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REPUBLIC OF SOUTH AFRICA



**SOUTH GAUTENG HIGH COURT
JOHANNESBURG**

CASE NO: 2014/05881

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

GLADYS MIYOBA MULOMBA

Applicant

And

KINGSLEY IDISI

Respondent

J U D G M E N T

FISHER AJ:

[1] This matter came before me in the unopposed motion court as an unopposed application. The Applicant, the mother of a minor child, N..... O..... I..... (*the child*), sought in terms of section 28 of the Children's Act 38, 2005 (*the Act*) that all the Respondent's parental rights in respect of the child be terminated. It was clearly contemplated in seeking such relief that the parental responsibilities would remain intact. Ancillary relief was sought in the form of an order that the surname of the child as registered with the Department of Home Affairs be changed from that of the Respondent to that of the Applicant.

[2] The salient facts of the application are as follows:

1. The Applicant and the Respondent, who is from Nigeria, are unmarried.
2. The Applicant met the Respondent in South Africa in August 2008 and the minor child was born on 27 May 2009 in South Africa.
3. The parties did not reside together at any time
4. After the birth of the child, the registration of the child's birth took place on the basis that Respondent was, with his consent, identified as the

father of the child in the records of the Department of Home Affairs.

5. The relationship between the Applicant and the Respondent continued for approximately a year after the birth of the child.
6. Throughout the relationship between the parties, the Respondent showed a lack of commitment to the child and did not maintain him or take any interest in his wellbeing.
7. The Respondent has been invited by the Applicant to participate in the child's life, but has failed to do so.
8. The Respondent has essentially abandoned the Applicant and the child and is currently untraceable.
9. The Applicant alleges that, whilst she and the Respondent were in contact, she was told that he was involved in unlawful activities. She alleges that he is of criminal disposition. She goes as far to suggest that the Respondent "*may even go the extent of selling the child if he were allowed to take care of him without my supervision*". (I must add here that no proper basis laid for any of these serious contentions).
10. One of the main complaints of the Applicant is that she is

inconvenienced when seeking to travel out of the country with the child in that she is required to request the consent of the Respondent to remove the child from South Africa. She has family in Zambia and wishes to travel there with the child.

11. Service of the application took place by substituted service and there was no opposition by the Respondent.

[3] The Respondent acquired full parental responsibilities and rights by virtue of section 21(1)(b)(i) of the Act when he consented to being identified as the child's father.

[4] When counsel for the Applicant stood up to move the application, I indicated that, in my view, the relief sought in relation to the termination of the parental rights only (as opposed to rights and responsibilities) was not competent. After some debate in relation to what would be a proper order in the circumstances, the matter stood down, at counsel's request, so that a draft order could be prepared requesting alternative relief. Counsel appeared later with a draft order and moved for the relief set out therein. I was satisfied that a proper case was made out on the papers for the relief contained in the draft order. Pursuant thereto the following order was handed down by me:

- "1. *The Respondent's parental rights and responsibilities in respect of the minor child, N..... O..... I....., are suspended until such a time as any application for maintenance is made by or on behalf*

of the minor child.

2. *The Applicant is the sole guardian of the minor child during the course of the suspension of the Respondent's parental rights and responsibilities which will include:*
 - 2.1 *to administer and safe-guard the child's property and interest;*
 - 2.2 *to apply for the minor child's passport from the Department of Home Affairs of South Africa and the necessary visas from the relevant foreign authority without the necessity of KINGSLEY IDISI consenting thereto and/or signing any document;*
 - 2.3 *to remove or consent to the removal or departure of the child from the Republic of South Africa without KINGSLEY IDISI's consent.*
3. *The Department of Home Affairs [is to] register the minor child with the Applicant's surname.*
4. *No order is made as to costs."*

[5] I am now called upon by the Applicant's attorneys, to provide reasons for the order granted and more specifically as follows:

- "5. *We are instructed to request written reasons from the Honourable Court for the decision:*
 - 5.1 *to suspend the Respondent's parental rights and parental responsibilities as opposed to only suspending the Respondent's parental rights;*
 - 5.2 *that the suspension will only be effected until such time any application for maintenance is made by or on behalf of the minor child;*
 - 5.3 *not to terminate the Respondent's parental rights."*

[6] On the basis that the relief sought on behalf of the Applicant was granted, it is an unusual step for reasons to be sought by the Applicant. Be that as it may, and, on the basis that I do not make a finding that an Applicant is entitled to reasons in such circumstances, I have decided to give a judgment in the matter. The reason for this is that the matter involves the fundamental rights of a child as well as important considerations relating to the interpretation of sections of the Act.

[7] Chapter 3 of the Act deals with parental responsibilities and rights. Section 18(2) states the following in relation to parental responsibilities and rights:

“(2) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right –

- (a) to care for the child;*
- (b) to maintain contact with the child;*
- (c) to act as guardian for the child; and*
- (d) to contribute to the maintenance of the child.”*

(My emphasis)

[8] In terms of section 1(1) of the Act parental responsibilities and rights are defined to mean “*the responsibilities and the rights referred to in section 18*”.

[9] Section 18 represents a partial codification and recasting of the common law

concept of “*parental power*” or “*parental authority*”.¹ Such concept amounts to a conglomeration of rights and obligations that flow naturally from the state of being a parent. These rights and obligations, for the most part, exist concomitantly. A parent naturally and in the absence of any limitation, has both the right and the obligation to carry out his or her overall function as parent, with all that this entails.

[10] The incidents laid down in sub-sections 18(2)(a) to (d) are cast as both responsibility and right. It is clearly neither desirable nor practicable to attempt to define which of the incidents of the parental condition is “*right*” and which “*obligation*”.²

[11] The other sections in the Act dealing with parental responsibilities and rights refer to such responsibilities and rights conjunctively. There is no attempt made by the Legislature to delineate this concept in a way that seeks to identify the components of this concept as being either right or responsibility.

¹ See J. Heaton: Chapter 3 – Parental Responsibilities and Rights in: **Commentary on the Children’s Act**, edited by CJ Devel and AM Skelton (revised Service 6, 2013) at 3-4

² South Africa is not alone in defining parental function as comprising concomitant rights and responsibilities. Other jurisdictions adopt similar characterisations in their legislation, for example:

1. section 3(1) of the United Kingdom, Children Act 1989 defines “parental responsibility” to mean:

“... *all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property*”. (My emphasis);

2. section 61B of the Australian Family Law Act of 1975 defines “parental responsibility” to mean “...*all the duties, powers, responsibilities, and authority which by law parents have in relation to children*”. (My emphasis)

[12] Section 28 of the Act is no exception. It reads as follows:

“28 Termination, extension, suspension or restriction of parental responsibilities and rights

(1) A person referred to in subsection (3) may apply to the High Court, a divorce court in a divorce matter or a children’s court for an order-

(a) suspending for a period, or terminating, any or all of the parental responsibilities and rights which a specific person has in respect of a child; or

(b) extending or circumscribing the exercise by that person of any or all of the parental responsibilities and rights that person has in respect of a child.”

[13] Thus, on a purely linguistic treatment of section 28(1)(a), the subject is not treated disjunctively - i.e. the section does not provide for a suspension or termination of any or all of the parental responsibilities or rights. This indicates that it was not the intention of the Legislature that a general suspension or termination of rights alone or responsibilities alone would be competent. (The section obviously permits of orders where certain responsibilities and/or rights can be singled out for special definition and treatment, however this was not sought here.)

[14] Parental responsibilities and rights are, for the most part, two sides of the same coin. Thus on a purposive interpretation of section 28(1)(a), an order, which terminated rights but left in place responsibilities, would be difficult, if not impossible of application. Such a result could never have been intended by the Legislature.

[15] The alternative relief sought in the draft order accorded with these general principles on the basis that it did not seek to separate rights from responsibilities.

[16] In relation to the suspension in the order, section 28(1)(a) authorises the suspension of parental responsibilities and rights “*for a period*”. The suspension thus cannot be indefinite. This suggests that it can be for a specified period or can be linked to the occurrence of a future event.³ The latter approach obviously has the potential to create some uncertainty when it comes to establishing, for the purposes of dealing with third parties, whether the event that delineates the suspension has occurred or ceased to operate. The determination of the status of unmarried fathers, being as it is dependent on factors that are not always readily apparent, is such that uncertainty of this nature is sometimes unavoidable⁴. Such uncertainties are generally capable of resolution by way of affidavit or other means of satisfying third parties as to the position. As a last resort the court can be approached for clarity.

[17] The order sought in this matter linked the suspension of rights and responsibilities to the child’s maintenance requirements. I considered this to be a proper course in the circumstances of the matter.

³ In **Commentary on the Children’s Act**: *supra* at 3-27 – J. Heaton (who contributed the section in this work on Chapter 3) suggests that suspension can be linked to occurrences such as jail terms of parents, the finding of proper accommodation or rehabilitation of parents in respect of conditions which may have caused the suspension.

⁴ For example it may be necessary to provide information in order to satisfy a third party that a father has acquired full parental rights and responsibilities in that he was

[18] Should the Respondent make a reappearance and be required to start contributing to the maintenance of the child, this would, in my view, be a proper time for the suspension to end and for the scope of the parent/child relationship to be revisited.

[19] Whilst it is accepted that the obligation of a parent to maintain his or her child is not, in the normal course, affected by whether that parent is allowed to exercise other parental rights and responsibilities, the contribution by a father to his child's maintenance cannot be underestimated in relation to its importance to the parental condition. This is recognised by the Legislature: In terms of the section 21(1)(b)(iii) the making of a contribution to the child's maintenance is an act that is regarded as momentous enough to bring about the acquisition by an unmarried father of full parental responsibilities and rights where they did not previously exist.

[20] I was satisfied that this provision in the order serves also to preserve the right to claim maintenance, should such preservation be necessary. In this regard section 21(2) provides that the provisions of section 21 “...*do not affect the duty of a father to contribute towards the maintenance of the child.*” This suggests that the responsibility of an unmarried father to maintain his child continues to exist as a duty which is distinct and independent from whether or not he has acquired parental rights and responsibilities by operation of section 21, and that the common law

living with the mother at the time of the birth or that he has “*contributed to the child's upbringing*” as contemplated by section 21 of the Act.

position relating to the obligation to pay maintenance (i.e. that it existed separately from the parental authority) is thus preserved by the Act. Whether the obligation to pay maintenance would survive a blanket termination or suspension of parental responsibilities and rights under section 28(1)(a) is, however, not clear. My sense is that it would, however I was not called upon to deal with this aspect in light of the terms of the order sought, which operates, in any event, to preserve the right to claim, at least, future maintenance.

[21] In the circumstances, and on a consideration of the relationship between the child and the Respondent, the present degree of commitment the Respondent has shown towards the child, and the interests of the child generally, I considered that the order sought on behalf of the applicant in terms of the draft order was a proper one.

DC FISHER

Acting Judge of the High Court

APPEARANCES:

For the Applicant:

Adv Nzwisisai Dandadzi-Dyirakumunda instructed by Fasken Martineau Inc

DATE OF HEARING

20 May 2014

DATE OF JUDGMENT

20 May 2014 / 6 October 2014