

REPORTABLE

**IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA**

CASE NO. 2115/10

EX PARTE application of

THULISILE CONSTANCE SIBISI

Applicant

JUDGMENT Delivered on 17 September 2010

SWAIN J

[1] The applicant seeks an order granting to her “sole full parental responsibilities and rights of care, contact, guardianship and maintenance” as defined in Section 18 of the Children’s Act No. 38 of 2005 (the Act) in respect of her grandchild I U M, a boy born on 26 July 2001.

[2] When the matter came before Patel J on 29 April 2010, he declined to deal with the matter and made an order referring the matter to the Children’s Court for determination. It appears that the learned Judge did so, on the basis that this was the appropriate forum to deal with issues pertaining to the guardianship of minor children, in the light of the provisions of the Act.

[3] This order elicited a response from the Presiding Officer in the

Children's Court for the Magisterial District of Pietermaritzburg, in the form of a written memorandum in which the Presiding Officer submitted that the Children's Court does not have jurisdiction to hear matters pertaining to the guardianship of minor children.

[4] When the matter came before me on 24 June 2010, I requested the State Attorney to brief Counsel to make legal submissions to this Court, in the light of the submissions of the President of the Children's Court.

[5] As a consequence a memorandum was filed by the State Attorney, as well as heads of argument on behalf of the applicant by the Pietermaritzburg Justice Centre. Because of the importance of the subject matter and the competing contentions as to the proper forum for issues of guardianship to be determined, when the matter came before Mnguni J, he referred it to the Full Bench for decision.

[6] The State Attorney, represented by M/s James, submits that only the High Court may hear applications for guardianship, whereas the applicant, represented by Mr. Singh of the Pietermaritzburg Justice Centre, submits that the Children's Court possesses concurrent jurisdiction with the High Court, to deal with these matters. Justification for both of these view points is ostensibly found within the provisions of the Act.

[7] It seems that the source of the confusion lies in the provisions of

Section 29 of the Act, which reads as follows:

“29. Court Proceedings. –

(1) An application in terms of section 22 (4) (b), 23, 24, 26 (1) (b) or 28 may be brought before the High Court, a divorce court in a divorce matter or a children’s court, as the case may be, within whose area of jurisdiction the child concerned is ordinarily resident”.

[8] In order to properly understand the provisions of this Section it is necessary to consider its terms, in the context of the Sections to which it makes reference.

Section 22 (4) (b) provides as follows:

“22. Parental responsibilities and rights agreements.-

(4) Subject to subsection (6), a parental responsibilities and rights agreement takes effect only if –

b) made an order of the High Court, a divorce court in a divorce matter or the children’s court on application by the parties to the agreement”.

Section 23 (1) provides as follows:

“23. Assignment of contact and care to interested person by order of court.-

1) Any person having an interest in the care, well-being or development of a child may apply to the High Court, a divorce court in divorce matters or

the children's court for an order granting to the applicant, on such conditions as the court may deem necessary.

- a) contact with the child; or
- b) care of the child.

Section 24 (1) provides as follows:

“24. Assignment of guardianship by order of court.-

- 1) Any person having an interest in the care, well-being and development of a child may apply to the High Court for an order granting guardianship of the child to the applicant”.

Section 26 (1) (b) provides as follows:

“26. Person claiming paternity.-

- (1) A person who is not married to the mother of a child and who is or claims to be the biological father of the child may –
 - b) apply to a court for an order confirming his paternity of the child, if the mother-
 - i) refuses to consent to such amendment;
 - ii) is incompetent to give consent due to mental illness;
 - iii) cannot be located; or
 - iv) is deceased”.

Section 28 provides 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”.

[9] It is immediately apparent that the relief envisaged in Sections 22 (4) (b), 23 (1) and 28 may be obtained from the High Court, the Divorce Court or the Children’s Court. None of these Sections deal with the subject of guardianship. Section 26 (1) (b), which deals with the situation where a biological father seeks an order confirming his paternity of a child, provides that application may be made to “a court”, which is not defined in the Act. However, Section 24, which provides for an order granting guardianship to the applicant, provides that application is to be made to the High Court.

[10] When this distinction is borne in mind, it is clear that Section 29 does not confer jurisdiction upon the Children’s Court, to hear an application for an order granting guardianship to an applicant, for the following reasons:

[10.1] The provision that an application in terms of the enumerated Sections “may be brought before the High Court, a divorce court in

a divorce matter or a children's court" is subject to the words "as the case may be". In other words, the appropriate court for the relief envisaged in each of the enumerated Sections, is the court named in each Section. That Sections 22 (4) (b), 23 (1) and 28 share courts, before which the relief envisaged by these Sections may be sought, does not justify the conclusion that an order granting guardianship to an applicant, may be brought before a Children's Court, in the face of the express wording of Section 24 (1), to the contrary.

[10.2] That Section 29 is concerned solely with issues pertaining to the territorial jurisdiction of the named courts, is made clear by the words "within whose area of jurisdiction the child concerned is ordinarily resident". In other words, in order for the courts referred to in the enumerated Sections to have jurisdiction, "the child concerned" must be ordinarily resident within a particular court's "area of jurisdiction".

[11] This conclusion is placed beyond doubt by a number of other provisions contained in the Act. It is only necessary for present purposes to refer to Section 45 (3), which provides as follows:

"45. Matters children's court may adjudicate.-

(3) Pending the establishment of family courts by an Act of Parliament, the High Courts and Divorce Courts have exclusive jurisdiction over the following matters contemplated in this Act:

- a) The guardianship of a child".

[12] The so-called "family courts" have not yet been established and consequently it is clear that in so far as Children's Courts are

concerned, the High Court has exclusive jurisdiction in matters concerning the guardianship of a child.

[13] Although not strictly necessary for the purposes of this Judgment, I would venture to suggest that on a correct interpretation of the Act and despite the provisions of Section 45 (3), the jurisdiction of Divorce Courts to determine issues pertaining to the guardianship of a child is unclear, in the light of:

[13.1] The provisions of Section 22 (7) which provide as follows:

“22. Parental responsibilities and rights agreements.-

(7) Only the High Court may confirm, amend or terminate a parental responsibilities and rights agreement that relates to the guardianship of a child”.

[13.2] The provisions of Section 24, which provide for an application to grant guardianship to an applicant only being made to the High Court.

[13.3] Section 45 (4) which provides as follows:

“45. Matters children’s court may adjudicate.-

(4) Nothing in this Act shall be construed as limiting the inherent jurisdiction of the High Court as upper guardian of all children”.

[14] Consequently, intervention by the Legislature may be necessary in this regard to clarify the jurisdiction, not only of Children’s Courts,

but also Divorce Courts, to determine the guardianship of children.

[15] Turning to the facts of the present case. The Family Advocate has reported and supports the grant of the relief sought. On considering all of the evidence I am satisfied that it is in the interests of the minor child that his guardianship, as well as the other rights envisaged in the relief sought, be granted to the applicant.

[16] The Master has reported and has pointed out that as is the norm in cases of this nature, any funds received from the Government Employees Pension Fund, should be paid into the Masters Guardians Fund, to be administered by the Master in terms of Section 90 (1) of the Administration of Estates Act No. 66 of 1965, for the benefit of the minor child.

The order I grant is the following:

- a) The applicant be and is hereby granted sole full parental responsibilities and rights of care, contact, guardianship and maintenance as defined in Section 18 of the Children's Act No. 38 of 2005 in respect of the minor child, namely:-

I U M, a boy born on 26 July 2001.

- b) Any funds due to the minor child from the Government Employees Pension Fund are to be paid into the Masters Guardians Fund, to be administered by the Master in terms of Section 90 (1) of the Administration of Estates Act No. 66 of 1965, for the benefit of the minor child.

K SWAIN J

I agree

MNGUNI J

I agree

D PILLAY J

Appearances /

Appearances:

For the Appellant : Mr. K. L. Singh

Instructed by : Pietermaritzburg Justice Centre
Pietermaritzburg

For the State Attorney : M/s O. James

Instructed by : Master of the High Court
Pietermaritzburg

Date of Hearing : 10 August 2010

Date of Filing of Judgment : 17 September 2010