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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A100/2004

DATE: 2 MARCH 2015

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

G[...] V[...] D[...] M[...]

Appellant

And

C[...] V[...] D[...] M[...]

Respondent

JUDGMENT

MATOJANE J

INTRODUCTION

[1] This is an appeal against the order of Magistrate Van Der Merwe in the Children's Court for the district of Nelspruit dismissing the points *in limine* raised by the appellant to an application by respondent for the amendment of the contribution order in terms of s161 (1)(a)(ii) of the Children's Act 38 of 2005 ("The Act"). The respondent being a minor was represented by Mr. Du Plessis from Legal Aid Justice Centre in Nelspruit. I shall revert to these *in limine* points herein below

BACKGROUND

[2] On 28 February 2013 the Children's Court made a finding that the respondent was a child in need of care and protection as she lives in or is exposed to circumstances which may seriously harm her physical, mental or social well-being¹.

[3] The court made *inter alia*, the following contribution order:

- "1. *Dat beide C[...] se ouers die reg en verpligting het om C[...] te versorg en kontak met haar te he.*
2. *Dat C[...] die beurswat aart haar beskikbaar gestel is te 'the Diocesan School for Girls' opneem en dat sy in terme van die bepalings van Artikel 46(d) van die wet in versorging van genoemde skool geplaas word.*
3. *Dat haar vader 'n maandelikse bedrag van R1500.00 aan C[...] betaal as kontribusie tot haar versorging.*
4. *Dat C[...] as afhanklike op haar Vader se mediese fonds geregistreer bly."*

[4] Unbeknown to the parties, the bursary awarded to the respondent was not sufficient to cover all her school expenses as it only covered the respondent's school fees and does not include boarding fees. The boarding fees amounted to R61 955.00 per year.

[5] On the 14 August 2013 the respondent's legal representative brought an application for the amendment of the contribution order in terms of s161(l)(a)(ii) of the Act for an order that appellant be ordered to pay a contribution in the sum of R5078.00 and that he be ordered to pay the boarding fees of the respondent. At the time, the respondent was still a minor. On the day of the hearing the appellant requested a postponement and on the next court appearance on 24 October 2013, the respondent had already turned 18 and no longer a child as defined in the Act.

[6] The appellant, who is the respondent's father denies liability for the respondent's boarding fees and argue that the court order placed respondent in partial care and in terms of s46(l)(d) of the Act, there must have been an agreement made between the appellant and the school and as there was no such agreement, the school cannot hold him liable for respondent's fees. Appellant further argues that the order of the Children's Court made in terms of s156 of the Act has lapsed as the respondent has now reached the age of majority whilst the proceedings were going on.

[7] The magistrate found that it was in the respondent's best interest to be placed in the Diocesan School for Girls in Grahamstown as she will be removed from her circumstances and away from the influence of her parents. The court ordered that the contribution order be amended to make provision for boarding school

fees.

[8] The court was satisfied that appellant could afford to pay for respondent's expenses as he is an attorney practicing for his own account and lives in S[...] N[...] R[...] in a big house with six bedrooms, four bathrooms, a swimming pool and bioscope facility. The appellant also told the social worker that he "n goeie inkomste verdien".

POINTS IN LIMINE

[9] The appellant contended before the Children's Court as he did before us that:

(a) the contribution order made in terms of s159(3) of the Act has lapsed as the respondent was no longer a child as defined.

(b) The court *a quo* accordingly did not have jurisdiction.

(c) The legal representative of the minor child did not have *locus standi* to depose to the affidavits on behalf of the respondent.

RELEVANT LEGISLATIVE PROVISIONS

[10] 10.1 In section 1 (1) of the Act '**child**' is defined to mean a person under the age of 18 years;

10.2 Section 150 is headed **Child in need of care and protection** and provides:

"(1) A child is in need of care and protection if, the child-

(a)

(b)

(i) lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social wellbeing. "

10.3 Section 156 - Orders when child is found to be in need of care and protection:

"(1) If a children's court finds that a child is in need of care and protection the court may make any order which is in the best interests of the child, which may be or include an order-

(a) referred to in section 46;

(b)

(c)

(d)

(e);"

10.4 Section 46 - Orders children's court may make (1) A children's court may make the following orders:

"(a) An alternative care order, which includes an order placing a child-

(i) in the care of a person designated by the court to be the foster parent of the child;

(b)

(c)

(d) a partial care order instructing the parent or care-giver of the child to make arrangements with a partial care facility to take care of the child during specific hours of the day or night or for a specific period

(2) A children's court may withdraw, suspend or amend an order made in terms of subsection (1), or replace such an order with a new order."

10.5 Section 159 - Duration and extension of orders:

"(1) An order made by a children's court in terms of section 156- (a) lapses on expiry of-

(i) two years from the date the order was made; or

(ii) such shorter period for which the order was made; and

(b) may be extended by a children's court for a period of not more than two years at a time.

(3) No court order referred to in subsection (1) extends beyond the date on which the child in respect of whom it was made reaches the age of 18 years."

[11] In terms of s46(1)(d) of the Act, a partial care order can be made instructing the parent or care-giver of the child to make arrangements with a partial care facility to take care of the child during specific hours of

the day or night or for a specific period. Section 76 expressly excludes care of a child as a boarder in a school hostel and residential facilities managed by a school from the ambit of partial care. In *casu*, the school has admitted that no arrangements have been made for the payments of the monies owed and in terms of s76 respondent could not have been placed in partial care as ordered by the Children's Court. It does not avail the respondent as contended by her counsel that appellant did not object to respondent being placed in the care of the Grahamstown School for girls and that appellant could easily afford the financial expenses of the respondent.

[12] It follows therefore, in my view that the magistrate erred in ordering that respondent be placed in partial care and on this ground alone the appeal should succeed as the money owed to the school has nothing to do with maintenance of the respondent as it is a delictual matter between appellant and the school.

[13] On the first point *in limine* counsel for the respondent submitted in her heads of argument and in court that section 176 of the Act places a safety net to the protection of children turning 18 whilst in the alternative care and therefore the contribution order must similarly remain in place until the end of the year in which the child turns 18. The difficulty with this submission is, firstly that the court order purported to place respondent under partial care in terms of section 46(1)(d) not alternative care and secondly, section 176 specifically caters for instances where a child is placed in alternative care. It is therefore incorrect as submitted by counsel that the contribution order is interrelated to the alternative care.

[14] I am in agreement with the appellant that the order that respondent seeks to vary is no longer enforceable. In terms of section 159(3) of the Act, an order in terms of section 196 cannot extend beyond the date on which the child reaches the age of 18 years. This finding answers the second and third points *in limine*. In my view, the magistrate was incorrect in dismissing the points *in limine*.

[15] It is for the above reasons that the appeal should succeed with no order as to costs.

K E MATOJANE

JUDGE OF THE HIGH COURT

I agree

L M MOLOPA-SETHOSA

JUDGE OF THE HIGH COURT
