IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 12624/18

Reportable

In the matter between:

MRS M **Applicant**

and

ESNA BRUWER **First Respondent**

MR M **Second Respondent**

JUDGMENT DELIVERED ON 21 DECEMBER 2018

Vos, AJ

Introduction

[1] This application has the features of an appeal against an order of the maintenance court, whereby an existing maintenance order in respect of children, was varied.

[2] But in fact, this is an application to review and set aside a 'directive' ('the directive') issued by a social worker, while acting as a facilitator, whereby she purported to vary a maintenance order of the High Court. The maintenance order is

incorporated in a deed of settlement, which was made an order of this court upon the granting of a final order of divorce by Weinkove AJ.

[3] In *The Law of Divorce and Dissolution of Life Partnerships in South Africa* [1], the role of a facilitator, or parenting coordinator, is described as follows:

> ‘ Parenting coordination (or facilitation as it is currently known in the Western Cape and case management as it is currently known in Gauteng) is a child-focused ADR process in which a mental health professional or legal professional with mediation training and experience assists high-conflict parties in implementing parenting plans and resolving pre- and post-divorce parenting disputes in an immediate non-adversarial, court-sanctioned, private forum.’

The parties and the children involved

[4] The applicant is Mrs M, a conveyancing secretary who works for a firm of attorneys in Paarl, Western Cape Province. She resides at B… , which is situated on the outskirts of the town. I shall refer to her as ‘Mrs M’.

[5] The first respondent is Mrs Esna Bruwer, a social worker, who practices under the style of Morgenzon Practice, at Morgenzon Estate, Northern Paarl, Western Cape Province. I shall refer to the first respondent as ‘Mrs Bruwer’.

[6] The second respondent is Mr M, a farmer and managing director of B… Farms (Pty) Ltd, a major producer of various agricultural products of Ceres, Western Cape Province. I shall refer to the second respondent as ‘Mr M’.

[1] Juta, by Jacqueline Heaton

[7] Mr and Mrs M have three children:

[7.1] N, who is 19 years old, and she is a first year student enrolled for a Bachelor of Commerce degree at the North West University.

[7.2] L, who is nearly 16 years old, and she is a learner in grade 10 at the P… School. L attends the boarding school during week days, but from time to time, and especially during examination times, L stays with Mrs M at the B… .

[7.3] J, who is 12 years old, and in grade 6 at the P… School. He resides with Mrs M at the B… .

[8] Although she has not been cited as a party, Mrs Christina le Roux also features in this application ('Mrs le Roux'). In an affidavit deposed to on 24 October 2018, Mrs le Roux describes herself as an attorney whose name appears on the roll of non-practising attorneys, and since 2018, she has become an accredited mediator with FAMAC. [2] It will become apparent later on in this judgment that Mrs Bruwer relied on the expertise and experience of Mrs le Roux, in order to issue the directive referred to above, whereby the maintenance was varied.

Relief sought

[9] Mrs M seeks an order reviewing and setting aside the directive dated 29 March 2018, on the following grounds:

[2] Family Mediators' Association of the Cape

[9.1] As social worker, Mrs Bruwer exceeded her powers as facilitator, by assuming the role of a court to determine the maintenance of the children, while acting impermissibly as a judicial officer;

[9.2] The process that Mrs Bruwer followed in order to arrive at her directive, was in any event unfair;

[9.3] Mrs Bruwer acted in a biased manner towards Mrs M.

[10] Mrs M also seeks an order that Mrs Bruwer should be removed as the facilitator, having been appointed in terms of a parenting plan ('the parenting plan'), and in the event of Mr and Mrs M failing to reach agreement on the appointment of another facilitator, an order should be issued that FAMAC be authorised to appoint such new facilitator.

[11] Mr M opposes the relief that is sought, and he contends that the directive issued by Mrs Bruwer is binding, and the process that was followed, was fair.

[12] After the application was served on Mrs Bruwer on 19 July 2018, she delivered a notice of her intention to abide the outcome of these proceedings, and not to oppose it. However, on 24 October 2018 Mrs Bruwer delivered an affidavit in which she inter alia stated that her directive is binding, and she believes that it is not in the best interests of the children to resign as facilitator.

Background

[13] During 2013, and having been married for 15 years, Mr M instituted divorce proceedings against Mrs M. On 16 April 2014 the court granted a final order of divorce, incorporating a consent paper and the parenting plan.

[14] The consent paper is a comprehensive agreement, running into 26 pages. It records that Mr and Mrs M shall remain co-holders of parental responsibilities and rights of care and contact with the children, as referred to in section 18(2)*(a)* and *(b)* of the Children's Act 38 of 2005 ('the Children's Act'), subject to the provisions of the attached parenting plan .

[15] The consent paper further records that Mr M will pay maintenance for the children as follows:

> ' 3. MAINTENANCE IN RESPECT OF THE CHILDREN
>
> Plaintiff shall maintain the children until they become self-supporting or complete their tertiary education (as defined in paragraph 3.8 below), whichever event shall last occur, as follows:
>
> 3.1 Plaintiff shall pay to Defendant the sum of R 6 000,00 per month per child with effect from 1 March 2014 until 31 December 2014 and thereafter R 5 000.00 per month per child with effect from 1 January 2015 on or before the first day of every month without deduction or set-off by way of stop order or electronic transfer into such account as Defendant may nominate in writing from time to time. Should either child, whilst still undergoing tertiary education (as defined in paragraph 3.8 below), no longer permanently reside with Defendant, the cash maintenance in respect of such child payable to Defendant in terms hereof, shall reduce to one third of the cash amount provided for herein. (If a child stays at residence he / she will be deemed to no longer permanently reside with Defendant).
>
> 3.2 Plaintiff shall retain the children, at his cost, on his current medical aid scheme or on a scheme with similar benefits and he shall pay the monthly subscriptions (and escalations) in respect thereof timeously.
>
> 3.3 Plaintiff shall pay the costs of all reasonable expenditure in respect of the medical, dental, surgical, hospital, orthodontic and ophthalmological treatment needed by the children and not covered by Plaintiff's medical aid scheme….
>
> 3.4 Plaintiff shall pay all the reasonable educational costs in respect of the children …'

[16] The consent paper further provides that Mr M shall contribute R250 per month in respect of the children's cellular telephone contracts, R10 000 per year

per child for the children's holidays, costs relating to studies at a tertiary institution, including residence fees and travelling costs pertaining thereto.

[17] Clause 5 of the consent paper deals with personal maintenance payable to Mrs M, while clause 6 records that Mr M is obliged to pay R2 million to Mrs M. The consent paper further deals with a property situated at Gansbaai, in respect of which Mrs M was obliged to transfer ownership thereof to Mr M. In paragraph 7 of the consent paper, Mr M and the trustees of the FJ Family Trust undertook to make 526 B available to Mrs M and the children, thereby providing them with accommodation until 30 June 2027. Upon the termination of Mrs M's right of habitatio of the B property, it will be sold and then she will receive 50 % of the nett proceeds of the sale of the property. It is clear that the consent paper constitutes a 'package deal' settlement. [3]

[18] The parenting plan makes provision for 'mediation and facilitation' and the appointment of a facilitator, who has a wide range of powers.

[19] A facilitator, or parenting coordinator's role is similar to that of a mediator, in that the goal is to facilitate the parties' mutual agreement regarding the resolution of a given dispute. The methods by which those disputes are resolved, are also somewhat similar. Parties typically communicate ex-parte with a mediator in mediation and with a parenting coordinator, in an effort to reach a mutual agreement. [4]

[20] Clause 6 (b) of the parenting plan reads as follows:

' 6 (b) <u>Powers of the facilitator</u>

6.4 The facilitator is authorised to:

[3] Georghiades v Janse Van Rensburg 2007 (3) SA 18 at para [19]
[4] Joi T. Montiel, Tennessee Journal of Law and Policy p. 381: Is parenting authority a usurpation of judicial authority? Harmonising authority for, benefits of, and limitations on the legal-psychological hybrid.

6.4.1 facilitate joint decisions in respect of the children, having regard to the best interests of the children;

6.4.2 regulate, facilitate and review the contact / residency arrangements (excluding matters relating to guardianship and/or relocation from Ceres or Paarl) in respect of the children, having regard to the children's best interests, provided that residency arrangements will not be changed by the facilitator unless by agreement between the parties or as recommended by a clinical psychologist;

6.4.3 make recommendations in respect of any issue concerning the welfare and/or affecting the best interests of the children;

6.4.4 regulate, facilitate and review issues relating to the children's maintenance;

6.4.5 resolve conflicts relating to the clarification, implementation and adaptation of the agreement or any subsequent Parental Responsibilities and Rights Agreement, having regard to the best interests of the children;

6.4.6 issue directives binding on the parties on any issue concerning the children's welfare and/or affecting their best interests but shall not be authorised to make a binding directive regarding a change in primary residence or relocation from South Africa, Ceres or Paarl (subject to a Court of competent jurisdiction holding that such directive is not in the children's best interest);

6.4.7 resolve conflicts relating to the clarification, implementation and adaptation of the Parenting Plan;

6.4.8 engage the services of an expert professional to assist him/her to issue directives that have a bearing on the children;

6.4.9 co-opt the services of a facilitator when reasonably necessary.'

[21] On 9 December 2016 Mrs M, Mr M and Mrs Bruwer concluded a 'Facilitation Agreement'. In terms thereof, Mrs Bruwer was appointed as facilitator to make recommendations in respect of any issue concerning the welfare and matters affecting the best interests of the children. In terms of paragraph 2.8 thereof it was agreed that, if Mrs Bruwer is unable to resolve any dispute by way of mediation, she may resolve the issue ' by issuing a directive which shall be binding on the parties unless a court of competent jurisdiction overrides such directive'. Paragraph 4.3 of the Facilitation Agreement records that:

> 'The facilitator shall, when required to issue directives, do so based on his / her professional opinion and shall not act in a quasi-judicial capacity nor shall he/she act as an arbitrator.'

[22] During April 2016, Mr M applied to the Paarl Maintenance Court for a reduction of the maintenance to an amount of R2000 per child per month in respect of the cash amount payable in respect of each child.

[23] Mrs M opposed the application for a variation of the High Court maintenance order, and shortly before the court hearing, Mr M withdrew his application in the Paarl Maintenance Court as he was advised that '... the more correct procedure would be to refer the maintenance dispute to a facilitator in terms of [their] agreed parenting plan'.

Events leading to the issuing of the directive

[24] During 2017 Mrs Bruwer had various sessions with Mr and Mrs M, but it appears that a number of issues remained unresolved. Early in 2018, Mr M declared a dispute with Mrs M about the children's maintenance and he required Mrs Bruwer to adjudicate it.

[25] It is common cause in this application that Mrs Bruwer '… then duly assumed the role of judicial officer, declaring that she will review the maintenance payable to [Mrs M] for the children'. [5]

[26] On 6 February 2018 Mrs Bruwer addressed an e-mail to Mr and Mrs M, inter alia stating the following:

> 'My proposal is that the current maintenance must be reviewed and also the contribution for which each parent must take responsibility. One child is out of the house and another at boarding school, which has a significant impact on

[5] See record 19 paragraph 41; record 135 paragraph 27

maintenance. In terms of clause 6.4.4, I must become involved in the maintenance dispute'. [6]

[27] On 20 February 2018, Mrs M addressed an e-mail to Mrs Bruwer in which she specifically recorded her dissatisfaction with the process, by stating that the findings or recommendations of Mrs Bruwer are not enforceable. [7] Despite that warning, Mrs Bruwer nevertheless proceeded.

[28] On 2 March 2018, a meeting was held where Mr and Mrs M, Mrs Bruwer and Mrs le Roux were present. At that meeting, Mrs Bruwer apparently considered the maintenance of the children and believed that she had the power to act in terms of paragraph 6.4.4 of the parenting plan which authorizes her to 'regulate, facilitate and review issues relating to the children's maintenance'. She instructed Mr and Mrs M to produce particulars of their income and expenditure by 20 March 2018.

[29] On 8 March 2018, Mrs M addressed an e-mail to Mrs Bruwer in which she recorded her dissatisfaction with the manner in which Mrs Bruwer was managing the sessions, and she complained that she acted in a biased manner. [8] Despite this further undisguised admonishment, Mrs Bruwer asserted her apparent judicial authority by continuing in an unusual manner with the determination of the new maintenance that had to be paid.

[30] Mrs M had to collate vouchers spanning several months, and due to her full-time employment and the managing of the two minor children, she could not meet the deadline of 20 March 2018, as set by Mrs Bruwer.

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[6] Freely translated from Afrikaans. The Afrikaans text reads as follows: "*My voorstel is dat die huidige onderhoud hersien word en ook die bydrae waarvoor elke ouer verantwoordelikheid moet aanvaar. Een kind is uit die huis en die ander een op kosskool, wat 'n wesenlike impak op die onderhoud het. In terme van 6.4.4 moet ek betrokke raak by die onderhoudsdispuut."*

[7] The exact words are: "*Die prokureur of dan jou bevindings / aanbevelings is nie afdwingbaar."*

[8] The e-mail proceeds as follows in Afrikaans: "*Graag wil ek my ontevredenheid beklemtoon in die manier waarmee die sessies tot op hede hanteer is. Sonder twyfel tree jy partydig op, en die kinders se welbehae is nie in jou beste belang nie."*

[31] On 27 March 2018 Mrs M had not yet delivered documents relating to her income and expenses to Mrs Bruwer. Mrs Bruwer then sent an e-mail to Mrs M, warning her that if the documents were not delivered to her office by close of business on 27 March 2018, she intended issuing a directive as follows:

[31.1] In respect of N's maintenance, 30% thereof would be allocated directly to N;

[31.2] L's boarding house fees would be taken into consideration with regard to the payment of her maintenance; and

[31.3] The maintenance of J would remain unchanged.

[32] At the time when Mrs Bruwer warned Mrs M on 27 March 2018 that she intended issuing the abovementioned directive, she had not yet been placed in possession of any documents evidencing the income and expenses of Mrs M.

[33] Later on 27 March 2018, Mrs M then delivered particulars of her income and expenditure with supporting vouchers, to Mrs Bruwer.

[34] It is common cause between Mr and Mrs M that Mrs Bruwer did not afford Mrs M the opportunity to have insight into the 'financial situation' of Mr M, or to make representations not to vary the maintenance, prior to issuing her directive. [9]

[35] It means that, prior to the directive, Mrs M did not even see the documents of Mr M forming the basis of his income and expenses to support his claim for a reduction of the children's maintenance.

[9] See record 21 paragraph 46; record 136 paragraph 29

[36] On 29 March 2018 Mrs Bruwer issued the following directive [10] :

'DIRECTIVE

This is a directive issued as a result of Fanie and Louise M approaching the facilitator with a dispute. Fanie referred a dispute in respect of maintenance to the facilitator in terms of the Court Order granted on 16 April 2014. In terms of the Court Order, Fanie's maintenance obligations are set out in paragraph 3. Any dispute in respect of maintenance would be dealt with through the facilitation process as provided for in paragraph 6 of the Parenting Plan. In terms of paragraph 6, the facilitator is authorized (paragraph 6.4.4) to 'regulate, facilitate and review issues relating to the children's maintenance'. In terms of paragraph 6.15:

'The parties shall be bound by the decision of the facilitator until a Court directs otherwise.'

I have read the documentation provided by both parties, have met with both Fanie and Louise (03.02.2018) with a view to trying to mediate a settlement. However, it is clear that a mediated solution is unable to be reached and as a result it is necessary for me to issue a directive in terms of the powers granted to me by the Court Order. I have read the correspondence and documentation provided, have considered each parties position and consulted when necessary with experts in order to reach my decision.

Fanie requested a reduction in maintenance due to a change in circumstances. Fanie stated that the change in circumstances related to the fact that their eldest daughter, N, is currently attending University in Potchefstroom, away from the residence with her mother. As a result hereof, Fanie does not believe that he is liable to pay the reduced one third cash maintenance as provided for in the Court Order in paragraph 3.3. However, clause 3.1 is clear. Clause 3.1 states:

'Should either child, whilst still undergoing tertiary education (as defined in paragraph 3.8 below), no longer permanently reside with Defendant, the cash maintenance in respect of such child payable to Defendant in terms hereof, shall reduce to one third of the cash amount provided for herein. (my emphasis).'

First ruling

It is therefore clear that at the time of signing the agreement, it was foreseen that a child would not, once undergoing tertiary education, permanently reside with Louise. In this event, Fanie had accepted his obligation to pay one third of the cash maintenance. I believe no good reason has been put forward to vary this particularly bearing in mind that a specified amount was agreed to and made an Order of Court i.e. 'shall reduce to one third of the cash amount'. I therefore find that Fanie is not entitled to a further reduction in respect of maintenance payable for N.

[10] The subheadings have been inserted by me

Second ruling

However, the objective of maintenance paid to a party are (sic) that the children or a specific child benefit form the amount paid. In this case more so, because the settlement agreement provided that Fanie takes full responsibility of the children's needs, including housing and all other aspects that they might need, which he has proved with relevant documentation during this process. I therefore direct that Louise ensures and provides monthly proof that the one third payment towards N are (sic) for the sole benefit of N, by either paying the said amount directly to N during the months that she is not in her care, or spend the money on real needs of N which can be supported by documentation. Louise may use her own prerogative to allocate or keep the one third maintenance payment for the times that N is with her during holidays.

Third ruling

The second issue referred by Fanie was a reduction in maintenance payable to L. At the time of the parties signing the agreement, L was primarily residing with Louise and attending school at Paarl Gymnasium as a day learner. Circumstances have changed and L continues to attend Paarl Gymnasium but as a weekly border. L therefore has contact to Louise every second weekend and to Fanie every other alternate weekend. It is therefore clear that the expenses incurred in respect of L for Louise have reduced. It is also clear that Fanie is now required, in terms of paragraph 3.4, to cover the boarding/residence fees in addition to the maintenance. However, it is fair and equitable that the cost of boarding/residence fees be taken into account as this is a changed circumstance and did not exist at the time of the signing of the agreement. In the circumstances, I direct that the amount of R3 200 be deducted form the maintenance payable by Fanie, as this is the amount which Fanie pays in respect of boarding/residence fees. I direct that Fanie shall be entitled to deduct the amount of R3 200 from Louise's monthly maintenance with effect from 1 April 2018.

Fourth ruling

Fanie shall continue to pay the maintenance as set out in paragraph 3 in respect of J until such time as J's circumstances change. Should J become a weekly boarder at school, Fanie's maintenance obligations to Louise shall be reviewed along the lines as set out above.

FACILITATORS NOTE
The intention of this directive is not to place a maintenance obligation on Louise, but rather to take the change of circumstances into account since the parties divorce in 2014. Irrespective of the fact that Louise has since also became employed, which is a further change of circumstance, no additional burden is placed on her to pay towards the children, but rather a review of costs in respect of the current needs of the children and circumstances.'

[37] On 3 April 2018, Mrs M wrote to Mrs Bruwer, and informed her that she disputed the directive and would refer the matter to court. On 6 April 2018, the attorneys of Mrs M wrote to Mrs Bruwer, informing her that her directive was

subject to being set aside, and requested her to tender her resignation as facilitator. Mrs Bruwer did not accede to that request.

[38] On 18 April 2018, Mrs M addressed another e-mail to Mrs Bruwer in which she, inter alia warned Mrs Bruwer of the consequences should she not resign, and a court had to find that her conduct was invalid.

[39] On 25 May 2018, the attorneys of Mrs M addressed another letter to Mrs Bruwer in which they contended that Mrs Bruwer did not follow a proper process, and that she acted outside of her powers. She was also asked to recall the directive of 29 March 2018 and to resign as facilitator.

[40] On 5 June 2018, Mrs M, Mrs le Roux, Mrs Bruwer and Ms Maas attended a meeting. Ms Maas represented Mrs M. At that meeting, Mrs Bruwer was again requested to withdraw her directive and to resign as facilitator. Mrs Bruwer did not accede to the request.

[41] Instead of resigning, and on 26 June 2018, Mrs Bruwer informed Mr and Mrs M that she had decided to appoint Mr Craig Snyder as ‘co-parent coordinator …’ to assist her with future disputes that might arise.

[42] On 27 June 2018, Mrs M sent an e-mail to Mrs Bruwer in which she recorded her objection to the appointment of Mr Craig Snyder.

Impermissible delegation of judicial authority?

[43] Mrs Bruwer and Mr M contend that the directive was lawfully issued and is binding, and therefore they argue that the variation of the High Court maintenance order is valid. In support of their contentions, they rely on clause 6.4.4 of the parenting plan in terms of which the facilitator was authorised to ‘regulate, facilitate

and review issues relating to the children's maintenance'. I turn to consider the meaning of those words.

[44] In *S v Twala (South African Human Rights Commission Intervening)* [11] it was held that a review, requires a '… reassessment of the case in a broad sense …'. Within the context of a court reviewing a decision or proceedings, it is trite that the concept of 'review', includes the power of a court to set a particular decision or proceedings aside. [12] In certain instances, a court may impose its own decision as substitute for the decision of a particular functionary. [13]

[45] The Shorter Oxford English Dictionary provides the following applicable definitions:

'regulate' is defined as:

> 'Control, govern, or direct by rule or regulations; subject to guidance or restrictions; adapt to circumstances or surroundings. Bring or reduce (a person or group) to order. Alter or control with reference to some standard or purpose; adjust (a clock or other machine) so that the working may be accurate.'

'facilitate' is defined as:

> 'Make easy or easier; promote, help forward (an action, result etc.) Lessen the labour of, assist (a person)'.

'review' is defined as:

> 'Hold a review of (military or naval forces). View, inspect, or examine a second time or again. Survey; take a survey; look back on; survey in retrospect. Submit (a sentence, decision etc.) to review. Look over or through (a book etc) in order to correct or improve; revise. Also re-examine; reconsider.' [14]

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[11] 2000 (1) SA 879 (CC) at para [17]
[12] Zuma v Democratic Alliance And Others 2018 (1) SA 200 (SCA)
[13] See Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another 2015 (5) SA 245 (CC) within the context of section 8(1)*(c)(aa)* of the Promotion of Administrative Justice Act No 3 of 2000
[14] Shorter Oxford English Dictionary Fifth edition volume 1 and 2

[46] In giving meaning to the words, regard should also be had to the context in which they appear in paragraph 6.4 of the parenting plan. In that paragraph of the parenting plan, it is stipulated that the facilitator may not make any binding directive involving guardianship, relocation and the place of primary residence of the children. In respect of the maintenance, there is no similar restriction of the facilitator's powers. Therefore, it would appear that in respect of maintenance, a directive is binding.

[47] Within the context of the use of the words, and the applicable meaning thereof as explained above, I am of the view that the words 'regulate, facilitate and review issues relating to the children's maintenance', are wide enough to afford Mrs Bruwer the power to vary the original maintenance order as it is contained in the consent paper.

[48] However, that is not the end of the enquiry. I have to determine whether the judicial authority that was conferred upon Mrs Bruwer, was validly done, because Mrs M submits that delegation of judicial authority is impermissible. I turn to consider the relevant legislation, in order to establish whether such legislation could be the source of Mrs Bruwer's authority.

[49] Currently, there is no legislation in South Africa that expressly authorises a court to appoint a facilitator or parenting coordinator to determine disputes between parents with regard to maintenance.

[50] The only reference that I could find, dealing with statutory authority granted to a facilitator, is contained in regulation 4 of the Labour Relations Regulations, promulgated pursuant to section 208 of the Labour Relations Act 66 of 1995. It is prescribed that a facilitator has the following powers and duties:

> '4 <u>Powers and duties of a facilitator</u>
>
> (1) Unless the parties agreed otherwise, the facilitator may-

(a) chair the meeting between the parties;

(b) decide any issue of procedure that arises in the course of meetings between the parties;

(c) arrange further facilitation meetings after consultation with the parties;

(d) direct that the parties engage in consultations without the facilitator being present.

(2) A decision by a facilitator in respect of any matter concerning the procedure for conducting the facilitation, including the date and time of meetings, is final and binding.

(3) By agreement between the parties, the facilitator may perform any other function.'

[51] In terms of section 8(1) of the Divorce Act 70 of 1979, a maintenance order made in terms of the Act, may at any time thereafter be rescinded or varied if '… the Court finds that there is sufficient reason therefor …'. No similar authority is given to a facilitator.

[52] In terms of section 16(1)*(b)* of the Maintenance Act 99 of 1998, the maintenance court has the authority to substitute or discharge a maintenance order if good cause exists therefore. Similarly, no authority is given in the Maintenance Act to a facilitator to vary an existing maintenance order.

[53] The empowering legislation that deals with parenting plans, is found in section 33 of the Children's Act, which provides as follows:

'Contents of parenting plans

(1) The co-holders of parental responsibilities and rights in respect of a child may agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child.

(2) If the co-holders of parental responsibilities and rights in respect of a child are experiencing difficulties in exercising their responsibilities and rights, those persons, before seeking the intervention of a court, must first seek to agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child.

(3) A parenting plan may determine any matter in connection with parental responsibilities and rights, including-

(a) where and with whom the child is to live;

(b) the maintenance of the child;

(c) contact between the child and-

(i) any of the parties; and

(ii) any other person; and

(d) the schooling and religious upbringing of the child.

(4) A parenting plan must comply with the best interests of the child standard as set out in section 7.

(5) In preparing a parenting plan as contemplated in subsection (2) the parties must seek-

(a) the assistance of a family advocate, social worker or psychologist; or

(b) mediation through a social worker or other suitably qualified person.'

[54] In terms of section 34(1)*(b)* of the Children's Act, a parenting plan may be made an order of court. In this case the parenting plan was made an order of court. It should be noted that in terms of section 33(5) a social worker may assist in the preparation of the parenting plan when the parents have difficulties in exercising their responsibilities and rights. The role of the social worker is limited to 'assistance' and 'mediation'. No statutory right is given to a social worker to determine disputes that may arise from such parenting plan, after it has been made an order of court.

[55] Mr M contends that the parenting plan determined the maintenance, as provided for in section 33(3)*(b)* of the Children's Act. Because the parenting plan was elevated to the status of an order in terms of empowering legislation, it is finally a court order that empowered Mrs Bruwer to vary the maintenance order of the High Court. On the face of it, the argument is persuasive.

[56] Counsel for Mr M submitted that a court order must be obeyed, even if it is wrong, and parties must comply with such order, unless it is set aside by a competent court. That submission is equally convincing.

[57] With regard to the status of a judgment which has not been rescinded, the authorities are clear. In *Bezuidenhout v Patensie Citrus Beherend Bpk*, [15] Froneman J emphasised this principle as follows: [16]

> 'An order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong (*Culverwell v Beira 1992 (4) SA 490 (W) at 494A-C*). A person may even be barred from approaching the court until he or she has obeyed an order of court that has not been properly set aside (*Hatkinson v Hatkinson [1952] 2 All ER 567 (CA); Bylieveldt v Redpath 1982 (1) SA 702 (A) at 714*).'

[58] That passage was quoted with approval by the Supreme Court of Appeal in *Minister of Home Affairs v Somali Association of SA*. [17] In that judgment [18] it was stated :

> 'The cornerstone of democracy and the rule of law is the uncompromising duty and obligation on all persons, more especially state departments, to obey and comply with court orders. There are processes in place for those who disagree with court orders. But they are not free to simply turn a blind eye to the order nor do they have any discretion to not obey it.'

And at paragraph 35:

> '… there is an unqualified obligation on every person against, or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. It cannot be left to litigants themselves to judge whether or not an order of court should be obeyed. There is a constitutional requirement for complying with court orders, and judgments of the courts cannot be any clearer on that score.' [19]

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[15] 2001 (2) SA 224 (ECD).
[16] At 229B-C. See also Erasmus: Superior Court Practice, 2nd edition, Vol 2 at D1-562, and the authorities quoted at footnotes 1 and 2.
[17] 2015 (3) SA 545 (SCA), par 34.
[18] At para [33], page 570.
[19] At page 571.

[59] However, when a judge did not have the authority to issue a particular order, there is also another principle that applies to such an order. In *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala N.O. and Others* [20] and *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Claire Cooper and Others*, [21] the Supreme Court of Appeal held that where an order or part thereof amounts to a nullity, the order may be ignored and does not have to be set aside.

[60] In *Department of Transport and Others v Tasima (Pty) Ltd* [22] the Constitutional Court criticised *Motala* and said:

> 'Allowing parties to ignore court orders would shake the foundations of the law, and compromise the status and constitutional mandate of the courts. The duty to obey court orders is the stanchion around which a state founded on the supremacy of the Constitution and the rule of law is built.' [23]

And:

> '… judicial orders wrongly issued are not nullities. They exist in fact and may have legal consequences'. [24]

However, whether or not an order is '*enforceable*', depends on whether the judge :

> '… had the authority to make the decision that he did *at the moment that he made it*.' [25]

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[20] 2012 (3) SA 325 (SCA);
[21] 2018 (4) SA 71 (SCA)
[22] 2017(2) 622 CC
[23] At para [183]
[24] At para [182]
[25] At para [198]

[61] So, in applying the principles in *Tasima*, it means that if Weinkove AJ did not have the judicial authority to grant the power to a facilitator to exercise judicial authority, that part of the order does not have 'legal consequences' and it is not enforceable. Whether the order has no legal consequences, or whether it is unenforceable, it follows in my view that the facilitator would not derive rights therefrom to exercise judicial authority.

[62] I revert to the Children's Act. Upon a reading of section 33 of the Children's Act, it is evident that co-holders of parental responsibilities and rights in respect of a child may personally determine the maintenance of that child. However, the legislature has not given express authority in the Children's Act to the co-holders of such parental responsibilities and rights to delegate their statutory right of determining the maintenance, to a third party. So, the Children's Act did not authorise Weinkove AJ to delegate judicial authority to the facilitator.

[63] If there is no legislation that empowered the court to delegate judicial authority to the facilitator, one has to look for the source of that authority elsewhere. I turn to consider the relevant authorities in the United States of America. There, many jurisdictions that authorise the appointment of parent coordinators by statute or court rule, restrict the ambit of the parent coordinator's decision-making authority.

[64] In Texas [26] it is regulated that 'a parenting coordinator shall not have the authority to make any decision affecting child support, child custody, or a substantial change in parenting time.'

[65] In *Morrow v Corbin* [27] it was held that:

> '[T]he power thus confided to our trial courts must be exercised by them as a matter of non-delegable duty, that they can neither with nor without the consent of parties

[26] Tex. Fam. Code Ann. Ş 153.606 (c West 2009)
[27] 62 S. V. 2d 641, 645 (Tex. 1933)

> delegate the decision of any question within their jurisdiction, once that jurisdiction has been lawfully invoked …'.

[66] In *Salt Lake City v Ohms* [28] the court stated that non-judges cannot properly be assigned judicial duties because: '[T]here are no provisions which subject them to the constitutional checks and balances imposed upon duly appointed judges of courts of record'. In *Rae SH* [29] the court held that 'Under the separation of powers doctrine judicial powers may not be complemented, delegated to, or exercised by, either non-judicial officers or private parties'. In *State Farm Mut. Auto. Ins. Co. v Kendrick* [30] the court held that 'A trial court cannot delegate the sole authority to perform a purely judicial function'.

[67] In *D'Agostino v D'Agostino* [31] it was held that 'A court cannot delegate or abdicate, in whole or in part, its judicial power'. In *Ruisi v Thieriot* [32] it was held that a trial court's authority is '… constrained by the basic constitutional principle that judicial power may not be delegated'. In *Zafran v Zafran* [33] it was held that it was not an improper delegation of judicial authority to appoint a case manager which has no decision-making authority.

[68] In *Heinonen v Heinonen* [34] the Oregon Court of Appeals held that a trial court cannot delegate final decision-making authority to a parenting coordinator, even with consent of the parties, but the agreement whereby the parenting coordinator was allowed to make decisions, did not provide for the trial court's review of that decision. In *Edwards v Rothschild* [35] it was held that, to allow a parenting coordinator to make decisions, constituted an improper delegation of judicial authority, but that a parenting coordinator without decision-making authority may validly be appointed.

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[28] 881 P. 2d 884, 851 (Utah 1994)
[29] 3 Cal. Rptr. 3d 465, 471 n. 11 (Cal. Ct. App. 2003)
[30] 780 So. 2d 231, 233 (Fla Dist. Ct. App. 2001)
[31] 54 S. W. 3d 191, 200 (Mo. Ct. App. 2001)
[32] 62 Cal. Rptr. 2d 766, 772 (Cal. Ct. App. 1997)
[33] 761 N.Y. S. 2d 317 (N.Y. App. Div. 2003)
[34] 14 P. 3d 96 (Or. Ct. App. 2000)
[35] 60 A.D. 3d 675 (N.Y. 2009)

[69] In *William J. Bower v Michelle A. Bournay-Bower* [36] the Supreme Court of Massachusetts set aside the appointment of a parenting coordinator as it amounted to an unlawful delegation of judicial authority. Spina J held that:

> 'A judge's inherent authority does not extend to compelling a party to submit to the binding decision-making authority of a parent coordinator without that party's consent.' [37]

[70] The court also held that, if the parties had consented to the appointment, or if the parent coordinator's authority had been limited to assisting the parties in resolving their disputes by issuing recommendations to the parties '… the referral to the parent coordinator may have been permissible as a way to further the court's capacity to decide cases by encouraging resolution of the parties' disputes by the parties themselves.' [38]

[71] I turn to consider the South African authorities. In *Hummel v Hummel* [39] the applicant applied to court for an order that a case manager be appointed to deal with the conflict about the parenting of his son, and be clothed with powers to make a decision which would be binding on the parties, subject to the overriding jurisdiction of the High Court to overturn such a decision.

[72] Sutherland J held that the notion of a case manager is one that derives from the practice of the courts and is not a label used in the Children's Act. After considering the provisions of section 33 of the Children's Act, the court held that '… section 33 (5) [of the Children's Act] articulates the scope for intervention to render assistance to the parents, not make decisions for them'.

[73] The court also held that the role of any '… other suitable person (such as a facilitator or case manager) is to facilitate decision making rather than to be the

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[36] 469 Mass 690 (2014)
[37] At 702
[38] At 706
[39] Unreported case number 2012/06274 2012 JDR 1679 (GSJ)

decision-maker'. [40] The court concluded that [41] '… the appointment of a decision-maker to break deadlocks is a delegation of the court's power; itself and impermissible act'. I am in respectful agreement with the reasoning of Sutherland J in *Hummel*.

[74] By virtue of section 33(3)*(b)* of the Children's Act, the determination of maintenance is a parental responsibility and right. Put differently: in the first instance, parents must personally determine the maintenance of their children.

[75] In that regard, it should be noted that section 30(3) of the Children's Act prohibits the transfer of that parental right and responsibility to a third party:

> 'A co-holder of parental responsibilities and rights may not surrender or transfer those responsibilities and rights to another co-holder or any other person, but may by agreement with that other co-holder or person allow the other co-holder or person to exercise any or all of those responsibilities and rights on his or her behalf.'

[76] In my view, the effect of what took place in this matter, is that the parents transferred their parental responsibilities and rights involving the determination of maintenance, to Mrs Bruwer. That is inconsistent with section 30(3) of the Children's Act. The fact that Weinkove AJ sanctioned the parenting plan, does not cure the defect.

[77] In *TC v SC* [42] the court considered whether it had the authority, by virtue of its inherent jurisdiction as the upper guardian of minor children, to make an interim order whereby a facilitator is appointed to deal with parenting disputes. The court held:

> 'I consider that it is possible, by means of appropriate limitations on the scope of the PC's authority, to craft a role for the PC which does not constitute an unlawful delegation of judicial decision-making authority, but permits the parties (and indeed the court) to benefit from the services of a PC.' [43]

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[40] At paragraph [9]
[41] At paragraph [13]
[42] 2018 (4) SA 530 WCC
[43] At paragraph [50]

[78] The court further held [44] as follows:

‘ [71] To summarise then: I consider that a High Court may, in the exercise of its inherent jurisdiction as the upper guardian of minor children:

[71.1] appoint a PC with the consent of both parties, provided that:

(a) there is already an agreed parenting plan in existence, whether interim or final, which has been made an order of court;

(b) the role of the PC is expressly limited to supervising the implementation of and compliance with the court order;

(c) any decision-making powers conferred on the PC are confined to ancillary rulings which are necessary to implement the court order, but which do not alter the substance of the court order or involve a permanent change to any of the rights and obligations defined in the court order;

(d) all rulings or directives of the PC are subject to judicial oversight in the form of an appeal in the wide sense described in *Tikly and Others v Jes NO and Others*, ie ‘complete re-hearing of, and fresh determination of the merits of the matter with or without additional evidence or information’.’

[79] In *TC v SC* the court did not deal with the provisions of section 165 of the Constitution, which provides as follows:

‘165 Judicial authority

(1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

(3) No person or organ of state may interfere with the functioning of the courts.

(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

[44] At paragraph [71]

(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.'

[80] In *MEC for Health, Gauteng v Lushaba,* [45] the Gauteng MEC for Health, applied for leave to appeal, inter alia against a punitive cost order that was granted against him in a medical negligence case that was successfully instituted by the respondent. The trial court initially issued a rule *nisi* in the following terms:

'A rule nisi issues, calling upon the defendant to show cause on Tuesday 28 October 2014 at 10h00 why he should not be held liable personally de bonis propriis on the attorney and client scale, jointly and severally with the defendant on attorney and client scale, for the costs.

Alternatively to the preceding paragraph and should the defendant be of the view that he should not be held personally liable, he should identify such persons in the Department of Health of Gauteng, as well as such persons in the office of the state attorney, who should be personally held liable for the costs as well as the reasons why they should be so held liable.

The defendant's affidavits, dealing with the preceding two paragraphs, should be filed and served by no later than Thursday 23 October 2014 at 12h00.'

[81] The trial court confirmed the rule *nisi*, and ordered four officials which it deemed responsible, to pay *de bonis propriis* 50% of the costs jointly and severally with the MEC on an attorney and client scale. On appeal, the MEC submitted that the award was improperly issued. The Constitutional Court held that the above quoted order: '… reveals that the court impermissibly authorised one of the parties before it to exercise a judicial power'. [46] It further held:

'It was not competent for the High Court to allow the MEC to be the judge of whether he should be held personally liable and, if he should not be held personally liable, to identify who should be. This does not accord with s 165 of the Constitution which declares that judicial authority of the Republic is vested in the courts.'

[45] 2017 (1) SA 106 (CC)
[46] At para [13]

[82] We should also be mindful of section 2 of the Constitution which provides that conduct which is inconsistent with the Constitution, is invalid:

> 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'.

[83] I return to the facts of this matter. The objective effect of the directive is that the maintenance order, contained in the consent paper, has been varied.

[84] The decision whereby the High Court maintenance order was varied, was not taken by co-holders of parental responsibilities and rights, but by a third party (Mrs Bruwer). She acted as a judicial officer and exercised a judicial power that falls within the preserve of courts. It is common cause between Mr and Mrs M, that Mrs Bruwer, in determining the new maintenance, acted as a judicial officer. [47]

[85] The most unusual process that unfolded before Mrs Bruwer, was a quasi-judicial process, because she directed Mr and Mrs M to produce particulars of their income and expenditure in order to review the maintenance that Mr M paid in respect of the children. In addition, Mrs M submitted a schedule of her income and expenses to Mrs Bruwer. The schedule, inter alia reflects the gross and nett salary of Mrs M. The expenditure schedule deals with items such as groceries, household expenditure, clothes, transport, educational expenditure, medical expenditure, insurance, pocket money, holidays, house maintenance, gifts, pet food and gym fees.

[86] The schedule of income and expenses is similar to the pro-forma schedule that is found in the Maintenance Act. In terms of section 6(1) of the Maintenance Act, a maintenance officer shall investigate a complaint that has been lodged in the prescribed manner. In terms of regulation 2(2) a complaint for the substitution or

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[47] In paragraph 41 of the founding affidavit, record 19, Mrs M stated: "… earlier this year, the second respondent (Mr M) declared the children's maintenance a dispute with the first respondent (Mrs Bruwer), who then duly assumed the role of a judicial officer, declaring that she will review the maintenance payable to me for the children." Mr M admitted the aforegoing (see paragraph 27 of the opposing affidavit at record 135).

discharge of a maintenance order shall be substantially in accordance with Form B. Form B contains the following sub-items under the heading ‘Expenditure’: Lodging, food, household expenditure, clothing, personal care, transport, educational expenditure, medical expenditure, insurance, pocket money, holidays, maintenance of house, entertainment, personal loans, security alarm system, membership fees, religious contributions, gifts, TV licence, reading material, lease / hire purchase payments, pets and other.

[87] The schedule of income and expenses that Mrs M produced, is nearly identical to Form B prescribed under the Maintenance Act.

[88] In determining this matter, a court should also have regard to section 28(2) of the Constitution which provides:

> ‘A child's best interests are of paramount importance in every matter concerning the child.’

[89] That constitutional principle is entrenched in section 9 of the Children's Act which provides:

> ‘In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.’

[90] In my view, it is self-evident that it is not in the best interests of a child that a social worker should be granted the judicial authority to vary a maintenance order of the High Court.

[91] I find that by issuing the directive whereby the maintenance order of the High Court was varied, Mrs Bruwer impermissibly purported to exercise judicial authority, contrary to the provisions of section 165 of the Constitution. Her conduct is unlawful and invalid. The directive stands to be set aside.

[92] Even if it can be found that Mrs Bruwer derived her authority from a parenting plan that was elevated to the status of a court order, the terms of that court order, insofar as it purports to delegate judicial authority to her, is inconsistent with section 165 of the Constitution, invalid and unenforceable. By virtue of section 2 of the Constitution, a court is certainly not authorised to grant an order which is inconsistent with the Constitution, because such conduct would be invalid.

Can review by the High Court cure the defect?

[93] It may be argued that the judicial conduct of Mrs Bruwer is not invalid, because the parenting plan determines that the decision of Mrs Bruwer stands '… unless the High Court, as upper guardian of the children, orders otherwise'. [48] In other words, because the High Court has the right to review and set the directive aside, the initial defect in delegating judicial authority to Mrs Bruwer, is cured by the review process.

[94] In *Kelm v Kelm* [49] the court declined to allow arbitration of child custody issues which go to the 'very core of the child's welfare and best interests', because that would 'encroach upon the trial court's traditional role as p*arens patriae*'. [50] The court in *Kelm* was not convinced by the argument that the opportunity for judicial review of the arbitration award, cured the defect. The court held that the opportunity for *de novo* judicial review of an arbitration award destroys the parties' expectation that an arbitration award will be final, and the court held that it would be wasteful of time and a duplication of effort.

[48] See paragraph 6.5 of the parenting plan
[49] 749 N. E. 2d 299, 301 (Ohio 2001)
[50] Parent of the nation

[95] In *William J Bower* [51] the court held that judicial review does not cure the initial defect because it '… is insufficient to cure the limitations on access to the courts created by compelling a parent to submit to binding dispute resolution'.

[96] In *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [52], although dealing with administrative action and not a court order, the Supreme Court of Appeal, inter alia said :

> 'Thus the proper enquiry in each case — at least at first — is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts'. [53]

[97] In applying that principle to the facts of this matter, and as there was no substantive validity in delegating judicial authority to the facilitator, the consequent directive of the facilitator was also invalid. One cannot validate invalidity, by bringing it under review to the High Court.

[98] In my view the initial unauthorised (or invalid) act of delegating judicial authority, cannot be cured by a High Court by ex post facto considering whether the conduct of Mrs Bruwer was right or wrong. Attempting to review conduct which is inherently invalid, involves further legal proceedings which are highly prejudicial to Mrs M, or for that matter, any other parent who would be faced with a similar directive whereby maintenance was varied.

[99] My reasons for holding that such review is prejudicial, are as follows:

[99.1] Generally, parties should be subjected to one process to resolve their dispute;

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[51] At 705
[52] 2004 (6) SA 222 (SCA)
[53] At para 31

[99.2] No written particulars of the claim for the reduction of maintenance were produced;

[99.3] No oral evidence was produced;

[99.4] No cross-examination was conducted;

[99.5] No record of the proceedings was kept. Under those circumstances a court (and Mrs M) will be at a significant disadvantage, because it will not be known what evidence was produced and what factual findings were made in respect thereof. Absent evidence, how does a party then challenge such non-existing 'evidence' on review? ;

[99.6] It is unclear who bears the onus of proof in such a review application. If it is Mrs M, she would be disadvantaged because presumably a quo, Mr M bore the onus to prove his claim for a reduction of maintenance. On review, the onus may possibly then shift to Mrs M;

[99.7] If there are factual disputes, the matter must presumably not be determined on the respondent's version, based on the *Plascon Evans* [54] principle, as in *B v S* [55] the Supreme Court of Appeal held: 'Because the welfare of a minor is at stake, a Court should be very slow to determine the facts by way of the usual opposed motion approach.' ;

[99.8] It would generally take a substantial amount of time before an applicant's review application is heard;

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[54] 1984 (3) SA 623 (A) at 634 - 635

[55] 1995(3) SA 571 (A) at 585E

[99.9] There are usually significant legal costs involved in review proceedings. If the matter had to be heard in the Maintenance Court, costs would usually be much less, and in many cases, there would be no costs;

[99.10] Should the review involve a whole new hearing? If so, presumably the parties will have to present evidence at a trial. But that will involve very significant legal costs in the High Court. It cannot be in the best interests of children that a trial should be conducted in the High Court about their maintenance;

[99.11] As a matter of policy, I think it is wrong to deprive a child of maintenance for a long time until an incorrect directive is set aside on review by a High Court.

[100] In my view *Lushaba,* [56] duly interpreted, is authority for the principle that the *initial* delegation by a court of judicial authority to a non-judicial person, cannot subsequently be cured by the same court when it reviews the decision of such non-judicial person. It will be recalled that in *Lushaba,* the court *initially* conferred judicial authority on the MEC to, inter alia identify persons who should be held personally liable for costs and then to report back to the court on affidavit who those persons were, in order for the court to *finally* consider and review the decision of the MEC, and to grant an order based on the decision of the MEC. Put differently: the court retained the overriding authority to review the decision of the MEC with regard to the question who should be held personally liable. The Constitutional Court held that:

> '… the court impermissibly authorised one of the parties before it to exercise a judicial power.' [57]

[56] 2017 (1) SA 106 (CC) at para 13
[57] At para 13

[101] I conclude that the right of either party to approach the High Court in order to review the judicial authority exercised by Mrs Bruwer, does not cure the unconstitutional and fundamental defect of delegating judicial authority to a social worker – contrary to section 165 of the Constitution. Once that delegation is impermissible and unauthorised, the very act of delegation of judicial authority is, and remains unauthorised.

A fair hearing?

[102] I proceed to consider whether the directive stands to be set aside on the separate ground that Mrs Bruwer failed to ensure that the parties were afforded a fair hearing.

[103] In terms of section 34 of the Constitution, Mrs M was entitled to a fair hearing : [58]

> 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

[104] In *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* [59] the Constitutional Court explained the right to a fair hearing as follows:

> 'This s 34 fair hearing right affirms the rule of law, which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and Rules of Court, where it is reasonably possible to do so, in a way that would render the proceedings fair. It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable

[58] Assuming that Mrs Bruwer could validly review the maintenance order.
[59] 2002 (1) SA 429 (CC) at paragraph 11

> opportunity to state their case. That reasonable opportunity can usually only be given by ensuring that reasonable steps are taken to bring the hearing to the attention of the person affected. Rules of Courts make provision for this.'

[105] In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [60] the Constitutional Court held:

> 'A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies, of course, to both criminal and civil cases as well as to quasi-judicial and administrative proceedings.' [61]

[106] In this matter Mrs Bruwer failed to ensure that there was a fair hearing. My reasons are as follows:

[106.1] Mrs M was not informed exactly what the nature was of the relief that Mr M was seeking. At the very least, and prior to the hearing, Mrs Bruwer should have ensured that Mrs M knew by which amount Mr M was claiming a reduction of his maintenance obligations.

[106.2] Mrs Bruwer did not afford Mrs M the opportunity to have insight into the documents that dealt with the financial situation of Mr M. [62]

[106.3] Mrs Bruwer did not afford the opportunity to Mrs M to make representations to her, based on the documents of Mr M, prior to issuing the directive on 29 March 2018. [63]

[106.4] In my view, it was incumbent upon Mrs Bruwer to at least have given an opportunity to Mrs M to address her about all the relevant issues including the financial position of Mr M, the financial position

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[60] 1999 (4) SA 147 (CC)
[61] At paragraph 35
[62] Paragraph 46 record 21; paragraph 29 record 136
[63] Paragraph 46 record 21; paragraph 29 record 136

of Mrs M as well as the needs of the children. It is clear that this never took place.

[106.5] There was no hearing held, and therefore the parties could not present evidence, or conduct cross-examination.

[107] Even if it could be held that there was a valid delegation of judicial authority, the difficulty that one has, as a general proposition, is that the variation of a maintenance order, should be done by a person who is legally qualified and has the necessary knowledge of the relevant legal principles. That is what the legislature achieves with the Divorce Act and the Maintenance Act, because only judges and magistrates have that judicial authority.

[108] In this matter, the variation of the High Court maintenance order, was done by a social worker, being Mrs Bruwer. As such, she is obviously not legally qualified, trained or has the necessary legal experience.

[109] In her affidavit of 24 October 2018, Mrs Bruwer states that she appointed Mrs le Roux '… for the maintenance dispute …' and she '… *relied* on her expertise and experience to come to the directive issued'. [64] (emphasis added)

[110] It would therefore appear that Mrs Bruwer, realising that she did not have the necessary qualifications and expertise to determine the reduction in maintenance, relied on the expertise and experience of a non-practising attorney. That conduct demonstrates that the judicial authority that was delegated to Mrs Bruwer, was effectively further delegated to Mrs le Roux. But, the maxim is: *delegatus delegare non potest.* [65] Mrs Bruwer was in law not permitted to rely on a third party to effectively do the determination of the maintenance.

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[64] See paragraph 17.1 of the affidavit, record 206

[65] In *South African Reserve Bank and Another v Shuttleworth And Another* 2015 (5) SA 164 (CC) at para 16 the Constitutional Court explained that the principle is that a delegate cannot delegate.

[111] I seriously doubt whether the parties, when they entered into the parenting plan, envisaged that the appointed facilitator would have the right to delegate her decision-making powers to another person.

[112] It is clear that a fair hearing was not held. Therefore, and also on this ground alone, it follows that the directive cannot stand, and must be set aside.

Is the second ruling vague and therefore invalid?

[113] In terms of the second ruling, Mrs Bruwer found:

> 'I therefore direct that Louise ensures and provides monthly proof that the one third payment towards N are (sic) for the sole benefit of N, by either paying the said amount directly to N during the months that she is not in her care, or spend the money on real needs of N, which can be supported by documentation.'

[114] Counsel for Mr M fairly conceded that the aforegoing ruling is unusual, vague and difficult to implement. In my view, this ruling creates more confusion than certainty. How can it be established what the 'real needs' of N are? Who is going to do that investigation? What 'documentation' will suffice? Must the 'monthly proof' be furnished as a pre-condition, prior to the payment of the maintenance by Mr M, or must it be provided after the money has been spent? Further, Mrs Bruwer does not have the right to determine that maintenance which is paid in respect of N, must be for the 'sole benefit' of N.

[115] In *City Capital* [66] the Supreme Court of Appeal held that a court order that is erroneous and vague, amounts to a nullity. It also stated that:

> 'The doctrine of vagueness, which is founded on the rule of law, is a foundational value of our constitutional democracy. It requires laws to be written in a clear manner,

[66] 2018 (4) 71 (SCA) at para 33 - 39

> with reasonable certainty and not perfect lucidity. Orders of court must comply with this standard: vague provisions in a court order violate the rule of law.' [67]

[116] Although the second ruling, forming an integral part of the directive, is not a court order, I am of the view that the abovementioned doctrine of vagueness is similarly applicable to the terms of the directive. As it is vague, the second ruling is either not enforceable, [68] or it amounts to a nullity. It cannot have any legal effect.

[117] Faced with this difficulty about the vagueness of the second ruling, counsel for Mr M submitted that the second ruling is severable from the rest of the rulings. If he is correct, it means that only the second ruling has to be set aside on the basis that it is vague. If he is incorrect, it means that the whole directive must be set aside.

[118] In my view, the second ruling is indeed severable from the rest of the directive and does not automatically result in the unenforceability or invalidity of the other rulings. As explained above, there are other grounds upon which the other rulings should be set aside.

Should Mrs Bruwer be removed as facilitator?

[119] It now remains to consider whether Mrs M is entitled to an order whereby Mrs Bruwer is removed as facilitator. I proceed to consider that issue.

[120] Despite Mrs M having submitted a detailed list of her monthly income and expenditure, Mrs Bruwer failed to deal with that evidence in her directive. In this regard, Mrs M contends that on 27 March 2018, prior to the issuing of the directive, Mrs Bruwer had already made up her mind and pre-judged the outcome, even before Mrs Bruwer received all the relevant financial documents of Mrs M. On 27

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[67] At para 35
[68] *Tasima* at para 198

March 2018 Mrs Bruwer informed Mrs M in an e-mail that the fact that L is in boarding school, will be taken into consideration with regard to the maintenance that is paid to Mrs M, and in respect of J, the maintenance will remain unchanged. [69]

[121] Mrs M further says in her founding affidavit that Mrs Bruwer could not have worked through the bundle of vouchers that was given to her on 27 March 2018, prior to issuing the directive on 29 March 2018.

[122] In an e-mail of 26 February 2018, Mrs Bruwer conveyed the following to Mrs M:

> 'One child is out of the house and the other one is in boarding house, which has a significant impact on the maintenance.' [70]

[123] That statement illustrates that Mrs Bruwer was already showing a strong inclination to reduce the maintenance payable by Mr M. She showed a biased approached, before she was placed in possession of all the documents relating to income and expenses. As early as 20 February 2018, Mrs M warned Mrs Bruwer that her directives were not going to be enforceable.

[124] On 8 March 2018 Mrs M sent an e-mail to Mrs Bruwer in which she stated:

> 'without doubt, you are acting in a biased manner …'. [71]

[125] In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [72] the Constitutional Court held that a judicial officer who sits on a case in which he or she should not be sitting, because seen objectively, the judicial officer is either actually biased or there exists a reasonable

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[69] Mrs Bruwer used the word "*onveranderd". See record 91*
[70] My translation from Afrikaans
[71] My translation from Afrikaans
[72] 1999 (4) SA 147 (CC) at para [30]

apprehension that the judicial officer might be biased, acts in a manner that is inconsistent with the Constitution. In this matter, Mrs M justifiably had a reasonable apprehension that Mrs Bruwer was biased.

[126] It is clear, as explained above, that Mrs Bruwer failed to ensure that Mrs M had a fair hearing. It is obvious that she has lost confidence and trust in Mrs Bruwer, and under those circumstances, it would not be in the best interests of the children that Mrs Bruwer remains as the appointed facilitator. It follows that Mrs Bruwer should be removed as the facilitator.

Costs

[127] Regrettably, Mrs Bruwer adopted an unfortunate attitude in this matter, which warrants Mrs M's concern of bias. Even before she was placed in possession of the income and expenses of Mrs M, she proclaimed on 27 March 2018 that she was going to reduce L's maintenance. That is exactly what she did on 29 March 2018.

[128] An impartial person should not advise one party to a dispute, before adjudication commences, that there is a possibility that the final ruling will be against that party – especially when all the evidence has not yet been produced. That is fundamentally wrong.

[129] In the fourth ruling, while dealing with J, she stated that 'Should J become a weekly boarder at school, Fanie's maintenance obligations to Louise shall be reviewed along the lines as set out above', which illustrates that she has probably pre-judged the matter. She cannot *now* determine that in future she will reduce the maintenance for J, because she does not now know what the future financial position of the parents is going to be.

[130] As a result of the conduct of Mrs Bruwer, Mrs M had to incur legal costs. On various occasions after the issuing of the directive on 29 March 2018, Mrs M requested Mrs Bruwer to resign as facilitator. Despite all those requests, she refused to resign. She was also requested to recall her directive, but she justified it by, inter alia stating that her directive is a 'legal result' and is binding until set aside. That may possibly be correct.

[131] Despite the meeting on 5 June 2018 where Mrs Bruwer was again requested to resign, she refused. Instead, she informed the parties that she was appointing Mr Craig Snyder as her co-coordinator. On a reading of Mrs Bruwer's affidavit, it is clear that she does not want to resign as facilitator, and wishes to retain that position. [73] I can see no reason why Mrs Bruwer should not be held liable for the costs.

[132] Mr M contends that the directive should stand, and that Mrs Bruwer should not be removed as facilitator. His opposition to the application, has been unsuccessful. I see no reason why he should also not be held liable for costs.

Order

[133] I make the following order:

[133.1] The directive issued by Esna Bruwer on 29 March 2018 is reviewed and set aside.

[133.2] Esna Bruwer is removed as the facilitator appointed pursuant to the parenting plan dated 25 March 2014, attached to the consent

[73] In paragraph 15 of her affidavit she says "*I do not believe that there is merit in the allegations by applicant in respect of my role as facilitator and believe that I would be doing a disservice to the re-arranged M family unit should I resign.*"

paper and made an order of court under case number 10037/2013.

[133.3] The applicant and the second respondent are directed to agree on another facilitator within 60 days of this court order, failing which, either one may approach FAMAC to appoint such a facilitator.

[133.4] The first and second respondents are ordered, jointly and severally, if the one pays the other is to be absolved, to pay the costs of this application.

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WESLEY VOS, AJ