

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, BHISHO)**

CASE NO: 628/2013

In the matter between:

**HELEN STEWART obo
A. S.**

Applicant

and

**THE MEMBER OF THE EXECUTIVE
COUNCIL DEPARTMENT FOR SOCIAL
DEVELOPMENT, EASTERN CAPE PROVINCE**

First Respondent

**THE DIRECTOR-GENERAL OF THE
DEPARTMENT OF SOCIAL DEVELOPMENT,
EASTERN CAPE PROVINCE**

Second Respondent

**THE DESIGNATED SOCIAL WORKERS,
DEPARTMENT OF SOCIAL DEVELOPMENT**

Third Respondent

JUDGMENT

MBENENGE J:

Introduction

[1] This application started off during October 2013 as a quest founded on the provisions of the Promotion of Administrative Justice Act 3 of 2000 for an order setting aside the alleged failure by the second and/or third respondent(s) to investigate and compile a report on the care and circumstances of a minor child, A. S. (A.), for purposes of determining whether she was a child in need of care and protection, and

for the grant of other relief ancillary or consequential thereto. Approximately 6 months thereafter, during April 2014, the Children's Court, Alice (Children's Court) found A. to be in need of care and the applicant to be a suitable foster parent. A foster care grant was also recommended, so much so that the applicant's concerns got to be allayed, resulting in the parties resolving their differences, save the question of costs.

[2] Because a judgment for costs involves a decision on the merits, and a claim for costs cannot stand alone,¹ it has become necessary to consider the merits of the application with a view to determining who as between the applicant and the respondents would have been successful had the matter proceeded to its logical conclusion. To that end, I deal first with the relevant statutory background and, thereafter, the factual matrix of the case.

Statutory background

[3] In terms of section 154 of the Children's Act 38 of 2005 (the Act) a person under whose care a child placed in temporary safe custody may, if she/he, on reasonable grounds, believes that the child is in need of care, refer the child to a designated social worker for investigation contemplated in section 155(2) of the Act.

[4] Section 155(2) of the Act casts a duty upon a designated social worker, before a child believed to be in need of care and protection as contemplated by section 154 of the Act is brought before a children's court for a decision (whether the child is in fact in need of care), to investigate the matter and within 90 days compile a report in the prescribed manner on whether the child is in need of care and protection.

[5] If the court finds that the child is in need of care and protection, the court may make an appropriate order in terms of section 156.²

[6] The court may, in respect of a child in need of care and protection, make any order which is in the best interest of the child, including an order, if the child has no parent or care-giver, that the child be placed in foster care with a suitable foster parent.³

¹ *Nxumalo v Mavundla* 2000 (4) SA 349 (D) at 352F.

² Section 155(7) of the Act.

³ Section 155(1)(e)(i) of the Act.

[7] The order of 7 April 2014 referred to in paragraph [1] above was granted on the strength of a “*SOCIAL WORKER’S REPORT AND NECESSARY DOCUMENTS SUBMITTED*”, ostensibly in terms of section 155 (7) of the Act, in so far as it found A. to be a child “*in need of care*” and, ostensibly in terms of section 156(1)(e)(i) of the Act, in so far as it found the applicant to be a suitable foster parent. The circumstances in which the order was granted are not altogether clear.⁴

[8] It is common cause or at least not in dispute that A.’s biological mother, the late M. S. (the deceased), passed away on 14 November 2007. A. is on record as having not had any form of relationship with her biological father, whose whereabouts are, in any event, unknown. When she was still alive, the deceased raised A. as a single parent and as such was responsible for her care, maintenance and support. A. was about seven years old when the deceased expired, and ended up being given care by her maternal aunt, the applicant.

[9] During 2012 the applicant solicited the assistance of the Social Worker, Alice towards the care of A.. There is a dispute of fact on the papers regarding the precise nature of the assistance the applicant sought. According to the applicant she lodged an application for a foster care grant in respect of A., during April 2012, whilst according to the respondents the applicant never attended upon the Alice Social Worker’s office during April 2012, but did so in May 2012 with a view to seeking assistance from the Social Worker concerning A.’s academic abilities and progress at school, and not otherwise.

[10] According to the applicant, when it became clear that she was getting no joy, because the social worker concerned had directed her to search for A.’s biological father which was well nigh impossible for her to achieve, and after demands made by her attorney urging the social worker to compile a report of her investigations did not yield positive results, she resorted to launching the instant application.

[11] The letter penned by the applicant’s attorneys of record predating the launch of the application (the letter is dated 17 September 2013) and allegedly transmitted to,

⁴ This will be discussed in greater detail later in this judgment.

inter alia, the first respondent, captures the essence of the applicant's complaint in the following terms:

"We have to advise that we are acting for and on behalf of our client, MS Helen Stewart. Our instructions are to advise that our client is the aunt and care giver to A. S., a fourteen year old minor whose biological mother, M. S. passed away on the 14th of November 2007. We are informed that at all material times hereto, the deceased was single parent who was solely responsible for the care, and support of the minor child.

According to our instructions, our client has no knowledge of the particulars, whereabouts nor the identity of the biological father of the minor child, in as much as she was never introduced to her or to the family. Our client, a forty five year old unemployed, illiterate and indigent woman has no means to maintain and support the child in issue.

We are advised by our client that in or about April 2012, she approached your Alice district office for the purpose of presenting an application for the Foster Child Grant in respect of the child in issue. We are further informed that our client was referred to a Social Worker. According to our client the Social Worker in attendance advised her to go back home and trace the biological father of the minor child in issue. According to the Social Worker in attendance, her department and/ or SASSA had no obligation to pay a client was advised to approach Maintenance Court for a maintenance claim against the biological father.

We are informed, further that our client was informed that she could only return to the office in issue, only if she has a death certificate in respect of the biological father, and it was only in those circumstances that assistance could be extended to her.

We have no advice, therefore, that the advice, opinion and directive issued to our client at the behest of the employee, the Social Worker in attendance was both unlawful and unconstitutional, same constitute an infringement of the best interest of a child standard provided in the Children's Act No 38 of 2005.

Our instructions therefore, are to demand, as we hereby do, that a designated Social Worker, responsible for the municipal area of Alice, be directed, within 30(thirty) days of receipt of this letter, to investigate the living conditions and personal circumstances of our client and those of the minor child in issue. Within that period compile and draw a report, wherein recommendations regarding whether the child in issue is in need of care or not are made. Further, and within that period file or caused to be filed with Children's, Manager and / or Assistant a date upon which an application for the appointment of our client as Foster parent to the minor child in issue could be presented to the said court. After having obtained such date to take all necessary steps to convey or communicate same to our client.

Unless there is substantial compliance with the contents of the demand presented heretofore, our instructions are to move an application to compel and enforce our client's constitutional rights without any further reference to yourself or to your relevant officials." Sic.

[12] The applicant has, albeit in a convoluted and verbose fashion, pleaded as much in the affidavit filed in support of the relief she sought.

[13] In the affidavit delivered in opposition to this application, deposed to by a certain Lindelwa Nompumelelo Primsrose Sepotela (Ms Sopotela), a qualified Social Worker and Service Office Manager in the employ of the Department of Social Development stationed at Alice, it is averred that the applicant's name does not appear on the intake register of attendees for April 2012.⁵ The absence of one's name in the register, according to Ms Sopotela, implies that the person concerned did not, on the particular date, attend upon the Social Worker's office. Ms Sopotela has further averred:

“8.3 The purpose of the applicant's attendance at the office of the Third Respondent during May 2012, when her name appears was to attain assistance with regards to A. S. (hereafter “the minor child”) regarding her being a slow learner.

8.4 The applicant was thereafter assisted with the referral of the minor child to a psychologist, whereon the 31st May 2012, the applicant accompanied by the minor child and social worker attended an assessment with the psychologist.

8.5 The minor child was evaluated as being a slow learner and referred to a special needs school in Port Elizabeth for the appropriate assistance.”

[14] The investigation into the circumstances of A.'s care and protection, goes the respondents' case, was subsequently undertaken culminating in A. being found to be eligible for a foster care grant, hence the order of the Children's Court issued on 17 April 2014.

[15] The applicant delivered no affidavit in reply to the allegations made in the answering affidavit deposed to by Ms Sotopela.

Is there a material dispute of fact on the papers?

[16] Before giving an answer to the question at hand, we should be reminded that where a disputed application is settled on a basis which disposes of the merits except insofar as costs are concerned, the court should not have to hear evidence to decide the disputed facts in order to decide who is liable for costs, but the court has, with the material at its disposal, to make a proper allocation as to costs.⁶

⁵ This register is said to embody names of all persons who attended upon the office of the Social worker in Alice “for any reason whatsoever”.

⁶ *Jenkins v SA Boilermakers, Iron and Steel Workers and Shipbuilders Society* 1946 WLD 15; *Gamlan Investments (Pty) Ltd v Trillion Cape (Pty) Ltd* 1996 (3) SA 692 (C) at 700G-H; *First National Bank of*

[17] The parties' versions differ in material respects. What needs to be considered is whether there is a material or genuine dispute of fact on the papers which would otherwise have necessitated a referral of the matter to oral evidence. One of the principal ways, relevant to the facts of this case, in which such dispute arises is when the respondent denies all the material allegations made by the applicant and produces positive evidence which may include statements by deponents or witnesses to the contrary.⁷

Analysis

[18] As already pointed out, Ms Sopotela denies that the order granted by the Children's Court on 07 April 2014 was a sequel to the applicant's visitation at the Social Worker's office during April 2012. Even though Ms Sopotela is not the social worker who attended to the applicant when she visited the Social Worker's office during May 2012, she claims, by virtue of her position in the office, to have "*access to all documents relevant to the placement of children in need of care and protection where reports in respect of those children were compiled by the social worker[s] who are stationed at the office*".

[19] Much as the social worker who attended to the applicant during her proven visitation of May 2012 and the one who testified during the relevant Children's Court proceedings⁸ delivered no confirmatory affidavits, Ms Sopotela has, at the very least, placed positive evidence, not controverted by the applicant in reply, pointing to her having access to the relevant documents in the Social Worker's office; she has placed cogent documentary evidence that belies the applicant's allegation of a visitation that took place in April 2012; she has provided sufficient detail of what the May 2012 visitation yielded.⁹

Southern Africa Ltd t/a Wesbank v First East Cape Financing (Pty) Ltd 1999 (4) SA 1073 (SE) at 1079G-I; and *De Kock v Minister of Public Works* [2004] 1 All SA 282 (Ck) at 296i-j.

⁷ *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163.

⁸ According to the relevant record "*E N ZENGETHWA*" is the social worker who appeared on the day the order favourable to the applicant was granted.

⁹ Namely, the referral of Annoleen to Port Elizabeth on 30 May 2012 for the rendering of assistance in relation to her academic problems.

[20] It was a matter of relative ease for the applicant, if what Ms Sopotela testified to was not the truth, to controvert Ms Sopotela's allegations in a replying affidavit. That did not take place. On the papers as they stand, the respondents' assertion that the grant of the order by the Children's Court was not necessarily triggered by the launch of this application, but by a separate process set in motion independently of these proceedings, ought to prevail.¹⁰ The applicant would, in my view, have been the unsuccessful litigant. However, because she was asserting a constitutional right against the state,¹¹ she ought not to be ordered to pay the costs of the application.¹²

Conclusion

[21] In all these circumstances, there shall be no order of costs.

S M MBENENGE

JUDGE OF THE HIGH COURT

Counsel for the Applicant : Mr M Mayekiso

Instructed by : Z YM Ndzabela Incorporated
Butterworth

¹⁰ In application proceedings the approach is that the facts stated by the respondent, together with the admitted or undenied facts in the applicant's founding affidavit, provide the factual basis for the determination – *Reddy v Siemens Telecommunication (Pty) Ltd* 2009 (3) SA 187 (W) at para [19]; see also *Plascon-Evans Paints (LTD) Ltd v Decro Paint and Hardware (Pty) Ltd* 1984 (3) SA 623 (A).

¹¹ The right to just administrative action enshrined in section 33 of the Constitution, given effect to by section 30 of the PAJA.

¹² *Affordable Medicines Trust and Others v Minister of health and Another* 2006 (3) SA 247 (CC) and *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC).

C/O S Z Sigabi
King William's Town

Counsel for the Respondents	:	Mr N Nabela
Instructed by	:	The State Attorney East London C/O Shared Legal Services King Williams Town
Date heard	:	22 September 2016
Judgement delivered	:	04 October 2016