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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

A380/16

A379/16

DATE: 9/6/2016

Not reportable

Not of interest to other judges

Revised.

IN THE MATTER BETWEEN:

(HIGH COURT REF.: 51/16)

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AND

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AND

IN THE MATTER BETWEEN:

(HIGH COURT REF.: 50/16)

A380/16

M B D

AND

Z B

SPECIAL REVIEW JUDGMENT

KOLLAPEN J:

1. The Honourable Magistrate of the Orkney Magistrate's Court has submitted the record in the proceedings of the above matter for special review in terms of the provisions of section 19(1)(a)(ii) read with section 24(1) of the Supreme Court Act 59 of 1959. The basis upon which the review is sought relates to the provisions of the Protection from Harassment Act 17 of 2011 ('the Act') and in particular what the learned Magistrate has described as the failure of the Act to provide for the rights of children who are respondents in proceedings brought in terms of the Act.
2. The background to the matter relates to two applications launched in the Orkney Magistrate's Court involving the conduct of minor children and in which applications protection orders were sought. The applications were initiated in both instances by the mothers of the complainants, who were both minors. The respondents in respect of whom the relief was sought and the Court proceeded to grant interim protection orders in terms of Section 3 of the Act.
3. Section 3(a) of the Act provides that 'Upon the issuing of an interim protection order the court must direct that the interim protection order be served on the respondent in the prescribed manner by the clerk of the court, sheriff or peace officer identified by the court.'

Form 3 of Regulation 4 promulgated in terms of the Act provides for the manner of issuance and service of any order made in terms of Section 3 of the Act and the concern of the learned Magistrate was that it did not provide specific directions in instances where the respondent was a minor as to how and in what manner service of the interim protection order should take place.

4. In order to accommodate the fact that the respondents were minors the learned Magistrate directed amongst other things that the interim order be served on the minor respondent in the presence of a parent or guardian and further directed that the parent or guardian appear on the return date of the interim order.
5. In submitting the matter for review the learned Magistrate took the view that the Act violated the equality guarantee in so far as it related to respondents who were minors. The following is stated by the Magistrate when making the referral:

'It is therefore my humble submission that Protection From Harassment Act also offends against the right to equality before the law in respect of respondent

children without providing for a parent, guardian or appropriate adult. I request the honourable reviewing judge to confirm or amend and or provide guidelines to the effect that when dealing with minor or child respondent, service be effected in a prescribed manner or any manner directed by the court in the following manner ... '

Analysis

6. Our constitutional dispensation evidenced by the Constitution of the Republic of South Africa Act No. 108 of 1996 unequivocally articulates the principle in Section 28(2) thereof that 'A child's best interests are of paramount importance in every matter concerning a child.'
7. The Children's Act 17 of 2011 has numerous provisions which relate both to the procedural and substantive protection of children when they are involved in legal proceedings. Those provisions include:

Chapter 2 Section 6 (2)(a)-(d) provides that:

(2) All proceedings, actions or decisions in a matter concerning a child must -

- (a) Respect, protect, promote and fulfil the child's right set out in the Bill of Rights, the best interest of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation;
- (b) Respect the child's inherent dignity;
- (c) Treat the child fairly and equitably;
- (d) Protect the child from unfair discrimination on any ground, including on the ground of health status or disability of the child or a family member of the child.

Section 6(5) provides as follows:

'A child, having regard to his or her age, maturity and stage of development, and a person who has parental responsibilities and rights in respect of that child, where appropriate, must be informed of any action or decision taken in a matter concerning the child which significantly affects the child'.

Section 10 of the Act makes provision for child participation:

'Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an

appropriate way and views expressed by the child must be given due consideration.'

Section 14 deals with children's right of access to court and states:

'Every child has the right to bring, and to be assisted in bringing, a matter to court, provided the matter falls within the jurisdiction of that court.'

Section 15 deals with the enforcement of rights and provides as follows:

(1) Anyone listed in this section has the right to approach a competent court, alleging that a right in this Bill of Rights or this Act has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.

(2) The persons who may approach a court are:

(a) A child who is affected by or involved in the matter to be adjudicated;

(b) Anyone acting in the interest of the child or on behalf of another person who cannot act in their own name.

Chapter 3 deals with parental rights and responsibilities and section 18(3)(b) provides as follows:

'A parent or other person who acts as guardian of a child must assist or represent the child in administrative, contractual and other legal matters'.

8. Thus even though the Act may be silent on the manner in which child respondents are to be dealt with, it is evident that the provisions of the Children's Act to which reference has been made provide an overarching and comprehensive protection to all children in all legal proceedings. The proceedings in terms of the Protection from Harassment Act would certainly fall within the proceedings contemplated in the Children's Act and there exists no reason in law or otherwise, why its provisions should not and do not have applicability in dealing with children (whether as applicants or as respondents) in terms of the Act.
9. Accordingly and notwithstanding that the Act is silent on this aspect it must follow that the overarching provisions of the Children's Act serve to cure whatever *lacuna* the learned Magistrate may have identified. On this basis it can then hardly be said that the Act violates the equality guarantee in so far as it relates to children in treating children who are complainants differently from children who are respondents. On the other hand and in order to ensure that procedurally the rights enshrined in the Children's Act have practical consequence and application, there may well be merit in the suggestions of the learned Magistrate with regard to service and the support and assistance of the parent or guardian in respect of minors who are respondents.

ORDER

10. In the circumstances I would make the following order:

10.1. Subject to the necessary Forms which deal with service and notification being amended to bring them in line with and to reflect the legal position unambiguously, it be required in all matters in terms of the Protection from Harassment Act 17 of 2011 and involving a respondent who is a child that:

- a) Service of the interim order be effected on the parent and or guardian as well as the minor child.
- b) The interim order direct that the parent and/or guardian appear on the return date of the order together with the minor child who is a respondent.
- c) In instances where there appears to be no parent or guardian, such fact shall be reported to the Court that issued the interim order by the person tasked with service of the order in which event the Court may give further directions for the minor to be assisted and supported.

N KOLLAPEN

I AGREE,

S A M BAQWA

JUDGE OF THE HIGH COURT

IT IS SO ORDERED.