furthermore, the minimum standards of social protection for youth were implemented.⁶⁹ The regional strategy on HIV care, treatment, and prevention for key populations and the guide for HIV prevention among adolescent girls and young women, and their sexual partners are developed and enshrined.⁷⁰

2.2.5 Southern African Development Community (SADC) Charter

The Southern African Development Community (SADC) Charter has adopted a Charter of General Fundamental Rights. The charter comprises of Article 7 which provides for protection of children and young people. Article 7 states that young people who are in gainful employment shall receive an equitable remuneration in accordance with national law and practice. Furthermore, the Article 7 states that appropriate measures shall be taken to adjust labour regulations applicable to young workers so that their specific development and vocational training and access to employment needs are met.⁷¹ Article 10 of the SADC Charter states that persons who have been unable to re-enter the labour market and have no means of substance shall be entitled to receive sufficient resources and social assistance.⁷² Furthermore, member states shall create an enabling environment so that workers are provided with fair opportunities to receive wages which provide for a decent standard of living.⁷³

2.2.6 The South African Constitution, 1996

The South African Constitution is the highest law governing the country. Section 28 of the Constitution, 1996 provides for the right of children and subsection (1) (b) states that a child

⁶⁸ SADC Regional Indicative Strategic Development Plan (RISDP) 2020–2030 October 2020 Page 18

⁶⁹ SADC Page 36

⁷⁰ SADC Regional Page 35 available at www.sadc.int accessed on the 21 November 2021

⁷¹ SADC Charter of Human Rights. Page 6

⁷² SADC Charter, Page 8

⁷³ SADC Charter Page 10 available at www.ilo.org accessed 21 November 2021

has the right to family care or parental care or appropriate alternative care when removed from the family environment if children living in a CHH are not well taken care of they can be removed to alternative care because it is in their best interest to be in a safe and a caring environment (sub-section 2 of the Constitution). The Department of Social Welfare may access the grant on behalf of children in child-headed households in the absence of a primary caregiver.⁷⁴ Furthermore, the Constitution provides that “every child has the right not to be required or permitted to perform work or provide services that- (i) are inappropriate for a person of that child’s age; or (ii) place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development”. This may not be the case with a child heading a CHH as he or she does the duties of an adult, and sometimes due to circumstances, they are forced to drop out of school to ensure that their younger siblings are cared for and all their necessities are met.⁷⁵

2.2.7 Children’s Act 38 of 2005

Section 129 of the Children’s Act 38 of 2005 speaks about the consent to medical treatment and surgery further stipulates that a child living in a CHH may consent to his or her medical treatment if he or she is over 12 years of age or only if they have sufficient maturity and mental capacity to understand the benefits, risks, social factors and other implications of treatment. However, this may cause a problem for a child below the age of 12 years as they have insufficient maturity. The Act should have included a part where the head in a child-headed household may consent without an adult supervision. Furthermore, Section 137 of the same Children’s Act 38, 2005 provides that child-headed households must function under the supervision of an adult and further state that an adult may be appointed by the Children’s Court, a governmental organization or Non-governmental organization (NGO). The provision of adult supervision is a commendable aspect in this Act. However, considering the heterogeneous nature of society accompanied by unreported cases of CHHs, it therefore improbable for all CHHs to receive adult supervision.

Further, Section 137 of the Child Act 38 of 2005 stipulates that the provincial Head of Social Development may recognize a household as a CHH if the parent, guardian, or caregiver of the household is terminally ill, has died or has abandoned the children in these households. In

⁷⁴ S Rosa, Counting on children realising assistance for the child-headed households in South Africa, 2004,24

⁷⁵ South African Constitution, 1996,section 28

Section 150 (2)(b) read with (section 155), states that all children residing in CHH need care and protection. They must therefore be referred to the designated Social Worker for investigation. In this case, a Social Worker needs to investigate foster care placement with the aim of assisting children.⁷⁶

2.3 Pertinent Case Laws Concerning Children

The practical implication of the law is felt within families that below, are case laws concerning the wellbeing of minors under different circumstances.

Bestuursliggaam van Gene Louw Laerskool v Roodtma where the parents were living separately, claim any outstanding school fees from the non-custodian parent. The Northern High Court in Bestuursliggaam van Gene Louw Laerskool v Roodtma found out that, although the custodian parent remained solely liable for the school fees, he or she could nevertheless, in terms of the common law, claim from the non-custodian parent any amount payable in excess of his or her share of the maintenance of the child in general. Furthermore, the Supreme Court of Appeal SCA in the case of Fish Hoek Primary School v GW found that the definition of a "parent" is wide enough to include any parent of the child - regardless of the relationship between the parents of the child and regardless of whether the parent has any parental authority over the child. The issue was the payment of school fees for a child born of unmarried parents in instances where the father did not have any parental authority over the child. Consequently, a school could claim payment of outstanding school fees from both parents, including the non-custodian parent, regardless of the relationship or the marital status of the parents.⁷⁷

In HM De Groot v CE De Groot, the matter consisted of the legal dispute between parents, lodged by the mother who aimed to prevent the father from having a custody of her child. In this case the court brought about a fundamental shift in the parent/child relationship from that which prevailed in the pre-constitutional era and now not only vests a child with certain rights but moreover, taking the child's views into account. The Court found that it was not in the best interests of the children that they be removed from their father and the current

⁷⁶ Act 38 of 2005, s 129,137 & 150.

⁷⁷ M Carnelley. Liability for the payment of public school fees. Potchefstroom Electronic Law Journal (PELJ) Online version ISSN 1727-3781 PER vol.14 n.6 Potchefstroom Jan. 2011. Available at www.nwu.ac.za accessed on the 21 November 2021

custody arrangement that they enjoyed. The application was accordingly dismissed. Furthermore, the Court found that it was enjoined by the Childs Act 38 of 2005 to give due consideration to the views of the children since in this case, it appeared that they were of an age and level of maturity to make an informed decision.⁷⁸

BAADJIES v MATUBELA, a case which related to the proof of the existence of a customary marriage which was contracted before the Recognition of Customary Marriages Act of 1998 came into operation in South Africa. The applicant brought an application to institute a divorce action against the respondent; she also intended to obtain maintenance for herself and her child from the respondent. The respondent contended that no marriage either by customary law or civil law existed between the applicant and himself and that he had no legal duty to maintain the applicant and contribute towards her costs.⁷⁹

CASE: NKONKI V NKONKI 4 SA 790 (C) The applicant married the deceased by civil rights as envisioned by the BAA 38/1927. The marriage was concluded in the Transkei which at the time was an independent state. During this marriage, the deceased concluded a second civil marriage in Cape Town. The approached the master to wind up the deceased estate who then had to consider and decide which one of these marriages was valid. The applicant thus approached the court to determine this – asking for an order declaring the marriage of deceased and the respondent to be void ab initio.

The court acknowledged the complexity of marriage and its consequences.

The court found that the Transkei was an independent homeland added to the confusion of the current case since the Transkei marriage act provided for polygamous marriages in certain circumstances. The law of the Transkei remained in force after 1994 until repealed in accordance with the constitution (s229). Thus, the difficult position arose in which the Transkei recognised polygamy, but South Africa did not.

The court commented that civil marriage by its nature is monogamous, and that customary marriage can be polygamous.

⁷⁸ HM De Groot v CE De Groot unreported (EHC) Case No. available at www.cisp.cachefly.net accessed 21 November 2021

⁷⁹ MAITHUFI, IP & BEKKER, JC 'BAADJIES V MATUBELA 2003 3 SA 427 (W)' (2003) 4 TSAR 753. Available at www.africanlii.org accessed 21 October 2021

The court held that the law of the Transkei only applied in the Transkei and thus when the deceased concluded his second marriage in Cape Town, he was bound by the law that governed there which did not permit polygamy. He was not entitled to enter into a polygamous marriage. In any case the court held that in terms of the Transkei Act, the deceased was not entitled to enter into a polygamous marriage where he was in a civil marriage in community of property.

The court thus held that the deceased had no locus standi in the Transkei or in South Africa to conclude another valid marriage – customary or civil.

The court thus held that the marriage between the deceased and the respondent is null and void. Furthermore, the judge was of the view that the marriage between the deceased and the applicant is not a civil marriage according to SA law nor is it a customary marriage – it is a sui generis marriage enjoying all the protection accorded to a marriage in law (the judge does not elucidate on this point).

In addition, the court was of the view that the deceased's only three children (all by the applicant) would have been his heirs regardless of which marriage was validly entered into.⁸⁰

In *NS AND OTHERS v PRESIDING OFFICER OF THE CHILDREN'S COURT*. An urgent application was lodged and reviewed. The case consisted of the decision of the presiding officer of the children's court judgement that the children's court had no jurisdiction to hear a matter since the minor child is a Zimbabwean national. The decision was set aside by the SCA upholding that the children's court interims of – s44 of Children's Act 38 of 2005 does have jurisdiction in matter if the child concerned is ordinarily resident within its jurisdiction – this would include a child who is a foreign national residing within its jurisdiction – irrelevant whether child is legally or illegally in the country.⁸¹ The law therefore certainly aim to protect and promote the interest of children.

The matter of child support is often contentious. Likewise in *DIE BESTUURSLIGGAAM VAN GENE LOUW LAERSKOOL v J D ROODTMAN* according to counsel for the appellant, judgement interpretation is supported by the common law duty of both parents to

⁸⁰ CASE: NKONKI V NKONKI 4 SA 790 (C) Available at www.africanlii.org accessed 21 October 2021

⁸¹ *NS and Others v Presiding Officer of the Children's Court (2184/18)* [2018] ZAGPJHC 59 (6 February 2018) available at www.saflii.org accessed 21 October 2021

support their children in proportion to their respective means,⁸² Both parents have equal responsibility and a duty to support the child according to their means.

Divorces in nature are disruptive. When parents separate, the two separate households have to be set up, the most difficult decision is that of where each party will live and with whom the children will live.

Often when children and parents opt for divorce, conflict of custody arises. With the promulgation of the Children's Act 38 of 2005, the law recognizes that children should be given an opportunity, if they are of an appropriate age, to voice their opinions with regard to such issues. While the Act does not stipulate an appropriate age when children's views should be taken into account, it does state that a child of adequate age, development, maturity and intellectual capabilities should have his or her views and wishes considered.⁸³

McCall v McCall 1994 (3) SA 201 (C), Judge King referred to the following factors or criteria in determining custody:

- The love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child.
- The capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires.
- The ability of the parent to communicate with the child and the parent's insight, understanding of and sensitivity to the child's feelings.
- The capacity and disposition of the parent to give the child the guidance he or she requires.
- The ability of the parent to provide for the basic physical needs of the child.
- The ability of the parent to provide for the educational wellbeing and security of the child.
- The ability of the parent to provide for the child's emotional, psychological, cultural and environmental development.
- The mental and physical health and moral fitness of the parent.
- The stability or otherwise of the child's existing environment, with regard to the desirability of maintaining the status quo.

⁸² IN THE HIGH COURT OF SOUTH AFRICA In the matter between: DIE BESTUURSLIGGAAM VAN GENE LOUW LAERSKOOL v J D ROODTMAN. JUDGMENT: DELIVERED 29 SEPTEMBER. available at www.law.sun.ac.za accessed 21 November 2021

⁸³ McCall v. McCall. No. A00A1178. Available at www.legalcity.net accessed 21 October 2021

- The desirability or otherwise of keeping siblings together.
- The child's preference, if the court is satisfied that in the particular circumstances the child's preference should be taken into consideration.⁸⁴

The Children's Act 38 of 2005 also includes a list similar to the one above. However, the difference is that the list contained in the Act has a wider application in that it is not limited to only parents but applies equally to caregivers and any other relevant person in a child's life.

LAWRIE JOHN FRASER v THE CHILDREN'S COURT, PRETORIA NORTH with regard to child adoption, the court has issued the following ruling: "A children's court to which application for an order of adoption is made . . . shall not grant the application unless it is satisfied-

(d) that consent to the adoption has been given by both parents of the child, or, if the child is illegitimate, by the mother of the child, whether or not such a mother is a minor or married woman and whether or not she is assisted by her parent, guardian or husband, as the case may be".⁸⁵

JEZILE v STATE.& OTHERS High Court Case No: A 127/2014.

In this matter the appellant, a 28 year old male and the complainant, a 14 year old girl. Subsequently, in early January 2010 the appellant married the girl under customary law and eventually started to abuse, rape and traffic the girl. All this was possible because the girl's parents had passed away and prior to being married she was lived in a child headed households.

The court on this matter applied S 211(3) of the Constitution which provides that:

'The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.'

[59] S 28(1)(d) [in the Bill of Rights] stipulates that every child has the right to be protected from maltreatment, neglect, abuse or degradation; and s 28(2) that a child's best interests are

⁸⁴ McCall v. McCall. No. A00A1178. Available at www.saflii.org accessed on the 21 November 2021 also submitted to the University of South Africa.

⁸⁵ LAWRIE JOHN FRASER v THE CHILDREN'S COURT, PRETORIA NORTH. Case CCT 31/96. Available at www.saflii.org accessed 21 October 2021

of paramount importance in every matter concerning the child. A child is defined in s 28(3) as a person under the age of 18 years.

[60] S 39 of the Constitution, which deals with the interpretation of the Bill of Rights, provides that:

‘39(1) When interpreting the Bill of Rights, a court, tribunal or forum

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.’

[61] S 1 of the Children’s Act 38 of 2005 (“Children’s Act”) defines ‘trafficking’ in relation to a child as including:

‘(a) The ... transportation, transfer, harbouring or receipt of children, within or across the borders of the Republic –

(i) by any means, including the use of threat, force or other forms of coercion, abduction...abuse of power or the giving or receiving of payments or benefits to achieve the consent of a person having control of a child; or

(ii) due to a position of vulnerability, for the purpose of exploitation...’

[62] The following provisions of the Children’s Act are also relevant:

62.1 S 12(1), which stipulates that every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being;

62.2 S 284(1), which prohibits child trafficking;

62.3 S 284(2), which provides that it is no defence to a charge of contravening s 284(1) that the child or a person having control over that child consented to the intended exploitation;

62.4 S 305(1)(s), which makes a contravention of s 284(1) an offence; and

62.5 S 305(8), which provides that any person convicted of an offence in terms of s 305(1)(s) is, in addition to a sentence for any other offence of which he or she may be convicted, liable

to a fine or imprisonment for a period not exceeding 10 years or to both a fine and such imprisonment.

[63] There are a number of statutory provisions in the Sexual Offences Act (referred to supra) which are relevant:

63.1 S 3, which defines the offence of rape;

63.2 S 56(1), which stipulates that it is not a valid defence to rape to rely on the existence of a 'marital or other relationship'

Therefore, the Court found the appellant guilty and on 13 February 2014 the appellant was sentenced to 10 years' imprisonment on the human trafficking count, 20 years' imprisonment on the 3 rape counts (which were taken together for purposes of sentence), 6 months' imprisonment on the count of assault with intent to cause grievous bodily harm, and 30 days imprisonment on the count of common assault. The trial court further ordered that 8 years of the sentence for human trafficking, as well as the sentences imposed for the two assaults, would be served concurrently with the sentence imposed for the rapes. The appellant was thus sentenced to an effective 22 years' direct imprisonment. In addition, the trial court ordered that the appellant's details be included in the National Register for Sexual Offenders in accordance with s 50(2)(a) of the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007 ('the Sexual Offences Act').⁸⁶

YG v STATE CASE NO: A263/2016. On another similar case, the appellant in this matter was tried in the Regional Court, Johannesburg, on two charges of assault with intent to do grievous bodily harm. The first charge related to his alleged assault of his 13-year old son, M, and the second charge related to his alleged assault of his wife. The two assaults were alleged to have occurred at the family home on the same day, although they occurred at different times.

The trial court found the appellant guilty on both charges on the competent verdict of common assault. The court invoked section 297(1)(a)(ii) of the Criminal Procedure Act 51 of 1977 and postponed the passing of sentence against the appellant for a period of five years.⁸⁷

⁸⁶ Jezile v S and Others (A 127/2014) available at www.saflii.org accessed 21 October 2021

⁸⁷ YG v STATE CASE NO: A263/2016 available at www.saflii.org accessed 21 October 2021

S v M CCT 53/06) [2007]. M is a 35 year old single mother of three boys aged 16, 12 and 8. In 1996, M was convicted of fraud and sentenced to a fine coupled with a term of imprisonment that was suspended for five years. In 1999, M was charged again with fraud, and while out on bail after having been in prison for a short period, he committed further fraud. In 2002, she was convicted in the Wynberg Regional Court on 38 counts of fraud and four counts of theft.

The court judgment was perceived by others as punitive and very inconsiderate to send a single mother of three minors into prison, since it was alleged that she was their primary care giver. In addition, the Constitution S 28(2) is ostensibly all-embracing that the interests of the child would override all other legitimate interests of parents, siblings and third parties. It would prevent conscription or imprisonment or transfer or dismissal by the employer of the parent where that is not in the child's interest.⁸⁸

2.4 Conclusion

This chapter has examined the hierarchy of global law order. The United Nations is the world governing body that regulates and safeguard the interest of planets in order to maintain peace and stability in the world. Children's Rights and interests are found to be a significant measure of determining the development and humanity of individual countries. Apart from the UN, the African Continental governing body was also discussed. As it has been pointed out that Article 18 of the African Charter expressly provides for the protection of families, it says families are the natural units and basis for a society and should therefore enjoy special protection. A child-headed household is also a family and should therefore receive such protection.⁸⁹ And further, this chapter has subsequently extrapolated case laws relevant to the subject of children. The CHH is caused amongst other things by internal instabilities withing the families such as divorces and the inability of families to settle a favourable settlement for children. However, it is sufficient to note that the court judgements in the aforementioned case laws are not arbitrary to the interest of the children and in most cases, the law is in favour of the interest and rights of children in general.

⁸⁸ S v M CCT 53/06) [2007]. Available at www.saflii.org accessed 21 November 2021

⁸⁹ African Charter on the rights and welfare of the child 1990 , article 18 & 20

CHAPTER THREE

LEGAL AND POLICY BACKGROUND ON CHALLENGES EXPERIENCED BY CHILDREN IN CHH IN SOUTH AFRICA

3.1 Introduction

This chapter focus on addressing the legal and policy background on challenges experienced by children in CHHs in South Africa, for example, what does the law say about children and their rights. Laws or policies addressing children in child-headed households will be looked at. The South African Law Reform Commission (SALRC) recommended that CHHs be legally recognised in order to give them a solid protection. The positive aspect of CHHs is that it brings siblings together rather than placing children in need of care and protection in alternative care, because they might be placed in different places of care as opposed to neglecting each other. Legally recognising and protecting CHH gives the message that CHHs exist and are entitled to help from the state.⁹⁰

Section 150(1) of the Children's Act 38 of 2005 provides grounds on which children can be found in need of care and protection. This may include children who are abandoned or orphaned and left with no visible means of support, abused children, and at risk of maltreatment. Section 150 (2) of the said Act further stipulates that children in CHH may be in need of care and protection like any other children, where being in a CHH does not automatically make them the children in need of care and protection.⁹¹ Section 14(4) of the Child Care Act, a child in need of care and protection is a child without adult supervision or support. This chapter furthers elaborates on this section in the Child Care Act.⁹²

The review of the Child Care Act pointed out that a CHHs are a familiar phenomenon due the increasing number of caregivers dying due to HIV/AIDS and other related illness. This simply shows that HIV/AIDS is a contributing factor on the increasing number of CHH in

⁹⁰Lim, H.Y., 2011. Chapter 5 pg 269

⁹¹Lim, H.Y., 2011. Legally recognising child-headed households through a rights-based approach: The case of South Africa (Doctoral dissertation, University of Pretoria) Chapter 4 pg 209-210

⁹²Matthias, C. and Zaal, N., 2007. Children in need of care and Contribution Orders. *Commentary on the Children's Act, Juta and Co. Ltd: Lansdowne.*

RSA. On the contrary, section 137 of the Children's Act 38 of 2005 does not consider child participation in the determination of the CHH, while article 12 of the CRC and article 4 of the ACRWC state the importance of domestic law in child participation. The child acting as the head in a CHH must have a clear understanding of his/her duties, short-and long-term implications of his/her decision of being the head or volunteering to remain in a CHH. Section 137 (1)(a) of the Children's Act 38 of 2005 states that only a person above the age of 16 years may act as the head of the CHH because at that age they will be able to apply for a social grant in order for them to take care of their younger siblings. The age of 16 is regarded as appropriate simply because it is when they will be able to apply for an identity document (ID) and therefore be able to apply for the grant.⁹³

SALRC recommended that there should be no age restriction for the one to act as the head of a CHH, and the maturity of the child should be a determining factor.⁹⁴ This will enable every head of a CHH to be able to access help regardless of their age. Couzen and Zaal, stated that for the fact that the child is the eldest, above the age of 16 years in a CHH, he or she has to take responsibilities as the head of the household. By doing this does not mean that he or she is capable of providing adequate care to the members of the family.⁹⁵ This simply means that as the eldest will be able to seek help for the younger sibling(s), be able to provide for their basic need(s) and be responsible for decision making in the household.

3.2 Children's rights versus the impact of CHHs on young children in RSA

Every child has the right to be informed about their rights and how they should utilise them and the children in child-headed households. It is also important to recognise the responsibility of the child-caregiver, who is to make day-to-day decisions in matters concerning the household, children's right to access health care services seem to be a problem for children in CHHs as they do not have easy access to health care services due to their age restriction.⁹⁶

Children undergoing parentification, are in reverse roles whereby a child is obliged to act as a parent to their own parent or sibling. This is the process whereby children take on the roles

⁹³ Lim, H.Y, 2011.chapter 4,pg 222

⁹⁴ SALRC, 2002. 172

⁹⁵ Couzen and Zaalpg 226

⁹⁶ Kemp L. 2013,pg 4

and responsibilities of adults.⁹⁷ Parentification is the distortion or lack of boundaries between and among family subsystems, such that children take on the roles and responsibilities usually reserved for adults⁹⁸. The Children's Act 38 of 2005 section 129(2) states that children may give consent to their medical treatment or any related benefits if they are above the age of 12 years and have sufficient maturity to make informed decisions.⁹⁹This section supports children in CHHs, and in section 129 (4) of this Act, it further elaborates by stating that if a child is below the age of 12 years and is not mature enough, the parent or caregiver must give consent?¹⁰⁰

Section 137 of the Children's Act 38 of 2005 states that CHH must function under the supervision of an adult appointed by the Children's Court, but it further states that he or she may not make informed decisions without consulting the child heading the CHH. Children need special protection because they are the most vulnerable members of society, they depend on parents or families for protection and the state if the family dies. The state shall provide a legal practitioner assigned to the child at their expense.¹⁰¹

Article 25 of the Africa Charter on the Rights of the Child (ACRWC) also emphasises the children's right to be provided with alternative family care when they are being separated from their parents and the government must make possible arrangements to reunite with their parents.¹⁰² In cases of CHHs, the Government appoints a caregiver to supervise the family. Section 28 of the bill of rights in our Constitution states that children have the right to parental care.¹⁰³

Article 12 of the United Nations Convention on the Rights of the Child recognises children's rights to participation. Children have the right to be heard and to be involved in decision making.¹⁰⁴ Even when the children in CHHs have their caregiver but they make their own decision, the caregiver does not decide on their behalf. The convention emphasises that due to

⁹⁷ Hooper LM,2008, pg 1

⁹⁸ Hooper, L.M., 2008. Defining and Understanding Parentification: Implications for All Counselors. *Alabama Counseling Association Journal*, 34(1), pp.34-43.

⁹⁹ Children's Act 38 of 2005 section 129(2)

¹⁰⁰ Children's Act 38 of 2005 section 129(4)

¹⁰¹ Children's Act 38 of 2005 section 137

¹⁰² African Charter on the rights of the Children, article 25

¹⁰³ South African Constitution, section 28

¹⁰⁴ United Nations on the Rights of the Child, article 12

their vulnerability, they require to be protected legally before and after birth, these include protection from abuse, neglect, and other protective measures.¹⁰⁵

The ACRWC also emphasise that the child who is able to share his or her views must be given an opportunity to do so (article 7).¹⁰⁶ This notion also applies to the children in CHHs. The Government has not violated this right from them as they are also the ones who make decisions in their households and not the appointed Caregiver, regardless of the caregiver being present, children still have the right to share their views and participate in the decision making of all issues affecting them. In the nurturance approach, children are given what's good for them whereas they are given the right to decide what's good for them in terms of self-determination.¹⁰⁷ Richard Farson cited in Kruger argues that children's right can be only when all children have total self-determination.¹⁰⁸

The African Charter cited in Kruger 2018, provides that all actions concerning the best interest of the child must be the primary consideration. The child's primary consideration is weightier than other competing rights.¹⁰⁹ Section 28(2) of the Constitution also emphasises that the best interest of the child is significant in every matter concerning them.¹¹⁰ Article 3 of the CRC contains the principle, best interest of the child where it states that all matters concerning children, whether undertaken by the state or anyone, must be in the child's best interest and be a primary consideration.¹¹¹

Section 9 of the Constitution guarantees the right to equality before the law and right to protection and benefit of the law.¹¹² This emphasises that even though the children have lost their parent (s) that does not mean that the law does not protect them. The living conditions of children in CHHs are very poor; they lack to access to basic necessities; and some do not even complete their matric.¹¹³

¹⁰⁵ Abrahams, K & Matthews, T. 2011, pg 24

¹⁰⁶ African Charter on the rights of the children, article 7

¹⁰⁷ Kruger H.2018,pg 4

¹⁰⁸ Kruger H. 2018,pg 4

¹⁰⁹ African Charter on the rights of the Children, in Kruger H.2018

¹¹⁰ South African Constitution, section 28(2)

¹¹¹ United nations on the rights of the child, article 3

¹¹² South African Constitution, section 9

¹¹³ Bebuike, J.E, Van Belkum C & Maja TMM. 2014, pg 62

3.3 Case study

Mkhwanazi found herself placed in the unenviable role as a teenage head of a household, she became legally entitled to collect the state's social grants for her family. The Children's Act 38 of 2005 (as amended by the Children's Amendment Act 41 of 2007) and the associated regulations came into force in 2010, making it possible for children over 16, who have assumed the role of family caregiver, to collect the monthly grant.¹¹⁴

The Act cannot, however, address some of the other challenges facing young heads of these families, often placing the burden on social services to provide them with assistance. In Mkhwanazi's case, she was still in high school when she began caring for her sisters, 16-year-old Thembi and six-year-old Jane, and her brother, nine-year-old Nkosana. Child and youth care worker Joyce Mohlomi, who is part of the Isibindi project, stepped in to help when she identified the family as needing urgent assistance. Mkhwanazi was battling — she felt overwhelmed with responsibility — and had just failed Grade 11.

Mohlomi called a family meeting to mediate the issue of who should collect the family's social grant. Mkhwanazi had elected to let her 30-year-old sister Moipone Nxumalo continue to collect the R2 490 grant each month. The social grant had become a matter of concern because last year Nxumalo had moved to Mpumalanga to find a job, a long way from the family in QwaQwa in the Free State. Mohlomi thought it might be preferable for Mkhwanazi to collect the grant, rather than Nxumalo sending food and clothing parcels to the young family. But she accepted the teenager's decision because she did not want to upset the family dynamics.

Nxumalo said she had helped raise her siblings after her mother died six years ago but had been forced to move to Mpumalanga to look for a job. Despite living away from the family, she said she continued to provide financial support, clothing, and food for her siblings. While Nxumalo had recently married, she said she planned to return home to look after the young family so that Mkhwanazi could realise her dream of studying to be a nurse in Johannesburg. And this is where the story is nothing short of a miracle: the teenager has just become eligible to go to university. Now 19, Mkhwanazi passed her matric exams last year, through "sheer hard work", according to Mohlomi.¹¹⁵

¹¹⁴Case study available at www.mg.co.za accessed on the 21 November 2021

¹¹⁵ Case study available at www.mg.co.za accessed on the 21 November 2021

The care worker said another family meeting would be called to discuss how best to manage the current family predicament. She had met a member of the extended family in QwaQwa who had agreed to look after the children. For Mohlomi, her involvement in the Isibindi project was the realisation of a dream because she helps many children and youth, like Mkhwanazi, who face dire situations. Previously unemployed, she was trained by the government initiative, the Isibindi project, which is run in a partnership between the National Association of Child Care Workers (NACCW) and the national and provincial departments of social development.

Now it is Mkhwanazi's turn to shape her own future, with professional assistance. Having helped raise and care for her siblings, it would seem she would be a perfect candidate for a nursing job. But life remains tough for the teen. Having just written an entrance examination, she will have to wait to see whether she is offered a sought-after place in a nursing college.

Yet that is not the end of her problems. Funds or a bursary will also have to be found for her nursing tuition. Mohlomi said she would help Mkhwanazi to try to find funds for her studies. Speaking from the Johannesburg office of the careworkers association, Mkhwanazi sounded exhausted after having sat the nursing entrance examination. "I wrote an exam at a hospital," the teenager said, sounding slightly defeated. "They said they need only six people there, and we were many."

She had also tried to find out whether she could secure a place at university. Asked about the social grant her family received, Mkhwanazi said the social grant had not been for herself, but for her younger siblings who qualified for it. She did not even know the amount given each month to the family. "My sister brings the food and buys clothes for the family," she said. The teenager, now 19, said her mother had died when she was 13 and that she did not know what had caused her death. "I do not know my father," she said quietly.

All she wanted was to get into a nursing school. "I just like helping people, and it is just what I want to do. I couldn't believe it when I got my matric results. I got an SMS from the SABC to say I had passed, and they wanted to speak to me," she said. The deputy director of the NACCW, Zeni Thumbadoo, said child and youth careworkers were one of the social service professionals identified in the Children's Act.

“We have tried for a long time for our work to be recognised and acknowledged. And recently it has, with the statutory regulation of child careworkers from the South African Council for Social Service Professions. Child and youth careworkers are the second category of workers being regulated in the social services sector, following social work. We are in the process of being regulated.”

Thumbadoo said her nonprofit organisation worked with child- and youth-headed households around the country. “The youth might be heading the household, but they are often still at school. If we are servicing 140 000 children around the country, only 6% of them would be in child-headed households. The rest of the children are orphaned children — single or double orphaned children — but the majority of them would be living with a caregiver adult. They might be in foster care, or granny-headed households. So, your definition cannot be too distinct.

Even if there was an older granny, who was stressed out, they are in a way caring for each other. Our job has been to access the child support grant, the foster care grant, where possible, or other suitable grants.” Child-headed households are small in number, spread out around the country, and transient in nature, according to senior researcher Katharine Hall of the Children’s Institute at the University of Cape Town.

“The definition of child-headed households contained in section 137 of the Children’s Act includes a household in which a child over the age of 16 has assumed the role of caregiver, even if there is an adult living in the household who, for instance, is very old or terminally ill and is unable to take responsibility for ‘heading’ the household, whatever that means. The whole notion of headship is messy and controversial,” said Hall.

“The definition of such child-headed households is dependent on their identification by welfare services and a discretionary decision by the provincial head of social development that it is in the best interest of the children in the household for it to be defined as a child-headed household. This construction of ‘child-headed household’ is therefore conferred administratively; it is not a household form that can be quantified through national survey data and should not be conflated with the statistical estimates.”

Hall said the figures, analysed from Statistics South Africa’s General Household Survey, suggest that 0.5% of children live in this household form, and that there are around 50 000 to

90 000 child-headed households nationally. The Children's Institute has found that, because of the HIV epidemic, there has been a marked increase in the proportion of children who have lost both parents. But it has also been ascertained that most children living in child-headed households have a living parent.¹¹⁶

“Social grants are an important source of income for millions of people in South Africa. As children in child-headed households are older, on average, than in mixed generation households, fewer children fall within the eligible age threshold for child support grants [up to 14 years]. In addition, there are no pensioners living in these households. This means that child-headed households will have less access to income support through social grants,” the Children's Institute stated in its statistical brief.

For many families like Mkhwanazi and her siblings, the timeous intervention of a child and youth careworker like Mohlomi, who worked overtime to supervise the teenager's homework and guide her when she was overwhelmed, has proved to be a lifesaver.

3.3.1 Children's Act 38 of 2005 provision on medical treatment

A significant provision of the Children's Act is the setting of the age of consent to medical and surgical treatment to 12 years. It includes important provisions covering HIV testing, virginity tests and circumcision. Implementation of the Act is governed by the General Regulations Regarding Children (Regulation 261). The motivation for the Act was to allow the child heading a household the right to make medical decisions for themselves and siblings, which they previously were not entitled to do.

The Act provides that, “provided they have the maturity to understand the benefits, risks, social and other implications of the treatment”, children of this age may consent to medical treatment on their own behalf. If the proposed treatment involves a surgical procedure, a sufficiently mature child may still consent, if he or she is “duly assisted by his or her parent or guardian”.

To cater for the growing number of child-headed households, the Act gives minors of 12 or over, who are themselves parents [“child parents”], the right to consent to medical

¹¹⁶ Case study available at www.mg.co.za accessed on the 21 November 2021

*examinations and treatment for their child, provided they have the maturity of understanding to do so. They may also consent to surgical treatment for their child but are again still required to have the assistance of someone who has parental responsibility for them.*¹¹⁷

In the scenarios above, the Government offered her a grant to support the siblings. *Isibindi* intervened in to assist the family as Mkhwanazi was overwhelmed and needed assistance. It is worth noting that section 137 (7) of the Children's Act also provide that the head of the family must be respected and so are the ones who make an informed decision on behalf of the family regardless of their age.¹¹⁸

The intervention of an *Isibindi* care worker has been of great help in assisting Mkhwanazi in her role. The care worker also assists with homework for the younger ones. According to section 129(2)(a) of the Act, the age of making decisions related to medical treatment is 12 years. This enables Mkhwanazi and siblings to be able to make the decision regarding their medical treatment and examination.¹¹⁹

In the above case study, it is clear that the government is attempting to address CHH as the Children's Act itself covers them. The fact that the government has also developed programs like *Isibindi*, it shows that CHHs are not being neglected and are considered in the laws of the country.

3.4 The recognition of CHHs through a right-based approach

The rights of CHH are expressed in the constitution and will be examined below:

3.4.1 Best interest of the child

Section 28(2) of the Constitution expressly requires the child's best interest to be given priority in all matters concerning children.¹²⁰ This also includes children in CHH; section 7 of the Children's Act states all the points to be considered when considering the best interest of

¹¹⁷ <https://mg.co.za/article/2015-01-30-00-the-trials-of-child-headed-families> -accessed on 09 September 2019

¹¹⁸ Children's Act 38 of 2005,section 137(7)

¹¹⁹ Children's Act 38 of 2005,section 129(2)(a)

¹²⁰ South African Constitution, section 28(2)

the child.¹²¹ The criteria in section 7 are more relevant to the needs of a younger child and not of an older child taking care of the younger siblings in a CHH.

Article 3(1) of the CRC states that in all actions concerning children undertaken by anyone, either public or private institution or any administrative authorities', the child's best interest shall be of primary consideration.¹²²The African Charter on the Rights and Welfare of the Child also stipulates that all actions concerning the child undertaken by any persons or authority the best interest of the child shall be the primary consideration.¹²³This also includes children in CHHs; since they are also children, their best interest is to be considered in all matters affecting them regardless of their home circumstances.

The Centre for Child Law lodged an application with the Pretoria High Court (Transvaal Provincial Division) alleging that the physical conditions at the hostels where the pupils were housed, the lack of access control and the absence of proper psychological support and therapeutic services at the school infringe the pupils' rights under section 28 of the Constitution as well as the pupils' right to dignity (section 10) and their right not to be subjected to cruel, inhuman or degrading treatment (section 12). The pupils were sent to the school of industry in terms of section 15 of the Child Care Act of 1983 (the Act), which makes provision for a children's court to send a child to a school of industry if satisfied, after holding an enquiry in terms of section 13, that the child is in need of care. The Court found in favour of the applicants and directed the MEC for Education to:

1. Immediately supply each pupil with a sleeping bag with a temperature rating of at least five degrees Celsius; devise plans to put perimeter and access control at the school and provide the Court with written information regarding such plans within one month from the judgment date.
2. Make immediate arrangements for the school to be subjected to a developmental quality assurance process; and the MEC for Education to report back to the Court within five weeks on its plan to implement the recommendations of the team performing the developmental quality assurance process.

¹²¹ Children's Act 38 of 2005, section 7

¹²² United Nations on the Rights of the Child, article 3(1)

¹²³ African Charter on the Rights and Welfare of the Child, article 4(1)

3. Put in place, on an urgent basis and as an interim measure, listed support structures in order to properly provide for the psychological and therapeutic needs of children at the school.¹²⁴

3.4.2 Child participation

This principle allows children to make decisions on issues affecting their lives. Their rights to be heard, have autonomy and the ability to be given opinions are also protected; therefore, for CHH to function independently. It is their right to participate in the functioning of the household, the purpose of limiting the role of a supervisor and legally protecting the rights of children heading the household to make day-to-day decisions is to ensure that the CHH is always preserved.¹²⁵ Article 12 of the CRC recognises that children have the right to be heard and children's involvement in all actions affecting them need to have those views taken into account.¹²⁶

Para 6 of the UN Guidelines for Alternative Care of Children also stipulate that the child's best interest be considered on an individual case by case basis.¹²⁷

3.4.3 Child Health in CHH

The World Health Organization estimates that 740,000 HIV-infected children below the age of 15 were taking antiretroviral treatment in 2014, while in 2013 there were 190,000 deaths in this age group caused by lack of treatment. Children living with HIV generally rely on adult caregivers for access to HIV testing and care, including regular clinical monitoring. Caregivers remain responsible for ensuring adherence to medication until the child is old enough to assume this role¹²⁸ Health matters concerning children predominantly are sexual in nature.

¹²⁴ Centre for Child Law and others v The MEC for Education and others Case No. 19559/06 (T) Available at www.dullahomarinate.org.za accessed on the 21 November 2021

¹²⁵ Lim ,H,Y.2011.pg 236 available at www.repository.up.ac.za accessed on 20 November 2021

¹²⁶ United Nations on the Rights of the Child, article 12 available at www.repository.up.ac.za accessed on 20 November 2021

¹²⁷ UN Guidelines for alternative care of children, 2009, para 6 available at www.repository.up.ac.za accessed on 20 November 2021

¹²⁸ J Busa, A Strode, E Dauya and R Ferrand (2016) 'Falling through the gaps: how should HIV programmes respond to families that persistently deny treatment to children?' Vol 19 Journal of the International AIDS Society 20789 Available at www.ncbi.nlm.nih.gov accessed on the 21 November 2021

South Africa has a very progressive legal framework which provides that adolescents have a right from the age of 12 to access a range of sexual and reproductive health services including contraceptives, treatment for sexually transmitted infections and termination of pregnancy. However, consensual but underage sex is a criminal offence that needs to be reported to the police. These conflicting approaches between the various branches of law places doctors, researchers and other practitioners working with adolescents in an invidious position where they have a duty to provide adolescents with sexual and reproductive services but are required to report all sexual acts including consensual sex.¹²⁹

Pregnancy and childbirth in adolescence can have a long-lasting impact on the social and economic well-being and are among the leading causes of death among women aged 15-19 years (World Health Organization, 2018) compared to other age groups.¹³⁰ Therefore, medical treatment and access to contraceptives allow children in a CHH to make life altering decision regarding their health.¹³¹ The national norms and standards of child-headed households ensure and encourage the children in CHH to participate fully in the running of the home and benefits equally in the resources available.

3.4.4 Right to be protected from exploitation and child labour

Children have the right to be protected from any form of exploitation and child labour if it is discovered that that are trapped in the unacceptable working environment¹³² which violates their rights.

Further, article 3(1) of the CRC states that the state parties recognise children's right to be protected from economic exploitation and from performing any work that may be hazardous or may interfere with the child's education, may be harmful to the child's physical health, mental, spiritual, moral and social development.¹³³ Article 15(1) of the ACRWC is similar to article 3(1) of the CRC, which also stipulates that every child shall be protected from all form

¹²⁹ S Bhamjee, Z Essack and A Strode (2016) 'Amendments to the Sexual Offences Act dealing with consensual, under-age sex: Implications for doctors and researchers' (2016) Vol 106(3) South African Medical Journal 256 – 259. Available at <http://www.samj.org.za/index.php/samj/article/view/9877/7168>

¹³⁰ UN World Family Planning 2020, Pg 10 available at <https://www.unilibrary.org/content/books/9789210043694>

¹³¹ Children's Act 38 of 2005, section 134(1)

¹³² <https://www.hrw.org/topic/childrens-rights/child-labor-> accessed on 15 September 2020

¹³³ United Nations on the Rights of the Child, article 3(1)

of economic exploitation and from performing any work that is likely to be harmful to the child.¹³⁴

Furthermore, section 28(1)(f)(i) of the Constitution states that every child has the right not to be allowed to perform work or provide any services that are inappropriate to the child's age and place the child's education, wellbeing, education, physical, mental, spiritual and social development at risk.¹³⁵ Article 3(1) of the Minimum Age Convention states that the minimum age for the admission to any form of employment or work which its nature or circumstances in which is carried is likely to jeopardise the health, safety or morals of the young person shall not be less than 18 years.¹³⁶

Article 7(1) (a)(b) of the MAC further elaborates that national laws and regulations may permit the employment for persons 13 to 15 years of age in light work, which is not likely to be harmful to their health and development and also that will not prejudice their attendance at school, their participation in vocational orientation or training programs approved by the competent authority or their capacity to benefit from the instruction received.¹³⁷

3.4.5 Survival and development

The right to survival and development is a broad term and covers many things relating to children's rights. Article 6 of the CRC recognises that young people have the right to thrive and develop, it also emphasises the importance of the Government to ensure that the death of children and young people are prevented. The same article states that children should be able to grow up in conditions that do not impact negatively on their physical and mental wellbeing; government must make sure that children can live in these conditions in order to develop.¹³⁸

3.4.6 Right to education

Basic education must be made available by the State to all children.¹³⁹ The Constitution states that Everyone has the right (1) (a) to a basic education.¹⁴⁰ All South Africans have a right to a

¹³⁴ African Charter on the Rights and Welfare of the Child, article 15(1)

¹³⁵ South African Constitution, section 28(1)(f)(i)

¹³⁶ Minimum Age Convention, 1973.No138.Article 3(1)

¹³⁷ Minimum Age Convention, 1973.No138.Article 7(1)(a)(b)

¹³⁸ United Nations on the Rights of the Child, article 6

¹³⁹ Human Rights Commission, 2012. Charter of children's basic education rights: the rights of children to basic education. *South African Human Rights Commission*. Pg 15

basic education and the Bill of Rights obliges the government to progressively make education available and accessible through reasonable measures. Human resources constitute the ultimate basis for the wealth of a nation, and it is therefore vital that a country develops the skills and knowledge of its residents for the greater benefit of all.¹⁴¹

3.4.7 Law and child labor rights

Children need to be protected from any forms of exploitation. Section 28 (1)(d)(e) and (f) states that every child has the right to be protected from maltreatment, neglect, abuse or degradation, exploitative labour practices and not to be used directly in armed conflict, and they are to be protected in armed conflict. The Child Labour Act 101 of 1986 prohibits the employment of children below the age of 14 years in hazardous occupations.¹⁴²

Children aged from 10 to 14 are permitted to work ‘in exceptional cases’ and under specific conditions are guaranteed appropriate employment rights and such work must, like the work of younger adolescents and children, be registered with the municipal Commissioners for Children’s Rights and the Ministry of Labour and Social Affairs.¹⁴³

3.4.8 South African Law Reform Commission (SALRC) and CHHs

SALRC is a law reform aimed to assess the state of South African law and makes proposals for its reform to parliament and provincial legislations.¹⁴⁴ In the year 2002, SALRC acknowledged that CHHs would become a familiar phenomenon and be legally recognised.¹⁴⁵ SALRC reviews the law impacting on the rights of children; the Child Care Act, 1983 culminated in the Children’s Act, a comprehensive child protection law giving effect to a range of principles and rights in the convention.¹⁴⁶

3.5 Conclusion

In this chapter, it became evident that the Government is attempting to address CHHs. All the legal frameworks discussed are to protect the rights and responsibilities of CHHs and its

¹⁴⁰ Constitution SA ss 29 .1 (a)

¹⁴¹ Stats SA General Household Survey 2019. Page 10

¹⁴² Child Labour Act ,1986

¹⁴³ Liebel, M., 2015. Protecting the rights of working children instead of banning child labour: Bolivia tries a new legislative approach. *The International Journal of Children's Rights*, 23(3), pg 4.

¹⁴⁴<https://www.google.com/search?q=what+is+SALRC&oq=what+is+SALRC&aqs=chrome..69i57j0l5.13036j0j8&sourceid=chrome&ie=UTF-8#> - accessed on 28 Augusts 2020

¹⁴⁵ Lim, H.Y., 2011. Chapter 5

¹⁴⁶ SAF resources available at www.unicef.org accessed at 21 November 2021

head. The children's Act 38 also puts an emphasis on the special protection for children in CHHs, by stipulating that such households must be officially recognised, and they should at least function under the supervision of an adult¹⁴⁷. It appears that there is a stronger legal protection for children in CHH through legal recognition of their status and rights.¹⁴⁸

CHAPTER FOUR

VULNERABILITY OF CHILDREN IN CHHs

4.1 Introduction

This chapter focuses on the challenges experienced by children as the head of a CHH and also the coping resources and strategies available to support them. The chapter further explains how these experiences affect their education. The question of whether the legislation protects these households will also be looked at and what the causes of children becoming orphans and the heading CHHs are. According to USAID, CHHs are one of the major challenges related to the HIV and AIDS epidemic and that there is limited literature on CHH. The available literature focuses on CHHs related to HIV and AIDS and the effects of orphanhood in South Africa on children in CHH children's rights.¹⁴⁹

Children in CHHs are faced with huge responsibilities such as a caregiver, breadwinner and being an adult. They also may be forced to abandon their studies to assume responsibilities in their households and to seek employment in order to survive all that affects them socially and educationally.¹⁵⁰ However, a CHH has created a parental vacuum and schools remain the only place where the child heading the home can have their basic needs fulfilled while some

¹⁴⁷ SAF resources available at www.unicef.org accessed on the 21 November 2021

¹⁴⁸ Article available at repository.up.ac.za accessed on 21 November 2021

¹⁴⁹ USAID (2000) in Dlungwana, N.E., 2007. Pg 9

¹⁵⁰ Hartell, C.G. and Chabilall, J.A., 2005. Pg.214.

are deprived the opportunity to attend school, limiting them from understanding their roles and responsibilities at home and in the community¹⁵¹.

CHHs have receive more international attention through the UN Guidelines for alternative care of children and this has led to an increase in national attention. The children in CHHs are entitled to the resources of the state because they are also citizens and these resources form the legal rights to particular resources and children's rights in South Africa are stated in the Constitution of the Republic of South Africa No.108 of 1996.¹⁵²Some of the major rights of children in CHHs is having a formal caretaker as stipulated in the Children's Act 38 of 2005. A number of empirical studies in South Africa have confirmed AIDS as one of contributing factors to the increased number of CHH. Chidziva and Heeralal further state that children may also be left alone due to other causes such as motor vehicle accidents, when parents migrate or maybe abandon their children.¹⁵³

4.2 Causes of CHH

The possible causes of CHHs and becoming orphans to take care of each other will be looked at. The HIV and AIDS epidemic has changed the world where children live in it and has become a leading cause of adult death leaving children as orphans.¹⁵⁴ According to Chidziva and Heeralal, it is estimated that 2.3 million children have lost their parents due to HIV and AIDS,¹⁵⁵ adult caregivers may be involved in fatal accidents, migrate or abandon children, some parents died during the struggle for liberation, old apartheid system and black on black violence.¹⁵⁶ There is a widespread concern that the number children living in child headed households are increasing due to HIV related adult mortality in sub-Saharan Africa.¹⁵⁷ Despite HIV and AIDS some of the causes would be that there is a lack of adult care and protection, lack of adequate medical care, poverty, poor housing, psychological problems,

¹⁵¹ Mkhize, Z.M., 2006.Pg 65-66

¹⁵² van Dril, A.M.C., 2012.Pg 10-15

¹⁵³Chidziva, M.V. and Heeralal, P.J.2016, Pg 91-93

¹⁵⁴ Nziyane, L.F. and Alpaslan, A.H., 2012. The realities of orphaned children living in child-headed households. Pg 290

¹⁵⁵ Chidziva, M.V. and Heeralal, P.J., Circumstances leading to the establishment of child-headed households. 2016,Pg 91-93.

¹⁵⁶ Maqoko, Z. and Dreyer, Y., 2007. Child-headed households because of the trauma surrounding HIV/AIDS. *HTS Teologiese Studies/Theological Studies*, 63(2), pp.722.

¹⁵⁷ <http://www.ci.uct.ac.za/ci/projects/completed/analysing-the-nature-extent-child-headed-households-south-africa>- accessed on 23 February 2020

and an inability for extended family members to take care of the children.¹⁵⁸

4.3 Looking Ahead

By 2020, it was estimated that 2,3 million children will be orphaned as a result of sexually transmitted disease but there is limited information that could help them related to the risk and protective factors of their emotional and behavioral wellbeing.¹⁵⁹ This entails that there is a lot that needs to be done in assisting these children to be able to deal with emotions and hence be able to behave accordingly. CHHs tends to compare themselves with the children with parents when they see who provides them with necessities while they have to work for other people to provide for their siblings, and therefore feel less valuable and with low self-esteem¹⁶⁰.

In South African context of the Children's Act 38 of 2005 it regards CHH as the type of household that functions in the absence of a parent, guardian or caregiver or the caregiver is terminally ill, abandoned the children or are simply not available to care for the children. A child older than 16 years has assumed the role of an adult in CHH resulting in children being deprived of a warm and safe environment and exposed to poor living conditions.¹⁶¹ The Department of Social Development is in the process of compiling a child and youth headed households register to formalise assistance for CHHs and the DSD started a campaign in 2014 to ensure that existing and new CHH receive necessary assistance from the Government.¹⁶²

Several studies have been conducted and have proven that CHH exist across the nine provinces in South Africa, dealing with the stigma of family members being sick or dying due HIV and AIDS, lack of grieving and support, a shortage of resources, increased school absenteeism, school dropout and poor school performance also inadequate medical care.¹⁶³ Affected minors experiences various challenges such as increased responsibilities. According to the HSRC in a study of HIV, just 3 percent of South African households are

¹⁵⁸ Phillips, C., 2011. *Pg 140*

¹⁵⁹ Budowski, Monica 2002. Pg 121-43. is this your first time of citing this work?

¹⁶⁰ Dalen, N., Nakitende, A.J. and Musisi, S., 2009, Pg321.

¹⁶¹ <http://www.hsrc.ac.za/en/review/hsrc-review-march-2015/guiding-care-of-child-headed-households-> accessed on 19-02-2020

¹⁶² <https://pmg.org.za/page/Child-%20and%20youth-headed%20households%20%E2%80%8B-> accessed on 20 February 2020

¹⁶³ Pillay, J., 2016. Pg 3

CHH while other research has found that there are 0,7 per cent of all children living in CHH.¹⁶⁴

Children heading these households are faced with huge responsibilities such as providing shelter, clothes, food, education and also looking after the sick family members within their household with no income which can only be met by accepting donations or maybe through social grants.¹⁶⁵ These children find it difficult to take on adult responsibilities at such a young age and the study shows that the psychosocial damage to these children begins before the death of their parents when they are responsible for their sick parents.¹⁶⁶

In 2018 across South Africa, there were about 55, 000 children in 33, 000 CHH, there has been with no increase in the number children living in CHH between 2002 and 2018, the national survey shows that most children in CHH are orphans and 84% have living mothers, it just that they have migrated for work and left the young ones with the eldest, the research further suggests that CHHs are only temporary arrangements for example, when parents migrate for work or after the death of a parent and arrangements are to be made for some adult to come and live with the children.¹⁶⁷

4.4 Coping strategies available to children in CHH

This section covers coping and support structures that the children in CHH might have. In the task model by Van Dijk coping is seen as an effort to achieve certain goals, a process where one manages the demands that are challenging in order to deal with a situation.¹⁶⁸ Government Departments provide drop in centres, national school nutrition programs, voluntary counseling and training on HIV and AIDS, home community based care and also schools as a support.¹⁶⁹ The research shows that children in CHHs have to cope with lack of material resources in running their households and various other challenging tasks and responsibilities.¹⁷⁰

The government has allocated social assistance to orphans as a way of alleviating poverty and given in a form of money to the caregivers taking care of the orphans (CHH). These social

¹⁶⁴ van Dijk, D. and van Driel, F., 2009. Pg.918

¹⁶⁵ Mogotlane, S.M., Chauke, M.E., Van Rensburg, G.H., Human, S.P. and Kganakga, C.M., 2010. Pg 29.

¹⁶⁶ Nziyane, L.F. and Alpaslan, A.H., 2012. Pg 293.

¹⁶⁷ <http://www.childrencount.uct.ac.za/indicator.php?domain=1&indicator=17-> accessed on 21 February 2020

¹⁶⁸ van Dijk, D.A., 2008. *Pg 41*.

¹⁶⁹ Mogotlane, S.M., Chauke, M.E., Van Rensburg, G.H., Human, S.P. and Kganakga, C.M., 2010. Pg 30

¹⁷⁰ van Dijk, D.A., 2008. *Pg 19*

grants are Child Support Grants (CSG), Foster Care Grants (FCG) and Care Dependency Grants (CDG) that play a major role in taking care of these children.¹⁷¹ Extended family members in Sub-Saharan Africa can provide care and support to CHHs; however, they also need support in taking care of these children.¹⁷² Social workers should play an advocacy role to these children which will ensure that the children's rights are not violated and their needs are met.¹⁷³

The Department of Social Development is mandated by the Constitution of the Republic of South Africa and the Children's Act 38 of 2005 to render services to the care and protection of orphans and vulnerable children including CHHs. As there is a growing number of orphans, vulnerable children and CHHs due to HIV and AIDS epidemic, the Department of Social Development in partnership with the National Association of Child Care Workers (NACCW) developed a five year intervention programme called the Isibindi Model to roll out this community based child and youth care prevention and early intervention services which provides care to these children in their homes. This programme is rendered by a well-trained community based child and youth care worker who provide support to these children. One of the key successes of the Isibindi Model was to ensure that vulnerable children remain in school by providing educational support by relieving them from their household duties, especially to children in CHHs through the Department of Basic Education and the National Student Financial Aid Scheme (NSFAS), the vulnerable children get financial assistance in furthering their studies when they finish school.

4.5 Case study

Turning life around for the Gaba family child-headed household

In the semi-rural township of Umbumbulo, with its open spaces and picturesque rondavel traditional dwellings, children slide down the grassy hillsides on sheets of cardboard with gleeful abandon. But this picture of rural beauty and simplicity belies a darker endemic poverty that has beset the town for generations -- its newest victims, hundreds of children who have lost their parents due to AIDS. The child-headed Gaba family, Mboniseni 18, Mlungisi 14 and their two younger sisters, Balungile aged 9- and 6-year-old Khethiwe live in this area.

¹⁷¹ Maqoko, Z. and Dreyer, Y., 2007. Pg 725.

¹⁷² Nziyane, L.F. and Alpaslan, A.H., 2011. Pg 301.

¹⁷³ Nziyane, L.F. and Alpaslan, A.H., 2011. Pg 306

In their home province, KwaZulu Natal, half of the province's population, some 4 million, are children. In this province too, HIV/AIDS rates are the highest in the country, especially among women, and death and funerals are familiar daily occurrences. Both Gaba parents are now deceased and lay buried in the family garden right next to the children's home. Like several other children in their close-knit community, the Gaba siblings stayed home to take care of their parents as they languished, demonstrating remarkable strength, patience, resilience, and loyalty beyond their young years.

Sadly, after Dad passed away, then Mom shortly after, daily living conditions only got worse for the children. Without parental care and supervision, community members say, the children just wandered aimlessly around the village searching for food, consolation, and friendship. They very rarely attended school and their health soon deteriorated due to constant hunger and malnutrition. It was then that concerned neighbours contacted a local social worker who asked the Isibindi childcare workers to assist the orphaned children. Today, the sparsely furnished Gaba home is clean, comfortable, and well maintained by the children themselves, who readily admit that it is not nearly as good as their Mom would have done. "But it's OK for us," says little Khethiwe.

"Look, I have a pretty doll!" A childcare worker translated from Zulu for the UNICEF team, while her brother kicked a new football, a gift from the team. The Isibindi childcare worker has also taught the children how to problem solve, cook, wash their clothes, budget, maintain personal hygiene and discipline, including homework, and how to access food parcels and food vouchers. Though the children have attempted to plant a food garden, they have not been very successful; however, they are back in school. With the new information from the social worker, the oldest boy who recently turned 18, is about to take a big step forward as head of the family.

He has applied to become the official legal guardian of his siblings following which he will be eligible to apply for a foster care grant of about ZAR1, 500 per month. Though his first expense payment will be to repay the kind neighbours who collectively loaned the children R1, 450 to pay for their mother's burial and funeral, he is elated.¹⁷⁴ "Life is slowly turning

¹⁷⁴ Report available at www.unicef.org accessed 21 November 2021

around. It's getting better," he says.¹⁷⁵The case study shows how the Government has been assisting the children to cope in their households and the Isibindi programme seem to be working very well in ensuring that the children deal with the loss of their parents and how they cope with household chores and also be able to attend school without having to move out of their family home or community at large.

The appointed care workers from Isibindi are able to link the family with relevant services, for instance, in the above case study, the family was referred to the Social Worker for a Foster Care Grant which will be the family's source of income. These children are faced with various psychosocial challenges and are prepared to cope with stresses they face.¹⁷⁶ These children need social worker intervention to support the children. The said truth is that CHH or children in general will not survive if they do not have any employment or fixed income, Government should implement social welfare safety net enough to meet the needs of these children.¹⁷⁷

4.6 The Impact of CHH on education

Being a child and having adult responsibilities may negatively affect the child's concentration in school and as a result, some may decide to drop out of school. Education is often disrupted when parents become sick and the children are required to do household chores and play caregivers role to the siblings, this may have started even before the parents died. The study shows that there is less enrollment in education rates in orphans compared to non-orphans.¹⁷⁸ Poor or orphaned children are less likely to attend school as there is lower enrollment of orphaned children in school.¹⁷⁹ This could be because they lack support from either extended family members, the community at large or the Government.

The pressure of taking care of sick parents and siblings while trying to earn an income can cause children to drop out of school even while their parents are still alive but it becomes worst when both parents are deceased.¹⁸⁰ Many dropouts are responsible for ensuring that their household duties are fulfilled and to take care of their younger siblings. These younger siblings often drop out as well because they are exposed to discrimination and are vulnerable

¹⁷⁵ https://www.unicef.org/southafrica/reallives_4265.html-accessed on 24 February 2020

¹⁷⁶ Ganga, E. and Chinyoka, K., 2010. Pg 194

¹⁷⁷ Nicholson, C., 2007. Pg.407.

¹⁷⁸ Foster, g. and Williamson, j., 2000. a review of current literature on the impact of HIV/aids on children in sub-Saharan Africa. *aids-London-current science then rapid science publishers then Lippincott raven-*, 14, pp.s275-s284.

¹⁷⁹ Case, A., Paxson, C. and Ableidinger, J., 2004. Pg.483-508.

¹⁸⁰ Maqoko, Z. and Dreyer, Y., 2007. Pg 719.

to harassment or stigmatisation in their schools and communities which puts them at risk.¹⁸¹ Learners from CHHs should be allowed to voice their realities in order to inform education officials about their lived realities and experiences. Education itself plays a major role in the lives of the children as it is responsible for their educational care and development.¹⁸²

There are various challenges experienced by orphaned children from CHHs which affects their education. Le Roux-kemp (2015) cited in Newlin *et al* observe that children from CHHs have a low level of education this is due to many household responsibilities which prohibits them from continuing or completing their education. The study also stated that even though the CHH receive a grant, they still experience financial constraints which become challenging to their schooling as they struggle to find the appropriate space and support to get homework done, these children also misbehave due to the fact that they lack an adult guardian which affects their education.¹⁸³

4.7 How can legislation protect CHH?

The Government is obliged to provide alternative care to children without parental care.¹⁸⁴ Article 20 of the CRC of the child further states that children deprived of their family environment or for some reasons can no longer stay in that environment are entitled to special protection by the government.¹⁸⁵ Article 25 of the ACRWC also stipulates the importance of the provision of alternative care to children for their care and protection and treatment by the state. This may include foster placement as long as it is in the child's best interest.¹⁸⁶ This also applies to children in CHHs after the death of their parents if the need arises for them to be in alternative care, the Government must intervene.

Para 37 of the UN Guidelines for alternative care of children emphasize that the states should provide support and services to children who have lost their parents or caregivers and decide to remain in their households to the extent that the eldest is willing to act as the head of the household. The state must also ensure that a legal guardian is appointed to supervise the

¹⁸¹ Leatham, C.P., 2008. *Pg 15*

¹⁸² Leatham, C.P., 2008. *Pg 12-13*.

¹⁸³ Newlin, M., Reynold, S. and Nombutho, M.M.W., 2016. *Pg 162*

¹⁸⁴ Phillips, C., 2011.

¹⁸⁵ United Nation on the Rights of the Child, article 20

¹⁸⁶ African Charter on the Rights of the Child, article 25

family.¹⁸⁷Section 137(2) of the Children's Act 38 of 2005 further states that a CHH must function under the general supervision of an adult designated by the children's court or the state or a non-governmental organization and the a appointed person must be responsible enough to perform the duties within the CHH.¹⁸⁸

4.8 Conclusion

Children in CHHs are similar to other children; however, the difference is their family circumstances and experiences. Children in CHHs suffers various challenges especially since there is no adult in their household. They also have rights like any other children where South African legislation protects them. The increasing number of children in CHHs is due to the increased number of deaths due to the HIV/AIDS epidemic. Some of the children left by their parents end up living alone due to lack of inadequate support from extend family members, some because they are not prepared to be separated from their siblings. South Africa has developed a legal framework that protects children's rights including those who are deprived of their family environment.

¹⁸⁷ UN Guidelines for alternative care of children, 2009, para37

¹⁸⁸ Children's Act 38 of 2005, section 137(2)

CHAPTER FIVE

HUMAN RIGHTS IMPLICATIONS AND SOCIO-ECONOMIC RIGHTS LIKELY TO BE VIOLATED WHEN THE RIGHTS OF CHH IS DISREGARDED.

5.1 Introduction

This chapter focuses on the human rights implications when the rights of a CHH are disregarded, human and children's rights as stipulated in the Constitution of South Africa is looked at. This chapter further explores the extent to which the CHH are protected by the law. Considering the legal apparatus has to be accessible to the individual seeking protection.¹⁸⁹

The rights of children in South Africa and in the world as a whole are important in the legal system.¹⁹⁰ Children's rights as stipulated in section 28 of the Constitution of South Africa are analysed together with all other rights in the bill of rights. Children in a CHH are like other children and have rights both influenced by international law in the constitution.¹⁹¹ UNCRC is the international law instrument relevant in this regard.¹⁹² The principle child's best interest will be looked at its relation to children's constitutional rights. This chapter also discuss the rights of children in a CHH as set out in section 28(1)(b) and (c) of the South African Constitution.

5.2 Violation of children's right

This case note reflects on the approach that should be adopted by sentencing courts when imposing sentences on child offenders who turn 18 during proceedings. The Western Cape High Court recently considered the application of the sentencing principles in the Child Justice Act and section 28 of the Constitution to child offenders who turn 18 prior to their sentencing. The court confirmed that there is 'no arbitrary end to childhood for children who have committed offences before they attained the age of adulthood' and concluded that the

¹⁸⁹ Bilchitz, D., 2014. Pg 713.

¹⁹⁰ South African Constitution, section 28(2)

¹⁹¹ South African Constitution

¹⁹² United Nations on the Rights of the Child, available on www.hdl.handle.net accessed on the 21 November 2021

sentencing principles in the Child Justice Act are applicable to children who turn 18 prior to sentencing.¹⁹³

5.2.1 Protection from exploitative labour practices

Section 28 of the Constitution of the Republic of South Africa stipulates that children have the rights to be protected from any exploitative labour practices; they should not be involved in any work that is harmful to them.¹⁹⁴ Children above the age of 15 can be legally employed, also those between the age of 15 and 18 are protected from having to perform work that is harmful to their development.¹⁹⁵ Any work that is harmful to children might also interfere with their education and is also harmful to their health and social development¹⁹⁶.

State Parties to the African Charter take all appropriate legislative and administrative measures to ensure the full implementation of this Article which covers both the formal and informal sectors of employment and having regard to the relevant provision of the International Labour Organization's instruments relating to children, State Parties shall in particular provide through legislation, minimum wages for admission to every employment; appropriate regulation of hours and conditions of employment, provide for appropriate penalties to ensure the effective enforcement of this Article and also promote the dissemination of information on the hazards of child labour to all sectors of the community.¹⁹⁷

5.2.2 Child participation

Children have a right to participate in decisions that affect them but would have to exercise this right according to their age and capacity. Their right to participate emerged during the drafting of the CRC, Article 12 of the CRC which makes provision for the freedom of children who can make their own decision in matters concerning them to be able to express them freely, and the views of the children to be considered will be in line with their age and maturity.¹⁹⁸

¹⁹³ Carina du Toit and Zita Hansungule. S v SN unreported, case no. 141114/14 (WCC) Available at [S v SN unreported, case no. 141114/14 \(WCC\) : Sentencing child offenders after they turn 18 | South African Crime Quarterly \(ajol.info\)](#)

¹⁹⁴ South African Constitution, section 28(1)(e)

¹⁹⁵ United Nation on the Rights of the Child, article 32

¹⁹⁶ United Nation on the Rights of the Child, article 32(1)

¹⁹⁷ African Charter on the Rights and Welfare of the Child, article 15(2)(a)(b)(c)(d)

¹⁹⁸ Mkhize, Z.M., 2006. *Social functioning of a child-headed household and the role of social work*. Pg 66

According to Max-Neef *et al* (1987) the matrix for the classification of the fundamental human needs and the settings for interacting that are appropriate for this right are the associations, churches and neighbourhoods. These settings form part of larger systemic structures in which a child-headed household is nested. They support the household's social functioning through the provisioning of resources that are vital for healthy living. In other words, the church has a role to play in assisting children to deal with issues of death and grief.¹⁹⁹

The term 'every child' is not only referring to an individual but also a group of children; a certain reference is made to a specific group of children such as disabled children and minority groups. The Constitutional Court stipulate that after consultation, schools are at risk of acting unconstitutionally because proper majors are not in place to accommodate views of minority groups, is therefore advisable that the opinion is raised by marginalised groups in schools so they will be heard.²⁰⁰

According to Sloth-Nielsen, girl child is more likely to be the caregiver in child headed households. She explains that gender-based discrimination results in girls being more likely than boys to have to care for terminally ill family members, and to be the heads of child-headed households, or to bear a large responsibility for household chores²⁰¹

5.2.3 Children's right to parental care or to appropriate alternative care when removed from the family environment

Although the Guardianship Act 192 of 1993 still uses the language of parental 'rights, powers and duties', it has been recognized in South Africa that the parental power is in fact concerned more with the duties and responsibilities of parents than with parental rights and powers with the modern emphasis in this regard being on the rights and interests of children rather than parents.²⁰² Section 28 of the Constitution puts the focus on the child's right to proper family care.²⁰³ This applies to all children, including those in CHHs, children without parental care find themselves at a higher risk of discrimination, inadequate care, abuse and exploitation, and their well-being is often insufficiently monitored, child welfare services and poverty reduction initiatives are needed and Government support through the implementation

¹⁹⁹ Max-Neef, M., 1987. Max-Neef on Human Needs and Human-scale Development.

²⁰⁰ Reyneke, M., 2013. Children's right to participate: Implications for school discipline. pp.206-236.

²⁰¹ Ann Skelton.2010 girls' socio-economic rights in south Africa pg151

²⁰² Visser, P.J. and Potgieter, J.M., 1995. Introduction to family law. *JS Afr. L.*, p.159

²⁰³ South African Constitution, section 28

of policies and legislation is very important in promoting family based alternatives, the law must protect children from being separated from their families.²⁰⁴

The child's right to parental care as contained in section 30 of the Interim Constitution was discussed in *SW v F*.²⁰⁵ The case concerned adoption of a child by foster parents, in whose care the child had originally been placed when his mother was imprisoned. The child had spent all their savings in the first four months of their care and was at the time, six years old. On appeal, it was alleged that the right of the child to parental care in section 30 was incorrectly used to interpret the applicable provisions of the Child Care Act. However, the Court held that the right to parental care did not mean the right to the care of a natural or biological parent. The provision was therefore no bar to an adoption order being granted.²⁰⁶

5.2.4 The right to an education

Article 29 of the Constitution states that,²⁰⁷ article 28 of the UNCRC compels the state to make primary education compulsory and free to all, this may also benefit children in CHHs.²⁰⁸ African Charter on Human Rights article 17 states that every individual has the right to education.²⁰⁹ Article 11(3) of the African Charter on the Rights and Welfare of the Child provides that the states shall take appropriate measures with a view to achieving the full realisation of these rights and shall provide free and compulsory education.²¹⁰ Getting an education means that one is gaining self actualisation.

Education is a right for children. It is a right that also helps enjoys other rights. Second, education is a tool of empowerment, a means to promote children rights, and can provide individuals with the necessary skills to have the best possible life. Quality education must be available for every child, without any discrimination and respecting their dignity, no matter who they are, regardless of their race, gender, or disability; if they're in detention, or if they're a refugee.²¹¹ When children are at school they get a chance to learn their rights and

²⁰⁴ https://www.unicef.org/chinese/protection/files/Parental_Care.pdf- accessed on 07 September 2020

²⁰⁵ 1997 (1) SA 796 (O)

²⁰⁶ http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/childrens_act/salrc/05-dp103-ch3.pdf- accessed on 06 March 2020

²⁰⁷ South African Constitution, section 29

²⁰⁸ United Nations on the Rights of the Child, article 28

²⁰⁹ African Charter on Human and People's Rights, article 17

²¹⁰ African Charter on the Rights and Welfare of the Child, Article 11(3)

²¹¹ https://www.thekidsrightschangemakers.org/en/your-rights/education?gclid=Cj0KCQjw0rr4BRCtARIsAB0_48PFlz-bebxOlfMR2hODvCC3Y6HWapPG0LS1jDk5MkcG2j926BJXOYkaAmuMEALw_wcB- accessed on 15 September 2020

responsibilities through participatory activities and it makes the school a place where they can exercise their rights.²¹²

Education is important because it reduces poverty and social inequalities, empowers and helps individuals to reach their full potential, brings significant economic return for the country, it is also the key to achieving all human rights.²¹³ There are so many underlying factors that drive the poor quality of education and its outcomes, these may be social and economic factors such as poverty and low literacy levels and low levels of formal education in children's families.²¹⁴

5.3 Implications for when children's right are violated

Article 19 of the CRC states that States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child, Such protective measures should, as appropriate, include effective procedures for the establishment of a social programme to provide the necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.²¹⁵

Harmful practices involving direct physical violence against children will be offences under the criminal law on assault, including the law on murder/manslaughter where death results, provided any existing defences or justifications or provisions allowing parents or others to consent to them (see above) have been removed from the law.²¹⁶ If a child is without parents an orphan will not be able cater for his or her education due to economic circumstances, that child might be taken to institutions such as orphanage, the child might be exposed to different kinds of violence provoked by the staff or other children, the issue with detention centres is that children and adults who have committed an illegal act often live together with no

²¹² Öztürk, A. and Dogan, G.Ö., 2017. Effective Children's Rights Education from the Perspectives of Expert Teachers in Children's Rights Education: A Turkish Sample. *Journal of Education and Learning*, 6(4), pp.303-314.

²¹³ <https://theirworld.org/explainers/right-to-education> accessed 14 September 2020

²¹⁴ SAHRC Charter of Children's Basic Education Rights, 2012

²¹⁵ United Nation on the Rights of the Child, article 1947

²¹⁶ https://archive.crin.org/en/docs/InCo_Report_15Oct.pdf-accessed on 16 September 2020

restrictions, there is no system to protect children in hostile places like prison, there are many countries which lack a juridical system for children meaning that there are no courts of law for children. **5.4 Conclusion**

This chapter has explained the importance of children's rights in South Africa and section 28 of the Constitution further promotes children's rights and children's freedom. Children in CHH are entitled to alternative care within the household headed by the child (older sibling), which simply entails that it is their right to remain in their homes after the death of their parents. Child participation as a right was also explained and how it relates to children in CHH, article 12 was explained at its best level.

Section 29 was also explained in this chapter. Children in CHHs are well protected by children's rights in the Constitution of South Africa and in other legal treaties even though they do not speak directly to them. So far , the Children's Act 38 of 2005 is the only legal document that has discussed children in a CHH. The States are obliged to protect all children when their rights are being violated.

CHAPTER SIX

RECOMMENDATION AND CONCLUSION

6.1 Introduction

This chapter focuses on the conclusion of the entire study. The purpose of the study was to explore the challenges experienced by the children in CHH in SA. The study describes a CHH and some of the support systems available to them, their rights as children and how it

affects them as children in a CHH. Legal systems supporting these children were further discussed in the study. The study used qualitative analysis as opposed to quantitative. Which means the research utilised available data, literature from relevant books, articles and journals. And this data was explored and analysed through synthesising available information. Therefore, no interviews were conducted. The overall results demonstrated that children heading CHHs took over parental responsibilities and are sometimes found it difficult to cope.

6.2 Recommendations

The findings of the research demonstrated that there is limited literature on children in CHH's and therefore, more research needs to be done in order to increase literature; however, after exploring the available data, this thesis hereby makes the following recommendations:

The South African legislature needs to enact specific policies that aim specifically at protecting the wellbeing of CHH.

- The thesis has discovered that there are increased morbidity and mortality rates among adults as a result of the HIV/AIDS pandemic, poverty, violence, crime, and motor vehicle accidents that have directly resulted in growing numbers of orphans and vulnerable children. Henceforth, it is recommended that a social compact policy has to be enacted. The social compact policy among other things must enshrine punishment to the reckless drivers and also state funds need to be channeled into improving roads infrastructure with the aim of making them safe and conducive for vehicles.
- Social welfare agencies have to legally permit individual children who are affected by CHHs to withdraw social grant funds without the permission of adults since CHHs by definition don't have parents.
- The community, community-based organizations (CBO's), faith faith-based organizations (FBO's), non-governmental organizations (NGO'S) and the Government need to intensify their efforts in supporting CHHs with the psychological, medico-socio, socio-economic, legal, infrastructural and financial support to the CHH.

- School Feeding Schemes has to be expanded to every school to accommodate the nutritional needs of children from CHHs. Furthermore, the feeding scheme has to devise a plan to transport food to the homes of affected children on non-school days, such as on school holidays and weekends .
- The current unemployed insurance fund grant of three hundred and fifty rands (R350) announced by the South African President in March 2020 is commendable since it is a source of income for many unemployed parents. In contrast, this research has found that extended family members often reject the responsibility of taking care of family orphans as they do not have the finances. Therefore, for this reason, it is recommended that the current amount of R350 be increased to R1000. This will increase the disposable income of families and further incentivize relatives to adopt orphans and more importantly, encourage the present parents to financially support their children preventing the scourge of absent parents.
- A macro-economic strategy that seeks to create employment for all South Africans must be pursued by the Government. When employment opportunities become more available, it increases the living standard of the population and eradicates poverty.

6.3 Conclusion

This summary focuses on the main findings and conclusion of the research, challenges faced by children heading CHHs and support structures available to assist them in coping with their responsibilities. Children heading CHHs experience various challenges as pointed out in this thesis such as poverty, teenage pregnancy, substances abuse, crime and difficulty in meeting their educational needs and their basic needs. A lack of social support systems are also one of the challenges faced by children. Their current efforts by the government and non-governmental institutions deem inadequate to provide sufficient care to CHH.

Chapter Three of this thesis explored the current legislature and law surrounding the CHH. Therefore, findings of how the law supports these children have been made. These children face various challenges which hinder them from performing some of their duties properly.

They do not get enough time to focus on their studies, since they are overwhelmed by their duties of taking care of their younger siblings. Their right to education is easily violated because of pressure they might be having at home. They often drop out of school in an event where siblings are ill. The dynamics of CHH always bears undesirable sacrifices that have to be made by the children's.

South African Constitution and other legal framework recognise children in general but there is limited information regarding children in CHH. Their rights can be easily violated since they are not fully supported. In Social Work field conditions that benefits CHH needs to be created and be fully functional. Children in CHH have needs that need to be attended to by the state.

The 2007 Children's Amendment Act states that CHH may be recognized legally as a placement option for children with suitable support from An adult who is supervising them who may assist in arranging assistance in things like financial grant on behalf of these children in CHH.²¹⁷ Section 137 (2) of the children's Act 38 of 2005 also state that CHH must function under the supervision of an adult appointed by children's court or any other organ of the state or non-governmental organization determined by DSD, Section 137(9) also putted the emphasis that children in CHH may not be excluded from any form of grants subsidy or any form of assistance provided by the States because the house is headed by a child.²¹⁸

²¹⁷ Children's Amendment's act 41 of 2007, section 137

²¹⁸ Children's Act 38 of 2005, section 137(2)and(9)

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